National Reporter System—United States Series

THE FEDERAL REPORTER

WITH KEY-NUMBER ANNOTATIONS

VOLUME 223

PERMANENT EDITION

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

JULY—SEPTEMBER, 1915

ST. PAUL
WEST PUBLISHING CO.
1915

JUDGES

OF THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE DISTRICT COURTS

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Hon. CHRISTIAN C. KOHLSAAT, Circuit Judge.....Chicago, Ill.

[1] Recess appointment March 9, 1915.

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Hon. WM. W. MORROW, Circuit Judge ..... San Francisco, Cal.
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Hon. JEREMIAH NETERER, District Judge, W. D. Washington ..... Seattle, Wash.

[2] Recess appointment August 16, 1915.

[3] Died August 11, 1915.

CASES REPORTED

CASES

ARGUED AND DETERMINED

IN THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE DISTRICT COURTS

BENSON LUMBER CO. v. McCANN.

(Circuit Court of Appeals, Ninth Circuit. May 3, 1915.)

No. 2410.

1. MASTER AND SERVANT ⊂⊃288, 289—ACTION FOR INJURY TO SERVANT—QUESTIONS FOR JURY.

Defendant's sawmill was equipped with a push table, upon which the lumber, after leaving the trimmer, was delivered sidewise by means of an inclined slide composed of parallel skids. In the top of the table were transverse rollers to carry the lumber lengthwise and deliver it upon a carrier or loading table outside the mill and two feet lower. The roller at the end next the carrier table was a dog roller, equipped with spikes to engage the lumber and keep it moving. The machinery was designed to automatically and continuously move the lumber from the saw to the carrier table; but the slide was defective, in that the skids were too far apart, permitting some of the pieces to drop between endwise, where they would stick and cause a jam. Then it was necessary for some one to climb upon the push table, which was nearly six feet high, and relieve the jam. No one was designated to perform such service, but it was usually done by one of the employés loading lumber from the carrier table. Plaintiff, a boy 17 years old, was one of such workmen, and when he had been at work about two weeks, in attempting to step from the carrier table to the push table to relieve such a jam, his foot was caught and crushed by the dog roller. He had not been instructed in respect to such work, nor warned of the danger. It did not appear that there was any safer way of mounting the push table than the one he took. *Held*, that he could not be said as matter of law to have assumed the risk from such danger, which was not a normal and ordinary risk of his employment, and that such question and the question of contributory negligence were for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1068–1090, 1092–1132; Dec. Dig. ⊂⊃288, 289.

Assumption of risk incident to employment, see note to Chesapeake & O. R. Co. v. Hennessey, 38 C. C. A. 314.]

2. MASTER AND SERVANT ⊂⊃230—MASTER'S LIABILITY FOR INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE.

The ordinary care which an employé is required to exercise to protect himself from injury is not the same quantum of care in case of an inexperienced youth as in case of a mature and experienced man.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 687–700; Dec. Dig. ⊂⊃230.]

In Error to the District Court of the United States for the Southern Division of the Southern District of California; Olin Wellborn, Judge.

Action at law by H. C. McCann, by Jesse F. McCann, his guardian ad litem, against the Benson Lumber Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Gibson, Dunn & Crutcher and Norman S. Sterry, all of Los Angeles, Cal., and Wright & Winnek and Leroy Wright, all of San Diego, Cal., for plaintiff in error.

Hunsaker & Britt, of Los Angeles, Cal., and Haines & Haines, of San Diego, Cal., for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge. [1] This action was originally brought in the state court of California on July 30, 1908, to recover damages for personal injuries sustained by the defendant in error on July 30, 1907, while employed in the sawmill of the plaintiff in error in San Diego county, Cal. The parties will hereafter be referred to as plaintiff and defendant, as they were designated in the court below. The case was removed to the Circuit Court of the United States for the Southern District of California on the ground of diverse citizenship. The case was tried upon a second amended complaint, an amended answer, and an amendment to the answer. It was alleged in the second amended complaint that the defendant's mill was so constructed and operated that logs in continuous succession were delivered upon a carrier and carried by it backwards and forwards until cut into lumber by the great band saw of the mill; that such lumber was then delivered by connected machinery of the mill in continuous succession to a sawing table inside of the mill, known as a trimmer, and there cut into lengths; that from said trimmer the lumber was carried by connected machinery and discharged in continuous succession sidewise down a chute or slide made of parallel skids to a platform outside of the mill, known as a push table; that the defendant maintained, and by connected machinery caused to operate and revolve in the surface of the push table, rollers, including a roller studded with "dogs," projections, or spikes, for the purpose of carrying the lumber lengthwise at right angles from the direction at which it came upon the push table, until it dropped from the push table downwards about two feet to a loading table, known as the carrying table, where it was loaded as fast as received by the employés of the defendant upon wagons or trucks and carried away; that the whole process of converting logs into lumber was a continuous one; that, in order that such process should be continuous and uninterrupted, it was necessary to prevent any accumulation, collecting, or jamming of lumber, either upon the slide, push table, or carrying tables; that on the 30th day of July, 1907, the plaintiff was of the age of 17 years 3 months, or thereabouts, and was employed by the defendant upon and about said chute or slide and said platform or push table and the loading or carrying table; that the plaintiff was required as a part of his work to keep the lumber moving in a continuous stream down such chute or slide and along the push table, and to see that the lumber did not collect, jam, or pile up

on said chute or slide, or on the push table; that whenever the lumber did collect, pile up, or jam on the chute or slide, or on the push table, the plaintiff was required to go upon the push table and loosen and disentangle the lumber and the jam, while the rollers upon the surface of the push table were operating and revolving, and while the lumber was being delivered thereon in a continuous stream; that at the time the plaintiff was injured the defendant had provided no other means for mounting upon such push table than to step up and upon the same from the carrying table, over the dog roller revolving at the end of the push table next to the carrying table. This method of keeping the lumber moving in a continuous stream and relieving it from jams and other similar obstructions is charged to have been defective and unsafe in various particulars, among others, that the defendant did not provide the inclined plane of the chute or slide with a sufficient number of skids or other devices to carry the lumber from the mill to the push table, and it is charged that the defendant failed to use ordinary, or any, care to provide a safe way or safe appliances for the use of the plaintiff in doing the work in which he was employed. It is alleged that the plaintiff, by reason of his youth and inexperience, did not know of the perils and dangers to which he was exposed by the defendant, and that the defendant neglected to warn him of the perils and dangers incident to his employment. It is alleged that on the 30th day of July, 1907, while the plaintiff was so employed, a large amount of lumber became clogged and jammed between the skids and the push table, and that the plaintiff, while he was mounting and going upon the push table to disentangle the lumber, as he was required to do by the defendant, was caught by the "dog" roller revolving in the surface of the push table, and thrown down on the push table, and his right foot was torn, bruised, wounded, and mangled, by reason of which injury the plaintiff was required to and did have his foot amputated. Damages for such injury are alleged in the sum of $25,000, and liability for necessary board, lodging, and surgical and medical aid and treatment, amounting to $485, making a total of $25,485, for which judgment was demanded.

The amended answer to the second amended complaint denied substantially all of the allegations of the complaint. It was admitted that one or two pieces of lumber did become clogged between the skids, but it was denied that the plaintiff was required to go upon the push table, or upon any table whatever, either while the roller was in operation or revolving, or otherwise, or at all. It was admitted that the defendant had provided no means for mounting the push table, and alleged that such table was not to be mounted by any of the defendant's servants, agents, or employés at any time while said mill was in operation. It was alleged that the push table was not a place to be mounted, or for the doing of any work thereon, and that the dog roller was not an appliance over or about which the plaintiff, or any other person whomsoever, was required or permitted to do any work whatsoever. It was further alleged that the plaintiff was fully informed and instructed as to said work, and the danger, if any, that might pertain thereto. It was also alleged that the defendant

had instructed the plaintiff not to go on or upon the push table, and had not only warned and instructed him not to go on said push table, but had ordered him not to go on said push table. In a further separate and distinct answer it is alleged that the injuries sustained by the plaintiff were directly and proximately contributed to and caused by the fault, carelessness, and negligence of the plaintiff, and by his failure to exercise ordinary care for his own protection; and for a further separate and distinct answer it is alleged that the injuries which the plaintiff sustained were incident to the business in which he was employed, and that prior to receiving such injuries the plaintiff knew, or by the exercise of ordinary care on his part should have known, of the dangers incident to working in the position in which he was, and that the plaintiff assumed the risk of being injured as he was in and about said work, and that the injuries he received were risks assumed by him as incident to his employment. This answer was verified by the vice president and manager of the defendant, and filed on the 24th day of July, 1909. When the case was reached for trial in September, 1913, an amendment to defendant's amended answer, verified by its manager, was filed, in which certain of the denials in the amended answer that the plaintiff was required by the defendant to go upon the push table were stricken out, including the allegation that the defendant had provided no means for mounting the push table, and in lieu of these denials and the admission mentioned it was denied:

"That it [the defendant] had not provided any means for mounting upon said push table, and alleges that there were other, better, and safer means and methods for mounting said push table than at the place and in the manner in which said plaintiff, at the time the injuries alleged to have been received by him, attempted to mount said push table from the carrying table and over said dog roller; and defendant further alleges that lumber buggies were kept constantly alongside said push table, and that it was the custom of the employés, whenever it became necessary to mount said push table, to mount the same from said lumber buggies, which was a safe, easy, and convenient means of mounting said push table."

The case was tried before the court and a jury and resulted in a verdict for the plaintiff in the sum of $8,000. The case comes here upon questions of law arising out of the instructions given and refused to be given by the court to the jury concerning the duty which the defendant as an employer owed to the plaintiff as an employé and the rule respecting plaintiff's assumption of risk and contributory negligence. The verdict of the jury was in effect a finding that the defendant was guilty of negligence in discharging its duty to the plaintiff. The defendant raises no question here upon that issue, but it is too important a feature of the case to pass without examination for the purpose of determining the character of the risk which the defendant contends the plaintiff assumed in the work in which he was employed at the time of the accident.

The allegations of the complaint concerning the construction and operation of the defendant's mill were fully supported by the evidence. It appears, further, that it was the design and purpose of the carrier mechanism of the mill to move the lumber automatically from the great band saw to the carrier table outside of the mill without hitch or jam. But it failed at times at at least one point, namely, at the slide or

chute, where sticks would occasionally drop down endwise between the skid timbers, leaving the end of the stick above the slide or chute, where it would stop the further descent of the lumber and cause a jam. To relieve this jam some one would go onto the push table to pull out the fallen stick, which would allow the timber to descend to the push table and be carried thence automatically to the carrier or loading table. It was in going upon the push table to relieve such a jam, caused by a stick falling between the skid timbers, that the plaintiff was injured.

In the defendant's answer to the plaintiff's second amended complaint, the theory of the defense appears to have been that the carrier mechanism operated automatically in accordance with its design and purpose, and hence it was alleged that the push table was not to be mounted by any of the servants, agents, or employés of the defendant at any time while the mill was in operation. It was further alleged that the push table was not a place to be mounted for the doing of any work thereon, and that the defendant had instructed and warned the plaintiff not to go upon such table. In the amendment to the defendant's amended answer, filed when the case was called for trial, certain of the denials in the original answer, denying that the plaintiff was required to go upon the push table to loosen or disentangle any lumber which might become clogged or piled up on the slide or chute, and the allegation that the push table was not to be mounted by any of the defendant's servants, agents, or employés, were stricken out, and in lieu thereof it was alleged that there were other, better, and safer means and methods for mounting the table than at the place and in the manner in which the plaintiff attempted to mount the push table at the time he was injured; that lumber buggies were kept constantly along the side of the push table, and that it was the custom of the employés, when it became necessary to mount the push table, to mount the same from the lumber buggies, which was a safe, easy, and convenient means of mounting the push table.

The allegations of the complaint charging the defendant with negligence in maintaining a defective carrier mechanism were thus practically admitted, and the defense was shifted to the allegations in the amendment to the answer that the lumber buggies afforded a better and safer means and method for mounting the push table than the place and manner of mounting the table adopted by the plaintiff. This was a question of fact upon which evidence was submitted to the jury. It appears therefrom that the surface of the push table was 5 feet 7 inches above the level of the loading platform on which the plaintiff stood; that the length of this table was 17 feet 11 inches and its width 4 feet. It had in its surface across the width of the table 5 iron rollers about 6 inches in diameter revolving in the direction of its length towards the carrying table. One of the rollers was at the end of the push table opposite the carrying table. Two rollers were intermediate between this end roller and the roller at the end of the table next to the carrier table. The latter roller was studded with iron spikes or "dogs" from three-eighths to three-quarters of an inch in length. The purpose of the spikes was to engage the sticks of lumber on their under side and carry them forward onto the carrying table. These

rollers rose an inch above the surface of the push table and revolved at the rate of from 100 to 150 revolutions per minute, being geared to a revolving shaft of the same velocity. This shaft was 2 inches in diameter and extended along the edge of the push table for its whole length within 6 inches of the top of the table. The upper surface of the shaft was for more than one-half of its diameter exposed and uncovered, and was itself a menace to the safety of any one mounting to the push table from a lumber buggy or cart. The carrier table was located 2 feet distant from the push table and 2 feet lower in elevation. In the space between the end of the push table and the loading table there was a small platform at a height of 2 feet and 4 inches from the floor of the loading platform, with a small step leading to it from the loading platform for the purpose of facilitating the workman in mounting to the push table. From this small platform to the carrying table was 1 foot 3 inches. From the carrying table to the push table the distance was 2 feet horizontally and 2 feet perpendicularly, or 2 feet 9 inches in a direct line from the top of the carrying table to the top of the push table. This was an easy way to reach the top of the push table, but it involved stepping over the dog roller at the end of the push table heretofore mentioned. The other way to reach the push table was from the top of a two-wheel lumber push cart, if one happened to be on the loading platform in front of the push table at the moment when required. These carts had a platform over the wheels between 2 feet and 2 feet 6 inches in height above the floor of the loading platform. To mount upon the push table from a lumber cart standing by the push table involved a climb of more than 3 feet over the revolving shaft running along under the edge of the push table, if the cart was empty. If the cart was loaded, the top of the load might reach to near the top of the push table, or if partly loaded then only to a corresponding height; but a loaded or partly loaded cart was not always there, and its presence, and the height of the load, might not correspond with the emergency requiring an immediate climb to the push table. In any climb from a lumber cart to the push table there was danger from the revolving shaft. These were the two ways of reaching the push table, when, on the day of the accident, a stick dropped between the skid timbers, and, standing upon end, a jam of lumber immediately followed. To pull out this stick and release the jam the plaintiff undertook to reach the push table by way of the carrying table, but in attempting to step over the dog roller at the end of the push table his foot was caught and carried down between the dog roller and a board fixed across the front of it, and crushed so that the foot had to be amputated.

The board in front of the dog roller constituted a combination with the dog roller that was the immediate and efficient cause of the injury to the plaintiff's foot. This board was designated in the model of this part of the mill introduced in evidence and brought to this court with the return to the writ of error as "X." The board in question will therefore be designated as the "X" board. It was a board or plank nailed on the end of the push table, parallel with the dog roller for its entire length, and far enough away from the spikes in the roller to allow them to clear the board from 1 to 3 inches. The defendant's

outside foreman in charge of this work was T. C. Kilty. He was called as a witness for the defendant, and on cross-examination he testified that "the plank 'X' had no connection with the pushing of the lumber. It had no utility whatever in handling the lumber." This fact is obvious from an inspection of the model and an examination of the testimony. The plaintiff testified:

"I do not know what this board which was immediately in front of the spike roller was for. I was informed afterwards that it was there for the purpose of avoiding getting your clothes in the teeth of that roller when you got up on the platform, but I never knew it at the time."

The plaintiff at the time of the accident was of the age of 17 years 3 months. He had been employed in the mill about 2 weeks before the accident, and was one of four men who took the lumber as it came from the mill onto the carrying table and loaded it on trucks to be carried away. The plaintiff was not warned as to the dangers incident to his work, or instructed how he should go onto the push table to clear away a jam at that point. The foreman, Kilty, testified with respect to the plaintiff's employment as follows:

"When I employed this boy, I did not take him and point out the possible dangers of this machinery. I showed him his place, and started him—instructed him what to do, the same as all the rest of the men. I never said anything about the jams at all to any of those men about that push table. They knew their job was to release those jams, if there was any. Every man around the place knows their job. The boy knew that, too. I did not instruct him at all as to how he ought to go upon the push table. I just told him where his place was to work; that is what I told him. I didn't tell him that I expected him to work at releasing these jams when it occurred. I didn't happen to tell him that duty. I didn't tell that to any man there. They knew it was part of their job. They were there to take all of the timber that came from the mill. They were to take it off the platform, and it was their duty to see it came on the platform. They knew that. I didn't have to tell them that particular thing that way. They knew, if it was necessary to do so in their judgment, they must get upon the push table. They knew their job, and they knew they had to take all the lumber that came from the mill. I didn't tell them how to get up on the push table at all. I never had to give them that particular instruction. I didn't speak about the push table at all. I gave them no instructions about the push table. I would think I was insulting a man to tell him to watch out for this revolving shaft if they got up over it. You didn't have to tell them that."

It is contended by the defendant that the plaintiff was injured as the result of the risk which he assumed, and he therefore cannot recover, and the trial court erred in denying the defendant's motion for a directed verdict in its favor. In Choctaw, Oklahoma & Gulf Ry. Co. v. McDade, 191 U. S. 64, 68, 24 Sup. Ct. 24, 48 L. Ed. 96, Schlemmer v. Buffalo, Rochester & Pittsburgh Ry. Co., 220 U. S. 590, 596, 31 Sup. Ct. 561, 55 L. Ed. 596, Texas & Pac. Ry. Co. v. Harvey, 228 U. S. 319, 321, 33 Sup. Ct. 518, 57 L. Ed. 852, Gila Valley Co. v. Hall, 232 U. S. 94, 102, 34 Sup. Ct. 229, 58 L. Ed. 521, and in the recent case of Seaboard Air Line Railway v. Horton, 233 U. S. 492, 503, 504, 34 Sup. Ct. 635, 58 L. Ed. 1062, the Supreme Court has referred to certain distinctions that have been developed in the law of master and servant with respect to the assumption of risk by the employé, and has defined a contractual assumption of risk as employment necessarily fraught with danger to the workman; that is to say, employment where the

workman must be and is confronted with danger in the line of his duty. With respect to dangers of this character the workman assumes the risk, because "such dangers as are normally and necessarily incident to the occupation are presumably taken into account in fixing the rate of wages. And a workman of mature years is taken to assume risks of this sort, whether he is actually aware of them or not." This definition of an assumed risk is plainly not applicable to this case. The plaintiff was not a workman of mature years; but we pass that for the present to consider whether the risk and danger the plaintiff encountered were normally and necessarily incident to the occupation in which he was engaged. The dropping of a stick of timber between the skid timbers, causing a jam of lumber at that point, was wholly extraneous and collateral to the normal purpose of the carrier machinery. It was not intended to operate in that way, and it was not necessary that it should, and the fact that it did operate in that way was evidence of its defective and negligent construction and operation by the defendant, causing a risk which the plaintiff presumably did not assume. In other words, the failure of the carrier machinery to deliver automatically onto the push or carrier table all of the lumber that came to it was not a normal functioning of the machinery employed in that service. It was abnormal, and the evidence tends to show that the defendant knew it and failed to remedy the fault. This was negligence, and because of this negligence the plaintiff was required to mount the push table to relieve the jam. The plaintiff testified that he did not mount the push table by way of the lumber cart, because the latter was either too high or too low. If he remembered rightly, the cart was piled up exceptionally high with pieces that would have fallen off if he had tried to get up that way. This testimony was not contradicted.

This brings us to the consideration of the "X" board in front of the dog roller, over which the plaintiff had to go to reach the lumber jam from the push table. This board performed no service and had no utility or function in the work of the mill, and after the accident it was knocked out by an employé because it served no useful purpose and was dangerous. It created a danger that was not normally incident to the plaintiff's employment. With respect to such a risk the Supreme Court in the case of Seaboard Air Line v. Horton, supra, said:

"But risks of another sort, not naturally incident to the occupation, may arise out of the failure of the employer to exercise due care with respect to providing a safe place of work and suitable and safe appliances for the work. These the employé is not treated as assuming until he becomes aware of the defect or disrepair and of the risk arising from it, unless defect and risk alike are so obvious that an ordinarily prudent person under the circumstances would have observed and appreciated them."

Whether the plaintiff was aware of the danger of the dog roller in connection with the "X" board, and of the risk arising from it, were, of course, questions for the jury, upon which testimony was introduced; but it appears that before the trial the defendant had taken the plaintiff's deposition wherein he testified:

"I have not been in the mill since this accident. I have testified about the way the machinery was operated. Those were all things that I knew myself.

I knew myself in a general way how the mill was run, and knew how the machinery was operated. I never had any experience before this. When I went to work there, I studied the machinery, and went to the man in charge of it whenever I didn't understand something about it, so that I understood the general operation of the mill."

Upon the trial he testified:

"I knew that the roller was revolving; as near as I can remember the roller made about 100 revolutions a minute."

With respect to the danger of getting his foot into the roller he said:

"I know it now. I didn't stop to think about it then. I suppose I knew it. Most likely I knew, if I got my foot in there, it would be injured. I don't see how you can expect me to state that I knew, if I got my foot in there, it would be badly injured, at least would be injured, when I never gave it a thought at the time. I suppose I ought to know, if that is what you mean. I knew the board 'X' in the model was there. I never attempted to put my foot on that board by stepping on the carrying table, on the board, and then over. * * * I never stopped to think whether it was dangerous to step up there or not. I never had any occasion, I guess, to have me stop and think. I never gave any thought to whether there was any danger to get up on the carrying table or push table. * * * If I had had occasion to stop and think, I would have known and appreciated that there was danger."

We are asked upon this testimony to hold as a conclusion of law that the plaintiff was aware of the danger and risk of the dog roller in combination with the "X" board. But the plaintiff was not a workman of mature years, and he had had but little experience in the employment in which he was engaged, and he had not been warned of the danger incident to the work. His statements with respect to the danger of his employment:

"I did not stop to think about it then. * * * I never gave it a thought at the time. * * * If I had had occasion to stop and think, I would have known and appreciated that there was danger"

—instead of being admissions that he had assumed the risk of going onto the push table in the manner he did, was rather a frank statement of a youth that he did not appreciate the danger of the situation. He was at the age when physical activity usually outruns judgment and experience, unless restrained and directed by others possessed of greater experience and greater judgment. This restraint and direction he did not have. It therefore becomes a question whether he appreciated the danger and risk to which he was exposed. This was not a question of law, but a question of fact for the jury. Whether the danger and risk of the employment were so obvious that an ordinarily prudent person of his age would under the circumstances have observed and appreciated them was for the same reason a question of fact for the jury.

[2] But it is contended that, if the plaintiff did not assume the risk of his employment, his testimony shows that he was guilty of contributory negligence. We do not think this conclusion follows as a matter of law. In the case of Petersen v. California Cotton Mills Company, 20 Cal. App. 751, 130 Pac. 169, the plaintiff, who was 17 years of age, fell from a ladder which he had mounted to place a compound upon a moving belt. The ladder was so placed that it was

almost perpendicular to the floor of the mill, and, upon being mounted, slipped, throwing the plaintiff upon the revolving machinery, and he was injured. He brought suit against the mill company to recover damages. The defense was that the plaintiff had been guilty of contributory negligence in mounting the ladder. Upon the trial the plaintiff in his testimony showed familiarity with the construction and operation of the mill and its dangers, and admitted that he knew how the latter ought to be placed, and that if it was placed right it would not slip. The appellate court, in commenting on this testimony, said:

"The Socratic method of the examination was admirable, and it revealed an intelligent and candid witness; but the conclusion that his answers required the withdrawal of the question of negligence from the jury is opposed to the principle enunciated in well-considered cases, and is the result of a failure to give due prominence to certain significant features of the occasion. These circumstances, briefly stated, are the complexity of the situation, the fact that plaintiff was a minor, and presumably without the judgment of an adult, that he was ordered by his superior to do the work, which was outside of and more hazardous than his usual employment, that he was expected to and did obey promptly, and that he had a right to assume that the ladder was placed with due regard for his safety."

A petition for rehearing of this case in the appellate court was denied, and a petition thereafter presented to the Supreme Court for rehearing in that court was also denied. The case in all its details is very similar to the present case, including the age of the plaintiff and his frank admissions, drawn out by the questioning of skillful counsel, concerning the dangers incident to his employment; but the court held that the question of contributory negligence was one of fact for the jury, and it could not be said as a matter of law that no other rational inference could be drawn than that the plaintiff was guilty of contributory negligence.

This view of the question of contributory negligence is in accord with the decision of the Supreme Court of the United States in numerous cases. In the late case of Texas & Pacific Ry. Co. v. Harvey, 228 U. S. 319, 324, 33 Sup. Ct. 518 (57 L. Ed. 852) that court said:

"It has often been held in this court that ordinarily negligence or contributory negligence is not a question of law, but of fact, to be settled by the finding of the jury. Where there is uncertainty as to the existence of negligence or contributory negligence, whether such uncertainty arises from a conflict of testimony, or because, the facts being undisputed, fair-minded men might * * * draw different conclusions therefrom, the question is not one of law."

In view of all the facts and circumstances of this case we cannot say that no fair-minded man could come to any other conclusion but that the plaintiff was guilty of contributory negligence. It follows that we are of opinion that the court did not err in denying the defendant's motion for a directed verdict in its favor.

The court in its instructions left with the jury the question of the assumption of risk by the plaintiff with respect to his working in an unsafe place and with unsafe machinery, as alleged in the complaint, with the specific instruction that the plaintiff could not recover if he knew them to be unsafe and fully understood, comprehended, and appreciated the dangers incident to their use. To this and other instruc-

tions upon the same subject the defendant objected in substance because the court did not instruct the jury further that the plaintiff could not recover if, in the absence of actual knowledge, he would have fully understood, comprehended, and appreciated the dangers incident thereto, *had he exercised ordinary care and caution.*

In an appropriate place the court instructed the jury that contributory negligence was such an act or omission on the part of the person injured amounting to want of ordinary care, as, concurring or co-operating with any negligent act or omission on the part of the defendant, was a proximate cause of the injury. Ordinary care, the court stated, was such care as would be used by an ordinarily prudent person in the same or similar circumstances. To this instruction there was no objection on the part of the defendant. The court further instructed the jury that the ordinary care which a youth of limited judgment and experience is called upon to exercise is not the same quantum of care which the adult would be called upon to use under the same circumstances; that each is required to use ordinary care, but the care which the person of mature intelligence and judgment must employ is different from the amount which the law exacts of a youth of immature age, judgment, and experience. To this instruction the defendant objected on the ground that the law does not exact a different amount of care from an adult than from a youth; that each is required to exercise ordinary care, and is required to guard himself from open and obvious dangers which he knows, comprehends, appreciates, and fully understands, *or should by the exercise of ordinary care upon his part have fully appreciated, known, comprehended, and understood.* We are of the opinion that the instruction of the court was correct as applied to the question of contributory negligence, and that neither the instruction to which no exception was taken, nor this one, to which an exception was taken, was applicable to the question of an assumption of risk.

In Choctaw, Oklahoma, etc., Ry. Co. v. McDade, 191 U. S. 64, 67, 24 Sup. Ct. 24, 48 L. Ed. 96, the action was brought by the widow and children of McDade, a brakeman, to recover damages for the death of McDade, caused by the negligence of the railroad company in maintaining an overhanging waterspout in dangerous proximity to passing cars. There was evidence tending to show that McDade was killed as the result of being struck by an overhanging spout. The charge of the trial court had exonerated the railroad company from fault if in the exercise of ordinary care McDade might have discovered the danger. The Supreme Court held that this charge upon the assumption of risk was more favorable to the defendant than the law required; that the true test was not the exercise of ordinary care to discover dangers, but whether the danger was known or plainly discoverable by the employé—citing the case of Texas & Pacific Ry. Co. v. Archibald, 170 U. S. 665, 18 Sup. Ct. 777, 42 L. Ed. 1188. In distinguishing this rule from the rule respecting contributory negligence the court said:

"The question of assumption of risk is quite apart from that of contributory negligence. The servant has the right to assume that the master has used due diligence to provide suitable appliances in the operation of his

business, and he does not assume the risk of the employer's negligence in performing such duties. The employé is not obliged to pass judgment upon the employer's methods of transacting his business, but may assume that reasonable care will be used in furnishing the appliances necessary for its operation."

Section 1970 of the Civil Code of California, as amended by the act of the Legislature of March 6, 1907 (Statutes of 1907, p. 119), provides that an employer is not bound to indemnify his employé for losses suffered by the latter in consequence of the ordinary risks of the business in which he was employed, and after some further limitation upon the liability of the employer for injuries caused by the negligence of a fellow servant, it provides that:

"Knowledge by an employé injured of the defective or unsafe character or condition of any machinery, ways, appliances or structures of such employer shall not be a bar to recovery for any injury or death caused thereby, unless it shall also appear that such employé fully understood, comprehended and appreciated the dangers incident to the use of such defective machinery, ways, appliances, or structures, and thereafter consented to use the same, or continued in the use thereof."

No provision is here made that the employé shall not recover if he fails to exercise ordinary care to understand, comprehend, and appreciate the dangers incident to his employment; but it is contended by the defendant that this statute did not change or modify the rule of the common law, and that a servant was entitled to recover for an injury caused by any defect in the ways, machinery, or structures with which or about which he was required to work, unless he appreciated the danger incident thereto, *or by the exercise of ordinary care on his part he would have appreciated it.* We shall not prolong this opinion by discussing that question, or the cases cited in support of the defendant's contention. We may concede that the defendant is right with respect to the question of contributory negligence. But we are dealing with the rule relating to the assumption of risk, as distinguished from the rule relating to contributory negligence. It is with respect to the latter that the employé is held to the exercise of ordinary care to protect himself from injury if he is to recover for such injury, and for the employer this is a separate and distinct defense to an action on the part of the employé for the injury; and, as we have seen, the court correctly instructed the jury upon this feature of the case.

The right of the plaintiff to recover in this case is based upon facts which the evidence tended to prove—that the defendant was negligent with respect to the construction and operation of the mill in which the plaintiff was employed; that such negligent construction and operation were the proximate and efficient cause of the plaintiff's injury; that the plaintiff was of immature years, with but little experience in his employment; that he had not been warned of the dangers incident to the work in which he was engaged, and such dangers were not the normal and ordinary risks and dangers of the employment, but were abnormal and extraneous to the useful and proper operation of the mill. As the case was thus presented to the court, we are of opin-

ion that all of the instructions of the court correctly stated the law to the jury.

Finding no error in the record, the judgment of the court below is affirmed.

THE TEASER.

THE HARRISBURG.

FREDERICKSEN v. McDONALD et al.

(Circuit Court of Appeals, First Circuit. April 8, 1915.)

Nos. 1077, 1078.

1. COLLISION ⊜58—STEAM AND SAILING VESSELS—TUG WITH TOW.

When a steam vessel and a sailing vessel are approaching on such courses as to involve risk of collision, under the statutory rule the duty is upon the steam vessel to keep out of the way of the other, and when she has a tow the duty to navigate with extreme care to keep her tow out of the course of the sailing vessel, while it is the duty of the latter to hold her course and speed except in situations of imminent peril or extreme danger.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 68–71; Dec. Dig. ⊜58.

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

2. COLLISION ⊜62—SCHOONER AND TOW MEETING—IMPROPER NAVIGATION OF TUG.

A collision at night in Vineyard Sound between a barge in tow and a schooner on nearly meeting courses *held* due to the fault of the tug, which had a tow, 2,600 feet long in not changing her course so as to allow the schooner more room and in not signaling her tows of the approach of the schooner. The barge, also, *held* in fault for not keeping a lookout and not following the course of the tug. The schooner, which kept her course until immediately before the collision, *held* not in fault.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 80; Dec. Dig. ⊜62.]

3. COLLISION ⊜154—SUIT FOR DAMAGES—COSTS—ALLOWANCE OF WITNESS FEES TO LIBELANTS.

The allowance of witness fees to the master and crew of a vessel who were libelants in a suit for collision in which the vessel was sunk, and who were interested to the extent only of the value of their personal effects lost, approved.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 308; Dec. Dig. ⊜154.]

Appeals from the District Court of the United States for the District of Massachusetts; Frederic Dodge, Judge.

Suit for collision by John L. McDonald and others against the steam-tug Teaser, Harry W. Law, claimant; and the barge Harrisburg, George Fredericksen, claimant. Decree for libelants, and claimants appeal. Affirmed.

See, also, 217 Fed. 920.

Eugene P. Carver and G. Philip Wardner, both of Boston, Mass., for The Teaser.

Edward E. Blodgett, of Boston, Mass. (Blodgett, Jones, Burnham & Bingham, of Boston, Mass., on the brief), for Fredericksen.

Edward S. Dodge, of Boston, Mass., and Benjamin Thompson, of Portland, Me. (J. L. Ralston, of Halifax, N. S., on the brief), for appellees.

Before PUTNAM and BINGHAM, Circuit Judges, and ALDRICH, District Judge.

ALDRICH, District Judge. The collision in question was in Vineyard Sound, and was between a sailing vessel and a barge in tow.

The barge Harrisburg, together with another, was being towed westerly by the steamtug Teaser, and bound for Philadelphia. The sailing vessel was the schooner Demozelle, heavily loaded with coal, and was on a voyage from a New Jersey port to New Brunswick.

The collision was in the nighttime. The tow of the steamtug was something like 2,600 feet in length, and when the steamtug and the schooner discovered each other they were from a mile to a mile and a half apart, and were on courses nearly parallel; their courses differing hardly more than one point. The wind was bearing down somewhat from the north, yet the sea was comparatively smooth, and it is not perceived that the wind cut any figure in the means that brought about the disaster, unless it was when in extremis the schooner, putting herself upon an abrupt starboard tack, brought herself into the wind in order, if possible, to avoid contact with the barge Harrisburg. There was plenty of sea room on the steamtug's port, and there were no vessels to interfere with a maneuver of the tug and barges in that direction.

[1] It was urged in argument that, when a steam vessel and a sailing vessel are approaching on such courses as to involve risk of collision, under an imperative statutory rule, the duty is upon the steam vessel to keep out of the way of the sailing vessel, and that this duty imposes not only the obligation to so navigate as to keep herself out of the way of the approaching sailing vessel, but, when she has a tow, the obligation of navigating with extreme care and with a high degree of diligence, to the end that she shall keep her fleet of barges out of the course on which the sailing vessel is approaching.

We think the statutes and the authorities establish these two propositions, as well as the other proposition that the sailing vessel, under such circumstances of approach, shall hold her course and keep her speed, except in situations of imminent peril or extreme danger.

[2] The District Court charged the responsibility of the collision upon the steamtug and upon the barge Harrisburg, which was the head barge of her tow.

Speaking generally, the principal fault attributed to the tug by the District Court was that of not changing her course and that of her barges to port, thus giving a greater margin of safety to the approaching schooner; and, speaking generally, the faults attributed to the barge Harrisburg were that of not maintaining a proper lookout, and of

not holding herself in the wake of the course on which the steamtug was advancing.

The contending interests have been heard in this court in oral argument upon elaborate briefs, and the questions involved have been discussed with ability, and we infer, from what has been said here, that all of the questions were fully and carefully presented to the District Court.

An examination of the opinion of the court below demonstrates that that court considered very carefully, not only all the general questions involved, but most carefully analyzed and weighed with an experienced mind all conditions which bore circumstantially upon the substantive questions of fault, such as the courses of approach; the length of tow; the positions, conditions, and bearings of the lights upon the various vessels; the positions of lookouts and watchmen, their vigilance and worthiness; the conditions of the wind; conflicts in the testimony of witnesses who gave evidence in respect to the details of the disaster; their credibility, and the reasonableness of their stories; the possibility of the sheering of the barge under a loose hawser; the luffing of the schooner as she was brought into the wind for the purpose of clearing the barge; and much more.

We see no reason for going very much into detailed discussion of the subsidiary conflicts in the testimony, because we think the questions of fault, especially so far as they relate to the steamtug and the schooner, are plainly and reasonably determinable upon aspects of the situation which are not in controversy in any substantial way.

In the general view, we have a steam vessel proceeding in open sea, upon a westward course, with a long line of lightly-laden barges in tow, with plenty of sea room on her port and to the southward, who sights the green light of a sailing vessel a mile or two away, approaching upon nearly the same course upon which she is advancing.

In such circumstances of narrow margin it would seem that the steamer was bound to know, and ought to have acted promptly upon the idea, that her barges, which were in a considerable measure helpless as they were being hauled through the water, might, from various well-known causes, sheer a little from the course on which she was proceeding, and toward the course on which the sailing vessel was approaching, and thereby bring the sailing vessel into jeopardy.

Yet, in view of such a plain and manifest duty, she neither changed her course, nor signaled her barges of the approach of the schooner, until the schooner was abreast her beam and heading across the towline and likely to come into collision with the head barge.

We think it of little consequence, so far as the fault of the tug is concerned, whether the sheering of the head barge precipitated danger at that particular point in the line, because the disaster, in all probability, would have been averted if the tug had performed her obvious duty of seasonably changing her course and of warning the barges of the approach of the schooner, with a signal to starboard their helms. It is clear that the fundamental fault should rest upon the steamtug for not seasonably doing just what she did do when too late to avoid a collision. Not only should the steamer have immediately and unmis-

takably signaled the barges of the approach of the sailing vessel, but she should have taken the further precaution of changing her course, not so much for the purpose of keeping herself out of the way, because there was no probable danger of collision between the tug and schooner, but for the purpose of keeping her tow, for which she was in a very high degree responsible, away from the course upon which the steamer was approaching.

We think if the tug had responded promptly and reasonably to the plain duty which was upon her, as she sighted the approach of the sailing vessel, that the collision would have been avoided. Consequently, the District Court is sustained in its conclusions in respect to the fault of the tug.

Now, as to the sailing vessel, the schooner Demozelle, which in collision with the barge Harrisburg was a total loss:

We see no ground for sustaining the contention that the sailing vessel was at fault. Having sighted the tug, she kept rightfully on her course until she discovered the red light of the barge, when she attempted justifiable means for avoiding collision. It is quite true that the sailing vessel, when passing the tug, was aware of the fact that there were barges in tow; but we see no reason for charging her with fault, because we think, under law and fact, that she rightfully proceeded on her course until she discovered the red light of the barge, when she instantly attempted to avert disaster.

We agree with the reasoning of the District Court to the effect that it is more reasonable to suppose that the collision resulted because the barge had for some reason come to be far enough to the northward of the tug's course to get into the schooner's way than to suppose the barge to be following the tug's course and the schooner to have tacked between tug and barge, or that the schooner had been driven upon the tug's course through losing control of herself by bringing herself too close into the wind.

And we also think that the reasoning based upon the fact that the rear barge was under sail, and that the Harrisburg was not, and upon the probability of a loose hawser between her and the Harrisburg, adds considerably to the contention that the Harrisburg, not being under attention, could have swung or sheered away from the course of the tug and onto the course of the sailing vessel. But after all it is difficult to find just what occurred at the moment of the disaster.

Considerations in respect to conflicts in testimony under such circumstances are subsidiary and in a large sense immaterial, and perhaps it is not necessary in this case to attempt a solution of the tangle at the instant of collision, because the fundamental and controlling fault of the tug rests upon her for not seasonably making efficient efforts to take herself and her tow away from the course of the sailing vessel, and the fault was rested upon the barge for not being in a position to right herself and aid in such a maneuver. It would seem that many of the subissues raised by the evidence and the arguments in this case in respect to precisely what happened in emergency, might reasonably be deemed issues of minor importance, because the undisputed relative positions of the vessels, when the schooner was sighted by the

tug, required strict observance of general rules of navigation, and as the disastrous results, in the circumstances of this case, may, upon a general view, be fairly attributed to the nonobservance of rules which were enacted into positive law under considerations of public policy and of public safety, it would seem that the situation might reasonably be relieved from over-refinement in respect to minor details. At all events, we think the lightly-loaded barge was off her course, and that the collision cannot reasonably be attributed to any fault on the part of the sailing vessel.

Upon the question whether the barge should be held in fault, or whether the entire loss should be rested upon the steamtug which had her in tow, we are not so clear.

While those in charge of barges are held to rules of ordinary skill and watchfulness in management, it is understood that the higher measure of watchfulness and care rests upon the steam power which holds the barges in tow. The evidence is strong that those who were in charge of the barge Harrisburg were slack; that they did not see the schooner's lights until she was right upon them, when they could have seen them if they were properly attentive; that they did not know of her approach until her dark shadow was upon them, but it is not improbable that if the tug had done its duty by signaling the approach of the schooner, and by changing her own course, the barge would have brought herself under control in aid of the tug's change of course, and that the vessels would have passed in safety. But, after all, the question of the barge's responsibility in respect to the collision, under the peculiar circumstances of this case, is more of a question for the District Court than for a court of review. If the steam vessel had drawn herself, and had drawn her tow, a little away from the course of the approaching sailing vessel, a course to which the sailing vessel, under the circumstances, was bound to hold, she would simply have been obeying the mandate of the United States Statutes, and of the sailing rules of the sea, and in all probability would have been directly instrumental in creating a condition which would have enabled the vessels to pass in safety, and that such result would have come independently of the question whether the barge was or was not at fault in not being in her wake.

As has been already observed, the testimony pointed strongly in the direction of showing gross inattention on the part of those in charge of the Harrisburg. But the District Judge saw the witnesses who were called to vindicate the barge and relieve her from responsibility, and is therefore in a better position to determine the question of her fault than we are. While we have some hesitation on the question of the barge's responsibility because of the higher responsibility and the greater fault of the tug, still, in view of the rule which gives a large measure of weight to findings by courts of first instance, who see the witnesses, we do not feel justified in reversing the finding, and of saying that the barge was guilty of no fault which contributed to the collision.

Our conclusion is that all the questions involved in this case, including the question of costs, should rest where the learned District Judge left them.

[3] In respect to the witnesses, the master and crew of the Demozelle, to whom fees were allowed as witnesses rather than as parties, it perhaps ought to be said that they were not parties in the larger and more substantial sense in which the witnesses were parties in the cases upon which those objecting to the taxation rely; as, for instance, in the case in Nichols v. Brunswick, 3 Cliff. 88, Fed. Cas. No. 10,239, the party claiming fees as a witness was the principal, if not the sole party in interest, and in The Philadelphia (D. C.) 163 Fed. 438, the party claiming fees as a witness was a part owner of the vessel. And it is understood that in The Elizabeth and Helen, Fed. Cas. No. 4354, the witness was substantially interested in the main controversy. As to the decision of Judge Lowell in the Gladiator,[1] it appears that the claimant's witnesses, who came from Philadelphia to attend the trial, were allowed travel and attendance, while the claim for the travel and attendance of a witness Cahoon, who testified for the libelant, was disallowed. The ground of disallowance is neither discussed nor stated. We do not find upon an examination of the case that he was a party of record. The disallowance apparently could not have been upon the distinct ground that he was a party; but, whatever the ground may have been, there were no reasons given for it. Therefore we do not regard it as having any substantial weight upon the question involved here.

In the clerk's findings, he states that the main testimony of the witnesses in question related to facts concerning the collision, which of course was the substantial, if not the sole controversy, while they also testified concerning the value of their personal effects, about which there was no real dispute, that being their only interest involved.

Without pursuing the question further, and while the position of the objecting party is perhaps technically correct, we are not inclined to hold that witnesses in a situation like this were parties in such a substantial sense as to exclude them from the ordinary witness fees for travel and attendance, when allowance is made in the discretion of the District Court.

It is ordered that the decrees below be affirmed, with costs of this court.

LEWELLEN v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. March 13, 1915.)

No. 4149.

1. INDICTMENT AND INFORMATION ⟸125—INTRODUCING LIQUOR INTO INDIAN COUNTRY—DUPLICITY.

An indictment charging that the defendant carried intoxicating liquor into the Indian country from without the Indian country and from without the state of Oklahoma is duplicitous, since the offense of introducing liquor into the Indian country, as defined by Act Jan. 30, 1897, c. 109, 29 Stat. 506 (Comp. St. 1913, § 4137), is a different offense from carrying

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

[1] 223 Fed. 381.

liquor into the Indian territory from without the state of Oklahoma, as defined by Act March 1, 1895, c. 145, 28 Stat. 693, 697.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 334-400; Dec. Dig. ⊂⊃125.

Introducing intoxicating liquors into Indian country, see note to Joplin Mercantile Co. v. United States, 131 C. C. A. 171.]

2. CRIMINAL LAW ⊂⊃1028—APPEAL—THEORY IN THE TRIAL COURT.

Where no demurrer for duplicity was interposed to such indictment, but it was treated by the trial court and the instructions were given on the theory that it charged only the offense of carrying the liquor in from without the state, and the conviction was secured on such theory, it will be treated on appeal as charging only that offense.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2619, 2620; Dec. Dig. ⊂⊃1028.]

3. CRIMINAL LAW ⊂⊃814—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

Where the evidence showed only that intoxicating liquor, which was found in defendant's possession in the Indian territory, bore a tag showing that it had been shipped from a point without Oklahoma to a point therein several miles distant from where it was found, and defendant testified that he and another got the liquor from a spot where it was buried in the river bed 19 miles from the destination shown by the tag, it was error to instruct the jury that the possession of liquor recently introduced from without the state, when unexplained, was a circumstance to be considered by the jury in determining defendant's guilt, since there was no evidence that the liquor had been recently introduced into the state.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1821, 1833, 1839, 1860, 1865, 1883, 1890, 1924, 1979-1985, 1987; Dec. Dig. ⊂⊃814.]

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

L. Lewellen was convicted of introducing intoxicating liquor into the Indian country from without the state of Oklahoma, and he brings error. Reversed and remanded, with directions to grant a new trial.

James C. Denton, of Muskogee, Okl., for plaintiff in error.

Carter Smith, of Muskogee, Okl. (D. H. Linebaugh, of Muskogee, Okl., on the brief), for the United States.

Before SANBORN, ADAMS, and SMITH, Circuit Judges.

ADAMS, Circuit Judge. [1, 2] Defendant Lewellen was tried and convicted in the court below on an indictment reading as follows:

"United States of America, Eastern District of Oklahoma. The grand jurors of the United States of America * * * on their oath do find, present, and charge that one L. Lewellen, on the 13th day of February, A. D. 1913, in the county of Tulsa, state of Oklahoma, in the said district and within the jurisdiction of said court, the said county then and there being a portion of the Indian country of the United States of America, did at the time and place aforesaid unlawfully, knowingly, willfully, and feloniously introduce and carry into said Indian country and into the county aforesaid from without said Indian country, and from without the said district, and from without the said state of Oklahoma, one quart of malt, vinous, spirituous, distilled, ardent, and intoxicating liquor, to wit, beer, the said county and district having been a portion of the territory of the said United States known as the Indian Territory, and at all times was and now is a part of the Indian country of the United States of America, contrary to the form of the statute, * * *" tec.

The introduction of liquor into the Indian country, as defined by Act June 30, 1834, c. 161 (4 Stat. 729), and as construed in Bates v. Clark, 95 U. S. 204, 24 L. Ed. 471, Clairmont v. United States, 225 U. S. 551, 32 Sup. Ct. 787, 56 L. Ed. 1201, and Evans v. Victor, 122 C. C. A. 531, 204 Fed. 361, constitutes one offense (Act Jan. 30, 1897, c. 109, 29 Stat. 506 [Comp. St. 1913, § 4137]); and the carrying of liquor into the Indian Territory from without the state of Oklahoma constitutes another and different offense (Act March 1, 1895, c. 145, 28 Stat. 693, 697). See Ex parte Webb, 225 U. S. 663, 32 Sup. Ct. 769, 56 L. Ed. 1248; United States v. Wright, 229 U. S. 226, 33 Sup. Ct. 630, 57 L. Ed. 1160; Chambliss v. United States, 218 Fed. 154, 132 C. C. A. 112. The offense denounced by the act of 1897 is complete if liquor is introduced into "Indian country," whether it came from outside of the state of Oklahoma or not; but the offense denounced by the act of 1895 must involve the element of carrying the liquor from without the state of Oklahoma into some part of what before statehood constituted the Indian Territory. Joplin Mercantile Co. v. United States, 236 U. S. 531, 35 Sup. Ct. 291, 59 L. Ed. —, just decided. In fact, the gist of the offense denounced by the act of 1895 is its interstate feature, namely, the carrying of liquor into the Indian Territory from without the state of Oklahoma.

In view of this difference between the elements of the two offenses, it is probable that the United States attorney, in drafting the indictment against Lewellen, was either uncertain about the law or the facts of the case, and attempted to make averments in one count charging both offenses. This was not permissible; but as there was no special demurrer for duplicity or other attack upon the indictment, and as the trial judge instructed the jury concerning the law governing the second mentioned offense only, namely, the carrying of liquor from without the state into the Indian Territory, and as under that charge the defendant was found guilty "as charged in the indictment" and sentenced accordingly, this court will treat the indictment in the same way, as charging a violation of the offense denounced by the act of 1895 only. Crain v. United States, 162 U. S. 625, 16 Sup. Ct. 952, 40 L. Ed. 1097; Wiborg v. United States, 163 U. S. 632, 16 Sup. Ct. 1127, 1197, 41 L. Ed. 289.

[3] The evidence discloses these facts: That on the morning of February 13, 1913, the defendant Lewellen, while hauling a load of beer near to the city of Tulsa in the state of Oklahoma, was arrested by a United States deputy marshal on the charge laid in the indictment; that on the barrels containing the beer there was a tag, known as a shipping tag, denoting, according to its face, that the barrels came from Joplin, Mo., consigned to J. Ammerman, Keystone, Okl.; that the place where he was arrested was without the city limits of Tulsa, but within the county of Tulsa, in what was formerly the Indian Territory; that the town of Keystone is southwest of Tulsa a distance of about 19 miles. The foregoing facts constituted substantially all the evidence introduced by the government. Lewellen then took the stand in his own behalf, and testified, in substance, that he was driving the beer wagon into Tulsa for a man by the name of Boggs, who

asked him to go over to the city waterworks and get a load of beer for him; that Boggs secured the team from a livery stable in Tulsa, and at his request he (Lewellen) went along with him to help him load the beer; that they went over to the waterworks and found the beer in question, together with some beer which they left there, concealed in a sand bank, in the river bottom; that they loaded the beer into the wagon and started back to Tulsa, which was about a quarter of a mile distant, when he was arrested, and Boggs made his escape. He testified that he had no interest in the beer; that he did not know where it came from; that he was not engaged in the whisky business himself, but was engaged in the business of renting rooms in a house in which his wife and family lived. This was all the evidence in the case.

The court charged the jury, among other things, as follows:

"Any one who carries into this district from without the state * * * any intoxicating liquor, such as beer or whisky, violates a federal law, cognizable in this court. * * * In this case it is established and admitted by the defendant that he had the beer in his possession when he was arrested. Now, possession of beer or whisky by the accused in a case of this character within this district, which the evidence shows has been recently introduced into this district from without the state, in violation of law, and where the evidence in the case fails to account satisfactorily for such possession, consistent with any other theory than that the defendant did introduce it, is a circumstance which the jury may and should consider, together with the other evidence in the case, in determining the guilt of the defendant. * * * That the shipping tags on the barrels showed that they had been shipped, so far as the railroad transportation was concerned, from Joplin, Mo., a point without the state, to Keystone, Okl."

To this charge the defendant excepted. On this evidence and under this charge the jury found the defendant guilty, and he was sentenced by the court to imprisonment in the United States penitentiary at Leavenworth, Kan., for the period of one year and one day, and to pay a fine to the United States of $100, and to stand committed until the fine shall have been paid.

The shipping tags were not only not shown to have been attached to the packages in the usual course of business or by any direction of the defendant, but the packages to which they were attached are shown to have had a very unusual journey and experience, far removed from the usual and ordinary course of business. They were not found at any station, depot, or warehouse on the line of any transportation company between Joplin and Keystone. They first made their appearance concealed in a sand bank in the river bottom 19 miles away from the station to which the consignment appeared, according to the tags, to have been made. In such circumstances we do not think the shipping tags were in themselves competent evidence of any interstate shipment. Not only so, but there is not in this record the slightest evidence that the beer found in Lewellen's possession had been recently, if ever, introduced into the territory. How long the large quantity of beer of which that found in his possession was a part had been concealed in the sand bank is not disclosed. When it was delivered at Keystone, if in fact it ever was delivered there, is not shown, and when it was transported from Key-

stone a distance of 19 miles to the sand bank in the river bottom, where found, is not shown. It therefore appears that there was no substantial evidence in the case warranting a submission of the question whether the beer found in Lewellen's possession was carried into the Indian Territory from without the state of Oklahoma, and not the slightest evidence whether it had been recently introduced into the territory by the defendant from any source.

In view of these conclusions, the court's charge was unwarranted and erroneous. On the authority of Chambliss v. United States, supra, the judgment must be reversed, and the cause remanded to the District Court, with directions to grant a new trial.

And it is so ordered.

HIPPLE et al. v. BATES COUNTY, MO.†

(Circuit Court of Appeals, Eighth Circuit. May 3, 1915.)

No. 4237.

1. APPEAL AND ERROR ⊂⊃850—REVIEW—SCOPE.

For the purposes of review on appeal, an agreed statement of facts upon which a cause is tried is like special findings by the court or a special verdict of a jury, and the sufficiency of the stipulated facts to support the judgment may be reviewed, though neither a finding nor declarations of law are requested.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3346, 3351–3362, 3375, 3376; Dec. Dig. ⊂⊃850.]

2. MUNICIPAL CORPORATIONS ⊂⊃303—PUBLIC IMPROVEMENTS—ORDINANCE DECLARING A NECESSITY—SUFFICIENCY.

Rev. St. Mo. 1909, § 9255, provides that when the city council shall deem it necessary to improve a street, it shall, by resolution, declare such improvement necessary. Section 9254 provides that the council may, by ordinance, include in a special assessment for paving the cost of bringing the street to the established grade, provided that the resolution declares that such street shall be brought to such grade, and that the cost thereof shall be included in the special assessment for the paving. *Held*, that where a resolution declaring the necessity of paving a street provided that such street should be brought to the established grade, and that the cost should be included in the special assessment for the paving, it was sufficient, though it did not declare the necessity of bringing the street to the established grade.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 808–810, 821; Dec. Dig. ⊂⊃303.]

3. COUNTIES ⊂⊃150—INDEBTEDNESS—CONSTITUTIONAL LIMITATIONS—STREET IMPROVEMENTS.

Const. Mo. art. 10, § 11, limits the annual county tax levy, and section 12, prohibits counties from becoming indebted in excess of their income for the year, without an authorizing vote at an election. Resolutions of a city council for grading and paving the streets on the four sides of the county courthouse square were adopted in March, and the ordinance awarding the contract was passed in May. It appeared that the county levied the maximum tax rate for that year, and that its disbursements exceeded its receipts, but it did not appear what disbursement warrants had been issued, or what indebtedness had been incurred when the street improvement contract was awarded. *Held*, that as it was the duty of the county to make provision for payment of the cost of the street

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

† Rehearing denied July 24, 1915.

improvement, and as it may have had sufficient funds to meet such cost when the contract was let, the rights of the contractors to payment could not be defeated by the subsequent expenditure of applicable county funds, and tax bills for such improvement were not void as an attempt to create a county indebtedness in violation of the Constitution.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 165, 166, 215–217; Dec. Dig. ⊂⊃150.]

4. MUNICIPAL CORPORATIONS ⊂⊃470—PUBLIC IMPROVEMENTS—ASSESSMENT OF BENEFITS—STREET INTERSECTIONS.

Rev. St. Mo. 1909, § 9254, provides that assessments for street improvements shall be levied on lots or tracts of land abutting on either side of the street improved in proportion to the front foot, and that, as to the repair of the paving and guttering on any street, it shall be divided into sections extending from the center of one intersecting street to the center of the next intersecting street. *Held*, that where the streets on the four sides of a courthouse square were graded and paved, there was no authority for including in the tax bill against the county the cost of improving the fourth of the street intersections diagonally opposite the four corners of the square.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1118; Dec. Dig. ⊂⊃470.]

In Error to the District Court of the United States for the Western District of Missouri; J. F. Pope, Judge.

Action by Percy A. Hipple and another, partners doing business as Hipple & McSpadden, against Bates county, in the state of Missouri. Judgment for defendant, and plaintiffs bring error. Reversed and remanded.

James W. Cosgrove, of Muskogee, Okl., and W. M. Williams, of Boonville, Mo., for plaintiffs in error.

De Witt C. Chastain, of Butler, Mo. (Thomas J. Smith, of Butler, Mo., on the brief), for defendant in error.

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

HOOK, Circuit Judge. This was an action by Hipple & McSpadden against Bates county, Mo., on special tax bills issued by the city of Butler for the cost of grading and paving the streets on the four sides of the county courthouse square. Upon a trial by the court there was a general finding and judgment for the county. The plaintiffs obtained this writ of error.

[1] It is urged by the county that there is nothing here for review because the finding of the trial court was general and plaintiffs requested neither a finding in their favor nor declarations of law, and there were no objections to evidence. But the case was tried upon agreed statements of fact which, though quite prolix and with much redundant matter, contained the ultimate facts upon which the case depended. An agreed statement of facts upon which a cause is tried is, as regards review in an appellate court, like special findings by a trial court or a special verdict of a jury. The sufficiency of the facts stipulated to support a judgment may be reviewed. Lehnen v. Dickson, 148 U. S. 71, 73, 13 Sup. Ct. 481, 37 L. Ed. 373; Supervisors v. Kennicott, 103 U. S. 554, 26 L. Ed. 486.

[2] The trial court held the tax bills void because the initial resolutions of the city council did not declare necessary the grading of the streets, as distinguished from the paving. A statute of Missouri, afterwards embodied in section 9255, R. S. 1909, provided:

"When the city council shall deem it necessary to pave, macadamize, gutter, curb, grade or otherwise improve a roadway or any street, * * * the council shall, by resolution, declare such work or improvement necessary to be done."

The Supreme Court of the state has held a number of times that the resolution required is jurisdictional, and that strict compliance is essential to the validity of the proceedings. In the case of Main street on the east side of the courthouse square, which is typical of the others, the resolution duly declared the necessity of the paving, and though it did not in terms expressly declare the grading also necessary, it provided "that the street above described shall be brought to the established grade, and that the cost thereof shall be included in the special assessment for paying for said paving." It may be assumed that if the statute stood alone as it did when construed by the Supreme Court of the state, the resolution would be insufficient. But an amendment, afterwards incorporated in section 9254, R. S., provided that the cost of bringing a street to the established grade might be included in the special assessment for paving, and that the resolution declaring the paving necessary should also declare the fact of such inclusion. The resolution in question here followed the amendatory statute precisely, and it was sufficient. See City of Lexington v. Commercial Bank, 130 Mo. App. 687, 108 S. W. 1095. The later statute was evidently intended to cover cases like that at bar where paving is necessary and is so declared, but the preparatory adjustment of the street surface to the established grade is incidental and not a separate, substantial improvement by itself.

[3] It is also urged that the tax bills are void as an attempt to create a county indebtedness in violation of sections 11 and 12 of article 10 of the state Constitution. Section 11 limits the annual tax levy, and section 12 prohibits counties from becoming indebted in excess of their income and revenue for the year, without an authorizing vote at an election. Bates county levied the maximum tax rate for the year 1910, in which the street improvements were ordered, contracted for, and made, and it claims that aside from the plaintiffs' tax bills its ordinary current expenses for that year exceeded its income and revenue. But we think the defense was not made out. It appears from the stipulations that the disbursements for 1910 were in considerable excess of the receipts, but the resolutions for the improvement were adopted in March of that year, and the ordinance awarding the contract was passed in May. It was then apparent that the work would be done with the authority and under the direction of the city authorities to whom the state laws committed it. The stipulations do not show the disbursement warrants issued or indebtedness incurred or contracted by the county up to that time, but the amounts specified are in gross sums for the period from January to October and later. For aught that appears there were sufficient funds to meet the cost of the street improvements,

and they would have been available had due regard been had to the acts of the city authorities. Such work in front of county property in the city was relatively as important as work on county roads and bridges. Though the state statutes intrusted the control and supervision to the city, they imposed the obligation to pay upon the county, and in respect of the duty of the latter to apportion funds and make provision for payment, the cost of the street work was not different from that ordered and contracted for by the county itself. See State v. Appleby, 136 Mo. 408, 37 S. W. 1122. When the proceedings in the city council progressed to the awarding of the contract, the rights of the contractors to payment could not be defeated by the expenditure thereafter of applicable county funds. Otherwise a contract valid in all respects when made could be nullified by the subsequent acts of the statutory debtor. Other objections are made to the validity of the tax bills, but we think they have less merit than those already considered.

[4] The tax bills include the cost of the improvement of the entire street intersections at the four corners of the courthouse square. The statute (section 9254, par. 5) provides that the assessment shall be levied "on all lots or tracts of land fronting or abutting on either side of such street, * * * along the distance improved in proportion to the front foot." It does not, as is sometimes done, provide that the cost for the intersections shall be borne by the city at large, and it seems to be the intention that the property on each side of a lineal block shall be held for the improvement of the street from the center of one intersection to the center of the next, at least where the improved length is not greater. Support for this is found in the provision following the one above quoted that such distance shall be a repair district or section. This, however, would not authorize the inclusion of the fourth of the intersections diagonally opposite the four corners of the courthouse square. To that extent the amounts of the tax bills are excessive. The stipulations show the area of the entire intersections and the contract cost per square yard. The excess amount easily computable should be deducted, and judgment for the balance, with interest thereon, entered in favor of the plaintiffs.

The judgment is reversed, and the cause is remanded for judgment in conformity with this opinion.

ITOW et al. v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. May 10, 1915.)

No. 2515.

1. CRIMINAL LAW ⇐594—CONTINUANCE—DISCRETION—ABUSE.

Defendants moved for a continuance of a criminal trial until witnesses could arrive in Alaska from the United States. The court ordered the jury to be impaneled pending their arrival, and refused to continue the trial upon learning that the witnesses had missed their steamer. After the jury was impaneled, counsel for the defense declined to make an opening statement because of his lack of opportunity to talk with such witnesses, and asked to reserve that privilege until he had that opportunity. Continuances were thereafter granted until the arrival of such witnesses,

and when the trial was resumed after their arrival counsel made no opening statement. *Held*, that the court did not abuse its discretion in the matter of continuance, especially as counsel had the opportunity to obtain the witnesses' version of the facts, and to make an opening statement, and therefore it could not be seen that defendants were prejudiced.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1321, 1322, 1332; Dec. Dig. ⊂⊃594.]

2. CRIMINAL LAW ⊂⊃586—CONTINUANCES—DISCRETION.

An application for the postponement of a trial is addressed to the sound discretion of the trial court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1311; Dec. Dig. ⊂⊃586.]

3. CRIMINAL LAW ⊂⊃1151 — APPEAL — MATTERS REVIEWABLE — DENIAL OF CONTINUANCE.

A ruling on an application for the postponement of a trial is not reviewable, unless it is clearly shown to have been a gross abuse of discretion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3045–3049; Dec. Dig. ⊂⊃1151.]

4. CRIMINAL LAW ⊂⊃855—CONDUCT OF JURY—READING NEWSPAPER ARTICLES.

On a criminal trial, defendants' counsel consented to the separation of the jury, and the court instructed them not to talk to any person or read anything regarding the case. On a motion to discharge the jury and enter a mistrial, on the ground that they must have read a newspaper article relative to the case, the court examined the jury and became satisfied that none of them had seen or heard anything about the article. *Held*, that the denial of the motion was not error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2048–2053; Dec. Dig. ⊂⊃855.]

5. CRIMINAL LAW ⊂⊃1054—APPEAL—RESERVATION OF GROUNDS OF REVIEW.

An assignment of error complaining of the admission of evidence over objection might well be overruled, where no exception was taken to the ruling on the objection.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2662–2664; Dec. Dig. ⊂⊃1054.]

6. WITNESSES ⊂⊃203—PRIVILEGED COMMUNICATIONS.

A statement by a person accused of crime to the district attorney concerning the facts and circumstances attending the death of deceased was not inadmissible on his trial for the crime as a privileged communication.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 758; Dec. Dig. ⊂⊃203.]

7. CRIMINAL LAW ⊂⊃422—EVIDENCE—ADMISSIONS OF CODEFENDANT.

Where two defendants charged with homicide were tried jointly, a statement made by one of them was admissible against him, but not against his codefendant, unless made in his presence and assented to by him, either actually or impliedly.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 984–988; Dec. Dig. ⊂⊃422.]

8. CRIMINAL LAW ⊂⊃673—RECEPTION OF EVIDENCE—LIMITING EVIDENCE ADMISSIBLE AGAINST ONE DEFENDANT.

Where the statement of one defendant is admitted as evidence against him, but not against his codefendant, the court should instruct the jury to so regard it; and if the codefendant wishes to be relieved from the influence of such evidence, he should ask for an instruction limiting the effect thereof.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1597, 1872–1876; Dec. Dig. ⊂⊃673.]

9. HOMICIDE ⊂=300—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.
On the trial of I. and F. for homicide, the evidence for the government tended to show that I. deliberately planned the murder of deceased, and stabbed him with a sword while F. was holding him down. The evidence for defendants tended to show that deceased, F., and a third person were together in a bunkhouse; that deceased assaulted the others with his fists; that I., hearing the commotion, took his sword and went to protect the assaulted men; that deceased was about to strike him, and he attempted to strike deceased with the sword in its scabbard; and that deceased seized the scabbard, knocked I. down, fell on top of him, and in so doing fell upon the point of the sword. *Held*, that in either view of the testimony there was no occasion for an instruction as to homicide committed in self-defense, or in the prevention of a felonious act, since, if deceased committed any offense, it was an assault and battery with his fists, and not a felony.
[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614, 616–620, 622–630; Dec. Dig. ⊂=300.]

10. HOMICIDE ⊂=298—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.
An instruction to acquit if there was a riot in progress, or if a breach of the peace was taking place, and I. was making a lawful attempt to suppress the riot or preserve the peace, was inapplicable to the evidence, and properly refused; there being no riot, even on defendant's theory.
[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 612; Dec. Dig. ⊂=298.]

In Error to the District Court of the United States, for Division No. 1 of the District of Alaska; Overfield, Judge.

O. Itow and another were convicted of murder and manslaughter, respectively, and they bring error. Affirmed.

J. H. Cobb, of Juneau, Alaska, for plaintiffs in error.

Jno. J. Reagan, U. S. Atty., of Nome, Alaska, and John W. Preston, and M. A. Thomas, Asst. U. S. Attys., both of San Francisco, Cal., for the United States.

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

GILBERT, Circuit Judge. [1-3] The plaintiffs in error were indicted for the murder of Frank Dunn. Itow was convicted of murder in the first degree, and Fushimi was convicted of manslaughter. Error is assigned to the refusal of the trial court to grant a continuance for which application was made by the defendants' counsel, on the ground that necessary witnesses subpœnaed in Seattle and Portland had not arrived at the place of trial; and it is contended that by the denial of the application the defendants were deprived of a substantial right, the right of affording their counsel opportunity to examine these witnesses before the trial, and to acquire information from which he could make an opening statement of the defendants' case to the jury, the fact being that on account of those circumstances no opening statement was made. The indictment was found December 13, 1912. On December 20th the defendants applied for process to compel the attendance of witnesses alleged to be in Seattle and Portland. The case was set for trial on January 2, 1913. Continuance was then requested, and it was stated that the defendants' witnesses

had started from Seattle and were on their way. The court ruled that the jury should be impaneled pending their arrival. Later the defendants' counsel stated that the witnesses had missed their steamer, but would probably come on the next steamer. The court again refused to continue the trial. On the following day, after the jury were impaneled, counsel for the defense declined to make an opening statement to the jury, for the reason that he had had no opportunity to talk to the absent witnesses, and he asked that he might reserve that privilege until he should have the opportunity to see them. Subsequently two continuances, amounting in all to four days, were granted, awaiting the arrival of the witnesses. After their arrival, the trial of the case went on, and counsel for the defendant made no opening statement, nor did he request permission to make one. An application for the postponement of a trial is addressed to the sound discretion of the court, and a ruling thereon is not subject to review by an appellate court, unless it is clearly shown to have been a gross abuse of discretion. Hardy v. United States, 186 U. S. 224, 22 Sup. Ct. 889, 46 L. Ed. 1137. The facts in the record here show no abuse of discretion, and it is not seen that the defendants could have suffered prejudice from the rulings of the court. The absent witnesses arrived in time. The defendants' counsel had the opportunity to obtain their version of the facts, and to make an opening statement to the jury had he so desired.

[4] We find no error in the refusal of the court to discharge the jury and enter a mistrial upon the motion of the defendants, on the ground that the jury, having been permitted to separate on each adjournment or recess of the court, must have seen and read a certain article published in a newspaper at Juneau, entitled "Japanese are Accused of Many Crimes," in which reference was made to the case then pending in court. Counsel for defendants had consented to the separation of the jury. The court had instructed the jury not to talk to any person about the case, nor to read anything in regard to the case. When the motion was made to discharge the jury, the court, on examining the jury, became satisfied that none of the jurors had seen or heard anything said about the article in the newspaper.

[5-8] It is assigned as error that the court admitted in evidence a certain statement made by Fushimi to the district attorney, prior to the trial, concerning the facts and circumstances attending the death of Frank Dunn. It is said that this was error, for the reason that it was the admission of a statement, made after the alleged crime, by one of the two persons indicted for the commission of the offense, which, not having been made in the other's presence, was not competent evidence against him. The statement was offered as part of the government's evidence. It was objected to on behalf of Itow on the ground that the statement made by his codefendant was not competent evidence against him. It was objected to on behalf of Fushimi on the ground that it was a privileged communication. No exception was taken to the ruling of the court upon the objections. That fact of itself is sufficient to dispose of the assignment of error. We are disposed, however, in a case of this kind, to consider the merits of the objections, and inquire whether the defendants were prejudiced by the

ruling. The objection that the testimony was a privileged communication is untenable, and it is not presented in this court.

As to the other objection, the record shows that the statement was offered only as evidence against Fushimi, and that the district attorney so stated at the time. Fushimi was subsequently called as a witness for the defendants, and testified as to the matters referred to in the statement. Where two defendants charged with a crime are tried jointly, a statement made by one of them is admissible in evidence against him, but not against his codefendant unless made in his presence and assented to by him either actually or impliedly. Sparf & Hansen v. United States, 156 U. S. 51, 58, 715, 15 Sup. Ct. 273, 39 L. Ed. 343; Alsabrooks v. State, 52 Ala. 24; Johnson v. State, 70 Ga. 725; Brandt v. Commonwealth, 94 Pa. 290; State v. Cram, 67 Vt. 650, 32 Atl. 502; Commonwealth v. Bishop, 165 Mass. 148, 42 N. E. 560. In such a case it is held that the court should instruct the jury to regard the statement as evidence against the defendant who made it, and not against his codefendant, and it has been held that, if the other wishes to be relieved from the influence of such evidence, he should ask for an instruction limiting the effect thereof. Blackman v. State, 36 Ala. 295. In this case there was no request for such an instruction. We think there was no error in the admission of the statement for the purpose for which it was offered.

[9, 10] Error is assigned to the refusal of the court to instruct the jury that homicide is justifiable, if committed to prevent the commission of a felony upon the person of the slayer, or upon his servant, or in the lawful attempt to suppress a riot, or preserve the peace, and that, if they found that the deceased was attempting to commit a felony upon the persons of Nakayama and Fushimi, and that Itow was the foreman in charge of Nakayama and Fushimi, and that in the attempt on the part of Itow to prevent the commission of such felony the deceased was killed, or if the jury had reasonable doubt as to whether the deceased did not lose his life in that way, they must acquit; and that it would also be their duty to acquit if they believed that at the time Itow reached the scene of the fatality there was a riot in progress, or a breach of the peace was taking place, and Itow was making a lawful attempt to suppress the riot or preserve the peace. These requested instructions were properly refused, for the reason that there was nothing in the evidence to which they were applicable.

The theory of the prosecution, as sustained by the witnesses for the government, was that Itow deliberately planned the murder of Dunn, and stabbed him with a sword while Fushimi was holding him down. The evidence of the defendants tended to show that a controversy arose between Dunn and Fushimi and Nakayama, in which Dunn assaulted the others with his fists, that Itow hearing the commotion took his sword and went to protect his men, and stop the fight, that Dunn was about to strike him, and that he attempted to strike Dunn with the sword in its scabbard; that Dunn seized the scabbard, struck Itow with his other hand, knocked him down, and leaped or fell on top of him, and in so doing fell upon the point of the sword and was mortally wounded. In either view of the conflicting testimony, there was no occasion for an instruction on the subject of homicide com-

mitted in self-defense, or in the prevention of a felonious act. If Dunn was killed in the manner testified to by the government's witnesses, it was murder. If he was killed in the manner testified to by the defendants, it was an accident.

Again, the requested instruction erroneously assumed that Dunn was slain while in the commission of a felony. There is no evidence for that assumption. If he committed any offense, it was an assault and battery with his fists. There was no riot, even on the theory of the defendants, for the affray which Itow said he was attempting to suppress was betwen Dunn and the two Japanese who were with him in the Chinese bunkhouse.

The judgment is affirmed.

ILLINOIS CENT. R. CO. v. STEWART.

(Circuit Court of Appeals, Eighth Circuit. April 14, 1915.)

No. 4320.

1. DEATH ⊂=49—ACTION UNDER EMPLOYERS' LIABILITY ACT—SUFFICIENCY OF PETITION.

The petition in an action against an interstate railroad company for the death of an employé *held* sufficient in its allegations respecting the next of kin of deceased to state a cause of action under the federal Employers' Liability Act (Act April 22, 1908, c. 149, § 1, 35 Stat. 65 [Comp. St. 1913, § 8657]).

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 64–66, 69; Dec. Dig. ⊂=49.]

2. MASTER AND SERVANT ⊂=243—CONTRIBUTORY NEGLIGENCE—RULES OF COMPANY.

Failure of employés to observe a rule of a railroad company *held* not contributory negligence constituting a defense to an action for death of an employé.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 682, 759–775; Dec. Dig. ⊂=243.]

3. MASTER AND SERVANT ⊂=289—ACTION FOR INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

In an action for the death of an employé, who, while repairing a defective coupling on a car standing with others on a delivery track, was struck and killed by other cars which moved down against him by gravity, where the evidence showed that deceased, with another, inspected the cars and found the defect, that the defective part could ordinarily be replaced in a minute, and that the car was loaded and waiting for delivery, the question whether deceased was chargeable with contributory negligence in not marking the car for removal to the repair track *held* properly submitted to the jury, there being no rule which required such removal.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089, 1090, 1092–1132; Dec. Dig. ⊂=289.]

4. MASTER AND SERVANT ⊂=210—MASTER'S LIABILITY FOR INJURY TO SERVANT—ASSUMPTION OF RISK.

An instruction that a railroad employé, who was struck and killed by cars left standing on a delivery track and which moved downgrade be-

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cause the hand brakes had not been set, did not assume the risk from such danger, *held* correct.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 554–556; Dec. Dig. ⇨210.

Assumption of risk incident to employment, see note to Chesapeake & O. R. Co. v. Hennessey, 38 C. C. A. 314.]

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

Action at law by Lillie M. Stewart, administratrix of the estate of Harry M. Toft, against the Illinois Central Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Wm. Baird & Sons, of Omaha, Neb., Helsell & Helsell, of Ft. Dodge, Iowa, and Blewett Lee and W. S. Horton, both of Chicago, Ill., for plaintiff in error.

J. A. McKenzie, of Omaha, Neb. (McKenzie & Cox and J. E. Von Dorn, all of Omaha, Neb., on the brief), for defendant in error.

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

CARLAND, Circuit Judge. This action was commenced by defendant in error, hereinafter called plaintiff, against plaintiff in error, hereinafter called defendant, to recover damages for negligently causing the death of one Harry M. Toft on January 27, 1913. Deceased was an employé of the South Omaha Joint Car Inspection Association, and defendant was engaged in interstate transportation, using the services of the Car Inspection Association in connection with other railroads. On the above date, at about 9:15 p. m., deceased was engaged in repairing a defective coupling on one of defendant's cars, and while so engaged was caught by a moving car belonging to defendant and fatally injured. The track on which the injury occurred was known as the Illinois Central delivery track. At the place of the injury it had an incline of three-tenths of a foot per 100 feet. There was a string of 18 or 20 cars standing on this track. The car at the northwesterly end of the string had the broken coupling which Toft was repairing. In addition to this string of cars, there were 3 other cars placed on the same track about 15 to 20 feet from the car on which deceased was working. These 3 cars moved by force of gravity, striking deceased and causing his death. The alleged act of negligence submitted to the jury was the leaving of these 3 cars without having the hand brakes thereon set. The alleged errors of the trial court will be taken up in the order in which they are argued by counsel in the brief.

[1] It is first urged that error was committed in the refusal of the trial court to direct a verdict in favor of defendant, for the reason that the complaint showed that the action was brought under the statute of Nebraska, while the evidence showed that the case was one triable only under the federal Employers' Liability Law. St. Louis, I. M. & S. R. Co. v. Hesterly, 228 U. S. 702, 33 Sup. Ct. 703, 57 L. Ed. 1031; St. Louis, S. F. & T. R. Co. v. Seale, 229 U. S. 156, 33 Sup.

Ct. 651, 57 L. Ed. 1129, Ann. Cas. 1914C, 156. This contention is based upon the following allegation of the petition:

"That this action is brought for and on behalf of the next of kin of the said deceased, the said deceased having left no widow or children surviving him; that the mother of the said deceased, Carrie Toft, of the age of fifty-three (53) years, the sister, Mabel Toft, twenty (20) years of age, and a brother, Milton Toft, seventeen (17) years of age, are the only surviving next of kin of the said deceased; that the mother of the said deceased at the time of his death was entirely, and the sister and brother were in part, dependent upon the said deceased for their care, support, and maintenance."

Whether or not the allegation above quoted was sufficient under the law of Nebraska we need not determine, as we are satisfied that it was sufficient under the federal Employers' Liability Act. Section 1, c. 149, 35 Stat. 65, provides:

"Or, in case of the death of such employé, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employé; and, if none, then of such employé's parents; and, if none, then of the next of kin dependent upon such employé."

The case was in fact tried as one under the federal Employers' Liability Act. The court said in its charge to the jury:

"The action is brought here by Mrs. Stewart, the administratrix; but it is entirely for the benefit of the mother under the statute. Under the circumstances here, no one else is entitled to any recovery. She is the sole beneficiary. The only damages which could be recovered, if any are given, are the pecuniary damages which the mother has suffered by the death of Mr. Toft."

No evidence was introduced at the trial tending to show the age or dependency of the brother and sister. The reference to them in the complaint was treated as surplusage. As the mother was the beneficiary under the federal law, we see no error in this ruling of the court.

[2] It is next claimed that the trial court erred in refusing to direct a verdict in favor of plaintiff in error, for the reason that the evidence showed that the deceased was guilty of contributory negligence. In this connection the following rules were introduced in evidence:

"A blue flag by day and a blue light by night, displayed at one or both ends of an engine, car, or train, indicates that workmen are under or about it; when thus protected it must not be coupled to or moved. Workmen will display the blue signals, and the same workmen are alone authorized to remove them. Other cars must not be placed on the same track so as to intercept the view of the blue signals, without first notifying the workmen."

"Joint Car Inspection Association. All Employees: It has been called to my attention that there are being repairs made to cars on transfers and in Albright without the protection of a flag. In the future, where it is necessary to make repairs on cars, you must protect yourself by flags. W. H. Cressey, South Omaha, Nebraska, February 16, 1911."

It is claimed that the deceased under these rules was bound to protect himself by either a flag or a blue light. Considering, however, the act of negligence which was submitted to the jury, and the further fact that the cars moved by gravity at the time they caught deceased and fatally injured him, it is apparent that a flag or a light would have been no protection against the force of gravity, which neither sees nor hears. As the three cars were placed upon the track before the de-

ceased commenced to repair the defective coupling, no flag or light would be expected at that time. We see no error upon this point.

[3] It is also claimed that the deceased had no authority to make repairs on the delivery track. George Alter, who was an employé of the Joint Car Association at South Omaha, testified as a witness for the plaintiff. He testified that he was called a flying inspector or bookman; that Toft, the deceased, was considered his helper. Alter and the deceased were on duty at the time of the injury. They inspected the 19 or 20 cars standing on the delivery track. There was a defective coupling on the nineteenth car, or the north car in that string of cars. It was the knuckle part of the coupling; the point of the knuckle was broken off, and of course it made it defective, and necessary to be repaired either there or sent back and be repaired. We had knuckles to repair this defective one at our disposal. I discovered the broken knuckle and I made mention to Mr. Toft, and I said, 'You had better put a card on it.'—That meant a bad order card, and he says, 'I will get one and put it in.' It was a loaded car going to the Cudahy Packing Company, I believe—so I didn't say any more. After that, he (the deceased) got this knuckle and started back up to put it in. I was there when he got the knuckle; he picked it out and says, 'I got one,' and put it on his shoulder. He started off, and I went to attend to other business. If a man can get at this repair handily, he can do it in a minute's time; you take out the knuckle pin, throw the old one out and put another one in; if a man has the material right there it can be done in a minute.

In reference to the duty of the deceased as to where he should make the repair of the defective coupling the court charged the jury as follows:

"There is evidence that Mr. Toft had a conversation with Mr. Alter, who was his immediate superior, after it was discovered that this coupling was broken, and that Mr. Alter said he thought he had better put a card on the car, a safety appliance card, and that in the usage of the yards, when that kind of a card is placed upon a car, the car is afterwards repaired and usually removed, perhaps always removed, to another track before the repair is made. But there is also evidence that after that conversation, and after walking the length of the 18 or 19 cars, Mr. Toft obtained a new coupling apparatus to take the place of the one which was defective, and that Mr. Alter knew this, and Mr. Toft put it upon his shoulder and told Mr. Alter he was going to see if he could put it in, and that Mr. Alter made no objections to that conduct.

"I think you at liberty to infer, from those facts and the rest of the evidence, that Mr. Toft had the right, if he chose, in the exercise of good judgment, or his own good judgment, to undertake to make that repair on the car at that place, and that he was not bound to card the car and to require it to be removed, but it was a matter for him to decide as to whether he should do that; and if you find that he did not exercise ordinary care in deciding to undertake to make that repair at that place, but that ordinary care on his part should have required him to remove the car to the repair track, then you would be authorized to find that he was guilty of contributory negligence in undertaking it there, and, of course, that that contributed to his injury, by placing him where subsequently the cars drifted down upon him and caught him.

"The method in which he undertook to make that repair has been disclosed to you. He thought it would take but a minute. It seemed to have taken quite a period longer. It was in the dark. He had a lantern, and there was another employé around him there for a while with another lantern, and he would not be entitled always to absolutely pay no attention to surrounding ob-

jects; and if, in the exercise of ordinary care, he should have kept a lookout around him, and should have seen these cars approaching him in time to have avoided it, you would be authorized to find that he was guilty of contributory negligence in that respect. Whatever you find in the way of contributory negligence, if any, that Mr. Toft was guilty of, if he was guilty of any, should be considered by you in arriving at your verdict."

We are of the opinion that the question as to where the deceased should perform the duty of repairing was properly left to the jury. Again, the rule or instruction of the Joint Car Inspection Association, above quoted, contained no provision against making repairs at any particular place, but it provided that wherever they were made employés should protect themselves by a flag. Mr. Cressey, who signed the instruction, says that his attention had been called to the fact that repairs were being made to cars on transfers and in Albright without the protection of a flag. There was no fault found with the place where the repair was to be made, and he assumed that they would be made on the transfer track. We see no merit in the fifth assignment of error, which relates to the paragraph in the court's charge in regard to the duty of the employés of the plaintiff in error towards other employés working about the cars on the delivery track.

[4] It is next urged that the court erred in charging the jury upon the subject of assumption of risk. The court told the jury that if they found the cars which caught the deceased were moved by the force of gravity, the deceased did not assume the risk incident to the cars being left without the hand brakes being set. There certainly was no error in this instruction, as the deceased only assumed those risks that were known by him or were plainly obvious, and there is no evidence in the record that the deceased heard or saw the cars moving upon him, or knew the hand brakes had not been set. In the absence of knowledge, he could rely upon the presumption that the employés of defendant had performed their duty in setting the hand brakes on the cars. Rules 761 and 821, in evidence.

The seventh assignment of error relates to that portion of the charge in regard to the conversation had between the witness Alter and the deceased hereinbefore quoted.

In view of the fact that the court left the question to the jury as to whether the deceased had a right to make the repairs where he did, the criticism of this portion of the charge, to the effect that it permitted Alter to decide where the repair should be made, in opposition to the rules of the association or railroad company, is not well taken.

Judgment below should be affirmed; and it is so ordered.

BLESSING v. BLANCHARD et al.

In re PACIFIC MOTOR CAR CO.'S ESTATE.

(Circuit Court of Appeals, Ninth Circuit. May 10, 1915.)

No. 2530.

1. BANKRUPTCY ⊂=348—CLAIMS—PRIORITY—"WAGE-EARNER."

Bankr. Act July 1, 1898, c. 541, § 64b (4), 30 Stat. 563 (Comp. St. 1913, § 9648), gives priority to wages due to workmen, clerks, salesmen, or servants, earned within three months before the commencement of the proceedings. Section 1, subd. 27 (Comp. St. 1913, § 9585), defines a "wage-earner" as an individual working for wages, salary, or hire at a rate of compensation not exceeding $1,500 a year. *Held*, that subdivision 27 does not refer to or limit section 64b (4), and hence priority cannot be denied merely because a claimant's wages or salary exceeded $1,500 a year, as that subdivision defines a "wage-earner" in any provision of the Bankruptcy Act or proceeding relating thereto in which the word may be found, and more especially the section prescribing the classes which may be adjudged an involuntary bankrupt.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 536; Dec. Dig. ⊂=348.

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

2. BANKRUPTCY ⊂=348—CLAIMS—PRIORITY—"SERVANT."

The general manager of a bankrupt corporation had authority to hire and discharge men and to superintend the salesmen, and had the general control of the workmen in all departments. He also worked as salesman, and he was neither an officer, a director, nor a stockholder of the corporation. *Held*, that his claim for salary was not entitled to priority under Bankr. Act, § 64b (4), since, though the word "servant" often has a broad meaning, and in one sense may include all employés in the service of another, and also the officers of corporations, it is not used in that sense in the section in question, but means a restricted class of subordinate helpers, who work for wages, but who are neither salesmen, workmen, nor clerks, especially as priority of payment is intended for the benefit only of those dependent upon their wages, and who, having lost their employment by the bankruptcy, are in need of protection.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 536; Dec. Dig. ⊂=348.

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

3. BANKRUPTCY ⊂=348—CLAIMS—PRIORITY.

Where the superintendent of an automobile company's shop, having authority to hire and discharge men in his department, but who was subject to the control and direction of the general manager, did the same kind of work in the shop as the men working under him in the repair of automobiles and general shop work, his claim for salary was entitled to priority under Bankr. Act, § 64b (4).

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 536; Dec. Dig. ⊂=348.]

4. BANKRUPTCY ⊂=348—CLAIMS—PRIORITY.

The claim for salary of such superintendent was entitled to priority under the California statute giving priority in insolvency proceedings to miners, mechanics, salesmen, clerks, servants, laborers, or other persons for work done or services rendered, assuming that such law was not supplanted by the Bankruptcy Act.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 536; Dec. Dig. ⊂=348.]

Petition for Revision of Proceedings of the District Court of the United States for the First Division of the Northern District of California; M. T. Dooling, Judge.

In the matter of the Pacific Motor Car Company, bankrupt. On petition by Chas. B. Blessing, trustee in bankruptcy, to revise a judgment allowing priority to claims of G. A. Blanchard and another. Reversed in part, and affirmed in part.

Heller, Powers & Ehrman and Reuben G. Hunt, all of San Francisco, Cal., for petitioner.

R. H. Countryman, of San Francisco, Cal., for respondents.

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

GILBERT, Circuit Judge. This is a petition to revise the judgment of the District Court in allowing priority to claims of two employés of the bankrupt. Blanchard was allowed a priority of $145.20, and Winn was allowed a priority of $245; the said sums being the balance due them respectively on their salaries earned within three months prior to the filing of the petition in bankruptcy. The bankrupt was engaged in buying, selling, and repairing automobiles. Blanchard was the general manager of the bankrupt, at a salary of $300 per month. As general manager, he had authority to hire and discharge men, and to superintend the salesmen, and he himself worked in the capacity of a salesman. He had the general control and direction of the workmen in the employment of the bankrupt in all its departments. He was not an officer, director, or stockholder of the bankrupt. Winn was the superintendent of the shop. He had authority to hire and discharge the men in his department, but was subject to the control and direction of Blanchard. He did the same kind of work in the shop as did the men who worked under him, in repairing automobiles and general shop work.

[1] The petitioner claims that neither Blanchard nor Winn was entitled to priority of payment, first for the reason that each was receiving a salary in excess of $1,500 per year; and it is contended that section 64b (4) of the Bankruptcy Act is to be construed in connection with section 1, subd. 27, of the Bankruptcy Act. That subdivision is found in a chapter which is devoted to definitions of words and phrases used in the act. Subdivision 27 defines a "wage-earner," and declares that the term "shall mean an individual who works for wages, salary, or hire at a rate of compensation not exceeding one thousand five hundred dollars per year." Although there is some authority to the contrary, we are of the opinion that the provision just quoted does not refer to or limit section 64b (4). It was intended only to define the phrase "wage-earner" in any provision of the Bankruptcy Act or proceeding relating thereto in which the word might be found, and more especially section 4b of the act (Comp. St. 1913, § 9588), which provides that any persons, excepting a wage-earner or a person engaged chiefly in farming or the tillage of the soil, etc., may be adjudged an involuntary bankrupt.

[2] The question remains whether or not Blanchard and Winn were entitled to priority under the provisions of section 64b (4), which gives priority to wages due to workmen, clerks, traveling or city salesmen or servants. The Bankruptcy Act of 1867 (Act March 2, 1867, c. 176, 14 Stat. 517) gave priority for wages due "any operative or clerk or house servant." The act of 1898 originally provided for priority of wages due to "workmen, clerks and servants." In 1906 (Act June 15, 1906, c. 3333, 34 Stat. 267 [Comp. St. 1913, § 9648]) it was amended by inserting the words "traveling or city salesmen," an amendment which was induced by decisions in which it had been held that salesmen were not included under the word "servants" in the original act. The word "servants" often has a broad and inclusive meaning, and in a sense it may be said to include all employés in the service of another, and also the officers of corporations. It is very clear, however, that it is not used in that sense in the section under consideration. Although the word "servant" is broader than the term "house servant," as used in the act of 1867, it was not intended by its use in the act of 1898 to include all employés; otherwise, there would have been no necessity for a specific mention of workmen or clerks or salesmen. We think the word "servant" should be held to mean a restricted class of subordinate helpers who work for wages, but who are not salesmen, workmen, or clerks. We do not think it includes the manager of a business, notwithstanding that he may also have rendered services as a salesman.

Priority of payment was intended for the benefit only of those who are dependent upon their wages, and who, having lost their employment by the bankruptcy, would be in need of such protection. It evidently was not thought that the general manager of the business would require special protection. Such seems to have been the opinion of the courts of bankruptcy. In re Grubbs-Wiley Grocery Co. (D. C.) 96 Fed. 183; In re Carolina Cooperage Co. (D. C.) 96 Fed. 950; In re Albert O. Brown & Co. (D. C.) 171 Fed. 281; In re Greenberger (D. C.) 203 Fed. 583. In Latta v. Lonsdale, 107 Fed. 585, 47 C. C. A. 1, 52 L. R. A. 479, the Circuit Court of Appeals for the Eighth Circuit, in construing a statute of Arkansas which denied preferences among creditors of insolvent corporations "except for wages and salaries of laborers and employés," held that an attorney employed by a corporation at a yearly salary, payable monthly, was not entitled to the preference. The court said that statutes of the character under consideration were enacted for the protection of wage-earners proper, who had neither the position, nor the opportunity, nor the capacity to obtain payment or security for their services.

[3] The claim of Winn as presented to the bankruptcy court recited that he was superintendent of the shop, working in and about the shop in the repair of automobiles and in the service department of said bankrupt, and that his salary was $150 a month. We are not convinced that the court below was in error in holding that Winn was a workman within the meaning of section 64b (4). The fact that, while working with the men as their foreman, he was superintendent of the repair shop, would not necessarily place him in a different class

from the other workmen, or exclude him from the protection of the act.

[4] In the briefs there is discussion of the question whether or not the statute of the state of California providing for priority payment in insolvency proceedings under the state law is supplanted by the Bankruptcy Act dealing with the same subject. It is unnecessary to consider that question here, for Blanchard, whose claim to priority under the Bankruptcy Act we think should be denied, is not included among those for whom the benefit of the state law is intended; that is to say, "miners, mechanics, salesmen, clerks, servants, laborers or other persons for work done or services rendered."

As to Blanchard, the judgment below is reversed; as to Winn, it is affirmed.

SMALLWOOD v. MOORE et al.

(Circuit Court of Appeals, Eighth Circuit. April 23, 1915.)

No. 142.

1. HOMESTEAD ⟸138—ELECTION BETWEEN HOMESTEAD AND DISTRIBUTIVE SHARE.

Under the laws of Iowa, the husband of an intestate inherits one-third of her real estate, termed his distributive share, or, at his election, the right to the homestead exempt from the claims of creditors. A bankrupt's wife owned 110 acres of land, and with her husband and children lived on the 40 acres constituting the homestead until her death in December, 1912. The husband and children continued to occupy the premises until February 20, 1913, when the husband conveyed to the children all his right, title, and interest therein. On April 9, 1913, he filed a voluntary petition in bankruptcy and listed in his schedules "a dower interest of one-third" in the 110 acres, also claiming as his exempt homestead the 40-acre tract. *Held*, that the deed to the children did not show an election by the husband to abandon his homestead right and convey his distributive share to defraud his creditors, nor was the listing of "a dower interest" of persuasive significance, while his continuous living on the homestead after the death of his wife, and his claim of the homestead exemption when he filed his petition in bankruptcy, evidenced his election to claim the homestead right.

[Ed. Note.—For other cases, see Homestead, Dec. Dig. ⟸138.]

2. FRAUDULENT CONVEYANCES ⟸52—EXEMPT PROPERTY—HOMESTEAD RIGHT.

Where one, having a homestead right exempt from the claims of creditors, conveyed it to his children, the owners of the fee, subject to the homestead right, in consideration of his love and affection for them and their verbal agreement to care for him, the conveyance was valid against his creditors and all the world.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 118–127; Dec. Dig. ⟸52.]

Petition to Revise Order of District Court of the United States for the Southern District of Iowa; Smith McPherson, Judge.

In the matter of Thomas Moore. On petition by Charles W. Smallwood, trustee in bankruptcy, to revise an order in favor of George Moore and others respecting an interest in land. Petition dismissed.

J. C. Mabry and Thomas Hickenlooper, both of Albia, Iowa, for petitioner.

John W. Lewis and R. R. Ramsell, both of Ottumwa, Iowa, for respondents.

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

SANBORN, Circuit Judge. This case comes by a petition to revise an order of the court of bankruptcy, and it presents a single question: Did Thomas Moore by his deed of February 20, 1913, elect to take his distributive share in the 110 acres of land in Iowa of which his wife died seised, so that he thereby estopped himself from electing and holding his homestead right in the 40 acres thereof on which he had lived for years, and on which he was living with his two unmarried sons when he was adjudged a bankrupt on April 9, 1913?

[1] Under the laws of Iowa the husband of a wife who dies intestate inherits, at his election, one-third of her real estate, which is termed his distributive share, or the right to possess and occupy the whole homestead exempt from the claims of his creditors. The distributive share is termed the primary right, the right presumed in the absence of an election. A method of election is prescribed by statute, but it is not exclusive. There was no such election in this case. The time within which it might be made did not expire before the conclusion of the proceedings in this case. A conveyance of the distributive share has been held in many cases to constitute an election of that share. Possession and occupancy of the homestead for many years have been held to evidence an election of the homestead right. No hard and fast rule has been established that every conveyance by one of his distributive share is an irrevocable election thereof, or that every continuing possession and occupation constitutes a choice of the homestead right. The courts of Iowa have determined each election by the facts and circumstances of each particular case.

From the year 1900 until her death on December 28, 1912, Catherine Moore, the wife of Thomas Moore, the bankrupt, was the owner of 110 acres of land in Mahaska county, Iowa. She, her husband and three children lived on this land in a dwelling house and appurtenant buildings upon 40 acres of it which is described as the northwest quarter of the northeast quarter of section 34, township 74 north, of range 17 west. Since her death Mr. Moore and his two sons, one of whom was a minor, employed a housekeeper and continued to occupy and use the premises as their home. Mattie Forsyth, Earl T. Moore, and Perrin L. Moore are the only children and the only heirs at law of Catherine Moore. On February 20, 1913, Mr. Moore in consideration of love and affection for these children, and of their verbal agreement to care for him in his old age, made a warranty deed to them of all his right, title, and interest, whether at law or in equity, and of all and any kind in the 110 acres. On April 9, 1913, Moore filed his voluntary petition in bankruptcy. In Schedule B (1) attached to his petition he listed "a dower interest of one-third" in the 110 acres, and in the same connection he claimed his homestead exemption in these words:

"The petitioner owns and claims as his exempt homestead under the laws of Iowa, the" 40-acre tract on which the buildings were situated, which he described according to the government survey.

After the trustee was chosen he insisted that Moore's deed of February 20, 1913, constituted an election by him of his distributive share of the estate of his wife and estopped him from thereafter claiming his homestead right in the 40-acre tract on which he lived, that the deed was voidable as to his creditors and that this trustee, as their representative, was entitled to take and sell one-third of the 110 acres and to apply the proceeds of the sale to the payment of the claims of Moore's creditors. The referee sustained, but the court below overthrew, this contention, and held that the bankrupt was still entitled to his homestead right in the 40-acre tract on which he had resided so many years, and on which he was still living.

[2] Conceding, without deciding, that if Moore had elected to take and had conveyed to his children his distributive share in his wife's estate, without any other consideration than his love and affection for his children and their verbal agreement to care for him, that conveyance would have been voidable by his creditors, it is also certainly true that if he had elected to take his homestead right in the 40-acre tract and for the same consideration had conveyed that right to his children, who were the owners of the fee therein subject to his homestead right, that conveyance would have been valid against his creditors and all the world. Green v. Root (D. C.) 62 Fed. 191, 199, 200; In re Feas' Estate, 30 Wash. 51, 70 Pac. 270, 272; Wilson v. Fields (Tex. Civ. App.) 50 S. W. 1024. Fraud is not to be presumed. That interpretation which validates should be preferred to that which avoids a contract or deed. And that construction of acts and sayings which tends to sustain should be preferred to that which tends to destroy the rights of homesteaders. Read the deed of February 20, 1913, in the light of these familiar rules, and no election to abandon his homestead right and convey his distributive share to defraud his creditors is readily perceptible. If he had made a warranty deed of an undivided third of the 110 acres, there might have been some basis for the contention that he had thereby evidenced his intention to select his distributive share in preference to his homestead right and to convey the former. But he did not do this. He conveyed nothing, and he warranted the title to nothing, but his right, title, and interest, whatever it was or might be, in the 110 acres. The description in the conveyance covers his homestead right as completely as it does his distributive share. This description and the deed itself were probably drawn, and Moore executed the latter, without any purpose or intention whatever to make or evidence any choice or election between the distributive share and the homestead right of the grantor, but with the sole purpose of releasing to his children all the interest he had in the land, of whatever character it might be, in consideration of their undertaking to carry him comfortably through his later years. To deduce from such a conveyance the conclusion that the grantor intended thereby to select one-third of the 110 acres as his distributive share, and make a voidable conveyance of it to his children to defraud his creditors, when without defrauding his creditors, and with honest intent, he could by the same

deed vest an unassailable title to the same property in the grantees, by selecting and relinquishing to them his homestead right, is such a forced and unwarrantable deduction that it fails to commend itself to the judgment. Dower had long been abolished in Iowa when Moore filed his schedule, and his listing of "a dower interest of one-third" in the 110 acres is without persuasive significance upon the issue in this case. But his continuous living on his old homestead after the death of his wife, and his clear claim of his homestead exemption when he first filed his petition in bankruptcy, evidence his true choice and real intention. The court below made no mistake in its conclusion that the bankrupt had never elected to take his distributive share of the estate of his wife and that he was not estopped from choosing and securing his homestead right in the 40-acre tract.

Let the petition be dismissed.

THOMAS et al. v. ANDERSON et al.

(Circuit Court of Appeals, Eighth Circuit. May 3, 1915.)

No. 4303.

1. APPEAL AND ERROR ⊜185—PRESENTING QUESTIONS IN LOWER COURT—JURISDICTIONAL QUESTION.

Where the question of the jurisdiction of the District Court is plainly apparent on the record, it cannot be ignored on appeal, even though it was not presented in the trial court, except by assignment of error after the final decree on the merits.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1166–1176, 1375; Dec. Dig. ⊜185.]

2. COURTS ⊜317—JURISDICTION OF UNITED STATES COURTS—DIVERSITY OF CITIZENSHIP—REARRANGEMENT OF PARTIES.

In a suit by three heirs, who were citizens of Tennessee, against the executor, who was a citizen of Missouri, in which the administrator of a deceased heir, who was also a citizen of Missouri, was joined as defendant to secure a construction of the will, the plaintiffs claiming either that it did not dispose of the residuary estate, or that the executor was given such estate in trust for the heirs, and the executor claiming that the residuary estate was given to him absolutely, the administrator must be classed as a plaintiff in aligning the parties for the purpose of determining jurisdiction, and therefore one of the parties plaintiff was a citizen of the same state as the defendant, and the District Court was without jurisdiction.

[Ed. Note.—For other cases, see Courts, Dec. Dig. ⊜317.]

3. COURTS ⊜310—JURISDICTION OF UNITED STATES COURTS—DIVERSITY OF CITIZENSHIP—UNNECESSARY PARTIES.

Though the interest of the administrator was like that of the other plaintiffs, so that he was a proper party, his interest was severable from theirs, and he was not a necessary party, and therefore need not have been joined under equity rule 39 (226 U. S. 659, 33 Sup. Ct. xxix), providing that where a proper, but not necessary, party could not be brought in without ousting the jurisdiction of the trial court, that court may in its discretion proceed in his absence, the decree to be without prejudice to his rights, which rule was merely declaratory of the prior practice.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 857; Dec. Dig. ⊜310.]

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4. COURTS ⊜318—JURISDICTION OF UNITED STATES COURTS—DISMISSAL AS TO PARTIES.

The trial court can retain jurisdiction of a suit by allowing amendments to the pleadings and dismissals as to proper, but not necessary, parties whose presence would oust the jurisdiction of the court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 863; Dec. Dig. ⊜318.]

5. COURTS ⊜318—JURISDICTION OF UNITED STATES COURTS—DIVERSITY OF CITIZENSHIP—AMENDMENT—APPELLATE COURTS.

The appellate court cannot permit the amendment of the pleadings and dismissal as to parties, so as to retain jurisdiction, since their function is supervisory and corrective, and Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1087) § 274c, as added by Act March 3, 1915, allowing such courts to permit amendments in case of an existing diversity of citizenship defectively alleged, does not authorize them to permit a dismissal of an unnecessary party to retain jurisdiction.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 863; Dec. Dig. ⊜318.

Diverse citizenship as a ground of federal jurisdiction, see notes to Shipp v. Williams, 10 C. C. A. 249; Mason v. Dullagham, 27 C. C. A. 298.]

Appeal from the District Court of the United States for the Western District of Missouri; Arba S. Van Valkenburgh, Judge.

Suit by Harry Anderson and others against William E. Thomas, executor, and others. Decree for plaintiffs, and defendants appeal. Reversed and remanded, with directions to dismiss the suit without prejudice for want of jurisdiction, unless the objection to the jurisdiction is removed by amendment with leave of the trial court.

Alfred N. Gossett, of Kansas City, Mo., for appellants.

William C. Michaels and E. Wright Taylor, both of Kansas City, Mo. (Delbert J. Haff, Edwin C. Meservey, and Charles W. German, all of Kansas City, Mo., and Alfred T. Levine, of Nashville, Tenn., on the brief), for appellees.

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

HOOK, Circuit Judge. [1] A question of jurisdiction of the trial court lies at the threshold of this case. Though not presented there, except by an assignment of error after final decree on the merits, it is plainly apparent on the record and cannot be ignored. Yocum v. Parker, 66 C. C. A. 80, 130 Fed. 770.

[2] Three heirs at law of a testatrix sued the executor of her will officially and individually in the District Court of the United States for the Western District of Missouri to recover a part of the residuary estate. The plaintiffs were citizens of Tennessee. The executor, who was also an heir, was a citizen of Missouri. The administrator of a fifth heir, likewise a citizen of Missouri, was made a defendant. The single, common point of controversy shown by the bill of complaint was the construction and validity of the clause of the will purporting to dispose of the residuary estate. If the plaintiffs were right in their contention, each of them was entitled to one-thirteenth of that part of the estate, as though in respect thereof the decedent had died intestate,

or, if not so, then that the executor took under the will as trustee for them, and the defendant administrator was entitled to a like share for the same reason. On the other hand, if the executor was right, he took the entire residuary estate under the will, to their exclusion. That the executor was also an heir, and had purchased the interests of certain other heirs, is unimportant. He was not asserting the right so derived and acquired to the detriment of the other parties to the suit. There was no controversy on that score. The controversy was directed solely to his claim to the entire residuary estate under the will. In that he stood alone, and the other parties to the suit, contesting his position, stood together against him. There was no dispute between the plaintiffs and the defendant administrator. He was equally interested with them in defeating the executor. Therefore, in aligning the parties for the purpose of jurisdiction, he should be classed as a plaintiff. The result is we have a suit by three citizens of Tennessee and a citizen of Missouri against another citizen of Missouri. That this conclusion does not rest on fanciful premises is confirmed by what occurred after the bill of complaint was filed. The defendant administrator, in answering, admitted the plaintiff's averments and joined them in their prayer for relief. The decree of the court was for him equally with each of them, and with them he now asks an affirmance of the decree. He was a real and proper party plaintiff in the suit, and, being a citizen of the same state as the real defendant, the trial court was without jurisdiction. Watson v. Bonfils, 53 C. C. A. 535, 116 Fed. 157.

[3] The three plaintiffs who brought the suit could have maintained it without the administrator. The interest of the latter, though like, was severable from theirs, and his presence was not essential to the relief they sought in their own behalf. He was a proper party, but not an indispensable one, within the long-settled meaning of those terms. Waterman v. Canal-Louisiana Bank Co., 215 U. S. 33, 30 Sup. Ct. 10, 54 L. Ed. 80; Horn v. Lockhart, 17 Wall. 570, 21 L. Ed. 657. Where a person whose presence in a suit is proper, but not indispensable, cannot be made a party without ousting the jurisdiction of the trial court, it may in its discretion proceed in his absence, and the decree shall be without prejudice to his rights. The thirty-ninth equity rule (226 U. S. 659, 33 Sup. Ct. xxix), to that effect is declaratory of the settled practice at the time of its adoption.

[4, 5] When the trouble is noticed after the suit has been brought, the power of the court to retain jurisdiction by allowing amendments to pleadings and dismissals of those whose presence would oust it has been upheld in the interest of justice and the speedy determination of litigation. Grove v. Grove (C. C.) 93 Fed. 865. But the cure, if there can be one, must be had in the court of original cognizance, not in the appellate court. The former is the forum of first action, where the parties come and go, where the pleadings are presented and the issues formed and tried. The function of an appellate court is supervisory and corrective. By section 274c of the Judicial Code (Act March 3, 1915) it has been enlarged in case of an existing diversity of citizenship defectively alleged; but the power to allow amendment, so conferred, does not reach the case at bar. Various conditions in which cases have

been sent back to trial courts with authority to make corrections to show jurisdiction appear in the following: Lewis v. Darling, 16 How. 1, 13, 14 L. Ed. 819; Gaylords v. Kelshaw, 1 Wall. 81, 83, 17 L. Ed. 612; Robertson v. Cease, 97 U. S. 646, 650, 24 L. Ed. 1057; Continental Ins. Co. v. Rhoads, 119 U. S. 237, 7 Sup. Ct. 193, 30 L. Ed. 380; Denny v. Pironi, 141 U. S. 121, 11 Sup. Ct. 966, 35 L. Ed. 657; Roberts v. Lewis, 144 U. S. 653, 658, 12 Sup. Ct. 781, 36 L. Ed. 579; Stuart v. Easton, 156 U. S. 47, 15 Sup. Ct. 268, 39 L. Ed. 341. It was specifically held in Denny v. Pironi, supra, that a case cannot be amended on appeal to show jurisdiction.

The decree is reversed, and the cause is remanded, with direction to dismiss the suit without prejudice for want of jurisdiction, unless the obstacle to the jurisdiction is removed with leave of the trial court.

CENTRAL R. CO. OF NEW JERSEY v. HIRSCH.

(Circuit Court of Appeals, Third Circuit. May 20, 1915.)

No. 1915.

CARRIERS ⇐336—INJURY TO PASSENGER—CONTRIBUTORY NEGLIGENCE.

A passenger, while standing on the steps of a vestibuled car in a moving train, to which position he was invited by the action of a baggageman in opening the vestibule doors under instructions from the conductor to let the passenger off at the next station, should the train be obliged to stop there, was knocked from the steps by the swinging shut of the vestibule door which the baggageman had negligently left unsecured. A rule of the company posted in the car prohibited passengers from going upon the platform when the car was moving, and a state statute exempted the company from liability for injury to a passenger "by reason of" a violation of such rule. *Held* that, while the passenger may have assumed the ordinary risk in violating the rule, he was not bound to anticipate the negligence of the employé which was the proximate cause of his injury, and was not barred of the right to recover for his injury by contributory negligence.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1357–1362; Dec. Dig. ⇐336.]

In Error to the District Court of the United States for the District of New Jersey; Hunt, Judge.

Action at law by Solomon Hirsch against the Central Railroad Company of New Jersey. Judgment for plaintiff, and defendant brings error. Affirmed.

Edwin F. Smith, of New York City, for plaintiff in error.

Wilbur A. Heisley, of Newark, N. J., for defendant in error.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

McPHERSON, Circuit Judge. The plaintiff recovered damages in the District Court for personal injuries sustained while he was a passenger on one of the defendant's trains. The other facts—either undisputed, or settled by the verdict—are as follows:

On the afternoon of February 24, 1913, the plaintiff, who was a traveling salesman, went to the Lakewood station two or three minutes before 3:44. This was the schedule time of a regular train by which he intended to travel to Farmingdale, a town not far distant. A train was standing at the station, which he supposed to be the one he desired to take. He checked his trunk to Farmingdale, and testified that the baggage master assured him that the trunk would go by the train then standing before the station. He took a seat in the forward compartment of a combination smoking and baggage car, the compartment being next to the engine. The train was vestibuled, the doors of the vestibule being of the usual pattern—a trapdoor, which when closed forms part of the platform, and when open leans back against the body of the car; and an upright or perpendicular door, which when closed forms an outside wall of the vestibule, and when opened swings back against the trapdoor. This arrangement requires the perpendicular door to be closed before the trapdoor can be lowered. There were devices for holding the doors in place when the vestibule was open.

When the plaintiff was asked for his ticket and offered the conductor a mileage book, he learned for the first time that he was on a special train whose first regular stop was Elizabethport, 40 miles or more beyond where he wished to go. Thereupon he asked to have the train stopped at Farmingdale, but the conductor refused the request, informing him, however, that the engine would probably take on water at Red Bank, a station some distance beyond Farmingdale, and that he could get off there. The plaintiff acquiesced, and paid his fare to Red Bank. Soon afterwards the situation arose that has given rise to the present suit. The defendant's road from Lakewood to a point beyond Farmingdale is a single track, and at Farmingdale the train on which the plaintiff was riding was due to pass another train coming in the opposite direction. Only one of these trains would stop; if the other train arrived first, the special would go directly on; but if the special arrived first, it would be obliged to stop, until the other train should pass. With this contingency in mind, the conductor told the baggageman to let the plaintiff off at Farmingdale if the special should be compelled to stop. The plaintiff overheard the conversation imperfectly, supposing it to be a positive direction to let him off at Farmingdale; but as it happened, his misunderstanding was of no importance, for as the special approached Farmingdale both the conductor and the baggageman ascertained that the other train had not yet arrived, and that the special would have to stop. The conductor learned this fact by looking out of the sidedoor of the baggage compartment, and the baggageman looked out from the vestibule door, which he had opened for that purpose. Another reason for opening it was probably to save time, as it was part of his duty to descend and turn the switch after the train stopped. While these events were happening, the train was nearing the siding (which was beyond the Farmingdale station), and the plaintiff left his seat, carrying his bag and coat, passed through the baggage compartment, went out upon the platform, and descended the steps, awaiting an opportunity to alight. The train was still moving at a speed which the plaintiff described as "fast"—some of the wit-

nesses thought it was 15 or 20 miles an hour—when the accident happened. One of the doors—probably the perpendicular door—fell against his body and forced him off the lower step, so that he was obliged to loosen his hold and was thrown to the ground, where he was dragged under the train in some way, suffering the severe injuries complained of.

Just why the plaintiff took his place on the platform was the chief matter in dispute, but since the verdict we must take the facts to be that he was invited to that position of danger by the baggageman (who was merely the conductor's agent to let the plaintiff off), and that he had good reason to believe that he was so invited in order that he might alight without delay when the train came to a stop. The jury has also found that he was not negligent in accepting the invitation and in taking a position on the steps, and further that the injury was due solely to the negligence charged in the declaration, namely, the baggageman's failure to fasten back the doors securely. The company's negligence is not denied, and the only question that needs consideration now is whether the court should have given peremptory instructions against the plaintiff on the ground that he was guilty of contributory negligence. If the case should have gone to the jury on this point, the instructions were careful and adequate.

The case is near the border line, but we have not been convinced that the court was in error. We shall not discuss, and certainly do not intend to qualify, the cases that declare the platform or steps of a moving train to be a place of obvious danger, which a passenger must ordinarily avoid. If he voluntarily take such a risk, he must bear the consequences; but the verdict has settled that the present plaintiff did not go upon the platform voluntarily, but in response to the invitation by the baggageman given in the course of obeying the conductor's instructions. Now, under such circumstances, while it may be true that the plaintiff was still taking the risk of a known or obvious danger, we have not been persuaded that he took the additional risk of the company's negligence. Section 39 of the New Jersey act of 1903 (P. L. 1903, p. 666), upon which the company puts much reliance, is not decisive of this controversy. That section is as follows:

"In case any passenger on any railroad shall be injured *by reason of his going or remaining on the platform* of a car, or on any baggage, wood, or freight car, in violation of the printed regulations of the company posted up in a conspicuous place inside of its passenger cars on the train, such company shall not be liable for the injury: Provided said company at the time furnished seats inside its passenger cars sufficient for the proper accommodation of its passengers."

The company furnished the seats and posted the proper regulation:

"Passengers must not go or remain on the platform while the car is in motion, nor must they go at any time in any baggage or freight car."

And it may well be that, if the plaintiff had been injured merely by reason of what may be described as the ordinary and fairly to be expected incidents of a position on the platform of a moving car, it would be necessary to consider how far this statute applied to the special situation, namely, the invitation to assume that position. But he was not so

injured. The proximate cause of the injury was the direct interposition of the company's negligence, namely, the failure to secure the doors carefully, and this he was not bound to anticipate. As far as can be seen, he would not have been thrown from the train if this neglect had not been present. Against such want of care he was not obliged to guard, and it was not part of the risk he assumed.

In our opinion the case was properly submitted to the jury, and the judgment is therefore affirmed.

COLLINS v. PEOPLE'S POWER CO.

(Circuit Court of Appeals, Eighth Circuit. April 14, 1915.)

No. 4290.

DEATH ⊂=8—ACTION UNDER LAWS OF OTHER STATES—SPECIAL LIMITATION—"COMMENCEMENT OF ACTION."

An action for wrongful death in a court of Iowa, or in a federal court in that state, although based on the statute of Illinois, is governed by the procedure and decisions of Iowa relating thereto as to when an action should be deemed to have been commenced.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 12, 36, 52, 121, 133; Dec. Dig. ⊂=8.

For other definitions, see Words and Phrases, First and Second Series, Commencement of Action.

What law governs actions, see note to Russell v. Fleming, 47 C. C. A. 606.]

In Error to the District Court of the United States for the Southern District of Iowa; Smith McPherson, Judge.

Action at law by Miles Collins, administrator of the estate of Stephen R. De Bord, deceased, against the People's Power Company and others, later dismissed as to all but the named defendant. From the judgment, plaintiff brings error. Reversed.

James W. Bollinger, of Davenport, Iowa (James H. Andrews, of Kewanee, Ill., on the brief), for plaintiff in error.

Joe R. Lane, of Davenport, Iowa (C. M. Waterman, of Davenport, Iowa, on the brief), for defendant in error.

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

CARLAND, Circuit Judge. Stephen R. De Bord was killed July 10, 1911, in the city of Rock Island, state of Illinois. November 3, 1911, Collins, as administrator of the estate of De Bord, commenced an action in the district court for Scott county, Iowa, to recover damages from the People's Light Company and Tri-City Railway Company, claiming that De Bord was killed through the negligence of the defendants. March 22, 1912, an amended petition was filed in said court, in which the People's Power Company was added as a defendant. April 11, 1912, the People's Power Company answered the amended petition.

June 4, 1912, the plaintiff in error dismissed the petition as to all defendants, except the People's Power Company. August 1, 1912, an order of removal to the federal court was made by the district court of Scott county. On September 27, 1912, the defendant in error moved the federal court for leave to withdraw its answer and file a demurrer. Leave was granted and the demurrer filed. November 16, 1912, the demurrer was sustained, for the reason that it did not appear from the petition that De Bord left any widow or next of kin; the court taking judicial notice of the statute of Illinois which gave the right of action. June 21, 1913, the plaintiff in error, Collins, amended his petition by setting up the Illinois statute, and also alleging that De Bord left a widow and father surviving him. The statute of Illinois giving the right of action provided that every such action should be commenced within one year after the death should occur. The defendant the People's Power Company again demurred to the petition, for the reason that it appeared therefrom that the limitation of one year for bringing the action under the Illinois statute had expired before June 21, 1913, the date of the amendment setting forth the statute of Illinois, and alleging that De Bord left surviving him a widow and father. The federal court sustained this contention and dismissed the action. The writ of error challenges the correctness of this judgment.

The question to be decided is: Was the action brought by Collins, as administrator, commenced within one year from July 10, 1911, the date that De Bord was killed? The action was in fact commenced November 3, 1911, in the district court for Scott county, Iowa. The petition, however, made no reference to the Illinois statute, and did not allege that De Bord left a widow or next of kin, and the state court could not take judicial notice of the provisions of the statute. The federal court could take judicial notice thereof, but an order removing the case into the federal court was not made until August 1, 1912, 20 days after the expiration of the year following the death of De Bord. The amendment in the federal court, setting forth the Illinois statute, as has been stated, was not filed until June 21, 1913.

It is claimed, therefore, that the action never became an action under the Illinois statute until either the removal to the federal court or the filing of the amendment setting up the Illinois statute, both of which occurred after the expiration of the year. The facts, however, upon which the plaintiff in error sought to recover, were fully stated in his petition filed at the commencement of the action in Scott county. Whether under the circumstances herein detailed the commencement of the proceeding in said county was a commencement of the action within the meaning of the Illinois statute must be determined, we think, by the law and procedure of Iowa, and not by that of Illinois. In Knight v. Moline, E. M. & W. Ry. Co., 160 Iowa, 160, 140 N. W. 839, the Supreme Court of Iowa had under consideration the same question that is presented in the present case. The case cited was one to recover damages in a court of Iowa for a death occurring in Illinois; the right of action being given by the same statute of Illinois that gives the right of action to the plaintiff in error. An amendment alleging the survival of a widow or next of kin was not filed until

after verdict had been rendered against the defendant. In answer to the contention that the amendment created a new cause of action, not commenced within the period of one year from the time of death, the Supreme Court of Iowa used the following language:

"This action was commenced in the Iowa court within one year. Such call of the statute is therefore answered. The manner of commencing the action in Iowa was necessarily the Iowa manner of commencing an action, and not the Illinois manner. Upon commencement of the action, the jurisdiction of the Iowa court attached. The methods of pleading and procedure were necessarily those of the forum, and not of the sister state. The manner of commencing a personal action in Iowa is by * * * an original notice, and not by the filing of the petition. The action could have been commenced by the serving of a notice before the expiration of one year, and this could have been properly followed by the filing of a petition after the expiration of such period. If this petition could be filed after the expiration of one year, why not an amendment also? The identity of the cause of action is not made to depend upon perfection of allegation; nor is the identity changed by the filing of a mere amendment. Though the petition be demurrable, that fact does not lift the toll of the statute. * * * We think it clear, therefore, that the particular statute of Illinois out of which the cause of action arose was fully complied with by the commencement of this action within one year, and that such statute was in no manner contravened by the subsequent procedure. The jurisdiction of our court having attached while the cause of action was valid and before the statute had run, the court must necessarily ascertain the rights of the parties under such statute in accordance with its own rules of pleading and procedure, and not in accordance with those of the foreign jurisdiction. * * * It follows that the filing of the amendment by the plaintiff did not render the statute of limitations available to the defendant as of that date."

We think the above decision, being a construction of the laws of Iowa allowing amendments and providing for the commencement of actions, is binding upon the federal court sitting in Iowa. Therefore we do not think the case of Union Pacific Railway Co. v. Wyler, 158 U. S. 285, 15 Sup. Ct. 877, 39 L. Ed. 983, and other cases cited by counsel for defendant in error, are applicable. The trial court should have followed the decision of the Supreme Court of Iowa in the case referred to.

The judgment below should be reversed, and the case remanded, with instructions to overrule the demurrer, with the right to the defendant to answer within a time to be named, if it shall be so advised, and to otherwise proceed with the case as law and justice may require; and it is so ordered.

LAZARUS, MICHEL & LAZARUS v. HARDING et al.

(Circuit Court of Appeals, Fifth Circuit. April 26, 1915. Rehearing Denied May 28, 1915.)

No. 2596.

BANKRUPTCY ⟸467—REVISION—HARMLESS ERROR.

An erroneous order, requiring the holder of drafts to surrender them to the trustees in bankruptcy, does not prejudice the holder, where he was given credit for the amount of the drafts, leaving a balance still due the bankrupt, and the order will not be revised for that error.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 929; Dec. Dig. ⟸467.

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

Pardee, Circuit Judge, dissenting.

Appeal from, and Petition to Superintend and Revise Order of, the District Court of the United States for the Northern District of Alabama; William I. Grubb, Judge.

Bankruptcy proceedings against the Payne & Joubert Machine & Foundry Company. Lazarus, Michel & Lazarus appeal and petition to superintend and revise as against W. P. G. Harding and others, trustees in bankruptcy. Appeal dismissed, and petition denied.

Girault Farrar, of New Orleans, La., for appellants and petitioners.

Percy, Benners & Burr, of Birmingham, Ala., and Dinkelspiel, Hart & Davy, of New Orleans, La., for appellees.

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

PER CURIAM. The questions involved are properly here upon the petition to revise, and the appeal is therefore dismissed.

The fee of $1,000 allowed the petitioners was, under the facts of the case, reasonable, and we are not disposed to disturb the judgment on that account. The lower court erred in ordering the petitioners to deliver to the trustees in bankruptcy the two drafts of the Carmichael Company and the Corn Products Refining Company. But the error is without prejudice to the petitioners, since they are given due credit for the amount of the drafts, leaving a balance due by them of $1,863.42.

Finding no reversible error in the record, the petition to revise is denied.

PARDEE, Circuit Judge. In the summary proceedings instituted by the trustees the District Court had jurisdiction to fix and determine petitioners' compensation for professional services rendered and to be rendered to the bankrupt. See Bankr. Act July 1, 1898, c. 541, § 60d, 30 Stat. 562 (Comp. St. 1913, § 9644). But in such summary proceedings the court was entirely without jurisdiction to deal as it did with the alleged preference to the petitioners of the check or draft of the

Corn Products Refining Company, which transaction appears by the undisputed facts to have been, not only fair and proper, but without profit to the petitioners and for the benefit of the bankrupt's estate. The decree sought to be revised provides:

"That all title to said check for $1,125 is divested out of respondents, Lazarus, Michel & Lazarus, and that said respondents will also restore and deliver to the said trustees the said check of the Corn Products Refining Company of the face value of $1,125; and said respondents are hereby restrained and enjoined from collecting said check of $1,125 from said Corn Products Refining Company and from all other persons."

While this court says "this part of the decree is without prejudice to the petitioners," in my opinion it is so clearly erroneous for want of jurisdiction that, if for no other reason, the decree should be revised in that respect.

DALTON ADDING MACH. CO. et al. v. MOON-HOPKINS BILLING MACH. CO. et al.

(District Court, E. D. Missouri, E. D. March 1, 1915.)

No. 4067.

1. PATENTS ⊜129—SUIT FOR INFRINGEMENT—ESTOPPEL TO DENY VALIDITY.
In a suit for infringement of a patent against a corporation and two individuals, who organized such corporation while application for the patent was pending, one of whom was the inventor and applicant, and the other of whom had knowledge of the invention and the application, and that the same had been assigned to complainants, all three defendants are estopped to deny the validity of the patent on the ground of anticipation or want of novelty.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 182½–186; Dec. Dig. ⊜129.]

2. PATENTS ⊜328—INFRINGEMENT—IMPROVEMENT IN ADDING MACHINES.
The Hopkins patent, No. 1,039,130, for improvements in adding and writing machines, *held* infringed.

In Equity. Suit by the Dalton Adding Machine Company and the Addograph Manufacturing Company against the Moon-Hopkins Billing Machine Company, John C. Moon, president, and Hubert Hopkins, vice president, of said company. On final hearing. Decree for complainants.

Banning & Banning, of Chicago, Ill., and Rippey & Kingsland, of St. Louis, Mo., for complainants.

Frederick R. Cornwall, of St. Louis, Mo., for defendants.

DYER, District Judge. This is a bill in equity, filed by complainants against defendants, charging infringement of letters patent of the United States, numbered 1,039,130, issued September 24, 1912, to the Addograph Manufacturing Company, and to the complainants as assignees of the defendant Hubert Hopkins. The facts touching the history of this patent are plain, and, as I understand them, well understood and practically undisputed. The invention covered by the patent

relates to improvements in adding and writing machines. The facts, as I gather them from the record and the argument of counsel, that led up to and finally culminated in the granting and issuance of the patent, are substantially as follows:

Application for this patent was filed in January, 1903. Its history, however, dates back to a period prior to the filing of the application. In December, 1901, one James L. Dalton was a merchant residing and doing business in Poplar Bluff, Butler county, Mo. Hubert Hopkins and his brother William at that time lived in St. Louis. Hubert Hopkins had theretofore made certain inventions in adding and typewriting machines, and had conveyed a half interest in the same to his brother William. The two were unable to manufacture and put on the market these inventions. In December, 1901, William Hopkins went to Poplar Bluff and there succeeded in interesting James L. Dalton and others of that city in financing the enterprise. The result was that a contract was entered into by and between the Hopkins brothers and Dalton and his associates by which the latter agreed to furnish $2,500—a part of which was to go to the former and a part of it was to be expended in the manufacture of the first machine, so as to demonstrate its practicability. Shortly after this agreement was made the Hopkins brothers built the machine in St. Louis, using a part of the $2,500 for that purpose.

The money provided for by this contract proved insufficient, and a second contract was made and entered into by the same parties on the 28th of June, 1902, according to the terms of which an additional sum of money amounting to $1,250 was put up by Dalton and his associates. In consideration of this sum Hubert and William Hopkins were to assign a half interest in the inventions to a company thereafter to be organized, and in which title to the inventions should be placed. The machine was completed in September, 1902, and is one of the physical exhibits in the case, and is marked "Original Hubert Hopkins Machine." This machine was exhibited in St. Louis in October, 1902. Various persons were invited to inspect it, for the purpose of obtaining further investments in the enterprise.

In December following the complainant the Addograph Manufacturing Company was organized, with a capital of $50,000, divided into 500 shares of $100 each; 249 shares were issued to Hubert Hopkins, and 1 share to his brother William. Thereafter, on the 24th of January, 1903, application for a patent was filed in the Patent Office. Three weeks after this application had been filed, Hubert Hopkins executed an assignment of the application to the Addograph Company. This assignment contained all the inventions claimed in the application. It requested that the patent be issued to the Addograph Company as assignee. Thereafter, on the 24th of September, 1912, the patent was issued, as Hopkins had requested.

It further appears from the evidence in the case that in 1903 Hubert Hopkins sold his stock in the Addograph Company to the American Arithometer Company. This stock, with a few additional shares it had bought, gave it control of the Addograph Company. This left Dalton and his associates in the minority, and practically without voice in its

control. It appears that Hubert Hopkins sold his stock for $5,000. To regain control, Dalton and his associates in the name of the Addograph Company had to and did pay to the Burroughs Machine Company (the successor of the American Arithometer Company) the sum of $40,000 for the stock Hopkins had sold for $5,000.

After the transfer of the stock by Hopkins to the American Arithometer Company the Addograph Company made a license contract with James L. Dalton for certain considerations, and a certain royalty to be paid the Addograph Company, giving to Dalton the exclusive right to make and sell the machines. After this there was organized the Adding Typewriter Company, to which Dalton assigned the license contract. After this, to wit, in 1909, the name of the Adding Typewriter Company was changed to the Dalton Adding Machine Company. This latter company thereupon became the exclusive licensee. These facts made it necessary to join the Dalton Company with the Addograph Company as a joint complainant.

[1] From the facts above stated it is claimed by the complainants that Hubert Hopkins is estopped from disputing the validity of the patent in suit. It is not only claimed that Hubert Hopkins is estopped, but that the Moon-Hopkins Billing Machine Company (one of the defendants) is also estopped. The facts relied upon to show an estoppel of the Moon-Hopkins Company are briefly these:

After Hubert Hopkins and his brother sold their stock in and left the Addograph Company, they, in June, 1903, went to John C. Moon (president of the Moon-Hopkins Company) and told him that Hubert Hopkins had made some inventions in adding and typewriting machines, and that he and his brother desired to interest Moon and his associates in the organization of a new company to manufacture and sell the inventions that Hubert Hopkins had made. On the 6th of July, 1903, a contract was entered into between Hubert Hopkins, William Hopkins, John C. Moon, and Carey C. Crawford, by which they undertook to manufacture the inventions Hubert Hopkins represented that he had made. The outcome of this arrangement was the organization of the Moon-Hopkins Billing Machine Company. It is insisted by the complainants that Moon and his associates knew of the rights of the complainants; that Moon visited the Holland Building in St. Louis and saw the machine on exhibition, and that it was fully explained to him by Hubert and William Hopkins.

The facts before recited are contained in the record, and have been carefully and correctly set forth, as I believe, by counsel for the complainants. The statement of the facts as above given is unnecessarily long, perhaps, but in my judgment proper to be stated to a full and fair understanding of the situation.

The question of estoppel raised by these facts is in my judgment the most important question presented in the case. From the facts disclosed in the record I am satisfied, and so find, that Moon and his associates had knowledge of the inventions of Hubert Hopkins, and were fully advised of all that transpired in reference thereto, and had knowledge of complainants' rights in and to the patent in suit.

These being the facts, as I find them to be, it would seem that the

defendants and each of them are and should be estopped from claiming that the patent in suit is invalid, either on the ground that it was anticipated by prior patent rights or on the ground that it possessed no novelty.

The case reported in 178 Fed. 822, 102 C. C. A. 267, Johnson Furnace Co. v. Western Furnace Co., to which my attention was called by counsel, seems to be controlling authority in this case. The Court of Appeals for this district, speaking through the presiding judge, said:

"'Very much of the evidence and argument on behalf of defendants has been devoted to the charge that complainant's patents were invalid, having been anticipated by prior patents, a large number of which were given in evidence, and that it possessed no novelty. A sufficient answer to this proposition is that as Parkison participated with Johnson in the sale of the patent to Burns for complainant, and Parkison received one-eighth of the consideration therefor, he, and all in privity with him, are estopped from now alleging the invalidity of the patent."

The conclusion reached by me that the defendants are estopped from claiming that the patent in suit is invalid makes unnecessary the examination of the numerous patents set up in the defendants' joint and several answers. Whatever the state of the prior art may have been, it is not available as a defense in this action.

[2] The remaining question in the case is that of infringement. This I will not attempt to deal with, as expert witnesses and learned counsel have done. I shall content myself with simply announcing the result. The briefs and arguments of counsel on either side have been full and able. I will not undertake to reconcile the conflicting views of trained experts, nor the widely divergent views of learned counsel, but will state that my conclusions have been induced more from an examination of the physical exhibits in the case than from the testimony of experts and the arguments of counsel. The findings may be, in conclusion, summed up as follows:

1. The defendants are estopped from claiming the invalidity of the patent in suit.

2. Claims 7, 29, 32, 65, 113, 141, 142, 147, 153, 158, 170, 176, 185, 200, 235, 236, 238, 240, 241, 245, 246, 250, and 254 of the patent in suit have been and are infringed by the defendants' machine.

It follows from these conclusions that the complainants are entitled to a decree against the defendants; and it is so ordered.

UNITED STATES v. UNITED STATES STEEL CORPORATION et al.

(District Court, D. New Jersey. June 3, 1915.)

No. 6214.

1. MONOPOLIES ⟸24—ANTI-TRUST ACT—SUIT TO RESTRAIN VIOLATION—RELIEF.

The purpose of a suit in equity by the United States to prevent and restrain violations of Sherman Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 209 (Comp. St. 1913, § 8823 et seq.), brought under section 4 of the act, is to restrain present and prevent future violations through the power of injunction; but where the evil effects of past undue restraint or monopoly of trade continue to be effective and harmful, and if to prevent continuance of such wrongs a dissolution of the unlawful combination is necessary to make the relief effective, the court has power to decree such dissolution; but, unless so necessary, such power will not be exercised.

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

2. MONOPOLIES ⟸24—ANTI-TRUST ACT—VIOLATION.

The United States Steel Corporation was organized by the consolidation of a number of large steel-making concerns in 1901. During the ensuing ten years previous to suit it at all times had active and increasing competition. It manufactured about half of the steel produced in the United States, and its proportionate part during that time decreased in nearly all lines. The testimony, largely of competitors and customers, showed that it has been fair to competitors, has steadily increased its production, and that, while competition has been close, it has abstained from radical cutting of prices, and has usually publicly announced its prices in advance and maintained the same; that with the exception of a short intermediate period none of its prices have been the result of agreement with other manufacturers, but all have been independently adopted, have been reasonable and conservative, and have helped to keep the market steady. Several competitors testified that they did not believe it possible for it to force them out of business or obtain a monopoly of the steel-making industry. *Held*, that such evidence was insufficient to establish any purpose, either in the organization of the corporation or in the conduct of its business, to create a monopoly or to unduly restrain trade to the detriment of the public, in violation of Sherman Anti-Trust Act July 2, 1890.

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

3. MONOPOLIES ⟸12—SHERMAN ANTI-TRUST ACT—VIOLATION.

An important purpose of the organization of the Steel Corporation was the building up of an export trade. Such trade in iron and steel at that time was sporadic, consisting of dumping products in foreign countries when the domestic market was overcrowded, and on the whole was not profitable. The Steel Corporation, by reason of its large capital and organization, for the first time created and maintains a regular and permanent market, by organizing a subsidiary corporation to sell the large line of diversified products, manufactured by its associate subsidiary companies, such as must be kept in stock, sending the same for distribution to the 300 warehouses which it established and maintains in 60 different countries, sending to each the things most in demand. In this manner it increased the value of its foreign trade from $31,000,000 in 1904 to $91,000,000 in 1913, controls from 80 to 90 per cent. of such trade in iron and steel, and has been able to command better prices, although domestic prices have been generally reduced. *Held*, that such action was not in restraint of foreign commerce, in violation of Anti-Trust Act July 2, 1890, but was in aid of it by legitimate

methods; such trade having in fact been thereby largely created, and not taken from others.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. ⟸12.]

4. MONOPOLIES ⟸24 — ANTI-TRUST ACT — COMBINATIONS IN RESTRAINT OF TRADE.

The history of the organization of the United States Steel Corporation in 1901 reviewed, and *held* not to evidence any intention or purpose on the part of the organizers to monopolize or restrain trade, especially in view of the fact that no such thing was attempted, but to show that the consolidation was the natural outgrowth of the changing conditions in the trade in its transition from iron to steel, and the tendency to integrate the plants back to ore supply and forward to the finished products, and to secure greater economy of management and large capital necessary to meet the demands of structural contracts and the development of export trade.

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

5. MONOPOLIES ⟸17, 26—SHERMAN ANTI-TRUST ACT—SUIT FOR VIOLATION—AGREEMENT IN RESTRAINT OF COMPETITION.

At a time of panic and threatened serious financial disturbance representatives of a number of the largest steel manufacturers, who were competitors, met and after discussion came to an informal agreement or understanding to maintain prices for their own protection and the protection of customers who had stocks on hand. At later meetings committees were appointed, who considered and assented to specific prices to be maintained by each company until it should find reason to change them, in which case it was understood that it should notify the others, that another meeting might be held. These tacit agreements were more or less observed by the parties until normal conditions were restored, although there were many other manufacturers who did not take part in nor regard them. *Held* that, while no formal words of contract were used, the understanding amounted to an agreement in restraint of competition, in violation of Anti-Trust Act July 2, 1890, § 1 (Comp. St. 1913, § 8820), but that such agreement would not justify the court in dissolving participating corporations on a bill filed by the government after it had ceased to be observed.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. §§ 13, 17; Dec. Dig. ⟸17, 26.]

Per Woolley, Circuit Judge, concurring.

6. MONOPOLIES ⟸12—ANTI-TRUST ACT—VIOLATION—"RESTRAINT OF TRADE."

Whether a manufacturing combination is one in "restraint of trade," or has monopolized or attempted to monopolize commerce, in violation of Sherman Anti-Trust Act July 2, 1890, §§ 1, 2 (Comp. St. 1913, §§ 8820, 8821), depends upon the inherent nature or effect of the combination, the evident purpose of its acts, or the intent to be inferred from the extent of control secured over the industry, the method by which such control has been brought about, and the manner in which it has been exerted, resulting in prejudice to the public interests by unduly restricting competition or unduly obstructing the course of trade.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 10; Dec. Dig. ⟸12.

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

7. CORPORATIONS ⟸306 — LEGALITY OF ORGANIZATION — LIABILITY OF DIRECTOR.

The fact alone that a corporation after its organization paid for property purchased with stock and then elected the seller a member of its

board of directors does not render him responsible for any alleged illegality in its organization.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1457, 1458; Dec. Dig. ⟸306.]

8. MONOPOLIES ⟸20—ANTI-TRUST ACT—VIOLATION.

A corporation, although a combination of other large manufacturing corporations and having a very large capital, cannot be said to be inherently a monopoly, where during ten years its increase in percentage of business is much less than that of its principal competitors.

[Ed. Note.—For other cases, see Monopolies, Dec. Dig. ⟸20.]

9. MONOPOLIES ⟸20—ANTI-TRUST ACT—VIOLATION.

That the United States Steel Corporation was formed by combining as constituent members corporations which were themselves large combinations, recently formed, and which had demonstrated their power to unlawfully monopolize trade in their several lines of business, warrants a finding that the organizers of the Steel Corporation intended to unite and perpetuate such monopolies and combined for that purpose. The corporation itself, however, neither attempted nor possessed the power alone to do the unlawful things intended by its formation, but it unlawfully combined with competitors, by means of pools and informal understandings, to restrain trade by controlling prices.

[Ed. Note.—For other cases, see Monopolies, Dec. Dig. ⟸20.]

10. MONOPOLIES ⟸24—ANTI-TRUST ACT—SUIT FOR VIOLATION—RELIEF.

A corporation which is not in and of itself a monopoly nor a combination in restraint of trade, within the meaning of Anti-Trust Act July 2, 1890, §§ 1, 2 (Comp. St. 1913, §§ 8820, 8821), should not be dissolved because it may in the past have combined with others to restrain trade by controlling prices, where such unlawful acts have been discontinued.

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

In Equity. Suit by the United States against the United States Steel Corporation and others. Decree for defendants.

J. M. Dickinson, of Chicago, Ill., and Henry E. Colton, of Washington, D. C., for the United States.

Lindabury, Depue & Faulks, of Newark, N. J. (Joseph H. Choate, of New York City, John G. Johnson, of Philadelphia, Pa., Francis Lynde Stetson, of New York City, David A. Reed, of Pittsburgh, Pa., Raynal C. Bolling, of New York City, Cordenio A. Severance, of St. Paul, Minn., and Richard V. Lindabury, of Newark, N. J., of counsel), for defendants United States Steel Corporation and others.

Murray, Prentice & Howland, of New York City (George Welwood Murray, of New York City, of counsel), for defendants Rockefeller.

Kellogg & Emery, of New York City (Frederic R. Kellogg and Chester W. Cuthell, both of New York City, and J. D. Armstrong, of St. Paul, Minn., of counsel), for defendants Louis W. Hill and others.

Before BUFFINGTON, HUNT, McPHERSON and WOOLLEY, Circuit Judges.

BUFFINGTON, Circuit Judge. We may say in advance that all the members of this court are in agreement as to the decree that will be entered in this case, although we are not in complete accord concerning every step by which that result is reached.

The subject-matter of the litigation is of such magnitude and complexity, and the record is of such size, that the effort to set bounds to this discussion has not been easy. So many questions, large or small, were laid before us in the oral argument, and so many are considered in the extended briefs of counsel, that we cannot hope to give them all a place in such discussion. But we trust that one or other of the two following opinions will pay adequate attention to the most important, with the result of avoiding repetition as far as possible, while presenting somewhat different aspects of the controlling principles by which the case must be decided. Without a needless expansion of the discussion, it would scarcely be practicable to take up each detail for the purpose of pointing out just where we are in complete agreement, and where certain divergencies of view exist. We have thought it best, therefore, to adopt the course referred to, believing that the two opinions will cover the whole case, and will also sufficiently indicate the reasons that have led us to a common conclusion.

This case—a proceeding under the Sherman Anti-Trust Law—is largely one of business facts. The construction of that statute has been settled by the Supreme Court. Standard Oil Co. v. United States, 221 U. S. 1, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734; United States v. American Tobacco Co., 221 U. S. 106, 31 Sup. Ct. 632, 55 L. Ed. 663. That construction has been applied in this circuit in the Keystone Watch Case (D. C.) 218 Fed. 502, and the Powder Trust Case (C. C.) 188 Fed. 127. It follows, therefore, that our duty is largely one of finding the facts and to those facts applying settled law. The act in question provides:

"Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract, or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court." Comp. St. 1913, § 8820.

"Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, any part of the trade or commerce among the several states or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction, thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court." Section 8821.

"Sec. 4. The several Circuit Courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition, the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises." Section 8823.

"Sec. 7. Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any Circuit Court of the United

States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee." Section 8829.

When the Constitution of the United States conferred on Congress the right "to regulate commerce with foreign nations and among the several states," its purpose was not to fetter, but to further and foster, trade. This constitutional purpose to promote lawful trade by protecting it from unlawful restraint is avowed in the title of the act, viz., "An act to *protect* trade and commerce *against* unlawful restraints and monopolies," and, as held by the Supreme Court (Standard Oil Case, supra), "one of the fundamental purposes of the statute is to protect, not to destroy, rights of property."

[1] Now unlawful restraints of trade are of three kinds, past, present, and future. As to present and future restraints, Congress by section 4 empowered "the Attorney General to institute proceedings in equity to prevent and restrain such violations," and to that end invested the courts "with jurisdiction to prevent and restrain violations of this act." The jurisdiction here conferred is the chancery power of injunction, a power which is used to restrain present wrongs or prevent threatened ones. This is shown by the act providing even for temporary preliminary restraining orders while the case is being heard. "The function of an injunction is to afford preventive relief, not to redress alleged wrongs which have been committed already." Lacassagne v. Chapuis, 144 U. S. 119, 12 Sup. Ct. 659, 36 L. Ed. 368, cited in Black v. Jackson, 177 U. S. 360, 20 Sup. Ct. 648, 44 L. Ed. 801. Applying that general principle, the Supreme Court of the United States, in the Standard Oil Case, supra, citing Swift v. United States, 196 U. S. 375, on page 377, 25 Sup. Ct. 276, 49 L. Ed. 518, said:

"It may be conceded that ordinarily, where it was found that acts had been done in violation of the statute, adequate measure of relief would result from restraining the doing of such acts in the future."

In view of what was held by this court in the Powder Case, supra, it scarcely need be again said by us that where the evil effects of past undue restraint or monopoly continue to be effective and harmful when the proceeding is begun—that is, where "the inherent nature of the contemplated acts" is such as to bring about their continuance and repetition, or where, to use the expressive language of the Supreme Court in the Standard Oil Case, 221 U. S. 75, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734, a "perennial violation" of the act exists—the jurisdiction to restrain present and prevent future violations vests under this section, and if, to prevent continuance of such continuing wrongs a dissolution of the unlawful combination is necessary to make the relief effective, the original combination will be dissolved. That power was exercised by this court in the Powder Case, supra, and by the Supreme Court in the Standard Oil Case, supra, and the Tobacco Case, supra. In the Keystone Watch Case, supra, this power to dissolve was not exercised, the court there saying at page 519 of 218 Fed.:

"But we see no sufficient evidence that the public interest requires us to break up the existing corporate entity. United States v. Great Lakes Towing

Co. (D. C.) 208 Fed. 746. The record satisfies us that the watch case business is not suffering from the absence of live and healthy competition, and except in the directions already mentioned—namely, the retail sales of the Howard watch, and the policy of boycotting—we think the court is not called upon to interfere."

The reason why the power to dissolve was exercised in the Standard Oil Case, namely, that it was a violation continuing up to the filing of the petition, is pointed out by the Supreme Court in these words:

"But in a case like this, where the condition which has been brought about in violation of the statute *in, and of itself,* is not only a *continued* attempt to monopolize, but also a monopolization, the duty to enforce the statute requires the application of broader and more controlling remedies," and is justified because "the acts and dealings established by the proof operated to destroy *the 'potentiality of competition,'* * * * but also to be an attempt to monopolize and a monopolization bringing about a *perennial violation* of the second section."

To this we may add that, while the power to dissolve was for the same reason exercised by us in the Powder Case, yet it will be observed there was in that case a refusal to enjoin as to certain defendants, the court saying:

"As the only relief we can grant in this proceeding is injunctive, the petition must be dismissed as to any defendant who was not violating the law, or threatening to violate it, when the suit was commenced."

Indeed in each of the cases, the injunction was granted, not to enjoin past violations, or because there had been violations in the past, but because such violations were continuing when the bill was filed. It will therefore appear that by this act a comprehensive plan of relief was mapped out, "to *protect* trade and commerce *against* unlawful restraints and monopolies": First, a criminal prosecution by the government under sections 1 and 2 for all violations, past and present; second, an injunction in equity, on complaint of the Attorney General, under section 4, against all present or threatened violations of the act; and, third, a civil suit under section 7 by any one injured against any violator of this act.

In pursuance of the power vested in him by section 4 above quoted, George W. Wickersham, then Attorney General of the United States, on October 26, 1911, filed this petition. Without entering into detail, we may say it prays that the Federal Steel Company, organized in 1898; the Carnegie Steel Company, organized in 1900; the Carnegie Company of New Jersey, organized in 1900, which held the stock of the Carnegie Steel Company of Pennsylvania; the American Steel & Wire Company, organized in 1899; the National Tube Company, organized in 1899; the National Steel Company, organized in 1899; the American Tin Plate Company, organized in 1898; the American Steel Hoop Company, organized in 1899; the American Sheet Steel Company, organized in 1900; and the United States Steel Corporation, which acquired the stocks of said companies—be held unlawful monopolies, and that the United States Steel Corporation, and each and all the said units composing it, be decreed to be illegal and be dissolved, and that their officers and stockholders be perpetually enjoined.

Seeing, then, that the remedy here sought is that of both dissolution

and injunction, we turn to the statute to ascertain on what state of facts dissolution should be decreed or injunction awarded.

The words of the statute are few and clear. Manifestly the trade which it seeks to protect is the natural and normal buying and selling of property, and the protection it gives is by preserving to all engaged in such trade this trade right of natural and normal buying and selling, free from unlawful restraints and monopolies. For it will be observed the statute is not directed against all restraints and monopolies, but "against unlawful restraints and monopolies." This naturally raises the practical question: What are the lawful restraints and monopolies which the statute impliedly does not forbid, and what are the unlawful restraints and monopolies which it not only expressly forbids, but enjoins and indeed makes criminal? In the late case of Nash v. United States, 229 U. S. 373, 33 Sup Ct. 781, 57 L. Ed. 1232, the Supreme Court, referring to its former decisions, clearly defines what the statute forbids and does not forbid as follows:

"Those cases may be taken to have established that only such contracts and combinations are within the act as, by reason of intent or the inherent nature of the contemplated acts, prejudice the public interests by unduly restricting competition or unduly obstructing the course of trade."

The present case involves the legality, not of a contract, but of a combination; that is, the legality of the United States Steel Corporation, which the petition asks to have dissolved. Therefore, applying the foregoing definition of the Supreme Court to the case in hand, the basic question for us to decide is one of fact, namely, whether the union of the several defendant companies in the United States Steel Corporation "prejudices the public interests by unduly restricting competition or unduly obstructing the course of trade." The public interests thus prejudiced consist of—First, competitors in trade; second, the purchasing public; and, third, the general public. For example, if this Steel Company was in any way guilty of unfair business competition, if it was guilty of such conduct as to unfairly force a competitor out of the steel business, or if it unfairly prevented those who wanted to go into the steel business from doing so, then the Steel Company was, in the judgment of the Supreme Court, prejudicing the public interests by unfairly driving individuals out of business or preventing them from entering it, and it was also injuring the public by unduly restraining trade. So, also, if this Steel Company was restricting output in order to exact unfair prices; if it was buying up competing plants and dismantling them to needlessly restrict output; if it was by reason of its controlling power furnishing the public with inferior goods; if it was using its power to needlessly and unfairly reduce wages; if it was seeking to deceive purchasers by a false appearance of competition, when in fact it owned or controlled such seeming competition—then it was prejudicing, not only that portion of the public which desired to buy steel, but the public interests generally by unduly obstructing the course of trade and thereby preventing the steel business from moving in its natural and normal channel.

A study of the various anti-trust cases shows that such unfair, prejudicial acts as we have thus instanced have been found where the Sher-

man Law has been held to have been violated. Thus, in the Standard Oil Case, supra, 221 U. S. at page 76, 31 Sup. Ct at page 521 (55 L. Ed. 619, 34 L. R. A. [N. S.] 834, Ann. Cas. 1912D, 734), the Supreme Court, referring to the conduct of that company toward its competitors, says:

"We think no disinterested mind can survey the period in question without being irresistibly driven to the conclusion that the very genius for commercial development and organization which it would seem was manifested from the beginning soon begot *an intent and purpose to exclude others*, which was frequently manifested by acts and dealings wholly inconsistent with the theory that they were made with the single conception of advancing the development of business power by usual methods, but which, on the contrary, necessarily involved the intent to *drive others from the field* and *to exclude them from their right to trade*, and thus accomplish the mastery which was the end in view. * * * The exercise of the power which resulted from that organization fortifies the foregoing conclusions, since the development which came, the acquisition here and there which ensued of every efficient means by which competition could have been asserted, the slow, but resistless, methods which followed, by which *means of transportation were absorbed* and brought under control, the system of marketing which was adopted by which the country was divided into districts and the trade in each district in oil was turned over to a designated corporation within the combination, and *all others were excluded*, all lead the mind up to a conviction of a purpose and intent which we think is so certain as practically to cause the subject not to be within the domain of reasonable contention."

Like unfair conduct toward competitors marked the Tobacco Case, 221 U. S. 106, 31 Sup. Ct. 632, 55 L. Ed. 663. It was there said:

"The history of the combination is so replete with the doing of acts which it was the obvious purpose of the statute to forbid, so demonstrative of the existence from the beginning of a purpose to acquire dominion and control of the tobacco trade, not by the mere exertion of the ordinary right to contract and to trade, but by methods devised in order to monopolize the trade *by driving competitors out of business*, which were ruthlessly carried out upon the assumption that to work upon the fears or play upon the cupidity of competitors would make success possible. We say these conclusions are inevitable, not because of the vast amount of property aggregated by the combination, not because alone of the many corporations which the proofs show were united by resort to one device or another. Again, not alone because of the dominion and control over the tobacco trade which actually exists, but because we think the conclusion of wrongful purpose and illegal combination is overwhelmingly established by the following considerations: (a) By the fact that the very first organization or combination was impelled by *a previously existing fierce trade war, evidently inspired by one or more of the minds which brought about and became parties to that combination.* (b) Because, immediately after that combination and the increase of capital which followed, the acts which ensued justify the inference that the intention existed to use the power of the combination as a vantage ground to further monopolize the trade in tobacco *by means of trade conflicts designed to injure others, either by driving competitors out of the business or compelling them to become parties to a combination.*"

It will also be seen the evidence of intended monopoly and throttling of competition was found in the buying up of plants not commercially needed and then dismantling them. Thus in the Tobacco Case, supra, 221 U. S. at pages 182, 183, 31 Sup. Ct. at page 649 (55 L. Ed. 663), it was said:

"We think the conclusion of wrongful purpose and illegal combination is overwhelmingly established by the following considerations: * * * By

persistent expenditure of millions upon millions of dollars *in buying our plants, not for the purpose of utilizing them, but in order to close them up* and render them useless for the purposes of trade."

Taking steps to keep others from entering the business is also recited as a violation of the act:

"The conclusion of wrongful purpose and illegal combination is overwhelmingly established by the following considerations: * * * By the gradual absorption of control over all the elements essential to the successful manufacture of tobacco products, and placing such control in the hands of seemingly independent corporations *serving as perpetual barriers to the entry of others into the tobacco trade.*"

So, also, in the Keystone Watch Case, supra, pages 510 to 512 of 218 Fed., unfair conduct toward competitors constituted the violation of the statute. Speaking for this court Judge McPherson there said:

"Beginning in 1904, or thereabouts, it made several attempts—perhaps not very numerous, but numerous enough—that showed a definite purpose to restrain trade by attempting to fix and maintain prices, and by using a species of boycott or blacklisting in order to lessen the trade of its rivals. We shall not stop to detail the attempts of this character that were made during the period from 1904 to 1910, because the policy and system to which we refer were manifested with unmistakable distinctness in the latter year, and were carried on with vigor and persistence. * * * Now, what the defendant company did was either to close these already existing and already utilized outlets, or to narrow them materially, so far as the [watch] cases of its competitors were concerned; and we think the proposition need not be discussed that this was pro tanto a direct and unlawful restraint of trade."

So, also, amongst other factors which tended to show a violation of the statute, reference was made in the Tobacco Case, 221 U. S. at page 174, 31 Sup. Ct. at page 646 (55 L. Ed. 663), to the maintenance of a false appearance of competition:

"The record indisputably discloses that after this merger the same methods which were used from the beginning continued to be employed. Thus, it is beyond dispute * * * that the new company has besides acquired control of eight additional concerns, the business of such concerns being now carried on by four separate corporations, all absolutely controlled by the American Tobacco Company, although the connection as to two of these companies with that corporation was long and persistently denied."

In the Powder Case, oppression of competitors existed and was thus referred to at page 140 of 188 Fed.; Judge Lanning speaking for this court:

"The association of manufacturers of powder and other explosives had probably never been stronger than it was in February, 1902, when the change in the management of the Dupont works took place. It had for years arbitrarily fixed prices in the different parts of the United States, waging a disastrous warfare against competitors until they were coerced into terms satisfactory to the association or brought into the association. * * * Measures were often devised to limit the output of the members of the association and to crush competition by manufacturers not members of the association."

[2] The tests of the violation of this statute having then, as we have seen, been adjudged by the Supreme Court (Nash v. United States, supra), namely, whether the acts in question "prejudice the public interests by unduly restricting competition or unduly obstructing the course of trade," it would appear the questions of fact for us to determine from the evidence are these:

First. Was the Steel Corporation, when this bill was filed in 1911, prejudicing the public interests by unduly restricting competition, or unduly obstructing the course of the steel and iron trade, between the states, or with foreign nations? If this question be answered "Yes," the law was then being violated, and an injunction should issue to restrain present and future violations.

Second. Did the Steel Corporation, when it was formed in 1901, either by the intent of those forming it, or by the inherent nature of that company's contemplated acts, prejudice the public interests by unduly restricting competition or unduly obstructing the course of the steel and iron trade, interstate or foreign? If this question be answered "Yes," then the law was violated, and the Steel Corporation must be adjudged originally illegal. If illegal, it must be dissolved, because only thus can its inherent nature be prevented from continuing to work further violations of the statute. On the other hand, if these questions are negatived, then the Steel Corporation should not be dissolved, but permitted to pursue that usual course of trade, which it was the purpose, as we have seen, of this statute to protect. It will thus be seen that, as stated at the outset, this case is practically one of business facts.

Turning, then, to the first question, let us address ourselves, first, to the iron and steel trade here in the United States, and inquire whether the evidence satisfies us that the Steel Corporation, when this bill was filed in 1911, was then prejudicing the public interests by unduly restricting or unduly obstructing the steel and iron business of the United States. In considering that question, a number of fields of inquiry naturally suggest themselves. Had this company in 1911 a monopoly of the steel and iron trade of the country? What had been and was then its business conduct towards its competitors? Was it fair or unfair? Had it forced or was it forcing others out of the steel trade by unfair conduct? Had it prevented others from entering it? Was it then exacting or had it exacted from the public undue prices for its products? Had it lowered the character of its product? Had it cut down or was it cutting down, its output so as to restrict proper supply? Had it taken advantage of its power to unduly reduce wages? All these, as we have seen from the Standard Oil, the Tobacco, the Powder, and Keystone Watch Cases, were inquiries by which the question could be determined whether the Steel Corporation was acting, as the Supreme Court said in the Standard Oil Case, 221 U. S. at page 58, 31 Sup. Ct. at page 515 (55 L. Ed. 619, 34 L. R. A. [N. S.] 834, Ann. Cas. 1912D, 734), with "the legitimate purpose of reasonably forwarding personal interest and developing trade," or, on the other hand, "with the intent to do wrong to the general public and to limit the right of individuals."

Now as trade is a contest for it between different persons, and the gain of that trade by one means the loss of it to another, it follows that the person who best knows whether the man who gained it, gained it fairly, is the man who lost it. If there is monopoly, if unfair business methods exist, if the course of trade and fair trading is throttled, we can find proof of it from business competitors. Trade competitors are the first to feel the pinch of unequal, unfair, and undue restraint of the

natural and normal course of trade. Being the first to suffer, they are the keenest to condemn. Turning, then, to this Steel Corporation's competitors, let us decide from the proofs whether the Steel Corporation had, when this bill was filed, a monopoly of the iron and steel business of the United States.

We turn, first, to finished rolled products, because they are the basic supply to the vast number of varied industries throughout the country dependent thereon. If all these minor industries are dependent on a monopolized source of an indispensable base, we can say, without going further, that not only such industries, but the general public, are prejudiced; for, as said and held by the Supreme Court in the Tobacco Case, wrongful purpose and illegal combination are established "by the gradual absorption of control over all the elements essential to the successful manufacture of tobacco (steel) products." Indeed, the importance of such basic supply in the dependent steel trade is shown by the fact that in the congressional investigation of the Steel Corporation, made by Congress by resolution of January 28, 1905, hereafter referred to, the second inquiry there ordered was:

"To what extent said corporation and its associates control the output and prices of the finished products made by independent companies, dependent upon it for their raw materials?"

What, then, are the facts in reference to finished rolled products? In that regard, the evidence (see summary in Statement of Case, page 412) is that in 1911 the finished rolled product—which excludes pig iron, steel castings, and ingots—of the United States (using in this opinion, when quoting figures, round numbers, and by the term "Steel Company," or "Steel Corporation," meaning the United States Steel Corporation) was 19,000,000 tons. Of this tonnage the competitors of the Steel Corporation produced 54 per cent., or 10,300,000 tons, while the Steel Corporation made 8,700,000 tons; but not only did its competitors produce in 1911 the major part of the country's finished rolled product, as above, but judging from the past, the present proportionate lead of the competitors bids fair to increase. In 1901, when the Steel Company was formed, the total finished roll product of the United States was 13,000,000 tons. This was substantially divided between 49.9 per cent. made by its competitors, and 50.1 per cent. by the Steel Company. While both together have since increased the nation's product from 13,000,000 to 19,000,000 tons, yet of this 6,000,000 increase its competitors produced 3,400,000 tons to the Steel Company's 2,600,000 tons.

Taking steel ingots, another basic supply on which great numbers of finishing industries are ultimately dependent, we find (Statement of Case, page 406) that while in 1901, of the 13,000,000 tons of the total American ingot production, the competitors of the Steel Company only made 4,500,000 tons, as against the Steel Company's 8,500,000, yet by 1911, in the country's vast increase from 13,000,000 to 24,000,000 tons, the competitors had increased their production by 6,500,000 tons, while the Steel Company had only increased 4,500,000. In other words, while the Steel Company produced in 1901, 66 per cent. of the country's ingot production, it was producing but 54 per cent. in 1911.

In pig iron, the basic supply of foundries, finishing mills, and other

dependent industries, the relations were slightly the other way. In 1911, out of a total cast of 22,000,000 tons of pig iron (S. C. page 405), only 12,000,000, or 54.8 per cent., were made by competitors of the Steel Company, as against 9,000,000, or 56.8 per cent., made by such competitors in 1901, out of a total of 16,000,000—a decrease of 2 per cent.

These facts and figures bearing on basic supplies of the country's dependent iron and steel industries satisfy us that there is no monopolistic control anywhere of such basic factors as ingots, pig iron, and finished rolled products, and the testimony hereafter referred to satisfies us that any substantial producer of such basic articles can, by selling such products at such lower price as he sees fit, compel all producers of such supplies, including the Steel Corporation, to also lower their prices. So, also, monopolistic control of finished steel articles in wide use would be a matter of grave public prejudice. Taking, for example, wire production, in which, through fencing, nails, and the great range of articles made from wire products, so many people are interested. When the Steel Corporation was formed in 1901, of the 9,000,000 kegs of wire nails then made in the United States, the competitors of the Steel Corporation made 3,000,000 kegs, and the Steel Corporation 6,000,000. By 1911, the country's production had grown to 13,000,000, but of the 3,500,000 of increase the Steel Corporation made 1,000,000 as against its competitors making 2,500,000. The net result was that, when this bill was filed, the Steel Corporation's competitors had 6,500,000 and the Steel Corporation 7,000,000 of the country's total production of 13,500,000 kegs. So of wire netting, fencing, and other wire products in general use. The general average of the nation's total production made by competitors when this bill was filed was 78 per cent. It will be seen that in this particular respect, due, no doubt, as we shall see, to the growth of its foreign trade in wire products, the Steel Corporation had slightly increased its proportion from 20 per cent. of the total product in 1901 to 22 per cent. in 1911. But at the same time it will be noted that, as the very large part of the Steel Corporation's increase in wire products was made in foreign trade—the proofs (volume 10, p. 3902) show that only 42 per cent. of the Steel Corporation's wire product of 1911 was sold in the United States—it was in 1911 making relatively much less of the wire products consumed in the United States than it was in 1901.

In the important item of structural steel, used in bridges, steel framed buildings, steel car frames, etc., the steel corporation's competitors produced about 67 per cent., and the Steel Corporation 33 per cent. And for the same reason as shown above, in the growth of the foreign trade, it will be seen by an analysis of Defendant's Exhibit (volume 3, page 317, and volume 2, page 204) that in structural shapes, as in wire products, the Steel Company was in 1911 making relatively less structural articles of this country's consumption than it was in 1901.

So, also, in steel rails. In 1901, the competitors of the Steel Company made 1,100,000 tons of steel rails, and the Steel Company 1,700,000. In 1911, its competitors made 1,200,000 tons, an increase of 100,000 tons, while the Steel Company made 1,600,000 tons, a decrease of 100,000 tons.

Summarizing our study of the proofs of this general subject, of the relative part of the Steel Company and its competitors in the total iron and steel production of the country, and their relative part in the home market, we find that, taking the ten years from 1901, when the Steel Company was formed, until 1911, when the Attorney General filed this bill to dissolve it, its competitors, starting in 1901, with making 49.9 per cent. of the nation's production of finished rolled product, including structural materials, rails, sheets, rods, and bars, had by 1911 so increased their relative proportion that they were then producing 54.3 per cent. of the nation's iron and steel output. And confining ourselves for the present to the production of 1911, used in the trade of the United States, which alone we are now considering, we find that, of the total amount of such iron and steel products in the whole market in that year, nearly 60 per cent. was produced by the competitors of the Steel Company. These conclusions, based as they are on proven, practical business facts and figures, show a strong trend away from any monopolistic absorption or trade-restraining control of iron and steel manufacture or markets of the United States by the Steel Corporation. On the contrary, these figures show a strong trend in that manufacture and market toward an even greater absorption thereof by the virile and growing competitors of the Steel Company. And this leads us, in an adequate discussion of the case, to at this point take up the character of the competition in the steel and iron business in this country; for we may rest assured of the practical fact that where in any business there exists a healthy, normal, unrestrained, and virile competition, which all are free to enter, the individual has full freedom of business opportunity and the public is in no danger of prejudice from monopoly or trade restraint.

When the steel business of the United States is referred to, one thinks of it as practically being in the hands of the United States Steel Corporation. Circumstances have made this natural. The manufacture of iron and steel in their basic form is confined to local districts. Outside of these localities and outside of those engaged in the steel business, there was, prior to 1901, but little general knowledge or appreciation of its magnitude and its basic relation to the general business of the country. When, therefore, this great steel company was quickly formed in that year and became at once the largest corporate capitalization known, it naturally and at once became associated in the general mind with absolute monopolistic control. But the fact that the Steel Corporation after due selection by it of such lines of finishing mills as were deemed necessary to carry out its plans left outside of it a most strenuous body of strong competitors was not then generally recognized. The names, location, and resources of those competitors were not then, and indeed are not now, known to those outside the steel and iron business. Nor was the significance of the anti-monopoly competitive powers and policies of such competitors appreciated. Indeed, the business fact above found, namely, that in 1911, when this bill was filed, the competitors of the Steel Company were making and marketing nearly 60 per cent. of the steel and iron produced in the United States, would surprise many. Since therefore

the gist of monopoly is the suppression of competition, we deem it pertinent to ascertain from the proofs the character and steady increase of competition in the iron and steel business since the Steel Corporation was formed. In doing this, we here note of its great competitors such only as have, in the ten years of competition between them and the Steel Corporation, made a higher proportionate gain of business than the Steel Corporation itself.

Taking the Steel Corporation as the basis of comparison, we may say that while the proofs show a very material increase of 40-odd per cent. in the Steel Corporation's business from 1901 to 1911, yet this very substantial increased percentage of the Steel Corporation's own business was less than that made by each of eight of its great competitors as follows:

Company.	Location.	Increase of Production from	Percentage of Increase.
Bethlehem Steel Co.	So. Bethlehem, Pa.	1901 to 1913	3779.7
Inland Steel Co.	Indiana Harbor, Ind.	1901 to 1913	1495.9
La Belle	Wheeling, W. Va.	1901 to 1913	463.4
Jones & Laughlin	Pittsburgh, Pa.	1901 to 1912	206.7
Cambria Steel	Johnstown, Pa.	1901 to 1913	155.5
Colorado Co.	Pueblo, Colo.	1901 to 1912	152.8
Republic Iron & Steel Co.	Youngstown, Ohio	1901 to 1912	90.8
Lackawanna Steel Co.	Buffalo, N. Y.	1901 to 1911	63.2

Taking up these companies one by one, it will be seen that in location, facilities, capital, and basic supplies, they show such strong past, present, and prospective competition as affords just ground for concluding that the steel and iron business of this country is not being, and indeed cannot be, monopolized by the Steel Corporation. For the real test of monopoly is not the size of that which is acquired, but the trade power of that which is not acquired.

Turning, first, to the Atlantic seaboard, we find there is a competitive group composed of the Bethlehem Steel Company, the Pennsylvania Steel Company and its subsidiary, the Maryland Steel Company. The two latter companies are additional to the above list, and are here referred to only to note their tidewater location as an advantage which the Steel Corporation with its inwardly located works does not possess. The works of the Pennsylvania Steel Company are near Harrisburg, Pa., and those of the Maryland Steel Company at Sparrows Point near Baltimore. These two companies have a combined capital and surplus of some $66,000,000 and with large extensions (volume 20, p. 7978) in view. Their ore supplies are drawn from the great Cornwall ore beds of Eastern Pennsylvania, and from Cuba, where they have inexhaustible supplies of Bessemer ore, which can be worked by steam shovels and are close to tidewater. Three matters have impressed us in reference to this seaboard competition: First, that the eastern seaboard iron and steel competition of the Steel Corporation has an ore supply wholly independent of Lake Superior; second, that their location near the seaboard gives in many cases substantial freight advantage over the Steel Corporation; and, thirdly, that the greatest advance in ore and steel production in the past ten years has been made by a seaboard competitor of the Steel Corporation, the Bethlehem

Steel Company. And as bearing on the question of the alleged object of those who originally formed the Steel Corporation to monopolize and unduly restrain competition and obstruct trade, it is to be noted that the striking growth and development of the Bethlehem Company was undertaken by one who helped form the Steel Corporation, who served as its first president, and who, if the object for which the Steel Corporation was formed was to monopolize the iron and steel business or to restrain trade, was warned of that intent. That such a man should attempt to build up a competitive business and succeed in expanding it as has been done shows that he at least was convinced that the field of fair, free, and full competition was open to him and others who desired to enter the steel business, and that the Steel Corporation had neither the business purpose nor the business power to monopolize the steel business or to throttle the growth of competition.

As we shall see later, the market reach of basic iron and steel plants is measurably restricted to its own district by freight limitations. Stevenson, volume 3, p. 1084; Gary, volume 12, p. 4834; King, volume 6, p. 2076; Thompson, volume 22, p. 9141. The supplies from which steel is made and the basic articles into which it is turned are of such bulk and weight as to thus localize or restrict their markets. Freight forbids such heavy product being hauled to far-removed markets. The existence and maintenance of strong competitive steel production on the seaboard is therefore a matter of grave import to the great section of the United States immediately tributary to the Atlantic Coast. Into this seaboard region the Steel Corporation enters under freight burden, its bulk mills being substantially in the Chicago and Pittsburgh districts. The proofs show that its seaboard competitors named have, as noted, abundant ore supplies, cheap water freights, and a great accessible surrounding market. Without entering into detail, we refer to some suggestive facts in the proofs. For example, the proofs (volume 10, p. 4028) show that the Maryland Steel Company, through its coast line water freight of $2.50 per ton, so covers the territory supplied by Mobile, Galveston, and other Gulf of Mexico distributing points as to exclude from that territory even the product of the Tennessee Coal & Iron Company, now owned by the Steel Corporation, which pays a railroad freight of $3.40 per ton. The proofs (volume 18, p. 7248) further show that, with the enlargement of the Erie Canal system, Lake Superior ore will be canal freighted from Buffalo to New York Harbor at 28 cents a ton less than the same ore is rail freighted from Lake Erie Ports to the Pittsburgh district. With the enlargement of that canal, the proofs are (volume 18, p. 7283) that blast furnaces are now planned for location on seaboard waters in New York Harbor limits. And it should be here noted that the proof is (volume 11, p. 4182) that the whole steel industry of the United States could be duplicated on the Atlantic seaboard and inland (volume 11, p. 4178) as far as Pittsburgh, and could be run on ores brought from Chili and Brazil alone. Lake Superior ores of the same metallic unit grade as the Brazilian would, in the view of the Michigan Tax Commission (Government Exhibits, volume 10, p. 2435), cost $7 a ton delivered at the Atlantic seaboard, as against ore of $3 from Brazil, which the report

states has "a tremendous field of high grade Bessemer iron ores running 65 to 68 per cent. metallic iron." As to the Cuban ore, the proof (volume 17, p. 6862) is:

"The total cost will not in any case exceed $2.25 per ton, and in ordinary shipping seasons will probably not exceed $2.10 per ton. This means that the ore reaches Philadelphia at a net cost of 4 cents per unit of iron. It is the cheapest ore supply in the world delivered at eastern Atlantic ports or in German or English ports. * * * In normal years, Lake Superior ores at the extreme eastern point at which they could possibly be shipped to meet eastern or foreign ores would have to get a price of 9 cents a unit in order to compete."

These facts and figures show that there is no basis on which to attempt ore monopoly. The proofs further show that, to adequately enter this seaboard territory and meet the competition of those located on the seaboard, the Steel Corporation was forced to establish large local distributing warehouses on the seaboard. For example (volume 10, p. 4060), the Corporation had established, amongst several others, warehouses on the Atlantic Coast near New York carrying $2,000,000, and one at San Francisco carrying $4,000,000 of diversified steel products.

Proof of the strength and growth of this seaboard competition is found in the record of the Bethlehem Steel Company. That company in 1901, its first year of competition with the Steel Corporation, made 18,000 tons of finished steel product, which was largely confined to rails. By 1913, it had increased its product to 700,000 tons. During that time it had also (King, vol. 6, p. 2120) entered into competition in structural steel, armor plate, and varied steel products. Indeed, its chief products, structural steel (volume 11, p. 4149), and open-hearth rails (volume 11, p. 4150), of which it is making 200,000 tons, have been developed since 1908. From 4,000 employés it has grown to 15,000; it has in view (volume 11, p. 4336) further integration to the extent of making all the finished products made by the Steel Corporation. Its ore supply of a million and a half tons a year comes from Sweden, from the Adirondack regions in New York, from Chili, and from Cuba, where it has practically inexhaustible reserves. The proofs as to these Chilean ore fields show that this corporation and other tidewater steel plants are wholly independent of Lake Superior reserves. The Chilean beds outcrop; they are stripped instead of mined; they are within a short distance of the coast to which they are gravity dropped. They are magnetic, hematite, and dry—a great saving in transportation, as will be appreciated by those familiar with the wetness of Lake Superior ores which necessitate the carrying of thousands of tons of water. The proofs show the substantial character of this competitor with a surplus and capital of $55,000,000 and further integration in view.

Referring at this point to the existence of a fair and open competitive field, as sensed by practical men in the iron and steel industry, we gain light from the proofs in reference to the Youngstown Sheet & Tube Company of Youngstown, Ohio. That company does not appear in the foregoing list because it came into existence after the Steel Corporation was formed. It is an inland company. Its ore supply is from Lake Superior. It started the year after the Steel

Corporation was formed. It purchased its reserve ore supply in 1903. It began with an investment of $600,000, which in the succeeding years has been increased to over $29,000,000. By 1913, it had an annual capacity of 1,000,000 tons of ingots and sold that year over 800,000 tons. This company is cited as evidencing three things: First, that the men in the steel and iron trade immediately after the Steel Corporation was formed felt they had an opportunity to enter and prosper in the steel and iron business, both in the home and (Manning, volume 19, p. 7968) foreign markets; second, they felt secure about their basic ore supply; and, third, they were free to and did build up a great business in making steel ingots, one of the primary products or bases.

Coming next to the Pittsburgh district, we find a strong competitor of the Steel Corporation in the Jones & Laughlin Company, which, at the time of the Steel Company's formation, the proofs show (Government Exhibit, volume 4, p. 1513) was then so integrated as to make "a greater variety of product than any other steel or iron company in the country." In 1901, its finished product alone was nearly one-half million tons. By 1912, it had increased that production to one and a half million tons. During that time it had integrated still further by building large additional works and had (King, volume 6, p. 2120) entered into competition with the Steel Company and others in the manufacture of tin plate and wire rods. Like all these other competitors mentioned, the Jones & Laughlin Company is thoroughly "integrated"; that is, it has its own basic supplies and carries on its work in continuous process from ore to diversified finished steel products. It has large reserve holdings of ore in the Lake Superior region and an ore fleet on the Great Lakes with a carrying capacity of 40,000 tons. It has over $50,000,000 capital and a large surplus.

Going east, we find at Johnstown, Pa., the Cambria Steel Company, a strong company also thoroughly integrated, and with an investment of nearly $70,000,000. From 400,000 tons finished product in 1901, the Cambria increased to nearly 1,200,000 tons in 1913, and it has (volume 6, p. 2199) further improvements in view looking to a large increase in its output. It has a 50-years' supply of Lake Superior ore and a Lake fleet of a capacity of 50,000 tons. At this point, the president of this company might be quoted. He was called as a witness both by the government and the Steel Company. His testimony is enlightening, as showing that his and other companies in the steel business feel the Steel Corporation has no power, even if so disposed, to monopolize, restrict, or stop their business. We quote (volume 28, p. 12034) from his testimony:

"Q. Have or not the leading competitors of the Steel Corporation, since 1901, increased their capacity or further integrated or added to their holdings of ore or coke?

"A. Oh, yes, sir; there have been a great many new properties secured by the other companies, and a large number of developments in both the coking regions and the ore regions.

"Q. And what would you say as to their progress, if they have made any, in the matter of integration and diversification of products?

"A. I think all of the companies have expanded and improved their plants and strengthened their holdings of raw material.

"Q. In your testimony for the government, referring to Jones & Laughlin, the Lackawanna, Cambria, the Republic, and perhaps others, you stated as follows: 'I do not think that there is any one of those companies that could not compete with the United States Steel Corporation and compete successfully.' You were not then asked to give your reasons for that opinion; be good enough to give them now.

"A. It is a very simple proposition to build a furnace and steel plant, or finishing mills fully the equal of the Steel Corporation's and labor can be employed at exactly the same price, and there is absolutely no difficulty in producing the various products at practically the same cost.

"Q. Has the Steel Corporation any such advantage owing either to its size, the extent of its integration, or any other circumstance, as would enable it to put its competitors out of business, did it choose to do so?

"A. No, sir. It would be impossible for it to do so without committing suicide.

"Q. Why?

"A. Well, their product is practically sold in this country. Of course, they do a small export business, but they sell to the same people that we do, and we sell to the same people that they do; and, if they would make prices so low that we could make no profit on it, there would be nothing left for the Steel Corporation; and, if they would undertake to put us out of business by selling below our cost, they would be selling below their cost, so that I cannot see how it would be possible for them to put a well-managed concern out of business.

"Q. Could the Steel Corporation confine any destructive warfare which it might undertake to any one competitor? In other words, could they wage a warfare against the Cambria or Jones & Laughlin, or any of the other considerable concerns, without involving the rest of their competitors?

"A. No, sir; that would be impossible.

"Q. Could they confine any warfare that they might undertake either against a single competitor or against all other competitors to any particular locality?

"A. No, sir; because the markets are all affected in sympathy, and, if the price was made below cost in one market only, we would go to the other; we would seek other markets.

"Q. Why do you say that the Steel Corporation could not make war against one competitor only without involving the rest of them?

"A. Because, for instance, we all sell to practically the same class of trade, to the same customers. We sell to many people who buy from Jones & Laughlin and the Steel Corporation and the Republic and the Inland Steel Company, and various other companies, so that it would be impossible to pick out the customers of any one manufacturer, and you cannot affect the price in one market without affecting it in all the other markets in the country.

"Q. Has the ability of the Steel Corporation to resist any such warfare increased since 1901? Are they any better able to take care of themselves in such a warfare now than they were in 1901?

"A. No, sir; I would say that they are not. I do not fear the Steel Corporation as much as I fear other competition."

Without going into detail as to other companies in the foregoing list, we may refer to the Colorado Company, whose market, the proofs show (volume 26, p. 10935), covers the United States west of the Mississippi. This company is integrated, is independent of the Lake Superior ore, has more than 60 years' supply of its own ores in Wyoming, New Mexico, and Utah, and has largely expanded its plant since 1901. It has resources of $80,000,000, and its finished product has increased from 200,000 tons in 1901 to about 500,000 tons in 1912. This company has by its western location (volume 26, p. 10937) a freight advantage over the United States Steel Corporation and all other eastern

competitors in selling rails to most of the railroads west of the Mississippi.

The history of the next company is illustrative of the feeling of confidence and security among practical steel men, which warranted them in making since the Steel Corporation was formed large expenditures and entering into competition in the steel business. The Republic Iron & Steel Company of Youngstown, Ohio, was in 1901, engaged principally in making iron. Its finished product that year was some 500,000 tons. It has since expended $25,000,000 in changing its business from iron to an exclusively steel one. Like all other steel makers, the Republic Company's policy has been one of simply following the progressive and universal practice of integration incident to the development of the use of steel. The Republic Company's process of integration its president (volume 2, p. 731) well describes:

"We have practically eliminated all our scattered iron mills, have concentrated them in the operation at a few points of production. So. to-day we produce practically but little iron and are manufacturing about 1,000,000 tons of steel per annum. This is what we call an integrating process; that was part of it, the addition of the mineral and coke and blast furnaces, and balancing up operations generally, completing the integrating process. * * * This integrating process that I speak of attended our development of the steel end of our business. We did not need it so much when we were simply manufacturing iron. It was done for economic and trade reasons, on account of the increased demand for steel and the decreased demand for iron."

The Republic has increased the range of its product and production until it is now a million and a quarter tons and extends (volume 28, p. 11999), all over the United States and Canada. It has gone into the Birmingham, Ala., field, where it has plants, as well as in Pennsylvania, Missouri, Illinois, Indiana, Iowa, and Michigan. It has acquired 40,000,000 tons of Lake Superior ore reserve and 80,000,000 in the Birmingham district, and has a lake fleet of 18,000 tons. Its growth during this time was such (Topping, volume 2, p. 735), that it is producing one twenty-fifth of all the steel produced in the United States and one thirtieth of all the iron. From a study of the testimony there is no doubt that the men who made these large expenditures in 1906 were satisfied that the field of fair business competition in the iron and steel business was open to them. These expenditures were made in completely integrating its manufacturing facilities. This integration consisted (volume 22, p. 9131) in increasing its blast and open hearth furnaces and ore supply and carrying their basic product forward to completion by additional plants which included finishing mills for merchant bar, for sheet bar, for billets, and for plate in addition to galvanizing works, rivet, spike, bolt, and nut departments, and by-product coke works. They have no more to fear from the competition of the Steel Corporation than they have from that of any other of their other competitors. The testimony of this company's president, who like the Cambria's president, was called as a witness both by the government and the Steel Company, is instructive, on that point. It is:

"Q. Where is the market for your product?

"A. All over the United States and Canada.

"Q. Has the Steel Corporation in your opinion power to put the Republic out of business?

"A. I think not.

"Q. Has it the power to put its competitors generally, or any of its principal competitors, out of business?

"A. I would say not.

"Q. What is your reason for thinking that they have not that power?

"A. I would have two reasons: One, that they have not the physical ability to do it; and, secondly, if they attempted it, they would involve their own market to such an extent that they would suffer equally with us. What I mean by physical is this: Their principal competition, companies like ourselves and others as strong as we are, are properly integrated; in other words, being self-contained on raw material, well equipped, and at least fairly well managed and properly financed, so that a combination of that kind would give us as much power to produce within somewhere a close approximation of their cost; at least their difference would not be so great that they could put us out of business. They have some advantages, and so have we.

"Q. Now, as to your second reason, that it would involve them in loss as well as you, what do you mean by that?

"A. Well, to illustrate, we might have a customer, we will say, in Michigan, engaged in the manufacture of agricultural implements, and another one in Illinois or Indiana. If we should sell in Michigan steel bars and plates that enter into the cost of production of a machine at a less price to A. in Michigan than we do to B. in Illinois, we would probably soon hear from B. in Illinois, because those two men would naturally compete in the general market of the United States with their machinery. So it would be with all other fabricated products made from steel, the markets are inter-related and interlaced to such an extent that you cannot reduce prices, in my judgment, in one market, without affecting in a short time the market elsewhere for the same commodity.

"Q. Could the Steel Corporation localize a destructive warfare against its competitors?

"A. Not in my opinion.

"Q. Why not, if there is any other reason than you have already indicated?

"A. I should say that the reason I have already indicated would be a complete answer to that thought. There is a sympathetic relationship existing between all markets that is so close that my experience would compel me to say that you could not affect the price in Chicago without affecting the price in New York. As a matter of fact, that is the experience that we have had.

"Q. And could the Steel Corporation wage a destructive warfare against any one of its competitors without involving all of them?

"A. No; I would say not."

The same confidence to enter into competition thus evidenced in the Republic Company was also shown by the Inland Steel Company of Indiana. That company had expanded its investment from some $4,000,000 to $20,000,000. It has acquired Lake Superior ores and a lake fleet of considerable capacity. Asked the question (volume 22, p. 9144):

"From your knowledge of the iron and steel business, the relative capacities of those engaged in it, the capitalization of the United States Steel Corporation, its ownership of railroads, its connection with financial interests, state whether or not in your judgment, it has the potentiality, if it uses it, to destroy its competitors?"

—its president testified:

"A. No; that is absurd. They cannot do it. I think it is a physical impossibility. I cannot imagine how they could do it.

"Q. Is there any possible doubt in your mind of the ability of the Inland Steel Company to maintain itself in any kind of competition?

"A. Well, that is what we are aiming to do. We think so. We think we are getting as well prepared as most of our competitors by the money that we have

spent there; and I believe it has been spent on the right lines. I know that we would not change any of it if we had it to do over again, as far as we have gone.

"Q. And you are very well integrated, as you have stated?

"A. Yes; we did the best that it was possible to do.

"Q. Mr. Thompson, you stated in answer to my question a short time ago, that the competition between the Inland Steel Company and these other companies had been active in the territory that you serve?

"A. Yes, sir.

"Q. What do you mean by 'active'?

"A. Always at it. We were always trying to get business. I don't know how to express it any stronger than to say that we were all looking for trade in an active way, all the time, keeping ourselves posted on conditions and soliciting business from just such men as the witness who was examined here this morning and from other railroads; I say it is active because we are always at it—all of us."

We have referred above to competitive steel conditions on the Atlantic seaboard as shown by the proofs. Those proofs also show (Pigott, vol. 26, p. 11066) how competition to the Cambria, Jones & Laughlin and the Steel Corporation has grown on the Pacific Coast. This competition has increased since the Steel Corporation was formed. Mr. Pigott testifies his company has built at San Francisco open hearth furnaces with a capacity of 30,000 tons; bar mills, with 30,000 tons capacity; and at Seattle a rail re-rolling mill with a capacity of 30,000 tons. For its basic supply this company is wholly independent of the Steel Company, Jones & Laughlin, the Cambria Steel and all eastern companies doing business on the Pacific Coast. This is clearly shown by the proofs. This company gets one-half of its pig iron from China and the balance from the Republic Company and the Tennessee Coal & Iron Company. The proof is (volume 10, p. 3887) that the freight paid to deliver the Tennessee Company pig iron from Birmingham, Ala., to San Francisco is $10.08 per ton. The proofs further show (page 3889) that the Chinese pig iron is delivered at Pacific points at a freight rate of $3.70 per ton. If to this $3.70 be added the price of the pig iron, $6.20 per ton, it will be seen that the Chinese pig iron at $6.20, plus freight $3.70, $9.90, can be paid for and delivered on the Pacific Coast for about the amount, $10.08, the Republic and the Tennessee Company pay for freight alone. As the proofs (page 3887) further show the pig iron from India is being delivered in San Francisco from Calcutta at an expense of $12.38 per ton, namely, price of pig iron $5.40 plus freight $6.98, it will be seen that the future basic supply of this and other companies that may spring up on the Pacific Coast can be had of Asiatic pig metal wholly independent of the Steel Corporation and other eastern competitors. In view of the further proof (volume 11, p. 4182), that the ores on the western coast of Mexico, and necessarily those of Chili, are also available, and that the improved practice in steel making (volume 3, p. 992) makes ores now usable which were formerly not so, the conclusion is warranted that the field for all possible development on the Pacific Coast in the steel business is wholly free from any monopolistic control whatever. It will thus be seen that a substantial steel industry in rails, bars, and open hearth steel has in fact grown up on the Pacific Coast, while in competition with the Steel Company, a competition which Mr. Pigott (volume

11, p. 11074) describes, "from the standpoint both of a customer and a competitor," "has been beneficial."

As we have said, we have, as throwing light on the substantial character of the strong and increasing competitive forces in the steel business, referred only to those above named. It is proper, however, to add that the proofs in the case (Defendant's Exhibits, volume 1, p. 137; volume 2, pp. 209, 210; and volume 3, p. 374) show the Steel Company has eight competitors in rolling structural shapes, that is, beams, etc., for bridges, skyscrapers, etc., and in the fabrication of such structural material over 300 competitors. In the rolling of merchant bars it has very considerably over a hundred competitive mills.

Later, we shall note the testimony of competitors as to their relation to the Steel Corporation, but before referring to individual relations, we deem it proper to here refer to some general phases of monopoly which affect all competitors. One of these was the practice by large companies of exacting freight rebates from railroads under threat of diverting shipments elsewhere. These practices were common up to the time of the ending of the old era of freights unregulated by the government (Government Exhibit, volume 3, p. 1120; volume 2, p. 441; volume 3, p. 1031; volume 3, p. 1035, and the discussion in volume 3, pp. 956, 957). In Swift & Co. v. United States, 196 U. S. 402, 25 Sup. Ct. 276, 49 L. Ed. 518, the Supreme Court said:

"It is obvious that no more powerful instrument of monopoly could be used than an advantage in the cost of transportation."

And in the Standard Oil Case, supra, this subject was again referred to as—

"the acquisition here and there which ensued of every efficient means by which competition could have been asserted, the slow, but resistless, methods which followed, by which means of transportation were absorbed and brought under control * * * all lead the mind up to a conviction of a purpose and intent which we think is so certain as practically to cause the subject not to be within the domain of reasonable contention."

On January 28, 1905, Congress directed (Government Exhibit No. 206, volume 5, p. 1615) the Secretary of Commerce and Labor to investigate the steel and iron industry of the country with a view to ascertaining to what extent the United States Steel Corporation controlled the output and prices of finished product made by independent companies dependent upon it for their raw material and to report any restraints by it of commerce, foreign or domestic. James R. Garfield, who as Secretary of Commerce and Labor, made this examination, was called as a witness. He testifies (volume 14, p. 6190) he had made an investigation and examination of the railways in a similar manner to that made in the Standard Oil, and found no rebating whatever by the railroads to the Steel Corporation. That he was justified in his conclusion is strengthened by the fact that at a meeting of the Steel Corporation's executive committee in 1901, called to consider the policy of the company towards railroads, the minutes (Government Exhibit, volume 3, p. 957) show the position taken the first year of the corporation's formation by its chairman and there recorded, was "that we cannot afford to

take the position of asking any railroad, directly or indirectly, to discriminate in our favor." This policy was later emphasized (volume 12, p. 4790) in a letter sent to the presidents of the railroads (Defendant's Exhibit, volume 3, p. 295), handling the Steel Corporation's freight, as follows:

"Personal. Sept. 20, 1905.

"Dear Sir: As you know, this corporation long since adopted the unalterable policy of recommending to subsidiary companies in which it is interested, that under no circumstances should rebates be solicited or received contrary to law. This policy will be strictly adhered to and it is hoped and expected your subordinates will be advised and instructed accordingly. If any one should at any time violate his instructions in this respect, notice of the same should be promptly given to the president of the subsidiary company interested and also to the undersigned.

"Yours very truly, W. E. Corey, President."

In view of this announced policy of the Corporation of the investigation made by the Department of Commerce and Labor, of the absence of any complaints by any competitor, and of no proof of any freight rebate being given, we are justified in concluding that the Steel Corporation has not used, or sought to use, freight rebates as a means of undermining its competitors, or of monopolizing business.

We next turn to ruinous trade wars against competitors which, as we have seen, was one of the features of attempted monopoly denounced by the Supreme Court. In that connection it is to be noted that under conditions incident to the steel trade the power of a large steel company to carry on a ruinous trade war against any particular competitor does not exist in the iron and steel industry. The customers of the great steel companies are large jobbers and the purchasing agents of other companies, who are in the closest touch with every fluctuation of the steel market. The result is that any effort on the part of any one of these great steel companies to inaugurate a trade war by ruinously underselling a competitor would at once, owing to the sensitiveness and inter-related character of the steel market, result in forcing the company that was thus ruinously selling in any particular market or locality to in the same way ruinously lower its prices in every other community. In that respect, the president of the Youngstown Sheet & Tube Company, a competitor, testified (volume 22, p. 9144) that, if the steel corporation attempted such a course, "they would involve their own market to such an extent that they would suffer equally with us." The testimony of the president of the Cambria Steel Company, already quoted (volume 28, p. 12036), is to the same effect, as well as that of the president of the Republic Iron & Steel Company (volume 28, p. 11999). And the practical impossibility of such a course is shown by Judge Gary (volume 14, p. 5378), where he testifies:

"I feel certain that by reason of our integrated proposition we had the advantage in cost of production over our competitors generally. If any one having advantage in any business is willing to sell down to his cost price, of course he would live while his competitors would starve; but that is a most unnatural position for any producer to take and long continue."

In view, therefore, of the uncontradicted proof of those familiar with the steel business that no such ruinous trade war could with profit to itself be carried on by the Steel Company against a competitor, and in the absence of proof of any effort by it to harass them by such conduct, we are warranted in concluding there has been no attempt by the Steel Corporation to monopolize or restrain trade through ruinous trade wars against its competitors. For of the conduct of the Steel Corporation, the views of its competitors is the best gauge. Monopoly and unreasonable restraint of trade are, after all, not questions of law, but questions of hard-headed business rivalry, and whether there is monopoly of an industry, whether trade is subjected to unreasonable restraint, whether there is unfair competition, are facts about which business competitors best know and are best qualified to speak. And it may be accepted as a fact that where no competitor complains, and much more so, where they unite in testifying (Campbell, volume 5, p. 1857; Smith, volume 19, p. 7942; King, volume 6, p. 2121; Bowron, volume 25, p. 10247; Pigott, volume 26, p. 11075; Manning, volume 19, p. 7701) that the business conduct of the Steel Corporation has been fair, we can rest assured there has been neither monopoly nor restraint. Indeed, the significant fact should be noted that no such testimony of acts of oppression is found in this record as was given by the competitors of the Tobacco or Standard Companies in the suits against those companies. We have carefully examined all the evidence given by competitors of the Steel Corporation. We have read the testimony of customers who purchased both from it and from its competitors. Its length precludes its recital here, but we may say its volume, the wide range of location from which such witnesses came, and their evidently substantial character in their several communities make an inevitable conclusion that the field of business enterprise in the steel business is as open to, and is being as fully filled by the competitors of the Steel Corporation as it is by that company.

Taking as fair samples of the views of the competitors, we note, first, the testimony of James Bowron, president of the Gulf States Steel Company, who says: "Their competition is strictly fair." Herbert S. Smith, vice-president of the Standard Steel Company of Alabama, and formerly general sales agent of the Lackawanna Steel Company of Buffalo, who says: "I have always regarded the competition of the Steel Company's subsidiaries as the fairest competition that we have." Of western manufacturers, we note that of William Pigou, president of the Pacific Coast Steel Company, who says:

"I have always found the competition of the United States Steel Company and its subsidiaries fair; its existence has been beneficial to the steel and iron trade of the country."

We have noted above the remarkable growth of the Youngstown Sheet & Tube Company, which came into existence in 1905, and in the meantime has grown to be a very important competitor of the Steel Company. The testimony of James A. Campbell, its present president, who was called as a witness by the government (volume

5, p. 1857), so fully covers the subject of the attitude of the corporation toward its competitors and the purchasing public that we quote it at length:

"A. My experience is that it is the best competition we have; that they are open and above board in all of their dealings. Their prices are either published, or we get direct information from them or through our customers as to what their price is, and we find that their price is practically the same to everybody. With other competition that we have, with the independents, for instance, the independents vary more in their prices, and we never quite know what their price is. It may be one thing to-day and another to-morrow, and they do not conduct their business in the same way, because it is a smaller business and more of an individual business; and they will make prices according to the class of material pretty largely and the class of orders. So we were not as capable of guaging how they are conducting their business as we are in regard to the subsidiary companies of the Steel Corporation.

"Q. Is your competition with these subsidiary companies of the United States Steel Corporation active and energetic and vigorous competition?

"A. It is—very, at times. We sell to many of the same people that they do, the same class of material.

"Q. Have you ever known of their having made low prices in a limited section of the country for the sake of attempting to put a competitor out of business?

"A. I think not. I do not recall any time, with any company.

"Q. Have they, in your experience, been guilty of any unfair methods to suppress competition?

"A. I think in the early days—I did think in the first two or three years we were in business that there were some things done, and I think done without the knowledge of the higher officials, that were unfair; but those disappeared promptly, and there has been nothing of that kind, nothing but the fairest competition in every respect for the last seven or eight years.

"Q. When the market has been falling, what has been your experience as to the prices which they have maintained as compared with those of the independents?

"A. In depressed times, when there is not nearly enough business to keep all of the mills operating to their full capacity, their prices are usually higher than the independents. In good times, when the mills are all working to capacity, their prices are usually lower than the independents. The independents will accept bonuses and do things of that kind that I do not think the corporation will do. So that I think the general effect is for the steadying of prices and making them better for the country at large, and of course in dull times, it is a great protection to the smaller manufacturers to have them keep their prices up, when business is slack, than it would be if they went out like the Carnegie Steel Company did in the early days and took all the business and shut the other people down."

To this may be added the testimony of Charles M. Schwab, who knew the conduct of the company as one of its original officers and later, as one of its competitors, felt the effects of its policy. We quote from his testimony (volume 11, pp. 4154, 4155) at length:

"A. In the beginning of the Steel Corporation, during my presidency, the policy of the corporation towards its competitors was not one of endeavoring to hurt, not one of endeavoring to stifle, or to destroy, but the policy of naming a price for our products, not only to our customers, but openly through the trade journals, if you will, because I used to give it to the Iron Age and the Iron Trade Review each week, and the sticking to these prices throughout the trade; there probably were exceptions of a minor character to very large consumers, but as a rule, during my presidency of the corporation, the prices of its products were fixed and published, and they were what were charged the customers. Is that clear?

"Q. You say you gave these prices to the public, as a rule, once a week?

"A. I did.

"Q. To the trade journals?
"A. To the Iron Trade Review and the Iron Age.
"Q. Are they the principal trade journals in the steel industry?
"A. They are the principal trade journals.
"Q. What has been the practice of the corporation in those respects or along those lines since you left the presidency, as you have observed it, from the point of view of a competitor?
"A. So far as I know, from the point of view of a competitor, they have adopted since that time practically the same policy.
"Q. Have you ever known of the Steel Corporation to have a published price and a secret price differing from the public one?
"A. So far as I am concerned personally, I do not know of any.
"Q. Have you ever known or heard of a case where the corporation has sold at a less price in a particular market to drive out a competitor?
"A. Never.
"Q. Or has sought to obtain a customer of a competitor by secret rebates or departures from these open published prices?
"A. I have never heard of such a thing.
"Q. Either while you were president or since you have been a competitor?
"A. Never."

We next turn to that most injurious feature of monopoly's wrong to the public, to wit, increase in the price of its product or a deterioration in quality. Turning, first, to the basic question of quality, no dispute arises under the proofs. They are simply uniform that both with independents and the Steel Corporation, there has been a steady bettering of quality in steel products. This factor of improving its product has been recognized by the Steel Corporation, and a study of the testimony of its buyers satisfies us that this progressive growth in quality by the Steel Corporation has been the principal means by which it has acquired and held its business.

Turning next to the increase in price, we are met by two aspects of the case. Two learned experts have been called, one by the government, and one by the Steel Corporation, who draw different conclusions as to whether there was an increase or decrease in the price of iron and steel products. The deductions of both are supported by weighty contentions and numerous enlightening charts. The able reasoning of both has had the thoughtful consideration the standing of the two men challenges. We may note that the different ranges of time they have taken, as the basis of their reasoning really makes them reason about two different things, but apart from that, we think whatever may have been the range of iron and steel prices during the periods of consideration selected by each, the proof is (volume 28, p. 12000) that in these days of quick communication the general price of steel and iron products cannot be localized, but is interdependent in this country and, indeed (volume 28, p. 12013), internationally so. That proof is that when there is an oversupply, even in the European steel and iron market, that market tends to unload on the American steel market, and on the other hand, when there is an oversupply here, this country seeks to dump on their markets at any price. Without citing the proof in that regard, we may refer to Corrigan, volume 26, pp. 11096, 11102; Moller, volume 19, p. 7666; Topping, volume 28, p. 12013; Kahn, volume 23, p. 9483. It will also be observed that so sensitive and inter-related is the price of steel and iron that a drop in price of any particular branch of steel leads to a drop in all other branches. King, volume 6,

p. 2114; Schwab, volume 11, p. 4387; Kennedy, volume 5, p. 1873; Topping, volume 2, p. 682.

No evidence is produced showing that there has been at any time an arbitrary or unreasonable increase in price of any of the numerous products of the Steel Corporation. On the contrary, the proofs (Government Exhibit, vol. 14, pp. 2912–2922) show decreases in important steel products, among which we may refer to wire nails which from selling in 1901 at $51, when the Steel Corporation was formed, were, in 1911, when this petition was filed, selling at $36. During the same time, steel bars receded in price from $33 to $25. Steel beams dropped from $36 to $27; billets from $27 to $24; and a statement taken from the Steel Corporation's accounts (Defendant's Exhibit, volume 2, p. 203) shows there was between 1904—a date when the Steel Corporation may be said to have been fairly systematized and under way—and 1912, a decrease in fabricated prices received by the company of 19 per cent., and of all other products, of 11 per cent. Summing up the business result, the president of the corporation (volume 10, p. 3854) testified the Steel Corporation was in 1912 getting about $8 a ton less for materials in the domestic market than they were receiving in 1904. Moreover, it should not be overlooked that during these years there were substantial factors of increased expense in the cost of manufacture. The freight on coke (volume 10, p. 3781), of which the corporation uses some forty thousand tons a day, has increased 12 per cent. since 1901; the freight on limestone, which constitutes one-third of a furnace's burden, has increased 10 per cent. since 1901; and iron and steel wages (volume 10, p. 3895) have increased 28½ per cent.

Standing aside for later discussion the matter of the Gary dinners and the meetings following them, through which it is alleged the Steel Corporation in co-operation with its competitors unduly restrained and obstructed the normal course of the steel trade, and confining ourselves to the fixation or control of prices by the Steel Corporation itself, or its subsidiaries, we may say we have found in this record no proof by any witness showing any instance in which the Steel Corporation or its subsidiary companies has set either an arbitrary, exorbitant, unfair, or controlling price on any one of its numerous products. It is a mere truism to say that the fixing and maintaining by a manufacturer of a fair price above cost is not only a right but a commercial necessity, and any other course, must end in his bankruptcy. When such fair prices are deported from and they are unreasonably raised and exacted from the purchasing public, the public is prejudiced thereby. On the other hand, when that price is so unreasonably lowered as to drive others out of business, with a view of stifling competition, not only is that wronged competitor individually injured, but the public is prejudiced by the stifling of competition. Between these two price extremes, there must, in the nature of things, be a considerable zone of reasonable price variation, and what is a fair price is a question which can only be determined by a careful ascertainment from cost sheets and other data of such fair price. In the present case neither side has furnished this court with proof from which we could intelligently determine whether the prices charged by the Steel Corporation for any

of the numerous articles here involved, beginning for example with pig iron and ending with rails, was unfair, exorbitant, or unreasonable. In the absence of such testimony, it is manifest that for this court to assume that the prices at which any of these articles were sold by the Steel Corporation and its competitors were unfair would be to base such conclusion on surmise instead of proof. But there is not only this absence of testimony in regard to the prices received being unfair and exorbitant, but there is, on the other hand, affirmative testimony, which we cannot disregard, and which, as it seems to us, constrains us to conclude that the prices of the product sold by the Steel Corporation have been the result of the joint action of the law of supply and demand and of that vigorous rivalry which has at all times existed between the Steel Corporation and its competitors. In that respect we have the testimony of the Steel Corporation's great competitors, of large and small manufacturers, over the whole country who purchased basic steel products and put them through other stages in their mills and factories; of jobbers and warehousemen who buy and hold for sale large stocks of steel products. The testimony of these men—and there is no testimony to the contrary—is that the iron and steel trade in the various products of the Steel Corporation is and has been open, competitive, and uncontrolled, and that all engaged therein have free will control in selling at their own prices. This important fact we shall not leave to here stand as a statement of a conclusion reached by us from a study of the testimony in volumes 18 to 28 inclusive; but, at the risk of unduly prolonging this opinion, we shall here spread of record the testimony of a few witnesses on that subject so that he who runs may read.

In taking up that question, we have, in the first place, the proof that so far as the prices charged by the Steel Company are concerned its practice has uniformly been to give the utmost publicity to such prices. In that regard, Charles M. Schwab, a former president, testified (volume 11, p. 4154), as already noted above:

"In the beginning of the Steel Corporation, during my presidency, the policy of the corporation (was) * * * of naming a price for our product not only to our customers, but openly through the trade journals, if you will, because I used to give it to the Iron Age and the Iron Trade Review each week, and the sticking to these prices throughout the trade; there probably were exceptions of a minor character to very large consumers, but as a rule, during my presidency of the corporation, the prices of its product were fixed and published and they were what were charged the customers. * * * So far as I know, from the point of view of a competitor (the witness is now president of the Bethlehem Steel Company) they have adopted since that time practically the same policy."

That these published prices are met in vigorous competition the proofs show. President Campbell of the Youngstown Company, speaking of his company, says, in substance, that their (volume 5, p. 1857) competition with the subsidiary companies of the United States Steel Corporation is active and energetic and vigorous, very at times. We sell to many of the same people that they do—the same class of material.

The sales manager of that company (volume 19, p. 7701) testified that the subsidiaries of the United States Steel Corporation have been

our competitors in these various lines of production and sales in every line we manufacture and throughout the country. The competition has been very severe.

The president of the Colorado Company (volume 26, p. 10940) says that, in the bar mill products, they meet Jones & Laughlin, the plants of the Steel Corporation that make these products, the Cambria Steel Company in some of them. The competition has been vigorous and independent and unrestricted, so far as it affected them. He thinks the competition has increased in extent. There are two or three new elements in the field and that has made all the old ones a little more active, including themselves.

The testimony of the sales manager of the La Belle Iron Works of Wheeling, W. Va., may be taken as typical of the existence of an open steel market in competition with the Steel Corporation. That company had, during the ten years following the organization of the Steel Corporation, increased its finished product of billets, sheet bars, nails, tubes, plates, skelp, and sheets largely over 400 per cent., and its market covered the entire country, Mexico and Canada. Its sales manager (volume 19, p. 7876) said that their competitors are all the leading steel companies, pretty near, take the Lackawanna, Cambria, Republic, the Youngstown Sheet and Tube, the Wheeling Steel & Iron, and the various constituents of the Steel Corporation. The prices which they obtain for their steel products are not fixed in agreement with their competitors. That is true of each and every year of the ten years that he had been general manager of sales. It is true of each and every article they have produced and sold in the market. There has been no time during the ten years when the price of any article they have produced and sold has been fixed by agreement with any competitor. He is able to say that because the chances are that if it had been done in his company he would have known it. That is his business. The prices have sometimes been fixed in a general way in consultation with their president. *No price has ever been suggested by the president or anybody else in any of these conferences, as a price agreed upon by any competitor.* The considerations that controlled him in these conferences, or when he acted independently of them in fixing prices, were competitive conditions and cost of manufacture. The state of their order book affects the question of prices. When the order book is lean, they probably make lower prices. When full of orders the chances are they will advance prices. That is always the case. It is observable that competition is keener and competitors more active when times are dull and order books are lean. Prices usually rule higher when business is active, and when business is dull they rule lower. The prices obtained by them have fluctuated. He would say the prices obtained by their competitors have fluctuated. The trade or competition in these various articles manufactured has been nearly always active during the period he has had charge of the sales. The competition has been what you would term keen. They met three or four or more competitors in every article they manufacture. The competitors are numerous. They have grown in numbers and output.

The testimony of the chairman of the Republic Iron & Steel (volume

26, p. 12019) shows how that large company arrives at its prices; they do not have uniform prices. They sell to some customers at one price and to other customers at another, varying with the size of the order, the quality and the character of the service they are expected to render naturally. They have traveling men and their own branch sales offices. As a general rule, they send out to them prices at various times at which they are to sell their various products. They give minimum prices below which they shall not go, and allow them to use their intelligence in getting all above they can. That minimum would naturally be the same for all of them. Generally speaking, it would be the same based on cost. They give them the same latitude; in other words, the same general base, which represents a minimum below which they must not go as it might involve a loss.

The general sales agent of the Lackawanna from 1905 to 1910 testifies (volume 19, p. 7905) as to the competitive prices of that company other than rails, to which special subject we refer later. He says: That he had entire charge of the sale of the output of that company, making prices. Their market covered practically the entire United States. Their product was always sold in competition with the product of other manufacturers of steel. The competition was always keen and a great many times aggressive. The leading competitors were the mills of the Steel Corporation, the Carnegie Steel Company, the Jones & Laughlin Steel Company, the Inland Steel Company, the Cambria Steel Company, the Pennsylvania Steel Company, the Eastern Steel Company, the Carbon Steel Company, the Maryland Steel Company; there were some others that he does not remember for the moment. In general, and in almost every case, he had the fixing of the prices. The prices were not fixed in agreement with competitors, always independently. That holds for the whole period of five years that he managed the sales. There was no time during that period when the prices he either quoted or fixed were quoted or fixed in agreement with any of their competitors as to any article that they sold. The prices were both uniform and variant. They might have been uniform on steel rails in some cases, and they might have been uniform on steel plates and shapes in some cases; but not necessarily so. They were following (referring to the uniformity on plates) at that time what they called the market price, and as a rule they tried to obtain the so-called market price. It was a matter of pride with a steel manufacturer to sell his goods at as high a price as that of any other manufacturer, and, if the leading makers were getting $1.60, they felt it was up to them to get the same price; hence the uniformity of price. They were not always able to get the price they tried to get. They found some means of shading it. The extent of their order book or list was a great factor in making prices, the terms of payment and delivery. If the mill was short of orders in any one line, special efforts were made to get business in that particular line, and in such cases the seller is inclined to be rather more moderate in his demands as to price, terms of payment, and all that. The prices varied considerably both ways during the period mentioned. That is true of everything except rails. When he went with the Lackawanna Steel Com-

pany, he found that the price of standard Bessemer steel rails was $28 a ton at the mill. It had been fixed for some time. He did not know how long a time. That price he adopted and never varied from it. It was tacitly understood that that was the price of their steel rails as fixed by the Lackawanna Company. He testified that no statement (referring to conferences with the president on the prices of other products) was ever made in any of these conferences by the president of a price agreed on with competitors which would be adopted or maintained by the Lackawanna. He did not recall any instance in which he was ever interfered with by an officer of the Lackawanna during the time he was there in quoting such price as seemed best in his judgment to be warranted by business conditions. He does not recall any price ever named by him based on any other consideration than competitive business conditions.

As to the Jones & Laughlin competition, the testimony of the man in charge of the sales (volume 20, p. 8029) is that Jones & Laughlin make steel billets, slabs, and blooms, and convert these into finished products, principally structural material, plates, bars, shafting, chains, spikes, wire, wire nails, tin plate, and black sheets in tin mill sizes. These different products that they have are sold in competition with other makers of similar products. The competition is unlimited. He means unlimited by agreements as to prices. That is true of everything he has mentioned. *He says that this has been so to his knowledge for about nine years.* The competition has been keen. It extends to competition in the matter of prices.

Turning from fellow competitive makers of the same general products as the Steel Corporation, we naturally turn to the testimony of millowners who use as their basic supplies the products made by these large companies and inquire whether, as buyers, they have found any price fixation by these basic manufacturers. As a type of that character, we note the testimony of the president of such a company (volume 20, p. 8050), who, in substance, says:

I should say we were using about 25,000 to 30,000 tons a year in 1901. It has been growing each year. I think last year we purchased something in the neighborhood of 100,000 tons. I know of no other single customer for bar mill products in the United States that buys as much as 100,000 tons. We buy from the Carnegie Steel, the Cambria Steel, the Republic Iron & Steel, the Youngstown Sheet & Tube, and others. We have always found competition for our purchases of bars. Very keen most generally. Of course, there are times in normal business when it is not so keen, times when the consumers of bars are competing to get them. We can generally purchase at a less price than the quotation. That is, the quotations published in the Iron Age or the Iron Trade Review. *I have never observed any indication of a combination or agreement among bar makers to fix prices.* We have always been able to buy on fair competition. I think we have always been able to get the benefit of fair competition.

The general manager of the next largest company of this character in the country (volume 20, p. 7999), speaking of the purchases of his company, in substance, says:

The competition is mainly between the Carnegie and the Republic. Price is one kind of that competition; the ability to handle our particular class of business and sufficient capacity on account of our enormous consumption of bars. We generally contract for our tonnage, and we take bids on that con-

tract. There is competition in the matter of price; in the matter of delivery; and, to some extent, in quality. So far as we know or can find, there is no evidence of price fixing between the companies. We believe there is genuine competition for our business.

The president of a large boiler works and a purchaser of both plates and tubes (volume 20, p. 8015), in substance, says:

We receive quotations on plates from Lukens Iron & Steel Company, Worth Bros., Carnegie Steel Company, Cambria, Carbon, and occasionally Allegheny Steel. They vary. There is a difference in the quotations from the different concerns. There is a range from one to three dollars a ton. We have never observed any evidence of a combination to fix prices among the different concerns that make quotations to us. We feel we get the benefit of a genuine and unrestricted competition for our purchases.

The president of a large bolt and nut industry, the basis of which is rod and bar steel (volume 20, p. 8042), says:

We have been buying from the Carnegie Steel Company, Jones & Laughlin, and the Republic Steel & Iron Company. Before buying bars and rods it is our custom to ask quotations from different makers. We buy two or three times in a year. The quotations on rods vary somewhat in price, about 50 cents a ton. They have been varying in that way to my knowledge since 1904. I never saw any evidence since 1904 of any combination to fix prices on our purchases. We have always got the benefit of competition on both of them.

The manager, since 1901, of the largest single gas company in the country (volume 20, p. 8085), says in substance:

I am familiar with the purchases of iron and steel pipe made by that company since 1901. I decide which bidder shall be awarded the contract. During that period we have got quotations from 13 different companies—there are 11 at the present time we get them from. We let our contracts and award our orders on the competitive basis all the time. The quotations vary, and have done so ever since I have been connected with the company.

The president of a considerable tank manufacturing company (volume 20, p. 8127) testifies as to competition for his purchases, saying in substance:

We buy from the Carnegie Steel Company, Cambria Steel Company, Jones & Laughlin, and have bought some from the Eastern Steel Company, also from La Belle Iron Works. We find prices are nearly uniform from all companies in busy seasons when the mills are busy. When the mills are not busy, we get little concessions from most any of them, not to exceed $1.00 a ton, or something of that kind. I would consider it keen competition. I think we have had the benefit of the genuine, aggressive competition for our business. We have had a range of prices—take three years past, or for ten years—ranging from $1.10 to $1.50, and that I think is competition.

The same open competitive seeking after business of a steel spring company that buys for its basic supplies large quantities of steel bars and billets is shown. Referring to the period from 1902 to 1913, its purchasing agent, in substance, says:

We buy bars from the Carnegie Steel Company, the Inland Steel Company, the Cambria, and the Pennsylvania. The quotations vary. There has been competition ever since I have been connected with my business. We buy billets from most any one that sells—New York State Steel, Carnegie Steel, La Belle Iron Works, Portsmouth Steel, Inland Steel, the Bethlehem, the Pittsburgh Steel Company, and the Republic. The quotations we have received on billets vary very materially. That has been so ever since I was connected with it. So far as I have been able to tell, there has been competition

in the billet business both as to price and on our part as to delivery. I certainly do think we have had the benefit of competition.

The president of a large coal mining company, which uses light rails, testifies (volume 20, p. 8172) in substance:

As a rule we buy on a competitive basis. In Pennsylvania we get quotations from the Carnegie Company, Jones & Laughlin, Cambria Steel, Pennsylvania Steel, and Bethlehem. I should say that under normal conditions there is a range in the quotations all the way up to a dollar a ton. That is when business is normal. There are times when we cannot get quotations from many of those rail companies. That would be times of great prosperity in the steel business. The conditions have been such as I have described since 1901. So far as I know, we get the benefit of real and genuine competition in our purchases of light rails.

The president of a very large jobbing company in semi-finished steel products testified in substance (volume 20, p. 8176) as follows to its purchases being competitive:

"I have been familiar with the business since 1899. We deal in billets and slabs, steel bars, Bessemer iron, basic iron principally; malleable iron sometimes, some little foundry and coke. In the last ten years we have bought semi-finished steel from the Ashland Steel Company, the Portsmouth Steel, the Republic Iron & Steel Company, the Carnegie Steel Company, the Youngstown Sheet & Tube Company, the Allegheny Steel, the West Penn Steel Company, the Cambria, La Belle, Jones & Laughlin, Lackawanna, and Pittsburgh Steel Company. We buy on a competitive basis. It is competitive in a way. We know what the market is. We are not tied up to anybody. We buy outright and buy wherever we can buy the cheapest. There is a variation between the price as quoted at any particular time by the different manufacturers. It has always been so. There is competition in these products. It has always been so, as far as I know.

The manager since 1907, of a factory using various steel products, hoops, bands, angles, channels, sheets, wire goods, etc., which they bought from numerous companies, including the Carnegie Steel Company, shows that the competition and price ranges have been greater in steel than in other metal products. In substance he says (volume 20, p. 8190):

The bids have not been uniform. On the contrary, they have varied. Since we commenced buying in 1907, there was nothing in the bids or offers or the transactions between us and the sellers that indicated any combination or arrangement between the various producers or sellers of the different class of steel products I have testified as to bring about a uniformity of price. The variations in the prices of steel, as a rule, were greater than the variations in the prices quoted for us in copper, ingot copper, scrap copper, pig iron, scrap iron, tin, pig lead, and antimony.

The president of one of the large hardware jobbing concerns in the country, buying large quantities of sheets and plates from several companies, including the Steel Corporation's subsidiaries, in substance says (volume 20, p. 8229):

During the last ten years there seems to be a great deal of competition in sheets. There has not been so much in the sale of tin plate, of course, as in sheets, because there are not so many in the business. With regard to sheets, the competition has manifested itself by a sharp solicitation of our business; and we could always get very low prices from what we might term the independents. The quotations on sheets during the last ten years have been variant. Anywhere from $1 to $3 a ton. The quotations on tin plate have varied. The quotations on tubular goods are about the same as sheets, only

not so much so. The competition in the sale of tubular goods has been keen among the different manufacturers.

Without quoting him at length, we may say the purchasing agent of one of the great Eastern railway systems (volume 21, p. 8568) shows that all the varied steel requirements of the road from a great terminal building to the spikes (with the exception of rail purchases which were made by the president) were wholly in his control, and that there were constant variations in price and active competition for the railroad's purchases in all lines.

The purchasing agent for a Western system (volume 22, p. 9071) shows the same course of virile competition for its purchases.

A large jobber in tin plate, building sheets, and other metals (volume 22, p. 8943) shows that the jobbing trade is done on narrow margins and that active competition is vital. His purchases during the last ten years were from different concerns, including the American Sheet & Tin Plate Company. He says in substance:

There was, so far as I have seen, during the last ten years, competition. There has been competition in these products which I have purchased between manufacturers. It has been of a very active character. They changed their price quotations very frequent. It has been so during the whole period of ten years I spoke of. Sometimes a given concern would be higher and sometimes a given concern would be lower. Our purchases have been based on the lower quotations. The competition in our jobbing trade has been very keen. The margin has been very small. That necessitates our buying as close as possible. At the lowest quotation absolutely. We have done that. That explains our buying sometimes from one and sometimes from the other. That has been the case during the whole ten years.

Another jobber testifies (volume 21, p. 8979) as to competitive conditions in wire during the last ten years. His purchases included the American Steel & Wire and competing companies. He says in substance:

There have been instances where the quotations we get from these concerns have agreed, but very rare. As a rule they vary. What would be termed appreciably; oftentimes to the extent of 50 cents to $3 a ton. I never recall a time when two quotations continued for any length of time to be the same. I am speaking now of the whole period of ten years. I never observed anything to indicate a combination between these manufacturers on prices. There was always competition. They had inducements of some kind to offer in the way of price or delivery.

We have carefully and patiently studied the voluminous testimony varying on the general course of all branches of the steel trade covering the whole time the Steel Corporation has been engaged in such trade. The testimony, as noted above, runs from volume 18 to volume 28, inclusive. It covers proofs by its manufacturing competitors in all branches, and also the different classes of customers whose trade it and its fellow competitors seek. It is apparent that among this latter class (that is, the consumers of its products) we would naturally find evidence of any throttling of competition, of any undue restraint of the steel trade. The typical extracts we have made above from varied sorts of buyers, of varied sorts of products, cover wide ranges of consumers. No one can read these volumes of testimony and fail to be satisfied that this great body of business men, scattered

over all parts of the country, in keen competition with each other in their several lines, is alert in seeing that competitive conditions exist between the manufacturers of basic steel products from whom they buy. And the sworn testimony of these men, who are vitally interested in the maintenance of real competition between the Steel Corporation and its manufacturing competitors that such real competition does exist and has existed during the past ten years, cannot but carry a conviction that such is the case. A study of the testimony of these men, who are close to and vitally interested observers of the prices of these products, shows that a single large concern, by lowering the price of any substantial steel product it sells, can depress the obtainable price. It further shows that the converse is the case—that no single large concern, by raising or even maintaining the price of any substantial steel product, can raise the obtainable price. It further shows that the prices at which actual sales were made during this time in the steel trade depends on whether the consumption of steel was such that the mills were crowded with orders from buyers, or whether buyers were crowded with offers from mills. In other words, if the mills were crowded with orders, there was an increase of competition between buyers and a corresponding decrease in competition between manufacturers. On the other hand, if the mills were lacking in orders, then there was a keen competition between millmen to get orders and corresponding decrease in competition among buyers to give them. The proofs further show that, when there is an increase of orders and a stiffening of prices, steel buyers are apt to buy at once, and this tends to further increase the price, but, on the other hand, buyers are not apt (volume 28, p. 11901) to buy at once when the price grows less, but wait until the bottom is reached, and this withholding of orders tends to accentuate the fall of prices. The proofs further show that in normal times, when ability to fill orders and ability to get orders are in fair balance, prices vary but little, but, as soon as that balance is disturbed, the tendency of prices up or down becomes accentuated, and increased competition follows between the mills, if prices go down, between buyers, if they go up. The study of these proofs, given by both mill owners and buyers of their product, satisfy us that this has been and is the course of the steel trade, and we are therefore justified from the proofs in concluding that the prices at which steel products have been bought from the Steel Company and its competitors have been fixed by business conditions—over demand or over supply. The proofs also show (volume 26, p. 11096) the same conditions and results prevail in the European steel market.

Assuming, then, that the iron and steel trade in the United States is and has been during the time here in question flowing in the natural and normal channel of demand and supply and of genuine competition, we next inquire as to what course the proofs show the Steel Company pursues in reference to such trade; in other words, is its course one of monopoly or in restraint of trade? Let us first ascertain what the practice of the Steel Corporation actually was and is as to prices. Whether that course be right or wrong, whether it be in violation of

the letter or spirit of the Sherman Law, there can be no uncertainty in three things: First, what its policy is; of its having been openly and publicly avowed; and, lastly, of its having been followed. Its avowed general practice in regard to prices is thus summarized (volume 12, p. 4771) by its chairman, Judge Gary, who says:

"The United States Steel Corporation has endeavored, so far as it could, to prevent the unreasonable increase of prices. It has been a decided factor from time to time in keeping prices down to a level which was believed to be fair and just. Prices generally are controlled very much by the business conditions of the country. The ordinary laws of trade and supply and demand fix the general prices of commodities, but the Steel Corporation has endeavored to prevent sudden and violent fluctuations downward by its advice, but more particularly by its own action in fixing its prices, and has endeavored to prevent the unreasonable increase in prices at times when the demand was greater than the supply and there was a general disposition in the trade to take advantage of these conditions and unduly increase prices."

That it has followed this policy is the testimony of both its competitors and customers. Thus a manufacturer of agricultural implements, buying bars and plates both, in Bessemer and open-hearth (volume 20, p. 8314), says:

"Our experience has been that, on advancing markets, the Carnegie Company were as low and frequently lower than competitors, while on declining markets they were generally a little higher."

Another manufacturer, a buyer of structural shapes and other products (volume 24, p. 9963), testifies that when prices are advancing the Carnegie Company is the last one to advance, and when they are declining it is the last one to decline. That this course has an absolute effect in steadying the market, and that every manufacturer buying plain material and fabricating it and being himself a bidder on the work prefers a steady market.

The president of the largest chain factory in the country (volume 21, p. 8763), and who was a large buyer of rods and bars, testifies that in his judgment the American Steel & Wire Company has, in several instances of boom times, prevented a runaway market; that many times manufacturers in that line have told him that, if it were not for the American Steel & Wire Company, the prices would advance, but that they could not get them to advance their prices.

A very considerable Southern hardware man (volume 25, p. 10373) testified that in dull times the Steel Company's prices were higher than its competitors, and that it did not go to the low quotations its competitors did; that this had an effect in steadying prices; that this is a benefit to buyers in that it removes the speculative feature.

Another large Southern hardware dealer (volume 25, p. 10720) and other buyers (volume 23, p. 9483) testify to the same effect. The testimony of competitors is to the same effect. Thus James A. Bowron, one of the leading Southern manufacturers (volume 25, p. 10427), testifies that they always knew what the prices of the Steel Company were; that they did not say their price was one thing and make it another; that their course was eminently conservative and the principal barrier against chaos. He testified that the Steel Company had stood

in its own light in refusing to advance prices when in his judgment the market justified advances. He adds:

"I think, if I had been a stockholder in the Steel Corporation, I would have felt several times that it was failing to earn the money for me that it ought to have done by advancing prices."

The fact of such policy and the reasons for it are thus summarized by Charles M. Schwab (volume 11, pp. 4157, 4158):

"While I was president of the Steel Corporation, I should say that our prices as a rule were somewhat above the other prices in depressed times and below the other prices in prosperous times. In other words, we endeavored to keep more uniform. * * * The theory was that many smaller dealers bought their steel from this corporation that we did not want them to be speculators, nor did they want to be speculators, as it were, in the price of steel; that as a rule they were caught with big stocks when prices were high, and made heavy losses by reason of rapid reductions and the inclination to over-buy when prices were low; and, if prices were kept nearly uniform, people buying steel would buy for their requirements and not speculatively."

The proofs also show (of which volume 26, pp. 11096, 11074, 11248, and 10928, may be cited as examples) that this policy, which is also followed by other large steel manufacturers, largely resulted in doing away with what are called delivery premiums; that is, of postponing deliveries of orders already taken at lower prices and giving the preference to orders taken later at higher prices, which higher prices were in effect obtained under the guise of so-called delivery premiums. The proofs likewise show that the lessening of extremes in the prices of basic steel products greatly benefits mills and factories that further fabricate such articles. Thus (volume 21, p. 8847) one such witness testified:

"Of course, I am only a small manufacturer and perhaps to a certain extent typical of the average small consumer of steel products, but the conditions in the present decade are far more stable and far more favorable to intelligent manufacturing than they were in the previous period. Of course, the fluctuations have been less, and you can calculate on your road which you have to go over with a good deal more certainty. * * * The sudden fluctuations, rising and falling in prices, were very unfavorable to the maintenance of contracts or to intelligent manufacturing. One could not buy and be sure that he could get out with a profit on account of the dips in the market."

The proofs show that the practical effects of this policy are that in prosperous times buyers are apt to buy from the Steel Corporation and in depressed times from its competitors. Whatever the wisdom or unwisdom of such a policy may be, we find no proof tending to show that it tends to monopolize the steel business or to unduly restrain trade or to prejudice the public. There is no proof that it in any way interferes with the right of any other person in the steel business to fix his own price on his own steel product. The proof shows that the Steel Corporation, in the exercise of its own business judgment, has elected to publicly announce its prices, to adhere to them with all buyers alike, and to give timely notice of its purpose to change them. It is neither the duty or the province of this court to express any opinion upon such policy, unless we are satisfied, as laid down by the Su-

preme Court, "that it prejudices the public by unduly restricting competition or unduly obstructing the course of trade," and of this we have no proof. For, as we have seen, the testimony of those engaged in the steel trade is that this policy of the Steel Corporation, in refusing to raise prices, has not restricted competition or obstructed the course of trade, but, on the contrary, has tended to prevent prices from rising to what was aptly termed a "runaway market." And in this connection it is just to note that if the Steel Corporation, in refusing to advance its own prices, prevented other manufacturers from advancing theirs, it was only exercising a veto power (volume 8, p. 3199; volume 6, p. 2144), which every one of many other competitors possessed, and was following a policy which was also followed by other large competitors (volume 6, p. 2108), who were also opposed to advancing prices. It is also just to say that in giving timely notice of its purpose to change them, and in giving publicity to its prices, in adhering to them, it will be seen on reflection that the Steel Corporation has adopted a policy of price publicity and adherence, somewhat analogous to the freight rate stability followed by the railroads under the directions of the Interstate Commerce Commission, which published their rates and only changed them on notice.

We now turn to the other phases of this policy, viz., the corporation refusing to sell at lower prices when prices dropped. That it did so, and that by reason thereof it lost business, which naturally went to those who did lower their prices, the proofs abundantly show. Of its right to refuse to sell at lower prices, provided it does not force others to do the same thing, there can be no question. This brings us to the question: What was the policy of the steel trade prior to 1901 under such conditions, what was its result, and what evils are avoided by this change of policy?

In that regard, the testimony leaves no doubt. We take the Carnegie Steel Company's course in the earlier steel period as illustrative, not only of its policy, but as fairly typifying that of its competitors as well. The cause of falling steel prices is, of course, that there are not enough orders to cover the production, and this leaves two courses open to the steel manufacturer: He must either shut down his mill or go after orders to keep it running. The policy of the Carnegie Company (and in that respect it was the same as others) was to try to keep the mills going, no matter what price they got for their product, or no matter whether their getting such orders meant the complete stoppage of their competitors' mills. Practically applied, this policy meant a fierce, ruthless price-cutting trade war, the practical results of which were that, if these low prices enabled one company's mills to get the orders to run its mills, the taking of these orders from other companies' mills and other sections of the country shut them down. Thus, in Government Exhibit (volume 11, p. 4279) we find a letter from Mr. Carnegie to the Carnegie Steel Company, embodied in its minutes, reciting such policy:

"In the former depressions we announced our policy, viz., take all orders going and run full. Our competitors believed we meant what we said, and this no doubt operated to clear the field. One after another dropped out; finally Pennsylvania Steel dropped out and only a few remained who could meet the lowest prices."

In volume 11, p. 4266, another letter of Mr. Carnegie to his company is given in evidence in which he says:

"My view is that sooner or later Harrisburg (Pennsylvania Steel Company), Sparrows Point (Maryland Steel Company), and Scranton (predecessor of Lackawanna Steel Company) will cease to make rails like Bethlehem (Bethlehem Steel Company). The autumn of last year seemed as good a time to force them out of business as any other. It did not prove so. The boom came and cost us a great deal of money."

The policy of taking orders, even without profit, was the destructive competition of that era. "To keep running [Government Exhibit, vol. 3, p. 1036], not to make profit, is the point we should steer to," was the direction to the Carnegie Steel Company. "Take every order, otherwise we come to a stop and only feed competitors who would close if we went to rock prices." Such being the policy, the proofs leave no doubt as to its effect. Mr. Schwab (volume 11, p. 4191) testified: That the destruction of the small and weak (competitors) was a practice not unknown in the old days. It was rather extensively carried on. It was at times with quite effective and marked results. That he did not know what percentage of them emerged from the steel wars in the old days. Not many. There were more gravestones than live competitors. That (page 4155) they did everything they could to secure all the business they could secure, regardless of the price at which they secured it. That it was pretty hard on the competitors at times, but that was their policy and one that it was very difficult to break away from.

Speaking of that policy, Judge Reed (volume 14, p. 5671) says:

"The policy of the Carnegie Company was to go out and get business, to take it wherever it could get it, and keep its mills running full, and run regardless of the feelings or prosperity of its competitors."

The result of the rail-cutting prices, as testified to by Walter Scranton of the Scranton Iron & Steel Company (volume 8, p. 3200), was that the price of rails was forced down to $14 a ton; that this was below the cost of manufacture; that, as a result of this war, his company was driven to abandon their mills at Scranton; and that wages were forced down to the lowest they had been for years. And as a practical example of this era of trade war competition and ruinous price-cutting, we have the testimony of Frank S. Witherbee, who, referring to the Troy Steel & Iron Company (volume 18, p. 7296), says:

"The Carnegie Steel Company drove that company out of business. It drove it out of existence, not by the use of the ores. I think the cost of pig iron was lower at Troy than it was at Pittsburgh. It drove it out of the business by its policy of going to our customers and telling them to get the best price they could from us and they would name 50 cents a ton lower."

Referring to one of these ruinous trade wars between two large steel companies, Powell Stackhouse, president of the Cambria Steel Company, which was not one of the participants, testified (volume 4, p. 1706):

"Q. How nearly can you fix the time of what you called the Gates and Carnegie row?

"A. That was somewhere in the '90's; in the latter part of the '90's.

"Q. About 1897, or somewhere along there?

"A. Somewhere along there; from 1895. I would not be sure of that.

"Q. And that was followed, I judge, from what you say, by rather a fierce trade war lasting a year or two?
"A. Yes; in all lines of steel.
"Q. In all lines of steel?
"A. Yes, everything. As a result of that, there was the keenest competition and steel was sold, bar steel, at, I think, less than nine-tenths of a cent.
"Q. And it cost more than that to make it?
"A. Yes; a good bit more.
"Q. And the consequence of this was very serious to the trade, was it not?
"A. It was serious to everybody in the trade. It was very serious, for intance, to the warehousemen, that had some thousand or more tons of steel, or whatever they might have on hand. Their stocks were probably reduced from one or two cents a pound way down.
"Q. That warfare left a trail of ruin?
"A. Yes; it did.
"Q. There were a great many failures on account of it?
"A. Yes.
"Q. And general business disaster?
"A. General depression.
"Q. And business disaster?
"A. Yes, sir.
"Q. And failure and bankruptcy?
"A. Yes, sir.
"Q. (continuing) —were the direct effect of it, were they not?
"A. Yes.
"Q. You had had trade wars before, I suppose, had you not?
"A. Yes.
"Q. But none so severe as that?
"A. None so severe as that.
"Q. But they were always attended with injury to the business, and especially to the warehousemen or middlemen, were they not?
"A. Yes, sir. The middleman had bought and had his material on hand, and, overnight, by the price falling a few dollars a ton—
"Q. (interposing) He was ruined?
"A. He was ruined in some cases. Some of them carry very large stocks.
"Q. The effect, I suppose, of such warfares, and particularly the Gates and Carnegie warfares, was felt mostly by the weaker concerns in the business?
"A. We all felt it.
"Q. You all felt it, but the stronger ones weathered it?
"A. Certainly.
"Q. And the weaker ones all went to the wall?
"A. They were weakened so that they gradually dropped out.
"Q. They gradually dropped out?
"A. Yes, sir.
"Q. So the effect of that was not confined to the manufacturers, but was felt even more by the warehousemen and jobbers, was it not?
"A. Yes. They could measure their loss at once. If they knew what their inventory was and the difference between what they paid and what prices had fallen to, they could measure their loss at once.
"Q. What about the retailers? What was the effect on them?
"A. The same thing. Anybody that carried a stock of steel or iron on hand, if the value of that stock was reduced $5 or $10 a ton, just simply had to write off that amount."

Indeed, the general competitive policies of the steel companies toward each other is well summarized (and this summary is justified by the proofs) by the chairman of the Steel Corporation, who (volume 12, p. 4777) says:

"On the other hand, in olden days, the rule in this country was different in this line of business. I have no doubt the suggestion of Mr. Carnegie, which was read in court a few days since when I was present, represented

not only his views, but the views of his associates, and the views generally held amongst those who were in charge of the iron and steel industry of this country. There was a competition that was bitter, fierce, destructive. If it did not absolutely drive competitors out of business, it so harassed and injured them as to prevent them from extending their business, or from taking advantage of their location, and at times compelled them to close their mills, discharge their employés, and disrupt their organization, and, in fact, was a competition that, in the opinion of those in charge of the United States Steel Corporation, I might say the opinion of those in control of the industry generally in this country at the present time, was calculated to destroy, to injure instead of build up, to prevent extensions of trade, to limit the capacity or the opportunity of many who were engaged in the trade."

In that connection, and in corroboration of what the chairman says, the testimony of others (Reed, volume 14, p. 5692; Roberts, volume 13, p. 4997; Farrell, volume 10, p. 4058) should be noted. This is summarized by Robert Bacon, who (volume 14, p. 5494) says:

"The facts are that the policy of the company from the beginning has been to change the old method of dealing with competitors. Judge Gary, who has done more for the United States Steel Corporation in its development and the benefits it has brought all hands than any one man since its formation, has made it a cardinal point of his policy, and has tried his best to inculcate it upon all the subcompanies that there was a new order of things, that there were new rules of the game in dealing with competitors, as well as in other human relations. Judge Gary has talked from the very first and has tried to compel the actions of all the others in the corporation toward dealing fairly and decently with competitors, as being the only way in which any kind of stability in prices or of conditions could be maintained. He has, from the beginning, preached and practiced the fairest kind of dealing with his competitors, keeping them informed, as far as he legitimately could, of all the conditions of the Steel Corporation, and by doing so has gradually acquired a degree of confidence that in my opinion has never existed before amongst competitors. The old conditions have changed; the old destructive and ruinous and ruthless warfare of the early days of the iron and steel industries has disappeared; by reason of the attitude of Judge Gary more than any one else, a condition has been produced among competitors in the iron and steel business, and, I believe, in many other industries, that never before existed."

And in that connection it should be noted that no testimony has been produced in this record that a return to the old trade war system of ruinous competition would, as a matter of fact, benefit the public interests. On the contrary, the proof is that present business methods and ethics are more to be desired. As expressive of the view of those in the steel business who are not connected with the Steel Corporation, we may note the testimony of the president of one of the largest steel castings companies in the country, who (volume 20, p. 8067) says:

"Before the formation of the Steel Corporation, business ethics, I might say, were in very bad shape; competitors had no confidence in each other; they resorted to subterfuges, misrepresentation, and false statements. That same lack of confidence existed between sellers and many purchasing agents. It was a very undesirable condition in which to do business. For the past seven or ten years (in later times, at any rate) all that misunderstanding or misgiving has been displaced by manly, straightforward dealing. I do not think it could have been brought about without the Steel Corporation's influence and example. The benefit of that example has extended into collateral industries like ours. I have noticed an improvement in the competition of our own business in an ethical way. We still have the competition, but we do not try to misrepresent or tell lies any more. We are honestly friends now. Then we pretended to be friends, but were the bitterest enemies. It appears to be an improvement that pervades the entire steel line, and being

the largest unit, the most influential unit, and setting a commendable example, has led us all to realize that it is a betterment."

A study of these proofs satisfies us that, apart from all ethical questions, the strong trend of the steel business at the close of the last century was toward driving competitors out of business by cutting prices, and that the business policy inaugurated by the Steel Corporation (volume 14, pp. 5670–5673; volume 13, p. 5218; volume 12, p. 4777; volume 14, p. 5717), and in which policy its competitors subsequently followed, has resulted, in the ten years of its existence: First in a more general division of business between all competitors in the steel business than under the older system; second, in tending to minimize the shutting down of its own and its competitors' plants in times of depression; third, it has made steel products nonspeculative, and has therefore benefited all dependent iron and steel manufacturers by enabling them to have a steady, nonspeculative supply of those basic steel products on which their plants depend for operation. The evidence on which these conclusions are based is corroborated by the business facts and business results in which we now summarize in the working out of this policy for ten years by the Steel Corporation and its competitors. During that time the business of both competitors and steel company has increased very largely, but it is highly suggestive, indeed, conclusive, proof that the Steel Company had neither monopolistic control or power to restrain trade, since the proportion of trade increase was very materially greater on the part of the Steel Corporation's competitors than its own. These significant figures prove that mere size, or bigness of business, is not necessarily a monopoly of business at the expense of all others engaged in it. And in that connection, and as aptly expressive of our views, we may quote with approval the language of Judge Hook of the Eighth Circuit, in his concurring opinion in the Standard Oil Case (C. C.) 173 Fed. 196:

"Success and magnitude of business, the rewards of fair and honorable endeavor, were not among the evils which threatened the public welfare and attracted the attention of Congress. But when they had been attained by wrongful or unlawful methods, and competition has been crippled or destroyed, the elements of monopoly are present."

In the most important element of steel rails, an item on which great stress has been laid as a most important factor of monopoly, and control of prices, we find that, in spite of the general increase of rail production, the Steel Corporation's relative proportion of rail business has fallen off nearly 8 per cent., while its competitors had increased correspondingly. In the great basic item of steel ingots, on which the great bulk of steel manufacturing rests, while the Steel Company's ingot business increased 44 per cent., its competitors ingot business grew nearly three times as fast, viz., 137 per cent. To say that any monopoly of ingots existed when this bill was filed, that it now exists, or that it can exist, is simply to run counter to the testimony of ten years' business experience and to the evidence in this record. In the great item of structural shapes, which enter into bridges, building, and other common uses, while the business of the Steel Company in these years increased nearly one-half, to be exact 42.7 per cent., its competitors have,

during these years, gone ahead nearly four times as fast, 164.4 per cent., and in that connection it will be observed, as heretofore shown, that a large part of the increase of the Steel Company's structural product was in the foreign, not in the home, market, in which latter market it has more than 300 fabricating competitors. Practically the same proportions exist in wire rods, the basic of wire fences, and other articles of wide-spread use. In wire rods, the Steel Corporation has increased its business 49.7 per cent.; its competitors 182.2 per cent., nearly four times as fast. So also a monopoly of the tin plate industry was feared, while the outcome shows the Steel Corporation has in tin plate and terne plate increased 63 per cent., its competitors have increased threefold as fast., viz., 186 per cent. So in the pipe industry. Instead of their being a monopolistic and exclusive growth, there has been a relative retrogression, for while the pipe business of the Steel Corporation has largely increased (in wrought pipe 36 per cent. and in seamless tubes 100 per cent.), its competitors have increased nearly six times as fast (in wrought pipe 209.9 per cent. and in seamless tubes over seven times as fast, 750 per cent.). In the item of pipe alone, it has already been noted in the testimony of the general manager of a great gas company that, as a buyer of pipe, it enjoys active competition between 13 concerns.

These facts and figures conclusively answer the charges of monopoly and restraint in the home market. We are therefore justified in answering in the negative the question to which the foregoing part of this opinion is addressed, namely, Was the United States Steel Corporation, at the time this bill was filed, then prejudicing the public interests by unduly obstructing the steel and iron business of the United States?

[3] We turn next to the steel and iron trade with foreign nations and address ourselves to the second question, namely, Was the United States Steel Corporation, at the time this bill was filed, then prejudicing the public interests by unduly restricting or unduly obstructing the steel and iron business with foreign nations?

In taking up that question, it is to be noted that the entire foreign business here in question is now carried on, not by the Steel Corporation, but by a subsidiary of the Federal Steel Company (volume 10, p. 3775), called the United States Steel Products Company. This company was formed in 1903, and the Federal Steel Company is the owner of its stock. This Products Company is not made a party to this bill, and there is no prayer for its dissolution. All other subsidiary companies of the Steel Corporation are made parties, and their dissolution in many cases prayed for. Whether the omission of the Products Company from the bill, and the absence of any prayer for its dissolution, was an omission, or was advisedly done, with the purpose of conserving its foreign trade, does not appear. But the absence of a formal prayer for the dissolution of the Products Company is, however, of no practical importance, for the continuance of such foreign trade of the Products Company is manifestly dependent on the manufacturing facilities, the product diversity, and the financial ability of the Steel Corporation. If, therefore, the Steel Corporation be dissolved by this court, the Products Company will be divested of the practical commercial

power of continuing its foreign trade, since the proof is (volume 10, pp. 3844–3879) that 80 per cent. of the goods it sells necessarily (volume 6, p. 2215; volume 12, p. 4731) comes from the Pittsburgh District in which the Federal Company has but little production. If the Federal Company be also dissolved, then the Products Company will, of course, be left without any mills or plants which are so located (volume 10, p. 3829) as to do export business, but 2 per cent. of the Federal Steel Company's product now going (volume 10, p. 3829) into foreign trade. So that the foreign trade of the Products Company, if acquired and held in violation of the Sherman Law, can be as effectually ended by a dissolution of the Steel Corporation, or the Federal Steel Company, as though the Products Company had been made a party to this proceeding and its dissolution prayed for and decreed.

It is apparent that the monopolization and restriction of foreign trade must, in the nature of things, consist of either taking away from others a foreign trade which already existed, or if such foreign trade was not in existence, then in building up or maintaining such foreign trade by preventing or restraining others from entering it.

Now foreign trade is not a mere general, theoretical abstraction of selling abroad, but is a concrete, definite, commercial business proposition in iron and steel. We have our domestic trade, which consists in supplying domestic use or consumption. And such domestic use necessitates one having or taking to the market where his customer is located the articles the latter wants to buy. It goes without saying that if one man has a wire mill at Pittsburgh situate near another man's billet mill, and that billet mill has in its warehouse at all times an ample supply of billets to run the wire mill (the proofs, volume 10, p. 3773, show 18 different analyses of such billets are required), the wire mill owner will prefer to deal with, and will deal with, the billet mill in Pittsburgh in preference to dealing with one at Chicago. And this is so, because freights are eliminated (volume 10, p. 3987); uncertainties of railroad transportation are avoided; if materials prove faulty or not of the right metallic character (volume 10, p. 3773), the mischief can at once be remedied. Of course, if the Chicago mill, from any motive, chooses, either from overproduction, business needs, or other causes, to offer the wire mills at Pittsburgh billets at a lower price than the Pittsburgh mill, a sale might be made; but this occasional purchase could and would result in no established, normal trade between the Chicago billet mill and the Pennsylvania wire mill. The only way such normal trade relation could be established would be by the Chicago manufacturer locating a permanent stocked warehouse near the Pittsburgh wire mill. If its cost of production was so low and it could pay the freight from Chicago to Pennsylvania, and could furnish in quality, quantity, and price the same product as the Pittsburgh mill, then, and then only, could it hope to have normal, continuous trade with the Pittsburgh wire mill. We take this homely but suggestive illustration to emphasize what the proofs show are the demands and requirements in foreign iron and steel markets which confront an attempt to enter them, and that such market is not to be held by the mere occasional shipping of goods to foreign countries. Moreover, in considering the possible range of for-

eign iron and steel markets for American iron and steel, there must first be excluded from that market, Germany, France, Austria, Italy, and Russia. The proof is (volume 10, pp. 3846, 3847) that the tariffs of each of those countries prevent the sale there of American iron and steel. The proofs also show (volume 10, pp. 3827–3849) that the attitude of the English public and the hostility of English labor organizations toward American iron and steel likewise prevent American iron and steel products entering England, save wire fences, the manufacture of which is only now being taken up there. It follows, therefore, that the iron and steel trade of the United States with foreign nations must be largely built up in other parts of the world, and such has been the outcome of the efforts of this company as shown by the proofs. Referring to trade in such nations as are not closed to the iron and steel business by their tariffs, these in a general way are the steel markets of Asia, Africa, the British Colonies, all South America, Cuba, and Mexico. But while these markets are open, they were, when the Steel Corporation was formed (volume 10, p. 4125)—

"practically pre-empted by foreign manufacturers and foreign merchants; that is, principally continental concerns, English concerns, as well as having branch offices and warehouses in all of the consuming markets of the world. It was a very difficult thing to enter those markets. The European manufacturers had been established in the markets of South America, Asia, Africa, and the Orient, some of them over 50 years. There was not only a prejudice, but a hostility, in most cases against newcomers in the trade. In order to get a foothold in these markets, we usually had to sell below the prices of the concerns that were established there, and who had their customers and native salesmen, and all the advantages that go with a long occupation of a business in any foreign country. It is more the custom in foreign countries than it is here for people to attach to themselves customers that buy from them regularly."

Moreover, the proofs (volume 10, p. 3842) show, and such would seem to be the manifest commercial fact that:

"It is impossible to develop a foreign business unless it is done continuously. Buyers will not patronize people who are not in a position to give them a continuous source of supply."

Without entering upon a discussion of other matters, it suffices to say that, not only were these foreign markets pre-empted and tenaciously held by foreign manufacturers, foreign merchants, and foreign bankers who refused to finance importing enterprises there unless there was (volume 10, p. 3833) a stipulation that all materials should be brought in such bank's own country, but the markets required the maintenance of varied lines of products, the only way to supply which varied lines was by maintaining varied lines of finishing mills at home and the maintenance of large warehouses (volume 13, p. 4974; vol. 11, p. 4139) abroad. The proofs in the case show that in 1901, when the Steel Company was formed, with the exception of wire exportations—which for various reasons (volume 10, pp. 3792–3790–3791) was not broadly successful—there was no iron and steel trade of an established or continuous character between American iron and steel manufacturers and foreign nations. It is true there were spasmodic exports which at times amounted to considerable volume, but they were not continuous or sustained, and they resulted in no established trade or dealing. In-

deed, in many cases the nature of this spasmodic trade (volume 10, p. 3842) was such as to create a hostile feeling toward any subsequent effort on the part of American iron and steel trade to enter the same foreign market. The proofs show that at that time and for many years previous, so long as the demand of the home market was sufficient to absorb their product, our iron and steel manufacturers made no effort to sell their output abroad. When, however, the reverse was the case, and they had on hand a surplus product for which there was no domestic trade, they went into the foreign market and tried to get rid of such surplus product there. The European and American steel and iron market being inter-related (volume 28, p. 12013), the proof is that, in addition to paying the freight to get his goods to the foreign market, the American manufacturer had, in order to get customers away from the foreign manufacturers who were already in possession of such trade, to cut the price when they sold in the foreign market. This spasmodic course grew to be known in the steel business as "dumping" (volume 10, pp. 3843, 3846, 3993), and may be well likened to the bargain sales by which a merchant seeks to dispose of a surplus stock which he cannot sell at normal prices. It will, of course, be obvious that a manufacturer could not continue such low-price dumping any more than a merchant could dispose of all of his stock—instead of his surplus stock—at bargain prices. The proofs (volume 26, p. 11096) show the same course of dumping abroad in times of depressed markets was followed by European steel manufacturers in our market. The then status of American steel manufacturers is shown by the proven experience of the Carnegie Steel Company. It was the most aggressive of any of the steel companies to enter foreign trade, exporting 70 per cent. of the then steel exports (volume 11, p. 4345). The Carnegie Company's location, facilities, and freight rates enabled it better than most other companies to enter foreign trade, and from its works, as the foreign trade of the Steel Corporation developed, such trade to the extent of (volume 10, p. 3845) 24 per cent. of the entire product of the Carnegie Company goes into such export trade. It will therefore appear that the Carnegie Company can be fairly regarded as the best fitted of American steel companies to compete for export trade. Referring to that time, the president of that company (volume 11, p. 4139) testified:

"We had made spasmodic attempts at it. In dull times when business could not be secured at home, we would make attempts at foreign business by going in and making an unusual price, which was the only way that any foreign business could be secured then, inasmuch as we had not an established business or business connection, and therefore customers were not inclined to buy from a firm who could only furnish them occasionally."

The relation of the Carnegie Company to foreign trade is shown by its minutes, etc., as they appear in Gov't Exhibit, vol. 3, p. 1134. From the proofs in the case three things seem settled, namely: That when the Steel Corporation was formed American steel manufacturers had no real dependable export trade abroad; that such sales as they made were spasmodic, made with a view to dumping surplus product; and such sales were secured by underselling the European market when they had no home market. It will also appear that being ex-

cluded by the steel tariffs of Germany, France, Russia, Austria, and Italy, and by other causes from England, such dependable foreign markets as were open for them to build up, as will be seen later, had to be found in other parts of the world. This summary of the situation is warranted by the study of the proofs.[1]

Seeing, then, that when the Steel Corporation was formed, no such volume of foreign trade in steel existed; that the acquisition of any part, or indeed the whole of it, could constitute a restraint of trade with other countries; and seeing that the foreign trade which the Steel Corporation had during its earlier years had increased from approximately $31,000,000 to $91,000,000—we turn to the next question, Did the Steel Company acquire this original or additional trade by monopolizing or restraining foreign trade, or attempting to do so; or, on the other hand, was its acquisition the natural and normal growth of fair business effort? We have said the foreign trade of the Steel Company in 1911 was $91,000,000, but of that amount some $30,000,000 is really not solely its own, but was shared by it with other American steel manufacturers. To explain, it will hereafter appear that in the develop-

[1]We may add that, wholly apart from the record, a reading by us of books, articles, and addresses on the subject of foreign trade satisfies us that the evidence of those who have in this record testified on the subject are in harmony with the views expressed in current literature of the steel trade. From that reading we have selected, as expressive of the then attitude of the American steel trade toward the foreign market, an article by James M. Swank (whose reports of statistics, Defendant's Exhibit, vol. 3, p. 145) have been received by all parties to this record as reliable). In an article on the Future of the American Iron Trade, in the Engineering Magazine of 1895 (volume 10, p. 613), Mr. Swank says:

"Except in periods of excitement, like that which prevailed last summer, our capacity for the production of iron and steel will be greater than the home demand. This fact, joined to the cheapening of all iron and steel products through competition, has led many of our manufacturers to look to foreign markets to absorb our surplus products or to employ our surplus capacity. An examination of our export statistics for many years shows that this is a delusive hope."

Mr. Swank then takes up our iron and steel exports for many years. He shows that during the 15 years following 1870 there was no progress whatever; that during the next six years it increased rapidly when a decline began, followed the next year by a slight increase. He called attention to the fact that, included in our iron and steel exports have been a number of things, such as machinery, boilers, hardware, sewing machines, saws, tools, locomotives, etc., which formed the principal part of our iron and steel exports; that out of $30,000,000 in the aggregate of such exports, less than $400,000 was pig iron; that plates and sheets were less than $200,000; that nails only amounted to $500,000, and iron and steel rails about the same amount, ending with this statement: "The other products of our rolling mills and steel works forming an infinitesimal part." He then says:

"It is evident that our iron and steel manufacturers as contradistinguished from the manufacturers of machinery, hardware, saws, tools, sewing machines, locomotives, and other finished articles have little to hope for in foreign markets under present conditions or those which have recently prevailed."

The conclusion of his whole article is this: "It follows from what has been said that American iron and steel manufacturers must look almost entirely to their own country for the employment of the productive capacity of their iron and steel works, and that, if this capacity cannot be properly utilized, some of it, as in the past, must stand idle or be abandoned. The fittest works will survive. For these there will be sufficient employment."

ment of a foreign steel trade, the Steel Corporation has established agencies, warehouses, freight communications, and other exporting agencies in many of the markets of the world. As we read the testimony (volume 11, pp. 4471, 4472), in reference to this $30,000,000 of foreign trade, it seems that if an American manufacturer of steel finished products, for example, locomotives, oil tanks, gas tanks, cars, etc., had an inquiry, or desired to make a bid to furnish such goods in some foreign country, where such manufacturer did not have, but the Steel Corporation did have, a representative, the Steel Corporation would, on request, ascertain and report to the American tank manufacturer what price he would have to put on his tanks, etc., to get into the desired foreign market. The ability of the tankmaker to meet such foreign competitive price in the prospective buyer's market depended, amongst other things, on two items—the cost of the sheets from which his tank was made, and the freight cost of delivering the tank. In case the current prices of such sheets in the American steel market were such that the tankmaker could not sell his tank low enough to compete with the foreign bidder the Steel Corporation would agree to furnish the plates at such lower price as would enable the tankmaker to underbid his foreign competitor. This price reduction, coupled with the fact that the Steel Corporation would forward the tanks with its own freight, enabled the tankmaker and the Steel Corporation to thus jointly sell the tank, which neither could do alone. By such operations, where it made the basic material, but did not make the finished article, the Steel Corporation, in 1911, thus did $30,000,000 in trade abroad in finished steel products in co-operation with other American manufacturers. The proofs show that this course of price reduction was followed in order to induce American manufacturers of finished steel products to co-operate with the Steel Corporation in extending the latter's foreign trade. The uncontradicted proof in that regard is that these foreign reduction prices thus given to American manufacturers to enable them to compete in the foreign markets were open (volume 11, p. 4472)—

"to all comers; anybody that wanted to develop a foreign business received our assistance, not only in the way of special prices, but we would lend him a salesman in a foreign country and place our office at his disposal and help him in every way to build up a foreign business * * * (volume 10, p. 3835). Our office is an encyclopædia for the manufacturers of the United States, particularly in iron and steel and those collateral lines. We have never hesitated to give information with regard to conditions in countries, and the credit of people whom we may have been doing business with, and especially facilities and information generally with regard to tariffs in countries and railway facilities for internal distribution generally. * * * (volume 10, p. 3836). I had prepared under my direction a list, I think, of about 158 manufacturers to whom we have made a special allowance in order to enable them to develop a foreign business."

The proofs show (volume 10, p. 3848) that this large volume of business, termed by the Steel Company "re-export" business, and amounting, as stated, to $30,000,000 in 1911, was shared in by 158 other firms or companies, and in making such re-export articles from 15,000 to 18,000 men were employed. The proof is (volume 10, p. 3885) that on ocean freights the Steel Corporation had no rebate or advantage over

its competitors. It will be observed that in thus reducing the price of basic steel materials to enable manufacturers to enter the foreign markets, the Steel Corporation has pursued the same helpful course of lower freights for exports which the Interstate Commerce Commission has, since 1903, approved of the railroads doing. In that regard the proofs show (volume 11, pp. 4474, 4475)—

"if a shipment is made from Pittsburgh to New York under a bill of lading beginning and ending with Pittsburgh and New York, that where it is known that it is going to be exported the rate is less than when it is known it is going to stop in New York; the tariffs are published. * * * There is an export rate and a domestic rate, and the government has encouraged the export business to the extent of permitting the Interstate Commerce Commission to make export rates. The export rates have been in effect since 1903."

And we may add the proofs (volume 10, p. 3933) show that the Interstate Commerce Commission has gone to the extent of differentiating among different articles for export, making freights on export rails lower than on other export articles. We may here say that the Interstate Commerce Commission and the railroads in thus co-operating with the Steel Corporation, and these other manufacturers in allowing lower freights from interior points to the seaboard on goods intended for export, has followed the policy adopted in European countries. In that regard the proofs (volume 28, p. 12037) show:

"The German government and the German railroads help for the export of finished products, but they charge the full domestic rate for any finished product that is imported."

Passing on, then, from this $30,000,000 of the foreign trade which the Steel Company has created for itself by inducing domestic consumers of its basic products to jointly enter into a foreign trade, and considering the other foreign trade, $60,000,000, which is its own, we examine the evidence as to whether the creation and building up of this, its own foreign trade, involves monopoly or restraint of trade. This becomes all-important, because the Steel Corporation contends that the creation and building up of a foreign steel and iron trade was one of the controlling reasons that led to its formation, and not a purpose to restrain or monopolize interstate home trade. In that regard the contention of the Steel Corporation is that no such foreign steel and iron trade could be built up without the large resources of the Steel Company (volume 10, pp. 3790, 3791), and the varied products which the integration and combination of its units alone made possible. The mere statement of this contention shows its importance, for if the twofold purpose of this statute is to foster and protect trade, both foreign and interstate, and if foreign trade cannot be increased without some such mechanically varied and financially strong agency as this Steel Corporation, then manifestly such agency is not a violation of a statute whose purpose was to permit—not to prevent—the normal, natural and to be desired development of unrestrained, unmonopolized trade, both foreign and domestic. In taking up this question, we dismiss once and for all the question of mere volume or bigness of business. The question before us is not how much business was done, or how large the company that did it—the vital question is, how was the business, whether big or little, done—was it, in the test

of the Supreme Court, done by prejudicing the public interests, by unduly restricting or unduly obstructing trade? The question is one of undue restriction or obstruction of trade, and not of undue volume of trade. If mere size were the test of monopoly and trade restraint, we have not one, but a half dozen unlawful monopolies in the large department stores of a single city. If a manufacturing and selling business, fully equipped for its local market, extends its operations to cover a state, its business, its facilities, its capital, must grow larger. If it is to cover nations, it must be larger still. These plain facts simply buttress the holdings by courts that the normal and necessary expansion of business to any size is not forbidden by the Sherman Law, unless such expansion is accompanied or accomplished by an undue retrain or obstruction of trade. For, as said by Mr. Justice Day in Flint v. Stone Tracy Co., 220 U. S. 166, 31 Sup. Ct. 342, 55 L. Ed. 389, Ann. Cas. 1912B, 1312:

"The possession of large assets is a business advantage of great value; it may give credit which will result in more economical business method; it may give a standing which shall facilitate purchases; it may enable the corporation to enlarge the field of its activities and in many ways give it business standing and prestige."

Turning, then, to this foreign trade, we find that in 1901 the Steel Corporation did a foreign trade of $31,000,000, and in 1911 of $91,000,000. This (volume 10, p. 3847) was 90 per cent. of the foreign iron and steel trade of the country. On the one hand, it is charged that this foreign trade was acquired by violation of the Sherman Act; on the other, that it is the normal and natural result of lawful business, commercial foresight, and persistent effort. To determine these contentions from the evidence, we now address ourselves. Of the purpose of this corporation to create and possess this foreign trade, there can be no question. So that, if it was illegally done, the company cannot escape the legal consequences. Its avowed purpose to enter into and acquire foreign trade in iron and steel is shown by the corporation's own proofs. Gary, volume 12, p. 4733; Reed, volume 14, pp. 5658, 5562, 5563; Bacon, volume 14, p. 5476. Indeed, in outlining the plan and scope of the operations of the Steel Company, whose formation he was then advocating, its first president (Schwab, volume 11, p. 4139) says:

"I enlarged and perhaps made a more strenuous talk to Mr. Morgan upon the subject of export, and our ability to export, and foreign business in foreign markets, than any other, excepting only the economic advantages to be derived."

Indeed, that the Steel Corporation was largely formed, that its large financial resources were designed and the varied lines of its constituent manufacturing units were bought to enable it to successfully enter foreign trade, is shown by the proofs. Thus (volume 11, p. 4321), referring to his talk with Mr. Morgan, Mr. Schwab says:

"I expected, naturally, to increase the foreign trade very much. May I explain what I mean by my development of foreign trade? I said before that this business could only be practically and successfully developed by works having a complete line of steel products, and that was one of the things to be gained by this organization.

"Q. And in taking this up with Mr. Morgan you presented that?
"A. That was one of the things I urged."

The fact that the development of the foreign trade necessitated a wide diversity of products, that this product diversity was to be obtained by the Federal Steel Company acquiring a number of mills making such diversity of products and completely integrating itself, is shown by the proofs. Referring to carrying out the general plans which he and Mr. Morgan outlined for acquiring such properties, Judge Gary (volume 12, p. 4733) testified:

"Q. Now, what were the subjects considered by you gentlemen, directors of the Federal Company or owners of the Federal at that time, and on account of which, or after considering which, you reached the resolution you mention?
"A. The question of securing the Carnegie properties, with their ore reserves, which contained a class and character of ore in large quantities which the Federal or the Minnesota Iron did not have, particularly their mills for diversified product, their location and their organization, which was believed to be a very good one, and if possible, the acquisition of other companies owning finishing mills, in order to diversify the product, including the Wire Company, which had been offered to us a number of times, and for the purpose, as I have said, of completing a rounded out proposition, for the development of the business, extension of the business, manufacturing at lowest cost, and, particularly, increasing the extent of export business."

And that such foreign trade demanded such wide diversity of product as could only be supplied by a company which was broadly integrated to manufacture such diversified supplies is shown by the proofs. In that regard, a witness of long experience in foreign trade (Farrell, volume 10, p. 3790) says:

"Q. What is the nature of your customers in foreign countries? Do you sell merchants or directly to consumers, or both?
"A. We sell to merchants, consumers, and manufacturers.
"Q. Is there any advantage in selling to merchants to have a diversified line of product?
"A. A great advantage. That is the reason why we have been able to develop our business, because we could offer them a diversified line of products from one source.
"Q. From your knowledge of the business and of the way it is done, what would you say as to whether or not the different constituent members of the Steel Corporation could all together have developed such a foreign trade as has been developed by the corporation, if they had remained separate and distinct?
"A. It would have been utterly impracticable or impossible. We had had an exemplification of that at the Pittsburgh Wire Company, where we were obliged to confine our exports to two or three different products, because of the necessity of having facilities to deal with certain lines of business. * * *
"Q. Take, for instance, the American Steel & Wire Company, as an economic proposition, as a business proposition; will you state whether or not it would have been feasible, or possible, for the American Steel & Wire Company to maintain agencies in the various countries as stated on Exhibit 39?
"A. It would have been impossible owing to the cost.
"Q. What would be the fact as to the Carnegie Steel Company in all these countries?
"A. The same thing would apply to the Carnegie Steel Company, even to a greater extent because of the character of their product, which is not as widely consumed as wire products and sheet steel products, and some of those others except in the case of some coarse products.
"Q. What influence, if any, does the offering of one class of steel products have on the sale of another?

"A. In the export markets, we say that one product sells another; that is, by having the great range of products, the buyer has an opportunity to order practically all of his requirements. Frequently these people will charter their own sailing vessels and load them themselves. They want to buy everything they can."

That this is a correct business estimate of the demands of the foreign market is corroborated by the testimony of the president of probably the most widely diversified range of finished steel products company in this country, who (Simmons, volume 23, p. 9403) says:

"Q. In what way has your ability to carry on a foreign business been affected by the fact that you have a full line consisting of many kinds of edge tools and cutlery?
"A. Without that, we would have practically no business abroad.
"Q. Why is that?
"A. Because no one line or one item in the line would be sufficient to interest the foreign buyers. It is the completeness of the line under one brand and one uniform quality that they seem to take an interest in.
"Q. That is, they buy full lines of you, do they?
"A. Yes, sir."

Of the fact that this policy of foreign trade expansion was as such entered into by the company and has since been pursued, the proofs are full. Roberts, volume 13, p. 4969; vol. 11, pp. 4147, 4148. A most experienced man of one of its constituent companies, the American Steel & Wire Company, and who had developed its foreign wire business, was given absolute charge of the development, along the lines previously advocated (Schwab, volume 11, p. 4147; Farrell, volume 10, pp. 3774, 3775), of all the export business. In 1903, the Products Company, a subsidiary of the Federal Steel Company, was created for that express purpose. A systematic plan was pursued of establishing foreign distributing warehouses and of building up new freight lines and shipping facilities. It will thus appear that, whatever may be the legal consequences of the acquisition of this great volume of foreign trade, there can be no doubt of the fact that it was acquired by this company in pursuance of a well-understood purpose. The proofs also show that the diversified products of the Steel Corporation, the location of its plants for export manufacture, and its facilities generally, are the means by which this trade has been supplied and built up. And they also disclose the fact that the different subsidiary finishing companies of the Steel Corporation were, among other things, chosen and acquired by that company with a view to developing the very foreign trade, which has since been acquired. Such being the case, it logically follows that, if the possession of this great volume of foreign trade is illegal as a monopoly or restraint of trade, the Steel Corporation, of which the Products Company is the mere agent, is also a violator of the Sherman Law. Was then this foreign business acquired, on the one hand, through illegal methods by the Steel Corporation monopolizing or attempting to monopolize, or to restrain foreign trade? Or was it, on the other hand, the result of lawful and fair means to expand and increase American foreign steel and iron trade without driving out those who were in such foreign steel trade, or without preventing those who wanted to enter it from doing so?

We have already seen that when the Steel Corporation entered this field there practically was no existing foreign steel trade held by American steel manufacturers. We have seen the opposition existing in such foreign markets to the building up of such trade by a newcomer; we have seen that the markets of practically all the principal nations of Europe were tariff closed to American steel, and that the spasmodic dumping policy theretofore pursued by American steel manufacturers had created (volume 10, pp. 4126, 4127) a prejudice against American trade which had to be overcome. In that regard, the proof by a witness of long practical experience, broad grasp, and commercial success in building up a discredited foreign steel trade, gives weight to his evidence. It is (volume 10, p. 3842):

"It is impossible to develop a foreign business unless it is done continuously. Buyers will not patronize people who are not in a position to give them a continuous source of supply. We had, in the early stages of the corporation, to live down the dumping business, which was quite prevalent with some of the companies prior to the formation of the Steel Corporation. * * * Prior to the formation of the United States Steel Corporation, some manufacturers in this country at times during depressions here would ship large quantities of materials to markets, principally to producing markets, such as Great Britain. The result was that prices were broken down, and in many instances the material was never delivered because the customers, after the prices had been disturbed, could buy material in their own country, and in some instances the customer has paid compensation to sellers to cancel the contract." [2]

He further says, in substance:

Dumping is an uneconomic practice, and one that does not develop a continuous business. It was a sporadic business and was indulged in owing to the exigency of manufacturing at the time. The export business of the corporation has been prosecuted continuously. It has been built up from two hundred and ninety thousand tons in 1903, I think, to two million two hundred and forty-six thousand tons in 1912.

Speaking of the efforts of American steel manufacturers endeavoring from 1895 to 1901 to dump materials abroad, the same witness (volume 12, p. 4629) says:

"They were endeavoring to dispose of large quantities of material, and in doing so they dislocated those markets, and as a consequence of that the prices were greatly demoralized, and the manufacturers in those markets not only met the prices made by the Carnegie Steel Company, but made lower prices; and the result was that thousands of tons of material were not delivered by the Carnegie Steel Company, and it was an actual fact that the buyers of their products paid them a compensation to let them out of the contracts after the market had been demoralized. The records of our office in London show, and I have examined them myself at times when I have been over—I was interested in looking it up—show that over $100,000 was paid to the Carnegie Steel Company by buyers for canceling contracts after they had thrown this material on the market there to shipbuilders and all sorts of people."

It took the Steel Company (Schwab, volume 11, p. 4148) one or two years to get the foreign business started. It was necessary to establish and maintain a series of large warehouses all over the commercial world. Space forbids details, but the proof (Farrell, volume 10, p.

[2] Indeed, the long time required to get foreign shipments of steel to their ultimate destination, and the changes in price meanwhile, makes even a regular, sustained foreign steel business (volume 10, p. 4126) a hazardous one.

3785; Defendant's Exhibit, vol. 2, pp. 179–189) shows that nearly 300 places of business have been established in 60 different countries and in all parts of the world, and that great warehouses or distributing stations have been opened at strategic distributing steamship centers. Taking Belgium, for example: It was a great manufacturing country; it had a tariff and 90 per cent. of its manufactured product (volume 10, pp. 3786, 3849) was exported. Consequently, there was no market for the Steel Company there, except street car rails. But notwithstanding there was practically no Belgian market for foreign steel, the Steel Company located a large warehouse at Antwerp in which it stored 10,000 tons of steel products, principally pipe. It was compelled to do this, because from Antwerp it was able to reach trading centers it could not reach direct from the United States. In that regard, the proof is (volume 10, p. 3786):

"We have shipping opportunities at Antwerp that do not exist in this country. Antwerp is a great distributing point; a large number of sailing vessels go to ports in the world that are not reached by steamers."

In the same way, while the Austrian tariff (volume 10, p. 3847) shut the Steel Corporation out of that country, it established a warehouse at Trieste, Austria, by reason of the fact that wire products and pipe can be trans-shipped at Trieste to ports on the Adriatic, Syria, and the Mediterranean. In the same way, the Steel Company established a warehouse depot at Vancouver, British Columbia, through which it furnished (volume 10, p. 3805), light rails for lumber camps, sheet iron, wire goods, and pipe. The building up of trade with British Columbia exemplifies that the steel trade acquired there was not by the Steel Company restraining or monopolizing an existing foreign trade, but was, by its creating a new and nonexistent foreign trade, in the face of serious obstacles. To reach Vancouver, the Steel Corporation was confronted by a railroad freight rate from Pittsburgh to Vancouver of $18 per ton, while the English steel manufacturer could reach Vancouver on already established lines of steamers from Liverpool to Vancouver at $7 per ton (volume 10, p. 3805). When his steel reached Vancouver, the English manufacturer paid one-third less of the preferential Canadian tariff than the American manufacturer (volume 10, p. 3799). The result of these adverse conditions was that, after the Steel Company opened its warehouse at Vancouver, it found (volume 10, p. 3805) that it was impossible to do much business unless the Steel Company itself established a line of its own steamers from New York to Vancouver, through the Straits of Magellan. The Products Company itself, accordingly, started such a line, which is the only one from New York to Vancouver. It has four steamers of its own in service and two chartered vessels. These vessels call en route at many ports on the west coast of South America and Mexico, at some ports which have no regular steamship line. In addition to carrying the products of the Steel Corporation, they (volume 10, p. 3806) have "been carrying considerable quantities of material for other manufacturers in this country who had been unable to develop a business because of the lack of facilities." In order to obtain return freight for their steamers, the Products Company have

to load them at Vancouver with lumber or coal for the Gulf of California (volume 10, p. 3807); there they reload with copper matte for Dunkirk, France; and in France they take on chalk for New York. The whole triangular trip occupies from seven to eight months and shows the hitherto unused methods and the continuous sustained effort that must be made to get and hold foreign trade. By like effort trade suited to the varied needs of various countries has been built up. Thus (volume 10, p. 3787) distributing warehouses have been established at Johannesburg, South Africa, at Sydney, Australia, in New South Wales, Copenhagen, Denmark, Barcelona, Spain, Singapore, Straits Settlements, Valparaiso, Callao, Buenos Ayres, Rio Janeiro, and other parts of the world to the number of 40. These warehouses (volume 10, p. 3787) are stocked with light rails for mines, corrugated iron for building, tin plate, wire products, pipe, and pretty nearly everything the Steel Company makes, except railroad rails. The steel for South America is carried by ship loads in chartered vessels; the Products Company having under charter, when this testimony was taken in 1913, some thirty-five vessels carrying cargoes to all parts of the world. Permanent and extensive bureaus are maintained at London and at Paris (volume 10, pp. 3789–3815), in order to sell from there to the English and French Colonial possessions, buyers for which possessions gather at the two cities named. The necessity for sustained continuous effort is shown by the proofs (volume 20, p. 7959). For example, the Products Company has a general steel trade in the Argentine Republic of six millions a year (volume 10, p. 3794), consisting of wire products, sheet steel, tin plate, rails, structural material, street railway material, etc. Taking the item of structural steel, the proofs show the continuous means by which such trade is obtained and held. The company located a resident engineering force there, designed and built in Buenos Ayres the first steel structural building in South America (volume 10, p. 3794), and, as a result of the maintenance of such a permanent engineering force there, has built every steel structure in Buenos Ayres, and (volume 10, p. 3795) "we have maintained a very large office there. We are building a number of government buildings there. We built all the buildings of the Buenos Ayres Exposition. We built one for the Argentine government and one for the United States government for their exhibits there." The proofs (volume 10, p. 3795) show that the products sold in the Argentine to make up this six million aggregate are produced by the following subsidiary companies of the Steel Company, namely, the Carnegie Steel Company, the American Sheet & Tin Plate Company, the American Steel & Wire Company, the National Tube Company, and the Lorain Steel Company, and (volume 10, p. 3801) the American Bridge Company. It will be noted that these products, with the exception of the Lorain Steel Company, practically come from the Pittsburgh district, and thus substantiate the proof (volume 10, p. 3829) that the Federal Steel Company was driven to further expansion and integration in order to enter foreign trade.

A similar trade of diversified articles amounting to four millions (volume 10, p. 3802) has been built up through agencies in four principal commercial centers in China, and a trade (volume 10, p. 3812) of five millions in Cuba. As evidencing that the foreign trade was largely newly created instead of taken from others, reference may be made (volume 10, p. 3811) to the trade built up in Black Sea territory. The steel sheets, pipe, and wire products from the American Sheet & Tin Plate, the American Steel & Wire and the National Tube Companies were at first sent to Hamburg and there trans-shipped. The building up of that trade by the Steel Company has caused (volume 11, p. 3811) the establishment of a direct line sailing every six weeks from New York to the Mediterranean, for which the Products Company furnished the nucleus of each cargo, viz., from 3,000 to 5,000 tons, but which afford shipping facilities to American manufacturers of all kinds of products. In the same way, a sustained trade of six millions a year (volume 10, p. 3818) has been developed in Japan. This trade consists in pipe, railway material, structural bridge steel, light gauged steel, tin plate, and street railway material, in all (volume 10, p. 3819) to the extent of 25,000 tons per month. In addition to using the regular steamer line, three or four vessels chartered by the Steel Corporation carried out entire cargoes each month from New York to Japan of the varied products (page 3818) of the Carnegie Steel Company, American Steel & Wire, American Bridge, American Sheet & Tin Plate, National Tube, and Lorain Steel Companies, respectively.

We have cited the above comparatively few foregoing proofs as to illustrate the Steel Company's foreign trade to exemplify its own continuous and indefatigable efforts (volume 10, pp. 3844–3846), to build up this trade on legitimate, commercial lines, and not by trade restraint or monopoly at the expense of its competitors. It has been the creation of a new American foreign trade, and not the monopolistic seizure of a pre-existing American foreign trade. Space constrains us to go into the extent of territory and varying character of that trade, the varied and individual requirements that had to be met in different markets, all of which show conclusively that the dumping, spasmodic foreign trade practices in vogue in the steel trade at the close of the last century were at variance with the building up of dependable foreign trade, and that with the Steel Corporation has come the substitution of reasonable, sound, and successful commercial practices in which and by which, under the proofs in this record, a dependable foreign steel trade can alone be built up. All these proofs, facts, and results serve to justify our conclusion, which we find as a fact, that this foreign trade of the Steel Corporation has not been gained by monopoly and is not a monopoly; that it does not, and has not, restrained trade; but, on the contrary, others in the steel trade (Youngstown, volume 19, p. 7708; Maryland, volume 20, p. 7979) have been, at the same time, free to enter such foreign trade and have done so to the extent of their resources. From a business viewpoint, the matter is well summed up by an experienced business man, produced by the government, who, speaking of the wire and

nail business with which he was familiar, and of the export business of the Steel Company, says (volume 5, p. 2033):

"I would say that it is the magnificent organization of the export department of the Steel Corporation which accounts for their success to a large extent. In every country in the world they meet the conditions; for instance, they have to have different gauges in different countries and different size kegs. In Japan there is a unit there which is different from elsewhere. Ours is a keg of 100 pounds, but theirs is a keg of 133 pounds. Now, to know how to reach all the different countries and supply the needs according to the circumstances and give them prices, and so on, in their own money, or it may be in English money, it is their wonderful organization that enables them to reach out as they do.

"Q. So the organization of the United States Steel Products Company, which handles the foreign business, is a very valuable thing for the steel trade of this country, is it not?

"A. Absolutely so. It is a wonderful organization."

Bearing on the systematic organization thus referred to, the proof (volume 10, p. 3788) is, in substance, as follows:

"The managers of these large offices in foreign countries are almost entirely American, and nearly all of them have been trained in our offices here. We have a civil service system in our business, and our men are promoted from one office to another according to their aptitude for business in certain countries. One man might be a good business man in Brazil, and might be a total failure in Australia."

As showing that this foreign trade has been built up on business executive effort, we may here refer to the facts later noted, namely, the very material decrease in the cost of selling and the very material increase in the prices obtained. And in that connection, namely, the increase in price obtained for goods sold abroad, and the decrease of price for goods sold in the United States, the proof (defendant's Exhibit, vol. 2, p. 190) shows the important fact, namely, that this foreign trade has not been built up at the expense of the home market. Without entering into the details of that exhibit, it suffices to say that some 80 steel or wire products are there listed, all of which have been sold at materially higher prices in the foreign than the same articles were being sold for in the home market. We find in that list such important and widely used articles as tin plate, structural steel, blooms, billets, and slabs, axles and steel wheels, plates, bars, and hoops, T-rails, pig iron, black and galvanized pipe, seamless tubes, horseshoes, wires of all kinds, nails and spikes, fences, bale ties—for all of which higher prices were charged and obtained in the foreign market than those paid by the domestic consumer. In connection with that exhibit, we note the testimony of W. E. Corey (volume 8, p. 3042), who says that, during the time he was president of the corporation:

"The Products Company had become so well established and had worked up such a line of customers and trade conditions in the world were such that as high prices were netted to the mills on foreign business as on domestic, and on some occasions were higher on certain contracts."

To the same effect is the testimony of James A. Farrell (volume 10, p. 3853), who says:

"Q. According to this statement, Exhibit No. 43, the gross tonnage of the corporation increased between those years from 1,001,716, to 2,243,138 tons, that is, from 1904 to 1912, or 123.9 per cent.?

"A. Yes, sir.
"Q. While the selling value increased 181.7 per cent.?
"A. Yes, sir; 181.7.
"Q. Or an increase of the average per gross ton of 25.8 per cent.?
"A. Yes.
"Q. What occasioned that increase in the average price per ton received by you on these export sales?
"A. Because of the fact that we were constantly selling a higher-priced product; that is, we were selling the various commodities in highly finished lines and fewer of the products in semifinished and coarser lines.
"Q. How was it that you were able to increase the value or improve the kind of product you were selling in that way? Was it because you were becoming established, or why?
"A. It was a natural development due to the fact that we had established offices all over the world, and because of the fact that our mills were getting into a state of preparation to do this diversified business.
"Q. In addition to selling the higher grade of goods, more finished articles, how do the prices upon these specific commodities compare per ton in 1904 and 1912, as a rule?
"A. They show an increase of about 25 per cent.
"Q. Then your increase was caused by that also, that you were able to get better prices on a specific product?
"A. Yes, sir.
"Q. Or many of the specific products?
"A. Yes.
"Q. That is all detailed, is it not, in defendant's Exhibit 42?
"A. It is.
"Q. Year by year?
"A. Yes; 1904 to 1912.
"Q. Inclusive?
"A. Yes.
"Q. This Exhibit 43 shows an increase in the domestic business in tonnage from 1904 to 1912 of 87 per cent., or from 5,818,149 tons to 10,877,544 tons, and an increase in the selling value of 65.2 per cent., or a decrease in the average per gross ton on shipments to the domestic market of 11.6 per cent.?
"A. 11.6 per cent.
"Q. What was the occasion of that?
"A. Because of the fact that prices in the domestic department have constantly shown a decline. We were getting about $8 a ton less for materials in the domestic market than we were receiving in 1904.
"Q. You have stated that you are getting about $8 per ton less in the domestic market than you did in 1904, that is, you did in 1911?
"A. Yes.
"Q. Has the price in the domestic market fluctuated in that time more or less in different years?
"A. More or less, but it has gradually shown a lower return."

In this matter, we have not overlooked government Exhibit No. 205 (volume 4, p. 1614), which challenges some 11 articles of export. It will be observed; however, the exhibit itself concedes that the prices include "in the majority of cases the freight and insurance to destination." As we have no facts and figures as to the separate items of such "C. I. F." exports, we have no proof warranting our excepting them from the conclusions stated above; namely, that higher prices have usually been obtained in the foreign market than have been charged in the domestic.

It will thus be seen that the significant factor in the view of the experienced witness quoted above (volume 5, p. 2033) is in the Products Company ascertaining, meeting, and supplying the individual need of individual foreign markets. And, as emphasizing his illustration of a

different nail keg unit in Japan, as the basis of doing business, it might be added that to gain a foothold in the trade of India another unit was demanded, for the proofs show (volume 10, p. 3792) that in India the keg unit does not prevail at all; that there the nail unit is a seven-pound package of nails in paper packages, which are put up in such package at the nail mill at Allentown, Pa., a seaboard plant, which was acquired with the American Steel & Wire Company. In the same way the proofs show (volume 10, p. 3792) the markets of Australia demand an oval nail, while in Java a round one is required. Indeed, the absolute necessity of making different goods for the foreign markets from those made for home trade is illustrated by the proofs of the large expense necessarily incurred to meet these local foreign requirements. Thus the evidence (volume 10, p. 3881) is:

"The first rail order we executed at the Tennessee Works was for the Argentine government; for the Chumbicha Railway. We expended on the rolls in preparing the rails for that order something like $74,000. That was the first order."

And (volume 10, p. 3844):

"After the corporation acquired the American Steel & Wire Company they expended $800,000 on the Allentown mill in order to diversify its products, and increase its opportunity to do a wider range of foreign business than it was doing at the time."

A patient study of the proofs of actual business facts, difficulties, and efforts shown in the testimony of experienced business men leads us to these conclusions:

First, that the foreign business in steel and iron done by the Steel Corporation has increased (volume 10, p. 3843) from 290,000 tons in 1903 to about 2,260,000 tons in 1912, and in value from $31,000,000 in 1904 to $91,000,000 in 1913 (volume 10, p. 3783).

Second, that the Steel Corporation normally does from 80 to 90 per cent. of the foreign iron and steel business of the United States (volume 10, p. 3897); that its exports of $91,000,000 in 1913 includes $30,000,000 of "re-export" business, so called, which it does in connection with other American manufacturers using its basic products; that the "re-export" business in connection with other companies (volume 10, p. 3848) gave employment to from 15,000 to 18,000 men, and the foreign business of the Steel Corporation to 40,000 men.

Third, that its competitors in the iron and steel business, with some few exceptions (volume 19, p. 7709), do not seek to enter the foreign market, so long as they can get a market at home (volume 10, pp. 3845, 3847, 3697; volume 20, p. 7980; volume 28, p. 12039), and what foreign steel business there was prior to 1901 had been small, and generally not profitable, and was done at from 7 per cent. to 11 per cent. expense on invoice (Farrell, volume 10, p. 3791; Government Exhibits, volume 3, p. 1133; Painter, volume 5, p. 1974; Stevenson, volume 3, p. 1093; Benner, volume 6, p. 2499, in connection with Farrell, volume 12, p. 4628; Gary, volume 12, p. 4758; Defendant's Exhibit, volume 9, p. 731).

Fourth, that the success of the Steel Company in building up this continuous foreign trade primarily consisted in its mechanical ability

to make the wide range and variety of product required by foreign markets and in its manufacture of such diversified products at plants properly located for export trade. Volume 10, pp. 3790, 3843, 3844, 4128; volume 11, p. 4320; volume 13, p. 5017; volume 23, p. 9403; volume 20, pp. 7978, 7979. In that connection reference might be made to the proof (volume 10, p. 4128), as showing how essential to the maintenance of foreign trade is the diversity of product which comes from broad integration (volume 10, p. 4128):

"Q. Can a manufacturer having a large line of products for sale afford to maintain such warehouses and conduct that business, when a person manufacturing only one line of goods could not afford to do it?

"A. It was tried by the National Tube Company before the formation of the Steel Corporation. They established a large warehouse at Johannesburg, South Africa, and were obliged to abandon it for two reasons, one because of the cost of doing business. It cost them over 8 per cent. to do the business, because they had one line of goods to sell only."

Fifth, in gradually reducing its own overhead cost of foreign selling (volume 10, p. 3791), from about 3½ per cent. in 1901 to 8 per cent. in 1911.

Sixth, in gradually increasing the price of such of its product as was sold in the foreign market from 1904, when the trade had gotten under way, to 1912, while it was at the same time gradually decreasing the price of such of its product as was sold to consumers in the home market. Volume 10, pp. 3853–3855. These relative changes are shown by defendant's Exhibit (volume 2, p. 203), as follows: In 1904 the Steel Corporation sold such of its product as it exported at an average price of $27.22 per gross ton; by 1912 it was able to market them at $34.24. During the same period it was in 1904 receiving for such of its product as was sold in the home market an average of $41.44 per gross ton; by 1912 this price was reduced to $36.53.

With these facts, figures, and results proved in this record, we are warranted in holding that the foreign trade of the Steel Corporation, its mode of building it up, and its retention when built up are not contrary to the Sherman Law. To hold otherwise would be, practically and commercially, to enjoin the steel trade of the United States from using the business methods which are necessary in order to build up and maintain a dependable business abroad, and if the Sherman Law were so construed, it would itself be a restraint of trade and unduly prejudice the public by restraining foreign trade. Happily, it is open to no such charge, for, as the Supreme Court in the Standard Oil Case said:

"One of the fundamental purposes of the statute is to protect, not to destroy, rights of property."

[4] Seeing, then, that the Steel Corporation, at the time this petition was filed, was engaged in the natural and normal conduct of business, both home and foreign, and that it was not then monopolizing, restraining, or attempting to monopolize or restrain, trade in iron and steel between the states or with foreign nations, we next turn to 1901, the year the corporation was formed, and address ourselves to the inquiry whether it was formed in order to so monopolize or restrain trade; or, to use the test fixed by the Supreme Court (Nash v. United States, supra),

was the Steel Company, when created, a combination which by its intent was meant to, or by the inherent nature of its contemplated acts would, "prejudice the public interests by unduly restricting competition or unduly restraining the course of trade"? Now, what is meant by the phrase "the inherent nature of its contemplated acts," which violate the statute when an illegal combination is originally formed, and which, continuing, because inherent elements warrant its dissolution whenever questioned, is illustrated by what was found to be the fact in the Standard Oil Case. There the court based its right and duty to dissolve the Standard Oil Company on the two facts that: First, the Standard Oil Company (221 U. S. 74, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. [N. S.] 834, Ann. Cas. 1912D, 734) destroyed the *"potentiality of competition"*; and, second, that it was "a monopolization *bringing about a perennial violation* of the second section of the act." And that there was in the Standard Oil Company of New Jersey a destruction of the power to compete—the potentiality of competition—and a perennial, continuous and perpetual violation of the law was shown, in the court's estimate (221 U. S. 75, 31 Sup. Ct. 505, 55 L. Ed. 619, 34 L. R. A. [N. S.] 834, Ann. Cas. 1912D, 734), by the following state of facts:

"(a) Because the unification of power and control over petroleum and its products which was the inevitable result of the combining in the New Jersey corporation by the increase of its stock and the transfer to it of the stocks of so many other corporations, aggregating so vast a capital, gives rise, in and of itself, in the absence of countervailing circumstances, to say the least, to the prima facie presumption of intent and purpose to maintain the dominancy over the oil industry, not as a result of normal methods of industrial development, but by new means of combination which were resorted to in order that greater power might be added than would otherwise have arisen had normal methods been followed, the whole with the purpose of excluding others from the trade, and thus centralizing in the combination a perpetual control of the movements of petroleum and its products in the channels of interstate commerce."

At this point we deem it proper to specially note these vitally important terms used by the Supreme Court, viz., the destruction of "the potentiality of competition," and the "perennial violation" of the statute. For, when it comes to the question of the dissolution of the combination, and that is the phase of this case we are now considering, a dissolution must be decreed whenever the inherent nature of its contemplated acts is such that from its very nature the combination was bound to destroy "the potentiality of competition," and these violations were, from its inherent nature, bound to be perennial. In other words, the Standard Oil Company had to be dissolved because its inherent nature was such that it was bound to destroy the power to compete in petroleum, and it would not be heard to say it had no intent to destroy competition when its inherent nature had made it do so. It therefore follows that, if such destruction of the power of competition and that by perennial violation thus evidenced the original inherent illegal nature of the combination, it would seem that if a long series of years had not resulted in a combination either destroying actual competition of others, or of their power to compete, or had not resulted in the long years of the combination's business in constant, perennial violations of law, it could not

reasonably be held that the inherent original nature of such combination was such as to make it unlawful when originally created and liable to dissolution whenever afterwards challenged. On the contrary, it would seem that the acts of a combination are fair tests of the real inherent nature of the combination, and that in such case the time-tried rule, "By their fruits ye shall know them," might well serve to best gauge the source or tree from or on which the fruit matured. But, passing by this time-tried rule, with its practical tests of what the Steel Company did in the ten years subsequent to its creation, let us address ourselves to the proofs of what was done at or about the time the Steel Corporation was formed, and from these proofs alone determine whether the object of those forming it was to prejudice the public by unduly restricting competition or unduly obstructing the course of trade, or, even if there was no such intent, was the inherent nature of the Steel Corporation's contemplated acts such as to prejudice the public by unduly restricting competition or unduly obstructing the course of trade?

A study of these proofs satisfies us that the United States Steel Corporation could not have been formed unless the minds of two men had previously united in a common purpose. Those two men were J. Pierpont Morgan and Andrew Carnegie. With them co-operated Charles M. Schwab, the president of the Carnegie Steel Company, Elbert H. Gary, president of the Federal Steel Company, and James H. Reed, the counsel of Mr. Carnegie and a director of the Carnegie Steel Company, all of whom, except Mr. Carnegie, became directors of the Steel Corporation. While the co-operation and participation of other persons and other companies subsequently aided and was necessary to the carrying out of the proposed formation of the Steel Company, yet, laying aside all mere incident, and going to the crux of the case, it is clear from the proofs that the Carnegie Steel Company held such a dominant relation to the steel and iron trade, and Mr. Morgan held such a dominant relation in finance, that unless Mr. Carnegie, who was the controlling shareholder of the Carnegie Steel Company, and Mr. Morgan, through his relation to the finances of the country and as a director of the Federal Company, could make possible a purchase of the Carnegie Company by the Federal Company, the United States Steel Corporation could not, and would not, have been formed. As Messrs. Schwab, Gary, and Reed all aided in bringing the two principals to an agreement, and as the result of such agreement was the formation of the Steel Company, we are justified in saying that, if there was intent to violate the Sherman Law, to be effected through the organization of the Steel Company, then such company was primarily the work of Messrs. Carnegie and Morgan, assisted, of course, by all those who participated in the furtherance of this primary purpose of bringing the principals together, as directors of the Federal Steel Company in agreeing to a purchase of, or in forming and taking part in, the management of the Steel Corporation itself.

Considering the magnitude of what was done, the mere sequence of events which resulted in the formation of the Steel Company had a directness, a simplicity, and a rapidity which is remarkable. On De-

cember 12, 1900, Charles M. Schwab made an address at a dinner given to him in New York in which, in substance, he gave a clear statement of the steel business, showing that the metallurgical method of making steel and the physical method of handling it were then fully developed, and he outlined his notions of wherein further advance was possible. His testimony as to his address is:

"I talked about the advantages that might be derived from doing a manufacturing business on a larger scale than had then been attempted and that we had undertaken in the manufacturing lines up to that time; all our endeavors up to that time had been to perfect methods of manufacture. By that I mean metallurgical and economical methods. By economies I mean that I believed that we had then reached the limit, or very nearly so, at which economies from a metallurgical or mechanical standpoint could be made effective, and I believed that the next great step in economical manufacture was to so regulate the business and plants of the business in manufacturing on a larger scale than had ever been attempted heretofore; that instead, as was then the practice, of having one mill to make 10 or 20 or 50 products, the greatest economy would result from having one mill make one product, and make that product continuously. The history of manufacture has shown that any line that specializes in any direction obtains the best economical results, and I believed that the various lines of steel should be so specialized, that it was not possible for any one company then to do that at once, but I also believed that great economies would result from locating mills at the point of consumption, by which the cost of transporting the finished material to the point of consumption would in many cases be reduced or saved. I also pointed out that I believed that great economic results would follow from our being able to manage these concerns in a manner that would stimulate the most effective effort in the management of the different concerns.

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"I went on to say that one of the most effective things would be our ability, as I said before, to stimulate the various managements. Secondly, or thirdly, I felt that the great export business of this country in iron and steel could only be done in that way. I felt, furthermore, that great economies would result in all these general items of expense which are met in the manufacture of iron and steel, on account of selling, traveling, office expenses, and all the general items that each individual concern with an individual line had to cover with a full organization. That could be covered by one such organization, and I felt that much economy would result in that direction, and, indeed, the whole line of my talk that evening was intended to show that the next great economic step to be made in the manufacture of steel, or, indeed, any business in general—I did not confine myself entirely to the steel business—directly to the steel business, but, in general, that the great economic result to be next obtained in manufacture was by the adoption of these methods, and then I made that application generally to the steel industry. * * * I pointed out, for example, the attempt that had been made to manufacure steel cars; that few companies throughout the United States who were engaged in the manufacture of bridges and other fabricated materials were attempting to manufacture steel cars; that that could never be successful; that the only way it could be successful was for some one works to devote itself exclusively to the manufacture of steel cars, and one kind of steel cars; that if different kinds of steel cars had to be made, like passenger cars, for example, as being different from freight cars, two separate works, as following out this general line of policy, would have to be built and so operated. I then pointed out, for example, structural steels. In those days a structural mill would probably make six different sizes of beams and channels and angles; by my plan a mill would be built that would roll on angles exclusively, and a mill would then be built that would roll on beams exclusively, and that the finished material, and so forth, of these mills, being adapted for that special thing, would be better and cheaper.

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"Well, Mr. Morgan listened with interest, and then asked me to sit down and talk with him a few minutes. The dinner was short and we sat in a corner and talked for some time at more length and with more amplification upon this subject."

Shortly afterwards Mr. Morgan sent for Schwab, who says:

"This whole subject was then gone into with much more detail, and the theories which I then advocated were amplified with reference to their application to the steel industry; and I pointed out at that interview to Mr. Morgan in great detail the economies and advantages that would result under those theories from their application to the steel industry.

"Q. Was there any suggestion then, or discussion, with regard to the advisability of a large corporation with facilities for manufacturing on all lines?

"A. There was; that was the chief discussion of the evening.

"Q. Can you go into that a little fuller?

* * * * * * * * * *

"I told Mr. Morgan that if the steel industry of this country were to start anew, that if there were no steel plants here, what I should advocate and build was such a plant as I have described heretofore, but that in view of the fact that the most of these things did exist, perhaps not in an ideal way or ideal location, that a new plant would be made possible, and that in view of the fact that they did exist, and that they could be made ultimately to conform to this theory, I believed that the then existing steel plants which I pointed out to him could be formed into one company, which would ultimately accomplish all the results which I had outlined. That was discussed at some length. The companies were mentioned that I thought would accomplish these results. They did not, by any means, embrace all the companies in the United States, but those which I thought would effectively make such an organization as was outlined.

"Q. Were they such as to cover all the branches of the industry?

"A. They were.

"Q. And what was your discussion with him with regard to the foreign situation?

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"With reference to the foreign situation, I pointed out to him that up to that time our business, the steel business in general, had been nominal with reference to export business; and that, in my opinion, it could only be made profitable and possible by such an organization; that no company selling an individual line, a single line, or one or two lines, could hope to successfully compete for foreign business where they were not prepared to furnish the customer every line that he might require for a structure or a business; and that half a dozen or a dozen individual companies could not afford the expense or the organization or secure the talent necessary to make a successful export business, while such a company as I outlined could.

* * * * * * * * * *

"Q. Did you mention the facilities that such a corporation as you described would need to possess?

"A. I did; and I may say that I enlarged and perhaps made a more strenuous talk to Mr. Morgan upon the subject of export and our ability to export and foreign business in foreign markets than any other, excepting only the economic advantages to be derived.

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"With reference to the ore, I pointed out to Mr. Morgan how advantageous it would be, for example, for one mine to mine all it could, regardless of what furnaces or products it was to go to, and have that ore then distributed by an expert between these 100 furnaces that would then operate, instead of 5 or 6 by which the mine could run continuously and run at a given amount and under the most economical conditions, regardless of how the ore was to be distributed; because, when a firm owned 5 or 6 furnaces, it was a question of how much of each kind of ore from each mine they could use, but, when a firm owned 100 furnaces, the question of distributing the ore from

each individual mine to that furnace became a simple and effective one; and that that would be of great advantage from a mining point of view. The fact that one mine contained ore of a high percentage of phosphorus might make it possible in an individual concern to only run it half the year; while, if the product from that mine was to be distributed to 100 furnaces, the additional amount of high phosphorus would be so little as to be no disadvantage, and therefore that mine could run continuously. With reference to the handling of the ore from the mines to the docks in the days of individual ownership, it was exceedingly difficult at the docks and on the railroad to keep the ores for the different firms and from the different mines separated and shipped as they desired to handle it upon their boat; whereas, with this large ownership of works, it was possible to ship the ore to the various docks as fast as it came down, without any of the expense from delay. The ships, instead of waiting at the docks until their special load of ore could come around and take the ore, they would come into port and depart ten hours later, instead of three or four days later, because the ore was always there ready to load on the ships. There is nothing in shipping that costs more than delay in discharge and loading; and therefore that very great economy was accomplished at once. I think the records of the ships will show to-day that a very small fraction of the time was consumed in handling the materials at terminals, as compared with what it was in times of individual ownership. So I went through from ore mines, railroads, and shipping, to the handling of material, right down to the finished material, which was the same thing as I have described before, with reference to individual efforts.

"Q. Did you or not speak of the advantage of a company owning its ore and its furnaces, and its rolling mills and finishing mills?

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"I told him—I will put it that way—that up to 1892 there was a very strong feeling that manufacturing companies should not own ore, but that had then changed. The Carnegie Company was gradually acquiring ore wherever it could, and, to my mind, the successful manufacture was only possible where every single step in the line of manufacture was carried out by some one concern, and that for the greatest economy, for the greatest development of the business, it was an absolute necessity."

The possibility and desirability of creating an American company capable of acquiring foreign trade should have been especially dwelt upon by one so thoroughly conversant with the steel business will be quite apparent when the significance of the proofs as to the relative relation of the export trade of the great commercial European countries is considered. The export steel trade of England is (volume 10, p. 3898) 65 per cent., as contrasted with 35 per cent. of home trade; Germany (volume 10, p. 3898) sends 60 per cent. of her steel abroad, as against 40 per cent. consumed at home; Belgium (volume 10, p. 3849) sends 90 per cent. of her product abroad.

The outcome of this second talk was that:

"Mr. Morgan was very much interested and said to me that if I could secure a price from Mr. Carnegie that he would undertake the formation of such a company; that he would undertake the business; that is the way he said it." Volume 11, p. 4141.

Within two or three days Mr. Schwab saw Mr. Carnegie, and, while the latter declined to give any written option, he expressed himself as willing to sell. Certain figures then jotted down by Mr. Schwab or Mr. Carnegie were carried by the former to Mr. Morgan, and were the basis on which Mr. Morgan proceeded in the formation of the Steel Company, although he had then no written agreement from Mr. Carnegie whatever. These facts are shown also by others. Volume 12, p.

4727. This situation continued until February 26, 1901, when Mr. Morgan obtained a formal letter from Mr. Carnegie through Judge James H. Reed. The latter's testimony (volume 14, p. 5660) is:

"He [Mr. Morgan] told us, in substance, that he had just awakened to the fact that he was making contracts here with stockholders of the Federal, the National, the National Tube, and so on, and he had not a scratch of the pen from Mr. Carnegie under which he could hold him or hold his estate if he died. He said, 'You men go up the street as fast as you can and get me something.' We took the Elevated and went up to Mr. Carnegie's house and explained what we were there for. * * * Mr. Stetson and I then, with occasional interruptions from Mr. Carnegie, dictated a letter to Mr. Morgan, or to J. P. Morgan & Co., which Mr. Carnegie signed, and we took the original down with us to Mr. Morgan, and he seemed quite relieved. * * * I don't think we left any (copy) with Mr. Carnegie."

By such letter (Exhibit 80, volume 3, p. 325, Defendant's Exhibit) Mr. Carnegie agreed to sell his mortgage bonds and stock in the Carnegie Steel Company, and agreed to receive in lieu thereof mortgage bonds of the United States Steel Company. The letter also provided that his sale was conditional on the Steel Company taking the holdings of the other shareholders in the Carnegie Steel Company at the same rate, but, instead of paying them in bonds as he was, they were to be paid in stock of the new company. The testimony (volume 14, p. 5656) shows that Mr. Carnegie was anxious to sell and retire from business. Indeed, several efforts had previously (volume 14, pp. 5474, 5475, 5513; volume 11, p. 4132; volume 12, pp. 4722, 4723, 4725) been made to sell the Carnegie Company. On the consummation of the sale, Mr. Carnegie took no stock in the new company, and had no part in its management. While, of course, he knew what companies the Steel Company was absorbing, and was keenly alive as to what properties his purchase-money bonds would cover, and, indeed, in respect to one company, the National Steel Company, which occupied a midway position between Chicago and Pittsburgh, insisted (volume 12, p. 4747) that it had to be taken in and his bonds cover their property, there is no proof whatever that he occupied any other relation than that of a seller of his stocks and bonds in his own company. Indeed, the dealings between the two men, the fact that they did not meet each other, their not even talking to each other about the plans, scope, and future of the new company, their allowing the intended sale to stand without any written evidence that it had been made, the inability or difficulty either of them would have had in its being carried out if either had died, conclusively show that the whole transaction between the two was that of a sale of Mr. Carnegie's personal holdings effected between them through the medium of third persons. We are therefore warranted in finding, as we do, that there is no evidence whatever to show that Mr. Carnegie united with any one to join in any violation of the Sherman Act, and that the statement in his answer filed in this case, to wit "that his sole motive in agreeing to the sale of the property of the Carnegie Company to the United States Steel Corporation was his desire to retire from the hazard and responsibilities of active business, and that since said sale was concluded he has had no connection with the business of the purchasing corporation," is true, and a conclusion which is supported by the evidence hereafter quoted at

length showing the reason which led Mr. Carnegie into being willing to sell.

We turn next to Mr. Morgan and such other persons as co-operated with him in forming the Steel Corporation and see what the proofs show. The vast size of the Steel Corporation they formed, the influence and control incident to such size, its seeming power to crush competition, its ability to absorb business through its systematized organization are all factors so associated with monopoly to restrain trade and crush out competition that we may say that, standing alone as a mere isolated fact, this great company gives one such an impression of monopoly that we feel we may in this inquiry place the burden upon it and its formers to satisfy us by affirmative proof that monopoly was not the purpose for which it was formed, but that it was the normal, regular, and natural outcome of the improvement in steel making, and its concentrated powers were only such as were deemed to be necessary to successful producing and marketing its product. To such inquiry and the proofs bearing thereon we now address ourselves.

The iron and steel trade of the United States has been a gradual sustained evolution. So far as the metallic base is concerned, such evolution may be broadly stated to have been from iron to steel, from steel to Bessemer steel, from Bessemer to open-hearth. It is interesting to note that the next development (volume 10, p. 4068; volume 26, p. 11066) bids fair to be from fuel smelting to electric smelting. These several stages of development have been accompanied by an abandonment and loss of equipment of great value (volume 2, p. 1167; volume 2, p. 732; volume 10, p. 3859; volume 10, p. 4077; volume 13, p. 4963), and have necessitated vast further expenditures for new appliances to make the new open-hearth steel product. To illustrate, referring to a single one of the rapid revolutions in steel making—the removal of phosphorus in pig iron in the Bessemer or open-hearth processes by the substitution in the lining of lime for a silicon base. This single chemical fact, made public in 1885 (volume 13, p. 4940), "practically revolutionized the iron industry, and by the year 1890 basic open-hearth steel had practically supplanted the use of wrought iron for all commercial purposes." Side by side with these rapid metallurgical changes of product there was at the same time going on radical changes in the mechanical handling of the product. To refer to but one of the many mechanical changes, "in the late 80's [volume 13, p. 4940] the introduction of electricity as a motive power also produced another revolution in the steel industry, so that practically all works had to be rebuilt if they desired to keep abreast of the recent developments of the art." But not only were metallurgical and mechanical changes taking place with regard to the different stages of metal production, but there developed at the same time a radical change, not of one product or one stage, but of all stages in the way of rounding up plants, or, as it is called, integration, so that continuous processes could be carried on. In the old method of wrought iron making there was no continuity of operation. Volume 12, p. 4934. The molten metal produced by a blast furnace was run into pig iron. This pig iron was transported to a rolling mill, where it was first puddled, and

then rolled into muck bar, which was again suffered to cool. The muck bar was again heated and rolled in finishing mills. As steel making progressed, its manufacture by various agencies (volume 13, p. 4944) not necessary here to detail, became a continuous fluid process. Instead of the metal being suffered to cool, it was continuously treated first as a fluid, and then as an ingot, but always without entirely losing its initial heat. But these steel plants, with their continuous processes and their increased capacity to produce, serve to confront the finishing plants with grave problems in reference to their basic supplies. This era of change and its new problems is testified to by Percival Roberts, Jr., whose experience and relation to the steel business give weight to his summary of the changing conditions and problems confronting that industry. He testified (volume 13, p. 4944):

"I think I had reached the situation existing as of the late 80's when basic open-hearth steel was gradually, or rapidly, I might say, supplanting wrought iron. The wrought iron plants that were of smaller capacity and had insufficient capital or lack of sufficient tonnage to dispose of the product of an economical steel plant commenced purchasing billets and blooms from those who had converted their plants into steel-manufacturing ones. This production of billets and blooms was practically a by-product with the finishing mills. In times of activity they had very little surplus product to spare. When not so pushed on finished material, they disposed of part of their steel-melting capacity in the shape of semifinished material. The iron plants purchasing this material found that the same could not be carried on successfully, due to the fact that it required an almost unlimited capital to be locked up in supplies of billets, as finished material required so many different weights of billets and blooms that the stock on hand had to be enormously large; also the chemical requirements of orders requires that different grades of steel should be used. This also required a vast amount of material to be carried at all times on hand. Another matter which occurred about that time changed very materially the situation, and that was the introduction of what was known as the Jones mixer. I might say that up to that time the production of all blast furnaces was run out from the furnace in the shape of liquid pig iron, and cast in the sand and allowed to become cool. The invention of the Jones mixer was for the purpose of carrying on the production of steel as one continuous operation from ore to the finished product, never permitting the material to become cold until it reached the final economic shape. I do not mean to say that this applies to all finished shapes, but to a cross-section of material at which it would be economical to let the material cool.

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"The Jones mixer is a large vessel placed between the blast furnace and the steel works in which the product of the blast furnace is run in liquid form, making a large reservoir of fluid pig iron from which ladles are taken in liquid condition the contents in liquid condition and used in Bessemer converters or open-hearth furnaces. The advantage of this process was that it reduced the cost of manufacture in this one respect alone by about $1 a ton, which is the cost of remelting cold pig iron for steel production.

"The situation from 1890 on grew more and more acute. Those concerns which had become more or less integrated and had changed their methods from those of iron to steel were continuing their integration to even a greater extent than before, although I would like to say that even prior to the introduction of steel the matter of integration was one of varying degree, even in the manufacture of wrought iron, although there was not the same necessity for it. In those days one man mined ore; another man ran a blast furnace; another man operated rolling mills. The processes were all disconnected.

* * * * * * * * * *

"Coal and limestone were sometimes separate, sometimes controlled by one party, but even in those days there were certain establishments which controlled their material from the ore and limestone up to the finished wrought

iron product, so that even in those days iron manufacturers were not on the same basis as regards competition. Those concerns whose output—I speak now as of about the year 1890—those concerns whose output was of a character and of sufficient tonnage, and who controlled sufficient capital to enable them to convert their works from iron to steel, did so, but there were a vast number of those whose character of product was of a less heavy nature, such as sheets, small bars, light plates, etc., who neither had the capital nor the output to warrant them in making, or rendered it possible for them to make, this change. There was also another class of establishments, namely, the blast furnaces who had heretofore supplied the puddling furnaces or the rolling mills with their pig iron for making bars. Those concerns found themselves without customers and they in turn were forced to develop a product which would take the place of their former ones. These smaller concerns were buying, as I say, to the best of their ability, their billets, blooms, and slabs from the larger concerns, who were making them in a certain sense as a by-product during the years from about 1890 to 1896.

"These revolutions which I have spoken of, due to the introduction of basic, open-hearth steel in place of wrought iron, were the fundamental reasons for all the earlier aggregations of work which took place about the year 1898, and through that year down to, say, 1900. Certain of them were integrated like the Federal Steel and the Carnegie Steel Company backward to their supplies of raw material, and to the extent which they had formerly been consumers, they to that extent became producers. The other concerns, like the National Steel, were composed largely of blast furnaces that had lost their custom for pig iron, and who found themselves compelled to produce, instead of pig iron, billets and blooms for sale to those who had formerly used wrought iron. The Tin Plate, the Sheet Steel, the Hoop, the American Steel & Wire were composed of concerns who individually were neither able, for want of capital or amount of output, to change from wrought iron or to manufacture steel in sufficient quantities to make it commercially profitable to do so.

* * * * * * * * * *

"The Tin Plate Company had been a consumer, and not a producer, of wrought iron product, and, in fact, the manufacture of tin plate had not taken place in this country until after the introduction of the use of open-hearth steel. So far as I included them in my answer, I meant to state that they individually were unable to produce the raw material from which their finished product was made, but by combining these individual units they would be enabled to do so economically."

The tendency of the steel business during these years towards concentration, combination, rounding up, or continuity of operation is reflected in the census figures. On the one hand is an unprecedented growth in the volume of the steel and iron business done and of the increase of capital; on the other hand is a striking decrease in the number of establishments doing it. Thus Bulletin No. 78, Census of Manufacturers, 1905, Iron and Steel and Tin and Terne Plate issued 1907, by the Department of Commerce and Labor (volume 13, pp. 4948, 4950), says:

"The growth of steel production has been the heaviest of any portion of the iron and steel industry. The product for 1900 shows a gain over that of 1890 of 6,510,348 tons, or 155.9%, or an average increase of about 650,000 tons per year. The product of 1890 shows a gain over that of 1880 of 3,147,271 tons, or 306.3%, an average increase of nearly 315,000 tons."

Whether the cause of this enormous increase of production on the one hand was due to the rounding up process, of decreasing the number of plants, and further expanding those that remained, the bulletin in question is, of course, speculative, but does show that decrease in the number of corporate plants with increase of capital in

those remaining was the actual fact in the iron and steel business. In that regard the same bulletin showed that there were in 1880 in the United States substantially 1,000 of such establishments with a capital of $230,000,000. By 1890 these 1,000 had decreased to 838, but the capital of those that remained was increased to $425,000,000. By 1900 the 1,000 establishments of 1880 had again decreased to 763, but the capital of those that remained had grown to over $600,000,000. During the same period the separate blast furnace establishments had also decreased. In 1880 they were 483; in 1890, 377; and in 1900, 273. This census evidence of widespread general change, readjustment, and concentration by practical men in the iron and steel business would seem necessarily to have had some impelling cause—economic, mechanical, metallurgical, or administrative—back of it. And, in the absence of proof to the contrary, the conclusion of Mr. Roberts would seem reasonable that "these revolutions which I have spoken of, due to the introduction of basic, open-hearth steel in place of wrought iron, were the fundamental reasons for the earlier aggregation of works which took place about the year 1898, and through that year down to say 1900," and that the business reasons which induced practical steel men to so act was the fact that, unless they did so, the changed conditions of the steel business might force them out of business. In that regard the testimony of Mr. Roberts (volume 13, p. 4951) is:

"Coming down to the year 1900, very many, if not the majority, of those concerns who did not integrate sufficiently to control their supply of raw material failed in business or were abandoned by their owners. * * * There are successful concerns to-day [page 4953] who have not integrated in the manufacture of their own steel, but those are of a character where tonnage plays no part. Where you come to a large tonnage, however, or a comparatively large tonnage, I know of no successful concern to-day which has not integrated. * * * There never [page 4956] was a year during that ten-year period that there were not numerous failures in the iron and steel trade with considerable aggregations of capital. I will say they were very numerous; so numerous that probably in some years it would amount to more than 100 failures in that period."

Light is thrown on some phases of this integrating process by the testimony of the president of the Republic Company, whose development and expansion has been heretofore noted. He says (volume 2, p. 732):

"We have practically eliminated all of our scattered iron mills, have concentrated them in the operation at a few points of production, so to-day we produce practically but little iron, and are manufacturing about a million tons of steel per annum. Q. This, I take it, is what you call an integrating process, was it not? A. Yes, sir; that was part of it; the addition of the mineral and coke and blast furnaces and balancing up operations generally completed the integrating process. Q. So that you were able to handle every feature of the process from the mining of the ore to the putting on the market of the finished product? A. Everything, except transportation. Q. And so far as transportation is concerned, I understand you owned a fleet of vessels on the Lakes to bring your ores? A. We have three vessels we own and have an interest or a part interest in some others. * * * Q. You are adequately supplied with lake facilities? A. No; not quite, not balanced up. We are large carriers on the Lakes in addition to our own fleet. * * * Q. I judge from your testimony that this integrating process that you spoke of attended your development of the steel

end of your business; am I right? A. You are. Q. You did not need that so much, or at all, when you were simply manufacturing iron? A. No; it was done for economic reasons and also for trade reasons."

This testimony serves to show how radical, extensive, and enforced was the steel integration, which, summed up in a few terse words of this business man, really meant a rounding up and readjusting of everything, as the witness says, "from the mining of the ore to putting on the market of the finished product," and an increase in that company's case of resources (volume 5, p. 1856) from $600,000 to over $23,000,000. From these figures the insistent necessity of integration in the steel business will be seen.

Coincident with these mechanical and metallurgical changes another basic change of peculiar and dominating importance in the steel business was also taking place. This was in freight and transportation. This change, it will be seen, not only restricted the range of a plant's market, but by doing so necessitated what might be termed locality integration. The chief factor in the manufacture of steel (volume 13, p. 4953) is labor, and the next is the locality where it is produced (volume 10, pp. 3961, 3987, 3988, 4059, 4060, 4061); being of great bulk, the transportation of the raw material to where it is made and the freight to where it is used (volume 11, p. 4344) are the factors decisive of its being profitably made and sold. As illustrative of the vital character of freight as a factor, the proof (volume 12, p. 4815) is that the Steel Corporation uses 45,000 tons of ore alone a day, not to mention coke or limestone. The delivery of the steel to the user, and the net gain over cost received from him, is, of course, the practical test of steel making. From these self-evident business truisms, it follows that the tonnage of bulky steel products restricts its steady, natural, and sustaining market to the consumption of the territory near its place of production; for example, great as is the consumption of steel in the New York district, and ample as is the productive capacity of the United States Steel Corporation to supply it, yet the proof (volume 10, p. 3782) is that the Steel Corporation does "very little business here (New York) compared with that done by the mills in Bethlehem, Phœnixville, and mills located near here." Prior to the regulation of freight rates by the government through the Interstate Commerce Commission, freight stability was unknown. Special rates to large shippers, cuts in freight rates, and secret rebates were common practices between the steel producers and the railroads, and these enabled steel manufacturers to ship bulky products into territory naturally supplied by other manufacturers, and by these cuts, special rates, or rebates to dump their surplus product in districts which they could not enter if they paid proper freight charges. Thus, at one time, the Illinois Steel Company, by virtue of getting a 45-cent rate from Chicago to Yokohama on export business, was able to ship rails to Japan. This freight rate (volume 10, p. 3882) could not be had now that freight rates are regulated. The pinch and prohibition of freights in narrowing markets may be best illustrated in a letter found in volume 11, p. 4286, where a great steel maker in 1899 said:

"The greatest blow we have received is in the rise of railway rates, and we should address ourselves to rendering these impossible. There is no reason why we cannot ship to Conneaut and to Western points by boat from Conneaut, and I would spend a good deal of money and a good deal of attention upon this. The mere fact that you begin shipping in that way by boat will bring railroads to their sense. I also think that something can be done shipping by Erie Canal from Conneaut. I think the Lorain or somebody else put a line of boats upon the Erie, and I know that a paper manufacturer of Erie does all his transportation by line of boats, which he tells me costs him about 75 cents per ton. One shipment to New York by canal would give your railroad friends much anxiety."

When, however, under the regulating power of the government, freight stability was enforced, the steel maker's market was at once locally restricted, and his only way of overcoming the regular, stable, adverse freight rate was to integrate locally; that is, to erect or acquire other mills in the market locality from which freight forbade his heavy product entering. The embargo laid by freight on distant markets is simply a business fact, and it suffices to say that, while the government by this enforced transition of the steel shipper from the era of unstable freight cuts and rebates to an era of freight stability in the end contributed to corresponding benefit and stability in the steel maker's business, yet it must not be overlooked that, in thus narrowing his market, the steel maker was compelled to broaden his market by expanding his operations so as to manufacture in additional localities. Coincident with this tendency to integration and to the consequent widening of variety of product and to the entry of steel into new fields, a radical change in the variety of ore supply was necessitated. In thinking of iron ore, we are apt to regard it as simply ore, and overlook the fact that there is a radical difference in different ores. In the earlier manufacture of iron, practically any ore could be used, but as the steel era came along with its chemical tests (volume 11, pp. 4334, 4141, 4375; volume 13, p. 4997), and the specified requirements incident to its use in varieties of articles, the particular character of the ore base became more and more a matter of importance. The practical proof of this wide range of various ores required is illustrated in the proofs, which is that, even with the wide range of ores owned by the Steel Company, it is at times unable to meet the requirements of purchasers. In that regard the proof is (volume 10, p. 3835):

"We (the Steel Company) purchase a great many rails from our competitors; occasionally our people in some country will take an order for a specification which it may not be possible for us to fill. At times we have bought rails which called for Cuban ores to be used as a basis for manufacture, and we bought those rails from the Maryland Steel Company."

We noted above (volume 10, p. 3733) where 18 different kinds of billets were required in a wire mill alone. The proof is (volume 11, p. 4375; volume 13, p. 4977; volume 12, pp. 4813, 4821) that it is only by a scientific mixture of different sorts of ores that steel of the large range of specified steel requirements can be made. This simple statement of a few lines, when carried into practical business operations, means the furnishing of many varieties of ores that may be as far away from a blast furnace as Minnesota, Chili, or Cuba. These must

be bought, mined, transported, fluxed, and treated in order to meet, for example, the exacting structural requirements of a steel rail. To successfully produce that rail in great tonnage, which, under the proofs, is a business necessity, every step in that long spread from the ore in the ground to the finished rail must be under the integrated control of that agency which is ultimately held responsible by the railroad for the rail. In that regard, we quote from the proofs:

"Starting from the ore fields. Individual concerns owned individual mines. No concern was sufficiently large to own groups of mines of different characteristics and qualities. All metallurgical people know that the best results are obtained by scientific mixtures of different sorts of ores, and, by consolidating the ore interests of all these companies, we were able to give each individual company the ideal mixtures in order to produce the most economical and best results. * * * To one familiar with the steel and iron-making industries the advantages of so doing are enormous. The transportation of material affords equal opportunities to economize. Ships do not need to wait until each particular cargo can be loaded for each particular works, but can be kept moving steadily, and assigned to various works while in transit. Mills that formerly had to make a great variety of articles, by reason of consolidation, are enabled to run steadily on one line, producing far greater tonnage and at very much less cost."

The result of these radical and forced changes in steel making evidenced itself in the rapid and widespread fever of integration by consolidation that took place toward the close of the century. Whether, from such consolidations, monopoly, rise in prices, and restraints of trade were hoped by many of their promoters to be obtained, it is certain that the deep-lying motive which led practical steel men to put their plants into such consolidation was the recognition of the absolute business necessity of integration as a condition of staying in the steel business. Thus the Carnegie Steel Company, occupying, as it did, the commanding position in the steel trade, varied, as were its products, having fully 70 per cent. of what foreign trade there was, and having the foremost place in the home markets, itself felt the necessity of and was preparing to enter on further integration by widening the variety of its product. While leading in some lines, it was deficient in others, notably pipe and wire (volume 11, p. 4143), which consumed much of its basic products. In the minutes of that company of July, 1900 (Government Exhibit, volume 6, p. 1881, and also volume 11, pp. 4281, 4282), its president stated:

"I have already expressed my views on the matter of rails referred to by Mr. Carnegie. For myself I do not see that there is anything left for us to do but to build a hoop and a wire mill. The American Steel & Wire Company have served notice on us for cancellation of their contract with us. The American Steel Hoop Company are buying but little from us. With the loss of customers that we have sustained, it will leave us in the position to have no four-inch billets to make. There does not seem to be any other place at present to place them. The contract with the Union Steel Company would not prevent us from going into the wire business. It is very doubtful, indeed, whether they would take a full tonnage from us. It looks very much as though we would have to put our steel into the finished article. We formerly sold to the constituent companies of the American Steel & Wire Company and the American Steel Hoop Company from 30,000 to 35,000 tons of billets per month. We have done all that we can to endeavor to get them to take their tonnage from us, but so far we have been able to accomplish nothing. I do

not see how we can stop at wire rods. I think we shall have to finish the wire and nails, because there are no customers for wire rods at the present time. We have figured that a hoop mill will cost about $800,000, a rod mill about the same amount, and a mill to make barbed wire and nails would cost about $1,000,000, or a total expenditure to go into the hoop and wire and nail business about $2,500,000."

In a letter embodied in such minute, Mr. Carnegie said:

"I do not think that there are many customers for rods remaining, and believe that, if there are, they will not exist for a long time. We should not go into rods, as I see it, unles we also go into wire. No use going halfway across the stream. Should aim at finished articles only. It is coming to this in all branches."

That these minutes represented the then purpose of the company was stated by its president, who testified (volume 11, p. 4282):

"We adopted the plan at that time of building mills to finish our own steel that we had formerly sold to those companies."

So also had the Carnegie Company determined to integrate by adding the important items of pipes to its finished product. The purpose of this was to create for itself and in itself a customer that would use part of its product by making it into pipe. This item of steel consumption, embracing oil, gas, water, irrigation, and kindred fields, the Carnegie Company, as we have seen, did not make. That this vast field of basic steel consumption was not sufficiently filled is shown by the fact that they planned to spend in additions for such pipe making mills, excluding land, $12,000,000. The plans for this enterprise were entered upon in 1897 or 1898 (volume 11, p. 4295). It will also be seen, in discussing later the acquisition by the Steel Corporation of the Seamless Tube Company, that the Carnegie people were carrying on substantial experimental work at the Seamless Company's plant with a view to itself entering the tube field (volume 13, pp. 4198, 4199). Efforts had been made to get a site near Pittsburgh, but sufficient acreage for the large works in view could not be found. Meanwhile, a site of 5,000 acres was secured at Conneaut, on Lake Erie, where the company's ore steamers coming from Lake Superior delivered the ore to the company's railroad for transit to Pittsburgh. From this point (volume 11, p. 4297; volume 11, p. 4286), water transportation for pipe was available to seaboard and to the entire territory tributary to the Great Lakes. The testimony (volume 11, p. 4297) is that this proposed widening of the Carnegie Steel Company's product variety to include pipe and wire products was absolutely "in good faith as indicative of the intention and purposes of the Carnegie Steel Company." In that regard the president of the company (volume 11, p. 4390) testified:

"Q. Speaking about the purpose of the Carnegie Company to go into other lines of business and the finishing of its semifinished product, do you remember whether the scheme talked of in the middle of 1900, as Judge Dickinson brought out from you, of building your wire mills, was persisted in to the end of that year?

"A. The scheme to ultimately do so was. My recollection is that the operations were deferred owing to financial conditions at that time in our company; but the idea of ultimately extending our lines into all these finished products was not conceived in that year. It had been discussed for some years before, and plans made, and a general policy outlined for ultimately doing it."

As evidencing not only that fact, but that it was a necessary and far-sighted integration (one called for by the legitimate future of the business), will appear from the fact that, after the Steel Company was formed and its comprehensive plan of complete integration was carried out, that company expended $13,000,000 (volume 10, p. 4076) in building the pipe plant which the Carnegie Company in 1900 planned to build, and it will be noted further that it built it in the immediate Pittsburgh district, on ground near the National Tube Works, where the Carnegie Company was not able to get the required site. All of which seems to strengthen and confirm the conclusion of the insistent requirement of integration in the steel trade at the close of the century. The like compulsory integrating influence thus shown in the Pittsburgh district evidenced itself also in the great Chicago steel district. In that district the Illinois Steel Company held the same commanding local position as the Carnegie Company in the Pittsburgh. Its natural market was the Chicago district (volume 6, p. 2215; volume 12, p. 4734). It had a rail market in Canada at times which could not be reached by the Carnegie. In spite of the allegations of foreign trade made by its then management, it really had little or none and really could have (volume 6, p. 2215; volume 10, p. 3829) no profitable foreign trade. Such foreign trade as it had to Canada was of the spasmodic character heretofore referred to. It had large plants at Chicago and Joliet, Ill., and at Milwaukee, and had railroad properties, but its product of basic open-hearth steel was, even in 1890, only 190,000 tons, as compared with the Carnegie Company's 1,250,000 tons. It (volume 14, p. 5505) lacked the finishing units of sheet steel, steel hoop, and tin plate mills (volume 12, p. 4735), that were afterwards acquired in pursuance of the integrating policy which the plans of the United States Steel Corporation contemplated. Practically it had no substantial wire (volume 12, p. 4734) or structural output and no tube or pipe output at all (volume 12, p. 4735). In 1898 the Illinois Steel Company entered on an effort to integrate by consolidation and with foreign trade in view (volume 18, p. 4718; volume 14, p. 5472). In pursuance of its integrating policy, the Illinois Company formed the Federal Steel Company, which took over the Minnesota Iron Company. This gave the Federal a Lake Superior ore reserve, its own railroad transportation to Lake Superior, its ore fleets to Chicago and lake ports. It also took over the Lorain Steel Company, which gave it mills in the Cleveland district, and at Johnstown, Pa., in the Pittsburgh district, and a relative approach to the seaboard. These mills were then regarded (volume 12, p. 4714) as enabling the Federal Company to supply foreign trade from those districts. This expectation was to that extent justified, for the proofs show (volume 10, p. 3813) that, so far as their individual products are concerned, the Lorain and Johnstown mills are now very substantial factors in the foreign trade developed by the Products Company. But apart from these mills the Federal Steel had no facilities for entering into foreign trade, and the proof is that, even with all the facilities for entering such trade possessed by the Steel Company (volume 10, pp. 3828, 3829), but 2 per cent. of the product of the Illinois Steel Company now goes into for-

eign trade, and that part goes, not into such general trade, but only into such Canadian markets as its location permits. The integrating steps thus mapped out are recited in the proofs (volume 12, p. 4695), but these partial efforts at complete integration proved disappointing in that it was not complete enough. In that respect the proofs are (volume 12, p. 4718):

"The plan and organization were good so far as they went, but the organization was too small; the capital employed was too small; the facilities for finishing steel were not sufficiently diversified. We lacked finishing mills, and our locations were not the best or good enough to extend foreign trade as we had hoped."

Realizing these limitations, and that the Federal Steel Company's operations were not rounded to a successful manufacturing future, the proofs (volume 12, p. 4721; volume 14, p. 5473) show that steps had been taken just before the United States Steel Corporation was formed to raise from $40,000,000 to $45,000,000 in further integrating the Federal Company. That such steps by the Federal Company had as their real basis the bona fide commercial and industrial requirement of further integration is, just as we have shown in the case of the Carnegie Steel Company, also shown in the Federal's case by after events in connection with later events in the Chicago district. The record (volume 11, p. 4143; volume 6, p. 2418) shows that the Federal Company was not equipped to make pipe and sheets at all, and plates only to a relatively small extent, and had no complete line of finishing mills. It further shows (volume 8, p. 2978) it lacked adequate open-hearth capacity, did not have the money (volume 12, p. 4762) to extend it, had (volume 11, p. 4226) very limited structural product facilities, and even with its ore supplies it had (volume 11, p. 4384) to buy other ores to get the proper mixtures. After the Steel Company was formed, in order to supply the needed rounding-up equipment of the Chicago district, which the Federal lacked, the Steel Corporation made large additions in that district at Gary, in the center, and at Duluth on the northern limit, with a view to reaching from Duluth the western Canadian market. In that regard the proofs (volume 10, p. 4074) show that some $80,000,000 were spent in building at Gary open-hearth plants, a rail mill, structural steel plants, bar mills, sheet mills, and plants of the American Bridge Company and the American Sheet & Tin Plate Company, in all of which facilities the Illinois and Federal Companies were deficient. Along the same line the proofs (volume 10, p. 4075) show that $10,000,000 are being expended at Duluth to erect blast furnaces, open-hearth furnaces, and bar and merchant mills with which to supply the American and Canadian Northwest. As evidencing this trend to further integration, the desirability of the Federal Steel Company acquiring the Carnegie Company and thus integrating eastward was, in 1899 (volume 12, p. 4722), brought to the attention of the Federal Steel Company by a representative of the Carnegie Steel Company, who then suggested:

"That it would be a good thing for the Federal Steel interests to purchase the Carnegie property and perhaps with them some other properties, which included finishing mills of various kinds, suggesting companies, the Wire Company, and the Tin Plate Company, and some other companies."

The matter was actively taken up by the Federal Company, but eventually fell through (volume 12, p. 4723), because "Mr. Frick was not willing to agree that the whole Carnegie organization, including himself, would remain in the company and assist in carrying on the business." The proofs further show that early in 1900 Mr. Schwab, the president of the Carnegie Company (volume 12, pp. 4724, 4725), urged the buying of that company by the Federal, and efforts were again made to have Mr. Morgan, who was a member of the board of the Federal Steel Company take it up, which he declined to do (volume 12, p. 4723).

This demand for integration which thus evidenced itself in these two leading companies, each attempting to integrate back to the base of supply and also into more extended and diversified finished product, also evidenced itself in other branches of the steel trade. This was the integration of mills which were large consumers of plates, ingots, billets, sheets, rods, structural iron, and other semibasic products. Without specifying all, we may refer to the steady integration of these various subdivisions of the steel trade. This began in December, 1898, when the principal tin plate manufactories integrated by consolidation into the American Tin Plate Company. In January, 1899, the American Steel & Wire was formed by a consolidation of all the leading wire product manufacturers. This was followed in February, 1899, by the consolidation into the National Steel Company of 12 per cent. of the ingot production of the country, which was located on the eastern side of Chicago and the western side of the Pittsburgh district. The same month saw the National Tube Company formed by great concerns making various kinds of tubes and pipes. In March of the same year, sheet steelmakers in large tonnage combined to form the American Sheet Steel Company, and in April of the same year, the American Steel Hoop Company was formed by the leading makers of hoops, bands, and cotton ties. While the American Sheet, the American Hoop, and the National Steel were separate companies, yet for integrated, continuous working, they were in effect (Topping, volume 2, pp. 636, 684, also volume 12, p. 4764) necessary to each other, Mr. Topping testifying:

"You will remember there was formed the Steel Hoop and the American Sheet Steel. The formation of those companies, as I understood at the time intended, was to balance up National Steel so as to make it more nearly self-sustaining. In other words, the National Steel was the raw producing steel company to supply the crude material to the Sheet Steel and Steel Hoop and Tin Plate Companies."

This integrated relation is no doubt the manufacturing feature on which it was (volume 12, p. 4747) insisted that the finishing companies would not sell to the Steel Corporation unless the National was also purchased, as Mr. Carnegie (volume 12, p. 4747) insisted should be done. In the same month we find the principal structural and bridge erectors and producers forming the American Bridge Company. In connection with this consolidating and integration of structural manufacturers and fabricators, it is but just to note, as illustrative of compelling forces outside that industry, the demands which the business world was making upon the structural steel industry. Thus in re-

ferring to the American Bridge Company, and its carrying forward at a later date this policy of expansion and local integrating of its works, the proofs (volume 10, p. 3961) show that such great operations as the tall buildings of recent origin, such railroad work as the Hell Gate Bridge, and such national work as the Panama Canal, practically necessitate the existence of such companies. In that respect the proof is railroad bridges are—

"confined to those companies having the largest plants and those equipped for that sort of work. There are very few companies, for example, that could build a bridge like the Hell Gate Bridge, involving 40,000 tons of material and an incidental expense of perhaps $300,000 to get the falsework together. When we secured that contract we had to expend immediately $160,000 for tools. While we were a very large concern and had a very well-equipped plant, we were obliged to buy $160,000 worth of tools for that particular work. * * *

"Q. Has there been any change in the style and size of the structures in the last 12 or 15 years which affected the size of the plants that are necessary in order to execute the contracts?

"A. Yes. * * * Since that time buildings ranging from 18 and 20 stories up to 36 stories have been built. * * * We fabricate the steel and deliver it to the site and erect it."

The proofs also show it is necessary to have structural plants in different localities. In that regard (page 3961), and referring only to the Middle West equipment, the proof is that the American Bridge Company has in the West—

"a plant at Toledo, one at Ambridge (Pittsburgh), one at Gary, Ind., a large plant and a comparatively new plant; one at Chicago, one in Minneapolis, one in St. Louis, and one in Detroit. * * * It is a zone business more or less." A zone business is a "business within 300 or 400 miles of where the plant is located. It is a question of freight rates.

"Q. You mean by that, bridge business or structural business for buildings?

"A. Both."

They further show that it requires a large plant to deliver such contract requirements so as to co-ordinate with other parts of the work. The proof is (page 3961), referring to the work done by the American Bridge Company along the Panama Canal:

"We have done about $8,000,000 worth of work there for the government so far. * * * We are building the emergency dams, building the transmission towers and the administration building and the machine shops, involving about 6,000 tons, and we have been doing a great deal of work outside of the lock gates which were furnished by McClintic-Marshall Company. I think we have done the major portion of the work, and it has always been work that we had to get out pretty promptly, and sometimes have to set aside other work to accomplish the deliveries required."

It will thus be seen that these large modern operations practically necessitate correspondingly large manufacturing facilities and financial resources to adequately and successfully meet such product demands. These rapid, widespread, and isolated integrations of different subdivisions of the steel trade cannot be reasonably explained on the sole theory of a widespread, dominating purpose in each of these aggregations to monopolize or restrain trade. In the first place, the proof is simply one-sided that they did not control trade, and that in spite of their size and large proportions of then existing trade, their competitors, as we have already seen, have increased more

rapidly than they. So that, while there may have been in the minds of those who formed them the possibility of monopoly and increase of price, we are inclined, from a study of the proofs in this case, to the belief that the real underlying influence was the economy of management, the locality of production and market, and the continuity of process which resulted from such integration. Take, for example, the last one formed, the American Bridge Company. During the years it has been a subsidiary of the United States Steel Corporation its business has increased 42 per cent. In that time, its competitors have increased their business 164 per cent. During that time the American Company has had the help of all the associated subsidiary companies of the Steel Company, it has shared in all the economies of management, co-operation and financial help rendered by the parent company, yet with all these aids, its competitors have increased their business four times as fast as its own. It would seem, therefore, that the American Bridge Company had even less hope or power to monopolize when it was originally formed and stood alone, when it could not, when bought by the Steel Corporation, so monopolize the steel structural business of the country. In view of such facts, we have been impressed with the view that these consolidations and integrations, accomplished or in view at the close of 1900, were more largely made with a view to meeting the changing conditions in the steel trade in its transition from iron to steel and in its adjusting itself to the progress, improvement, and development in that industry rather than with monopolistic intent. The proof in regard to the reasons for the formation of the American Bridge Company fairly states, as it seems to us, the basic reasons which led to the unifying of the separate branches of the steel industry. Thus in volume 2, page 874, it is testified, with respect to that company's formation, as follows:

"A. The purpose of the formation of the American Bridge Company was simply along the lines of economical shop management, and had no reference whatever to any monopoly or to securing the entire industry of the country. The plants which became a part of the American Bridge Company were believed to be in a position to be operated more economically as a combined whole than as independent units, and the foundation of that company was the securing of a steelworks whereby they could obtain, to a large extent, the control of their raw material for fabrication, the basis of practically all structural contracts being one of time; the time of delivery being the most important factor in practically 90 per cent. of all contracts taken. These independent units found themselves at that time in a very disadvantageous position, due to the fact that the large steel plants were commencing to do their own fabricating, whereby they were enabled to control their rolling mill supplies and make such deliveries as these independent fabricating shops, having no control over the raw material, could not do.

"There was also another reason for it, namely, that contracts were increasing so rapidly in magnitude that as independent units they were unable to secure sufficient working capital to enable them to fabricate these large tonnages.

"You can trace from the very beginning of the securing and assembling of their raw material through the designing, fabrication, transportation, and erection work, and the increase in their working capital, the reasons for putting together those plants, which were of two principal characters: First, they were partly competitive, I might say, by reason of a greater or less similarity of output and by reason of a common territory into which the transportation

rates enabled them to ship the material; and, second, plants absolutely noncompetitive, due, (a) by reason of an entirely dissimilar output, and (b) by reason of their geographical location.

"The whole scheme was one to decrease cost of production and to operate along the lines of what, at the present time is termed 'scientific shop management.' As a matter of fact, any advance in prices was not discussed to my knowledge; nor did any such enhancement ever take place. Competition at all times was extremely severe, and the profit on the output decreased from the time of the formation of that company until the present day. A number of concerns were offered to the American Bridge Company at the time of its formation, which were declined for various reasons, because they did not seem to be essential in the rounding out of the proposition that I have referred to."

As we have said above, it may have been the fact that, apart from the operative necessity that led to many manufacturers putting their works into these consolidations, there was probably a purpose also to monopolize and restrain trade, yet by the time the Steel Corporation was formed the inability of these prior combinations to so monopolize trade was proven to those who gave heed to facts and figures. For example, Government Exhibit, vol. 7, p. 2017, shows that the production in 1898 of the pig iron plants subsequently acquired by the Steel Corporation had been 46 per cent. of the country's total production of 1898; in 1900, the proportion of these plants had fallen to 41 per cent. In the same way, Bessemer plants afterwards acquired by the Steel Corporation had fallen from 73 per cent. in 1898 to 70 per cent. in 1900. The Bessemer rail plants had fallen from 63 per cent. in 1898 to 61 per cent. in 1900; wire rod plants had fallen from 97 per cent. in 1898 to 82 per cent. in 1900; structural shape plants had fallen from 66 per cent. in 1898 to 61 per cent. in 1900; plate and sheet plants had fallen from 67 per cent. in 1898 to 66 per cent. in 1900; while the wire nail plants subsequently acquired by the Steel Corporation, which had in 1898 produced 89 per cent. of the country's total production, had by 1900 dropped off to 73 per cent. Indeed, as we gather the net results of these different plants in varied steel lines, the acquisition of which (1901) by the Steel Corporation is alleged to evidence a purpose to monopolize, the facts and figures show that in only one product, namely, that of ingots and castings, had there been an increase of proportion in the three preceding years by these plants and in nine other branches, the plants which the Steel Company subsequently acquired, had in point of fact in those three years clearly shown their inability to monopolize by a decrease of relative percentage ranging from 1 per cent. in the case of plates and sheets to 16 per cent. in wire nails. And that this three years' decrease in actual monopolistic control was the normal trend of the steel business is shown by the fact that such proportions continued to decrease after the Steel Corporation was formed. As an example of this tendency we may cite the wire plants subsequently acquired by the Steel Corporation, which in 1898 had 88 per cent. of the country's production and in 1890 had fallen to 72 per cent., had by 1911 so continued to lessen their proportion of the part sold in the American market that it was then but 42 per cent. of the country's production.

Moreover, these combinations were the subject of Congressional investigation from 1898 forward, and the proof (volume 28, p. 11760)

is that while the results of that investigation were published (they are not in evidence before us) they have resulted (volume 12, p. 4755) in no adverse action by the government. From all which we find support for our conclusion that these former combinations were largely the result of economic and manufacturing plans for the production of product rather than for monopolistic plans for selling product. At any rate, the proof is that, as a practical business experience, these combinations which existed prior to the Steel Corporation had, in the three years preceding the formation of the Steel Corporation, shown a waning power to monopolize, if any such power existed when they were formed.

We have thus seen the unifying, integrating, and rounding-up influences which were irresistibly forcing those engaged in the practical work of making steel to form these prior combinations of integrating units. The proofs show that Mr. Morgan was a director in the Federal Steel Company (volume 12, p. 4724), but that he personally knew nothing of the steel business. His firm had taken part in some of these consolidations, but the suggestion of the absorption by the Federal of the Carnegie Company had not appealed to him. The proof is (volume 12, p. 4274) that while he was a member of the board of directors of the Federal Steel Company and was financially interested in it, he had probably never attended a meeting of the board and taken no part in its management and knew nothing of the practical steel business. The conditions in the steel trade being such as we have shown above, Mr. Morgan, in December, 1900, attended a dinner in New York where some 80 men, prominent in steel manufacturing and the banking business, were present. This dinner was given to Mr. Schwab, the president of the Carnegie Steel Company. Whether the dinner was given for the purpose of affording an opportunity of interesting Mr. Morgan in buying the Carnegie Steel Company, which the bitter differences between the partners in that company (volume 6, p. 2189; volume 14, pp. 5655, 5656) and the desire of Mr. Carnegie to retire from business then made possible, there can be no doubt, in view of the outcome, that Mr. Schwab then gave to the bankers present, and particularly to Mr. Morgan, who was seated beside him, such a comprehensive view of the steel trade as was well calculated to show the possibility of carrying integration to its logical manufacturing and merchandising efficiency, and afforded the Federal Company, of which Mr. Morgan was a director, the opportunity to carry out, on a large scale, the policy of integration that company had planned and had (volume 12, p. 4719) attempted to carry out. And there can be no doubt that Mr. Schwab realized that if a sale of the Carnegie Company could be made the grave discord among the partners of the Carnegie Company (volume 14, pp. 5655, 5656) which had arisen, could be ended, and the policy of integration on which, as noted, that company had also embarked, could be carried out by some larger organization. Indeed, the evidence is clear that there was an earnest desire on the part of the owners of the Carnegie Company for several reasons to sell. The situation was summed up by James H. Reed, who (volume 14, p. 5655) testified:

"Q. The Carnegie management was originally a partnership, I believe, was it not?

"A. A limited partnership.
"Q. When was it turned into a corporation?
"A. In the spring of 1900, turned into two corporations.
"Q. What is that?
"A. Two corporations were formed at that time.
"Q. What were they?
"A. The Carnegie Company was the holding company of the stocks of the Carnegie Steel Company, the Frick Coke Company, and the Bessemer and Lake Erie Railroad Company; the Carnegie Steel Company was organized under the laws of Pennsylvania and was the operating company.
"Q. What do you know of the desire of the stockholders of the Carnegie Company to sell out in the year 1900?
"A. I think they were all desirous to make some permanent disposition of the property, for several reasons.
"Q. There had been dissensions among the partners a year or two before, had there not?
"A. Yes; that is the mild word for it; there had been quite serious dissensions between Mr. Frick and Mr. Carnegie as the leaders.
"Q. Resulting in litigation?
"A. Resulting in litigation.
"Q. That was ended, I believe, by the organization of the corporation or corporations?
"A. Ended by the formation of the two corporations of which I have spoken.
"Q. Was entire harmony restored between the gentlemen by its organization?
"A. No, sir; it was not.
"Q. Now, did you learn from these gentlemen themselves of their desire to sell out in 1900, or from any of them?
"A. Why, I could not say that it was said in so many words, but I know it was their desire, as I say, that some permanent disposition should be made of the property for the reason that Mr. Carnegie was growing old. He had the majority interest in the company. A manufacturing company, like the Carnegie Steel Company, that was intensely active could not be successfully operated with the majority interest in the hands of trustees in case of his death. He himself was anxious to get out of business and get his interest in these concerns put into investment shape, and so you can see that generally there was a desire among all of them to have some kind of a disposition made of the property during his lifetime that would be permanent.
"Q. Was Mr. Carnegie giving a personal and immediate attention to the business during that time?
"A. He was, but not in the sense of being on the ground. He was either in New York or Skibo, and was getting constant reports, and he was seeing the various officers of the company frequently, and he was sending them advice from time to time.
"Q. Skibo is where?
"A. In the north of Scotland.
"Q. About how much of the year was Mr. Carnegie spending there at that time?
"A. About half of it.
"Q. And the other half in New York?
"A. In the United States, either in New York, or during the winter in the South.
"Q. But formerly, in earlier days, he had been in Pittsburgh and attended personally and actively to business, had he not?
"A. I believe until about 1880, when he moved to New York.
"Q. Was that so early as that?
"A. Yes, I think about that time. But he was within practical reach of the business whenever he was in the United States.
"Q. He could reach it by letters, could he not?
"A. Yes, and telegrams.
"Q. Do you know whether he was desirous of giving up even that connection with the business, aside from his desire to put his holdings in investment shape? Do you know whether he wished to be relieved of the care and

attention and thought that the business required of him, and to devote his time and thought and energies to other things?

"A. Yes; I think he was.

"Q. What was it that he contemplated, if you know, from him?

"A. What he has done since; that is, devoting himself to philanthropy and peace, and one thing and another."

With these matters no doubt in view, Mr. Schwab made an address as already quoted, and brought into clear relief three propositions: First, that steel making had then reached the limit of improvement in metallurgical methods; second, that further advance was dependent on integrating processes; and, third, that to take care of the growing steel production a great foreign trade was possible. It is suggested that this whole talk of integration or rounding up of manufacturing facilities is an afterthought, and a mere cloak to veil a concealed purpose to monopolize trade. Let us examine what the proofs show in that regard.

Looking only at the two great companies, the union of which made possible the steel company, the Federal and the Carnegie, we have the fact (see statements in bill, volume and title, "Pleadings," pages 3 and 4) that both these companies had been themselves gradual integration growths, and their managements were then trying to integrate them further. The Illinois Steel (volume 14, p. 5472; volume 12, p. 4693) had entered into the wider field of the Federal; it had integrated back to ore; it was trying to integrate locally into eastern markets through Lorain and Johnstown, had considered the acquisition of the Carnegie Company and had planned to spend (volume 12, pp. 4719–4721; volume 14, p. 5473), some forty to fifty millions of dollars in further broadening its field of products. For making the great basic products of open-hearth steel, which was then becoming the dominant factor in steel, the proofs (volume 8, p. 2978) show the Federal was not equipped. The subsequent location of the great open-hearth plant at Gary alone (volume 10, p. 4074) shows the existence of the Federal's prior need of further integration without reference to the fact (volume 10, p. 4074) that it was lacking in finishing mills for rails, bars, structural, sheets, etc. In the same way we have seen the Carnegie Company was lacking in finishing plants for tubes, wire, hoops, and many other finishing plants to use its subbasic product. These patent facts and urgent needs—facts which, as we have seen, were set forth at the time in the minutes, letters, and communications heretofore quoted—evidence the existence of the practical manufacturing necessity of both these two great companies, either building or buying finishing mills. That such purpose of manufacturing integration should have been elaborated and formally set forth as the reason for its purchase by the Federal Company of the Carnegie Company would not, in the nature of things, be done. Every one concerned knew these facts without their being stated. It was a thing every steel man recognized so fully that no specific reference would be naturally made to it. But the proofs do show that, whatever purpose was in the minds of those forming the Steel Company, integration was certainly one of the special objects in view. Thus, Mr. Schwab (volume 11, p. 4139) makes it clear that "the economic advantages to be derived" were more enlarged upon even than foreign trade. "I

might say," is his testimony, "that I enlarged, and perhaps made a more strenuous talk to Mr. Morgan, upon the subject of export and our ability to export, and foreign business in foreign markets, than any other, excepting only the economic advantages to be derived." That "the ability to export" and "the economic advantages to be derived," thus enlarged upon, was integration, is shown in Mr. Schwab's testimony:

"With reference to the foreign situation, I pointed out to him that up to that time our business, the steel business in general, had been nominal with reference to export business, and that, in my opinion, it could only be made profitable and possible by such an organization; that no company selling an individual line, a single line, or one or two lines, could hope to successfully compete for foreign business, where they were not prepared to furnish the customer every line that he might require for a structure or business; and that half a dozen or a dozen individual companies could not afford the expense or the organization to secure the talent necessary to make a successful export business, while such a company as I outlined could."

That this plan of integration in varied products—and nothing in excess of the required integration—was carried out is also shown by the proofs. In that regard, the same witness, speaking of his visit later to Mr. Morgan, when he took him the figures at which Mr. Carnegie would sell, testified:

"Q. Did you have any further talk with him at that time that you can recall?

"A. We had quite some talk upon the general subjects outlined before, and I was consulted with reference to the other concerns. I had nothing to do with the negotiations for the other concerns.

"Q. Who consulted you? Mr. Morgan?

"A. Yes; Mr. Morgan and Mr. Bacon.

"Q. Asking questions about what?

"A. A great many questions relative to the other concerns, the various concerns.

"Q. As to their character and business?

"A. As to their character and business, and what changes would be made, and how they would be operated, etc.

"Q. Was there in any of that conversation any question of obtaining all the steel plants, or acquiring a monopoly, or anything of that kind? * * *

"A. There was considerable discussion about the acquisition of other plants. I advised Mr. Morgan against it, because the other plants added nothing to the efficiency of the one I proposed. For example, plants like Jones & Laughlin, the Pennsylvania Steel Company, the Cambria, were discussed; but I said, 'No; they are in practically the same lines as the Carnegie Company, and they add no efficiency to this organization.'

"Q. At this time did the Federal have finishing mills?

"A. They did.

"Q. A sufficient number of them?

"A. They had a sufficient number in their own lines.

"Q. What were they lacking?

"A. The Federal did not make tubes; they did not make sheets; they did not make plates to any extent, and among the things needed there were few that the Carnegie Company made, other than rails, that the Federal Company made; and as to the Tube Company, the Carnegie at that time did not make tubes, nor did they make wire, which the Wire Company made. Indeed, the addition of these plants, the general whole, was the addition of the lines that the Carnegie or the Federal did not have.

"Q. Did either the Carnegie or the Federal have a complete line of finishing mills?

"A. No steel company had.

"Q. None of them had?

"A. None of them had, not nearly a complete line.

"Q. Which companies were there that you talked about as being capable of making up a complete line?

"A. There was the Carnegie and the Federal and the National; and then there was the Wire, the Tube, the Bridge, and the Sheet, and the Hoop Company, all of whom made their individual lines, and the Tin Plate Company also; I overlooked them.

"Q. As to the business of these companies, where was the business of the Federal principally done?

"A. Mostly in the Middle West.

"Q. And the Carnegie?

"A. When I say the Middle West, I mean Chicago and west. The Carnegie, from Chicago east.

* * * * * * * * * *

"A. They made rails. They made blooms and billets. You asked what they made in common. They made blooms and billets that were supplied to other finishing companies, which they did not finish themselves. Then the Carnegie Company made a few, a very small percentage of, merchant bars, and so did the Federal Steel Company.

"Q. In what territories, respectively, did they sell their products chiefly?

"A. As I said, the Federal sold mostly in a circle of which Chicago would be the center. The Carnegie sold theirs in a circle of which Pittsburgh would be the center.

"Q. What was the difficulty in trading over an extensive territory?

"A. If the Carnegie shipped west of Chicago, of course, they made a very great sacrifice in freights; and if the Federal shipped east of Pittsburgh, of course, they made a very great sacrifice in freights."

It will thus be seen that here was a complete outline of a manufacturing plan which, if carried out, enabled the Federal Company to integrate from or to varied finished products, and this not only in the Chicago district, but, through the acquisition of the Carnegie Company, through the Pittsburgh district as well, and through this latter district to reach the foreign markets, which it was powerless to reach from its own district, and through acquisition of the finishing mills held by the Tube, the Sheet, the Wire, and Bridge Companies to obtain the varied product facilities by which alone successful foreign trade could be built up. The testimony of Robert Bacon also shows that the whole plan turned on the possibility and advisability of the Federal buying the Carnegie Company, and, if that could be effected, that certain other units should be bought to provide adequate finishing plants. Thus, referring to a meeting of the federal directors held to consider the offer Mr. Carnegie made, Mr. Bacon (volume 14, p. 5479) testified:

"Q. Were any steps taken to get the views of the other Federal directors that day or later?

"A. Yes. We succeeded in getting them in New York the next morning, with the exception of Mr. Marshall Field, with whom we communicated over the long-distance telephone, so that the next day we had, I believe, the opinion of all the Federal directors.

"Q. How long did they remain together on Monday, the Federal directors I mean, whom you assembled?

"A. Nearly all day, at different times.

"Q. Was a conclusion reached that day with reference to the Carnegie offer—I mean, as to whether it was wise to accept it or not?

"A. My recollection is that, although it was very difficult to persuade some of the gentlemen, a conclusion was reached in principle in the afternoon.

"Q. Was there any discussion that day as to how the thing might be financed?

"A. No discussion as to detail.

"Q. I do not mean detail at all.

"A. But naturally the supposition was that it would be financed by J. P. Morgan & Co.

"Q. Do you remember whether Mr. Morgan said anything on that subject to his associate directors, as to whether he was willing to undertake it, I mean?

"A. Yes; my recollection is that in a very few words Mr. Morgan finally, after having heard our opinions, said that if they approved and substantiated the estimates in a general way of the business, and its probable success, that he would undertake to finance it.

"Q. Was there any talk that day as to what, if any, other concerns should be taken over?

"A. Yes; it was believed by all the men present, the directors of the Federal Steel Company, that if the Carnegie was purchased, other units should be purchased as well.

"Q. And were the other units talked of and considered?

"A. Yes; they were all considered.

"Q. And upon what principle were they chosen?

"A. Upon what principle were they chosen? I should say upon the principle of furnishing each an essential part of a completed whole; a new company which should manufacture all kinds of iron and steel products, owning its raw materials, facilities for transportation of raw materials to the mills and finishing plants, I think that was the basis upon which each one of these elements was considered, and, of course, the price at which they could be acquired, based upon their actual value.

"Q. Was any arrangement made on that day or shortly thereafter for opening negotiations with the owners of the various plants that were talked of?

"A. Yes; I think it was determined that day to go right ahead and see if they could be bought upon a satisfactory basis.

"Q. Who was intrusted with the negotiations? If you remember?

"A. I think that J. P. Morgan & Co. bore the brunt of it.

* * * * * * * * * *

"Q. What was said by the gentlemen present with respect to the objects to be attained by the organization? * * *

"A. It was said by all those gentlemen present, and I knew it to be their opinion, having been so closely associated with them for many years, that the object to be attained was the creation of a great new steel company, based upon the Federal Steel Company, which would be able, by the ownership of its raw materials, by all legitimate means of rail and lake transportation, and by the ownership of finishing mills of all descriptions both in the East and West to create a plant which should be able to manufacture every kind of iron and steel, and by reason largely of its ability to reduce the cost of production and the territorial distribution of its plants and activities, sell its products to the best advantage in every market in the world. I know that to be the object of those men that formed the United States Steel Corporation.

* * * * * * * * * *

"A. Mr. Morgan believed that if he could take part in the formation of such a company it would be the greatest, the crowning, achievement of his business career. He believed that the effect of such a creation would be upon the whole industrial fabric, the industrial life of this country, of tremendous beneficial effect. Convinced as he was by Brother Schwab and the other experts that almost inconceivable results could be obtained in the way of lowering cost of production of iron and steel, that such a company would bring more good into our whole national life, constituting as it did the greatest single factor in the great constructive work of the country, than could possibly be attained in any other way. His first great object was, as I have said, by reason of the decrease in cost of production, to make it possible to so improve the conditions of labor by increasing wages and bettering the conditions, and, by enabling the consumer always to depend upon stability of prices, to bring about a new condition of things. Those briefly, were the ideals and ambitions of Mr. Morgan in forming the United States Steel Company.

* * * * * * * * * *

"It was said by all those gentlemen present—I believe all of them; I know by Mr. Morgan—that under no considerations would he take part in anything which was or might be considered to be a monopoly or any attempt to restrain competition. I know that that was one thing furthest from his willingness to participate in."

Referring to this meeting Judge Gary (volume 12, pp. 4732, 4733), says:

"Q. Now, what were the subjects considered by you, gentlemen, directors of the Federal, or owners of the Federal, at that time, and on account of which, or after considering which, you reached the resolution you mention?

"A. The question of securing the Carnegie properties with their ore reserves, which contained a class and character of ore in large quantities which the Federal or the Minnesota iron did not have, particularly their mills for diversified products, their location, and their organization, which was believed to be a very good one, and, if possible, the acquisition of other companies owning finishing mills, in order to diversify the product, including the Wire Company, which had been offered to us a number of times, and for the purpose, as I have said, of completing a rounded-out proposition for the development of the business, extension of the business, manufacturing at lowest cost, and, particularly, increasing the extent of export business."

And (volume 12, p. 4751) he adds:

"You see, in this whole plan, Mr. Lindabury, there was an effort made to acquire property that would be useful to each other, and by that I mean to acquire a plant that furnished certain commodities to another plant which we were acquiring and to acquire—the latter because it could, at good advantage, secure the products which it needed for its uses, and so all through the line, from the ore down to the conversion from one product into another and the final distribution of the finished product."

These proofs certainly tend to show that the practical manufacturing question of rounding out or integrating the Federal Company by acquiring finishing companies was one of the objects its directors had in view at this meeting. The proofs also show that these several finishing mills were consumers of such basic products as were made by the Federal and the Carnegie, and that those two companies had no such finishing mills of their own as was adequate to consume the product they made, which was suitable for such mill. Without entering into the details of the proof bearing on these several finishing companies, all of which, together with the comments thereon are to be found in the Statement of the Case, page 63 and following, we may say they fairly show that without the acquisition of each of the finishing companies named, viz., the American Steel & Wire, the National Tube, the American Bridge, the American Steel Hoop, and the American Sheet Steel, the Federal Steel Company, even with the acquisition of the Carnegie would not have been provided with adequate finishing facilities for consuming its sub-basic product. And further, without the acquisition of the first three, the Federal would lack several of the most important products (Defendant's Exhibit, volume 2, p. 204) that have entered into the foreign trade built up by the United States Steel Products Company. It will also be noted that, in addition to the affirmative testimony quoted above tending to show that integration along manufacturing lines and development of foreign trade were among the avowed purposes of those who formed the Steel Corporation, there is a negative testimony of those who took part in forming the Steel Corpora-

tion, and quoted below, that monopoly of the steel and iron business was not the purpose for which that corporation was formed.

First. That with the competition left outside of the Steel Company, the extent of which has already been shown, a monopoly of the steel and iron business of the United States was simply impossible, and that no effort was made to secure these companies (volume 12, pp. 4756, 4757).

Second. That in view of the fact that the proportionate volume of competitive business has increased since the Steel Company was formed and that the proofs show no attempt by it to monopolize it to the exclusion of its competitors, to now attribute to those who formed the corporation an intended monopolization would be to say that, having formed the corporation for the purpose of monopoly, they immediately abandoned such purpose and made no effort to accomplish it.

Third. That the publicity, which the proofs (volume 14, pp. 5669, 5585) show the Steel Company has from time to time made of its prices, its accounts, and its policies, would seem a practice in line with legitimate business, rather than with illegal monopolization.

Fourth. That in carrying out the plan the advice of Abraham S. Hewitt was (volume 14, p. 5484) taken by Mr. Morgan, and at the latter's request Mr. Hewitt went on the board and served until his death, is a fact which, in view of the high character of Abraham S. Hewitt, tends to negative the contention that the purpose in view was to violate the law.

And lastly, as stated above, there is affirmative testimony that no such object was in view. In that regard the testimony of Robert Bacon (volume 14, pp. 5485–5487) is not to be overlooked. His service as Secretary of State under one administration, as Minister to France under another, coupled with his selection on his retirement from business to positions of educational character, warrant this court in attributing weight to his testimony. The testimony of Judge James H. Reed (volume 14, p. 5663), of Judge Gary (volume 12, pp. 4753–4755), and of Charles M. Schwab is to the same effect. The latter (volume 11, p. 4175) says:

"From the moment when I first started with Mr. Morgan, the question of our gaining a monopoly or in any way controlling the steel industry was never mentioned. My whole argument with him, as advocating this company, was the economic development of the same, and the matter, to the best of my knowledge, never came up thereafter."

And in this connection it is to be noted that the poofs show that the Carnegie Company and the finishing companies which the Steel Company acquired in 1901 were formed at various times from 1898 to 1900, that (volume 12, p. 5754) these particular companies (volume 28, p. 11759) were made the subject of congressional investigation, that no steps were taken by the government to dissolve such companies for the 13 years following the formation of the earliest of these companies, and 11 years from the latest, until 1911, that the Steel Company was also in 1905 made the subject of further congressional investigation, and that no steps were taken to dissolve it until this bill was filed.

Recurring, therefore, to the particular question with which this particular part of his opinion deals, namely, whether we should now enter

a decree dissolving the Steel Corporation on the ground of its inherent illegal character in 1901, and whether we should also dissolve the several constituent companies which it acquired on the like ground of their original inherent illegal character when they were formed, we think there is ground for our holding, in view of the facts, proofs, and views above set forth, that we are not, as a court of equity, warranted in taking such a drastic course as to now decree the dissolution of the Steel Corporation or its constituent companies.

We are, however, pointed to the subsequent acquisition by the Steel Company of several properties as being attempted monopoly or restraint of trade, and as evidencing an original purpose to monopolize and restrain. The first of such was in August, 1901, when the Steel Company bought the Shelby Steel Tube Company. Whatever may have been its motive at the outset, it is clear the purchase effected neither monopoly nor restraint of trade, for we have already seen that while, even with the acquisition of this company, the Steel Company's output of seamless tube, during the ten years of its existence, has doubled, during the same period its competitors' sales have grown sevenfold. In the light of such figures and facts, we are of opinion that the acquisition was simply in the due course of normal business, and, indeed, was but the virtual carrying out of integration plans of the Carnegie Steel Company that long antedated the formation of the Steel Company. Without entering into minor details, we may say that no proof of monopoly or trade restraint was shown beyond the conceded fact of purchase, and the fact that the new article of seamless tubing was in some uses supplanting lap-weld. We have examined, among others, the testimony found in Government Exhibits, volume 2, pp. 405, 411, 560, 562; Government Exhibit, volume 14, pp. 2902, 2823; volume 11, pp. 4198, 4199; volume 13, pp. 5237–5260; volume 17, p. 7940; volume 13, pp. 5076–5089; volume 12, p. 4803; volume 13, p. 4986; Delaware v. Shelby, 160 Fed. 928, 88 C. C. A. 110; Shelby v. Delaware (C. C.) 151 Fed. 64; Delaware v. Shelby, 212 U. S. 580, 29 Sup. Ct. 689, 53 L. Ed. 659; and Defendants' Exhibit No. 31, volume 1, p. 166—and therefrom, without entering into details we deduce these conclusions. The old type of tubing was called "lap-weld," and made by the National Tube Company. The Shelby Company made a different article, called "seamless" tube. While in some ways lap-weld and seamless were in competition, yet their main uses (volume 13, p. 5803) were not the same. The Shelby Company held a basic patent involving the piercing, at an early stage, of the billet from which the seamless tube was drawn. Before the purchase of the Carnegie Steel Company by the United States Steel Corporation, the former company, in pursuance of its purpose to enter the pipe business, was carrying on some experimental work in seamless tube making at the Shelby Company's plants, and its management had become convinced that the Shelby method was the proper one. Meanwhile the National Company had also determined to enter the seamless tube field, and to that end had bought the Standard Company. The latter made seamless tube under a patent granted to two former employés of the Shelby Company. Its business in the seamless tubes was (volume 13, p. 5083) very small, and it had (volume 19, p. 7940) previ-

ously tried to consolidate with the Shelby Company. Much patent litigation had resulted; the National Company carrying on the contest for the Standard Company.

When the Steel Company was formed, two divergent views were thus presented by the managements of two of its units. The National Tube, represented by Mr. Converse (volume 13, pp. 5243, 5244), contended the Standard's process and machinery was the proper mode of seamless tube making. The Carnegie Company, represented by its president, contended the Shelby method was the proper one. The determination of the matter seems to have been made by two directors of the Steel Company who had taken no part in the contest between the National Tube Company and the Carnegie Steel Company. Their testimony (volume 13, p. 4936, and volume 12, p. 4803) is that they became convinced that the patent of the Shelby Company controlled the situation. That company would only sell its patent, however (volume 12, p. 4805), if the Steel Company also bought its plant. Such purchase the Steel Company made in order to get the patent. In view of the fact that the Shelby patent has been sustained by the courts, that the Steel Company on its purchase abandoned the machinery used by the Standard Company, and has since manufactured under the Shelby process, we are satisfied that the acquisition of that company was an ordinary purchase, and had no other purpose than to acquire and use the legal monopoly which the Shelby Company had obtained from the government by its patent. And a purpose to restrain and monopolize the pipe business is negatived by the fact that no monopoly has resulted and that pipe (volume 11, p. 4481) sells for $20 a ton less than when the Steel Company was formed.

The next matter in the line of alleged monopoly and trade restraint was the purchase by the Steel Corporation of the Union Steel Company in December, 1902. The testimony bearing on that question on the part of the government will be found at volume 3, pp. 1086 to 1137; volume 5, pp. 1997 to 2009; volume 6, pp. 2141 to 2218; Government Exhibit, volume 4, pp. 1574, 1583; volume 5, p. 1883; and on the part of the Steel Company in volume 14, p. 5666; volume 12, pp. 4806 to 4810; volume 10, pp. 4037 and 4038. Without here discussing the testimony on the part of the Steel Company, we may say that the proof on the part of the government in itself shows that this sale was not made with any purpose of monopoly or trade restraint. The Union Steel Company had merged with the Sharon Steel Company. John Stevenson, Jr., who was the practical man in the Sharon Company, testified that such competition as there was between those companies and the defendant Steel Company was fair:

"I liked the competition. If you are bound to have competition, theirs was good competition."

He said he sold out his interest in the Union Company because he needed the money; that he had put more money into the enterprise than he owned and was hard up; that the effort to sell came from his company; that the sale was made on fair terms, cost and accrued profit. Their ore holdings were very valuable, had been definitely ascertained by spot borings, were owned in fee, and were sold in place at a price

based on the common ore royalty. He says that at the time of the sale the Union was only one of a number of competitors, all of whom were flourishing and doing an increased business, such as the Pennsylvania, Cambria, Bethlehem, Lackawanna, the Republic, and Jones & Laughlin. That his company's business with relation to the country's total production was less than 2 per cent., and that the Steel Company's percentage has decreased, and its competitors' percentage had increased, during that time. The testimony of Mr. Whitla, one of Stevenson's associates, is to the same effect, namely, that the competition of the Steel Company was fair, and that the business of the Union Company had grown to such an extent as to interfere with his own and some of his associates; that the sale was made at a fair price when the opportunity came to withdraw. To the same effect is the testimony of W. H. Donner. He started the Union Steel Company, was its practical man, and after the sale re-entered the steel business as president of the Cambria Steel Company, one of the principal competitors of the Steel Company. He says the Union Company, after its merger with the Sharon, had large ore reserves of very desirable quality; that they had valuable lake frontage harbor lands, and fine coking coal reserves; that they had large open hearth facilities (volume 12, p. 4806) in which the Carnegie Company was short; that they also had finishing mills in which the American Steel & Wire Company were short and which it needed (volume 12, p. 4807; volume 10, p. 4037), in foreign trade; that these finishing mills were adapted to using Bessemer steel with which the Carnegie Company was oversupplied; that the Carnegie Company (the Steel Company's subsidiary) had an overcapacity of Bessemer and an undercapacity of open hearth is conclusively shown by the subsequent integration of the Steel Corporation at Braddock (in the same district as the Union), where $11,000,000 was required in open hearth extensions. In that regard the proof (Farrell, volume 10, p. 4077) is:

"We are building at Pittsburgh a new steel works, a rail mill at Braddock, Pa., with a capacity of 750,000 tons a year of open-hearth steel; that is, to take up the rail business. This Bessemer equipment is obsolete; that is, the equipment is just as good as new, but the demand does not exist, so consequently we cannot employ it, and it necessitates producing steel that is required by the buyers. We are spending there about $11,000,000."

Donner says the movement to sell came from the Union Company, and not from the Steel Company; that he knows the Steel Corporation people were at first opposed to buying, and only changed their minds when shown how the Union would supply, as above stated, the features in which the former were short; that, in order to induce the Steel Corporation to buy, the Union Company was obliged to cut down their ore prices $1,500,000 below what these properties had been valued at when his company and the Sharon merged; that of the four men in the original Union Company he was in favor of selling in order to get out of debt, one of his associates was very anxious to sell, and in fact brought about the sale, because he was in an embarrassing position, because his connection with both the Union Company and the Steel Company prevented him from taking part in the affairs of either; that his other two partners were opposed to selling, and only acceded

to it on account of their personal relations to the partner who desired the sale. Without here detailing the defendant's testimony at length, which we may say corroborates the foregoing, we are of opinion that the purchase of the Union Company was a natural and normal acquisition, incident to the growth, increase, and needs of the Steel Corporation's business, and was not done with a view to monopolizing the steel business, or to restrain trade by eliminating competition. And we may say that this conclusion is in accord with the subsequent acts of the Steel Corporation. The proofs show (volume 10, p. 4037) that some $2,225,000 was spent by the Steel Company to further increase the Union wire plants and meet the needs of the company's foreign business. The whole wire capacity of the Union's wire plants (volume 10, p. 3845) is now being operated to the capacity of 83,000 tons of wire for foreign trade against 8,000 tons when it was bought. In connection with the work of these finishing mills, about a million and a half dollars were spent in open-hearth construction by which the finishing mills and furnaces—blast and open-hearth—were integrated into a continuous process. Indeed, the need of this plant to carry out the general unification problem of the Steel Company is shown by the fact (Donner, volume 6, p. 2185) that subsequent to its purchase of the Union Steel Company the Steel Corporation spent nearly $7,000,000 in extensions in view by the Union, and $10,000,000 in extensions planned after the purchase.

We next turn to the acquisition in May, 1904, of the Clairton Steel Company. The Crucible Steel Company was engaged in the manufacture of tool and finer grades of steel (volume 13, p. 4953), which the Steel Corporation did not make. In the spirit of complete integration which swept over the steel trade, the Crucible Company, as the sequel clearly shows, had in 1902, mistakenly through the Clairton Company, whose stock it owned, gone into ore ownership, furnace, open-hearth, bloom, billet, and slab integration on a scale far beyond its own requirements. In January, 1904, the Clairton Company had become insolvent and passed (volume 5, p. 2059; volume 14, p. 5669) into the hands of a receiver. The proofs (Government Exhibit, volume 2, p. 599; volume 14, p. 5587; volume 12, p. 4814; volume 13, p. 5236) show that several efforts had previously been made by the Crucible Steel Company to sell the Clairton Company to the Steel Corporation. That company declined to purchase. After the receivership, the negotiations were resumed with it and other interests (volume 5, p. 2061), and the property sold to the Steel Corporation with the permission (volume 5, p. 2061) of the court at $4,000,000 below cost. Clairton had a pig-iron capacity of some 420,000 tons. It had (volume 12, p. 4814, and volume 13, p. 5236) through its type of furnace construction been able for the first time to make pig iron from Mesaba ores without any mixture of old range ores. In connection with this sale, it should here be stated, as a matter of which this court cannot but take judicial notice, that the receivership of the Clairton Company and the sale of its property was under the direction of one of the judges now sitting in this case; that the bonds of the insolvent company were guaranteed by the Crucible Company; that, while the latter company was and has since

been prosperous, the guaranty by it of the Clairton Company's bonds seriously threatened not only the stockholders of the Crucible Company, as testified in this case (volume 14, p. 5669), but grave financial troubles in the community. To avoid these, the receivers, under the direction of the court, and in co-operation with the officers of the Crucible Company, sought to have the Steel Company buy this plant and thus relieve the Crucible Company of its large and threatening collateral liability.

The next of these acquisitions by the Steel Company, which it is alleged was made to monopolize or restrain trade, is known as the Great Northern ore lease, which was a lease on royalty of some thirty-nine thousand acres of Lake Superior ore lands in August, 1907. This lease provided for the payment of a minimum royalty of 750,000 tons to be mined in 1907, 1,500,000 tons in 1908, and an increase of 750,000 tons each year until 8,250,000 tons was reached in 1917. That yearly amount was then to be taken out until the lease ended in 50 years. The royalty was, using round figures, $1.17 per ton on 49 per cent. ore, $1.21 on 50 per cent., and $1.98 on 66 per cent. ore, with an increase of 3.4 cents per each year on all grades. The lease provided the Steel Company had the option to cancel it as of January 1, 1915. During that time the lessee had full rights to test the premises. In pursuance of such right of cancellation, the Steel Corporation early in 1911, and prior to the filing of this petition, gave notice of cancellation, in pursuance of which the lease was subsequently surrendered. It will thus appear that, whatever effect the leasing and continued control of this ore on the fact of the monopolization of ore reserves may originally have had, the surrender of the lease lessened the ore holdings of the company to a point far below any possibility of monopolization. A discussion by us of the question of the possible effect of this lease as giving monopolistic control would be problematical, and the uncertain character of any conclusion reached is best emphasized by the essentially different status of the ore business now and when this lease was made. This is due to the subsequent development of other fields and to the fact that ores which a few years ago were looked upon as not usable can now be used under new methods. Moreover, the facts cited in the former part of this opinion, in reference to the ore supplies of the competitors of the steel corporation, show not only that several of the large companies had a reserve for more years than the Steel Company, that the seaboard companies are wholly independent of the Lake Superior regions, and that the Steel Corporation's competitors have from time to time been able to acquire all additional ore reserves desired. In addition to this, we have the fact of large holdings by mining companies, who sell ore and who have been compelled (volume 16, pp. 6548 and 6544) to integrate into blast furnaces in order to dispose of it. The proofs of experienced witnesses (volume 16, p. 6232; volume 17, p. 7012) are that adequate ore reserves could be had by new companies. In view of these facts and proofs, and of the fact that the option to cancel the ore lease here in question had been exercised when the present petition was filed, it would seem that the ore reserve of the Steel Corporation held at that time gave it no monopoly in ore. Such being the

case, the ore lands in question having reverted to the owners, they and such defendants as were made parties to this cause by virtue of their relation to the acquisition of such ore lands appear to have no further part in this cause. So far as they are concerned, the petition will be dismissed.

We shall next consider the purchase by the Steel Company of the Tennessee Coal & Iron Company which was made in November, 1907. On the one hand, it is alleged the Tennessee Company was a competitor of great power and that its purchase was for the purpose of suppressing competition and effecting monopoly and restraint of trade. On the other hand, it is contended that the competition of the Tennessee Company was of relatively small extent, that its purchase was practically forced upon the Steel Company as a means of averting a threatening financial crisis during the panic of 1907, and that such purchase neither did, nor tended to, monopolize or restrain the steel and iron industry of the United States. Without here entering upon a detailed analysis of all the proofs, we may say that we have specially studied, in addition to other proofs, the evidence produced by the government and found at Buell, volume 1, pp. 15 to 34; Topping, volume 2, pp. 643–671 and 686–718; Perin, volume 2, pp. 792–982; Same volume 3, pp. 983–997, also 1005–1008, also 1016–1019, also 1024, 1025; Gov't Exhibit No. 90, vol. 1, p. 242; Gov't Exhibit, vol. 2, pp. 488, 493, 510, 544; Corey, volume 8, pp. 2973–2975; Alos, pp. 3045–3056; Grasty, volume 8, pp. 3140, 3153; Gov't Exhibit No. 341, vol. 8, p. 2132 (in that connection see Topping, volume 2, pp. 706, 709, 712, 714, 716, 755); also, Gov't Exhibit, vol. 2, pp. 488, 492, 510; and also the testimony produced by the Steel Company, to wit, Filbert, volume 14, pp. 5591–5593; Farrell, volume 10, pp. 4018, 4020, 4021, 4024, 4028; Witherbee, volume 18, pp. 7287–7290; Bowron, volume 25, pp. 10415, 10431, 10440, 10442; also, volume 20, p. 10408; Crawford, volume 13, pp. 6125–6178; Burr, volume 27, pp. 11573–11586; King, volume 25, pp. 10249–10260; Haas, volume 20, p. 8316; Farrell, volume 10, p. 3881; Defendant's Exhibit No. 12, vol. 1, p. 138—bearing on the question of monopoly and trade restraint as contended for by the government, and have arrived at the following conclusions: At the time the Steel Company bought the Tennessee Company, the latter's production of iron and steel was 1.7 per cent. of the production of the country. That up to that time the Tennessee Company had not been a business success. That it was making rails, which was its principal steel product, at a loss. That its ultimate success was problematic. That such success involved an outlay of upwards of $25,000,000 to put it on a dividend basis. That it had never really earned any dividends up to the time of its sale. That the whole testimony shows its relation as a successful, substantial competitor with the Steel Company in the volume of its business, the character of its product, and the breadth of its market, was negligible. We are warranted by this testimony, and find the fact to be, that its purchase by the Steel Company in no way tended to monopolize the steel and iron trade, and that it was not bought with the purpose or intent of monopolizing, or attempting to monopolize or restrain, that trade. Such negative conclusions and findings are con-

firmed by the affirmative proofs showing just how the purchase was made, namely, as a necessary part of comprehensive plans of bankers and business men, sanctioned by President Roosevelt to check the panic of 1907, which was then at its height. Without entering into details, we may say the situation was summed up in the letter of President Roosevelt to Attorney General Bonaparte, found in Gov't Exhibit No. 339, vol. 7, p. 2125, as follows:

"November 4th, 1907.

"My Dear Mr. Attorney General: Judge E. H. Gary and Mr. H. C. Frick on behalf of the Steel Corporation have just called upon me. They state that there is a certain business firm (the name of which I have not been told, but which is of real importance in New York business circles) which will undoubtedly fail this week if help is not given. Among its assets are a majority of the securities of the Tennessee Coal Company. Application has been urgently made to the Steel Corporation to purchase this stock as the only means of avoiding a failure. Judge Gary and Mr. Frick inform me that as a mere business transaction they do not care to purchase the stock; that under ordinary circumstances, they would not consider purchasing the stock because but little benefit will come to the Steel Corporation from the purchase; that they are aware that the purchase will be used as a handle for attack upon them on the ground that they are striving to secure a monopoly of the business and prevent competition—not that this would represent what could honestly be said, but what might recklessly and untruthfully be said. They further inform me that as a matter of fact the policy of the company has been to decline to acquire more than 60 per cent. of the steel properties and that this purpose has been persevered in for several years past, with the object of preventing these accusations, and as a matter of fact, their proportion of steel properties has slightly decreased, so that it is below this 60 per cent. and the acquisition of the property in question will not raise it above 60 per cent. But they feel that it is immensely to their interest, as to the interest of every responsible business man to try to prevent a panic and general industrial smash-up at this time, and that they are willing to go into this transaction, which they would not otherwise go into, because it seems the opinion of those best fitted to express judgment in New York that it will be an important factor in preventing a break that might be ruinous; and that this has been urged upon them by the combination of the most responsible bankers in New York who are now thus engaged in endeavoring to save the situation. But they asserted they did not wish to do this, if I stated that it ought not to be done. I answered that while of course I could not advise them to take the action proposed, I felt it no public duty of mine to interpose any objection.

"Sincerely yours, Theodore Roosevelt."

When called by the government as a witness, President Roosevelt (volume 8, pp. 2903–2908) testified as to this letter as follows:

"I was dealing with a panic, and a situation where not mere merely twenty-four hours, but one hour, might cause widespread disaster to the public. * * *

"I ought to say that from New York I had been told by banker after banker that the Tennessee Coal & Iron Securities were valueless as securities that counted in that panic. * * *

"There were two matters to which my attention was especially directed. One was the condition of things in New York, the relief that the action would bring, not merely to New York, but throughout the entire country—just as much in Louisiana and Minnesota and California as in New York. That was one thing. The other thing to which my attention was particularly directed was the percentage of holdings that the Steel Corporation had and had had and would have after the Tennessee Coal & Iron properties were acquired. * * *

"The knowledge that I had was that the Steel Corporation had some years previously possessed nearly 60 per cent. of the holdings of the steel industry in the country; that its percentage had shrunk steadily; that the addition of

the Tennessee Coal & Iron Company, which was something in the nature of 4 per cent., somewhere between 2 and 4 per cent., I have forgotten the exact amount, somewhere around there, did not bring up the percentage of holdings of the Steel Corporation to what it had been a few years previously. * * *

"My knowledge was simply this, that it was a matter of general opinion among experts that the Tennessee Coal & Iron people had a property which was almost worthless in their hands, nearly worthless to them, nearly worthless to the communities in which it was situated, and entirely worthless to any financial institution that had the securities the minute that any panic came, and that the only way to give value to it was to put it in the hands of people, whose possession of it would be a guaranty that there was value to it. * * *

"I believed at the time that the facts in the case were as represented to me on behalf of the Steel Corporation, and my further knowledge has convinced me that this was true. I believed at the time that the representatives of the Steel Corporation told me the truth as to the change that would be worked in the percentage of the business which the proposed acquisition would give the Steel Corporation, and further inquiry has confirmed me that they did so. I was not misled. The representatives of the Steel Corporation told me the truth as to what the effect of the action at that time would be, and any statement that I was misled, or that the representatives of the Steel Corporation did not thus tell me the truth as to the facts of the case, is itself not in accordance with the truth."

An examination of the testimony, viz., letter of the Attorney General of the United States of November 4th, cited by the President, volume 8, p. 2907; Gary, volume 12, pp. 4834–4866; Tierney, volume 4, pp. 1559–1587; Thorne, volume 3, p. 1276; Topping, volume 2, p. 695; Corey, volume 8, pp. 3052, 3054; Gayley, volume 9, p. 3618; Ledyard, volume 15, pp. 6065–6114—shows that the matter was as stated by the President, and that the Steel Corporation's chairman absolutely refused to purchase (volume 12, p. 4854), unless the matter was submitted to the government authorities, his testimony in that regard being:

"While the President of the United States could not say that we might purchase this, or that we should not purchase this property, yet, I believed, inasmuch as he had the general direction of the law department of the United States, certainly we ought to know what would be the attitude of the administration in case we did buy this property."

Indeed, as to this purchase, as well as the others, which we have discussed above, sales made under different circumstances and for various reasons, we cannot but feel, in the light of the proofs, that they were made in fair business course, and were, to use the language of the Supreme Court in the Standard Oil Case, "the honest exertion of one's right to contract for his own benefit, unaccompanied by a wrongful motive to injure others."

It is strongly urged that the fact that standard Bessemer steel rails have for a long series of years, covering indeed the whole life of the Steel Corporation, been sold at the uniform price of $28 per ton, shows some controlling influence, and, in connection with the proofs, evidences the existence of a combination among all rail mills, including the Steel Corporation, to control the price. Generally speaking, railroad rails are as to their basic character either Bessemer or open-hearth. Bessemer was the earlier development, and of this type is the standard Bessemer rail which has kept the above uniform price. The proofs show (volume 10, p. 4049) that about 30

per cent. of the rails sold are of this kind, the consumption having fallen (Defendant's Exhibit, volume 3, pp. 323, 324) from 99.9 per cent. in 1901, to 33 per cent. in 1912. As we have said, the proofs show that these standard Bessemer rails have been almost uniformly sold at $28, though there is some proof (volume 26, p. 10942) that they were at times sold for less. The open-hearth rail is a later development; it has largely superseded the standard Bessemer, constituting (volume 10, p. 4051) 60 per cent. of the rail product. It ordinarily sells (volume 10, pp. 4960, 4050) at from $1.50 to $2 per gross ton higher than the Bessemer standard rails, and the price of such open-hearth rails (volume 13, p. 4961) according to specifications. This is so (volume 10, p. 4050) "because many open-hearth rails are made to special analyses, the chemical composition is different, due to the fact that some railroads insist upon greater physical tests than others, which, of course, while the open-hearth process is the basic operation, nevertheless we call them different qualities of rails." The other 10 per cent. of rails consist of alloy or electric rails, the cost of making which (volume 10, p. 4051) is $40 per ton; nickle alloy rails, which vary (volume 10, p. 4051) from $34 to $60 per ton; and manganese, which sell for from $100 to $130 per ton, depending upon chemical analyses, they being especially made to serve for work on curves, under the shade of bridges, and other such trying places. It will thus be seen there is a wide variation in the character and price of the great bulk, namely, of 70 per cent. of the country's rail product, and that the standard Bessemer rails which it is alleged evidenced price-control, are in fact but 30 per cent. of the total rail consumption. The testimony (volume 13, p. 4959) throws some light on the uniform price of this remaining 30 per cent. of the standard Bessemer rails, namely, that $28 a ton is a foundation price from which the price of other rails, varying in specification and chemical requirements, can be figured. Another cause of price uniformity in rails, the proof (volume 13, p. 4960) shows is due to the change about 1900 in reference to freights; prior to 1900, there was an opportunity to bargain for transportation which was at no definite fixed price. Since 1900, by government regulation, railroads can no longer trade in transportation at varying figures. The extent to which special freight rates entered in the sale of rails prior to 1900 is illustrated by the incidents elsewhere referred to, where the proofs (volume 10, p. 3882) show that a special freight rate of 45 cents led to sales of rails being made from Chicago to Japan. The proofs also show that the real potential control over the price of rails is rather in the buyers than the makers of rails. Reflection will show why this is so. Freight rebating being out of the question, the price of a rail becomes purely a manufacturing question. A railroad is not compelled to buy its rails at once. It can defer its purchases, and the proof is that, when a large railroad like the Pennsylvania (volume 13, p. 4958) or the New York Central (volume 12, p. 4910) gives an initial order to one rail company, that sets the price of rails for other rail companies. At the argument of this case, in response to inquiries by the court,

it was stated that the Pennsylvania Railroad was a large stockholder in the Pennsylvania Steel Company, to which company reference was made in the first part of this opinion. Such being the case, it would seem as a business proposition that that road would be quite independent of any exaction in rail prices, and the fact and significance of this independence may be well connected with the proof that in the previous era of destructive rail price-cutting, there had been by means of such price-cutting an intent to drive the Pennsylvania out of business, and that company had been forced into a receivership. But whatever may have been the rail pool practices prior to the formation of the Steel Corporation, and in the earlier years following its formation to restrain or obstruct the rail trade, the proof in this case shows that in 1900 a new method of rail buying was begun, and was for some years prior to the filing of this bill prevailing between the railroads and five or six companies that make rails. In that regard Percival Roberts, Jr., who was a director of the Pennsylvania Railroad, testified (volume 13, p. 4957):

"During the presidency of Mr. Cassatt of the Pennsylvania Railroad, about the year 1900, he inaugurated a system for the Pennsylvania Railroad of making his purchases yearly at about the end of each calendar year for the succeeding one, and also proportioning his orders among the various rail mills, somewhat along the lines of their respective freight tonnages (see volume 10, p. 3996), not exactly accurately in regard to the latter point. This was done partially from the fact that they established a system of yearly budgets for their ensuing year's work, and they did it for the reason that they desired, as far as possible, to give uniform treatment to manufacturers along the lines of their road. Prior to that time purchases of rails were made from time to time as requirements might warrant. Many of the other leading railroads of the country, upon the inauguration of this policy, pursued the same, so that from that period on rails have usually been bought within a very few months covering the entire subsequent year. This is a distinct change from the method of handling this business prior to 1900."

The practical working out of this plan is shown in the proof (volume 13, p. 4050), and discloses the fact that, while the standard Bessemer rail still keeps to a standard price, there is a difference in non-Bessemer, which latter rails, with alloys, nickle, and manganese rails, constitute 70 per cent. of the product. These non-Bessemer, "open-hearth rails are made to special analysis, the chemical composition is different, due to the fact that some railroads insist upon greater physical tests than others, which, of course, while the open-hearth process is the basic operation, nevertheless we call them different qualities of rails." In describing the method of arriving at the rail price of the four different years of 1910, 1911, 1912, and 1913, Mr. Farrell, president of the Steel Company, and Mr. McCrea, president of the Pennsylvania Railroad, themselves fixed the price for the special rails sold to that company. The former (volume 10, p. 4052) says:

"Most of the large trunk lines have their own specifications. The Pennsylvania Railroad Company, for example, buys about 250,000 to 300,000 a year. They have their own rail specifications prepared by their engineer. We charge them for their rails $30.55 a ton, which we consider a fair price for rails of that specification. * * * We tried to get a little more. In this instance we figured those rails ought to net us $30.85 a ton, but Mr. McCrea talked

to me about the thing, and said, 'Now, I think that we might shade this a little bit,' so that finally, it was just a question of merchandising, two people sitting down and trading across the table, the seller getting the best price he could, and the buyer getting the best price he could, and we received $30.55. We make these special qualities of rails for a great many people."

It will also be seen from other proof (volume 11, p. 4145; volume 26, p. 10834) that the fact of a rail mill being situate on the line of a railroad is naturally a large element in securing it as a rail buyer. Indeed, a study of the testimony—from which we refer to Shook, volume 25, p. 10491; Welborn, volume 26, p. 10937; Schwab, volume 11, pp. 4162, 4327, 4387; Smith, volume 19, p. 7940—satisfies us that, whatever may have been the practices of rail pools, combinations, etc., prior to 1900, and during possibly some of the earlier years of the Steel Corporation, the dealings between the railroads and the rail-making companies have been of later years on a competitive basis, individual railroads dealing with individual companies. The policy of the Pennsylvania Railroad Company of distributing the railroad's annual requirements on the basis of the freight furnished by each mill would seem to have put an end to the trade wars between rail mills when rails were sold below cost (Roberts, volume 13, p. 5015; Scranton, volume 8, p. 3200) and companies were driven into and threatened with bankruptcy. The proof is explicit (volume 11, p. 4162) that $28 has for years been accepted by the railroads as a fair base price for rails, and that they have asked no reduction. There is no proof that such price is unfair, and the proof (volume 11, p. 4165) is that the mill cost of rails is from $22 to $23 per ton. The testimony of one large railmaker (volume 11, p. 4162) that, in his judgment, rails are too low, has support from the fact testified to by the president of the Republic Iron & Steel Company, who says (volume 28, p. 12002):

"We quit manufacturing rails because there is no money in them. * * * (Volume 28, p. 12018.) I came into the Republic Company in 1906, and we had, according to my recollection, 50,000 to 60,000 tons of rails on our books which I did not care to produce. I saw possibilities of making money on something else, so I replaced those contracts; in other words, I bought the rails from other producers and satisfied my contracts, and changed the rail mill into a sheet and tin bar mill. That was in the early part of 1907, according to my recollection, or the latter part of 1906."

To the above manufacturing cost must be added overhead, interest, and depreciation. The general nature of the last item, particularly in the change from Bessemer (volume 10, p. 3857) to open-hearth, we have already seen. The proofs (volume 8, p. 3034) show that for several years the price of rails, $28, has been lower in this country than in France, Germany, Austria, Italy, and Russia. It will also be noted that the practice of rerolling rails, an industry that has lately sprung into existence (volume 10, p. 4028) and grown to large proportions, enables railroads to have their old rails rerolled into lighter sections, has, in its simple mills, created another factor by which the railroads can protect themselves. It would seem, therefore, that on the whole, the weight of these proofs would tend to show that at the date of the filing of this petition the price of $28, at which the standard Bessemer rail was selling, was not chargeable to the Steel Company

as a violation by it of the statute here involved. Indeed, in connection with the continuance of this uniform price of $28 for standard Bessemer rails, which, as quoted elsewhere in this opinion, was testified (volume 17, p. 7909) as being tacitly accepted and continued by the sales managers of different rail companies, we can readily see how rail manufacturers simply followed that basic price to prevent the ruinous rail wars of the past. In that regard one of them (volume 11, p. 4387) testified:

"There is not a manufacturer of rails in the United States to-day—I, for example, as a rail manufacturer, feel that if I were to vary that price of $28 for rails, which seems to have been recognized by all rail manufacturers as a fair price and giving a fair profit, if I were to vary that 10 cents a ton, I would precipitate a steel war, to use such a word or expression, that would result in ruining my works without any profit. Everybody by tacit and mutual understanding felt the same about that. * * * I would not vary the price of my rails under any circumstances, not if I knew it was to get 100,000 tons in order, for the reason that my competitor next door would put the price down $1 a ton, or $.50 a ton even, and we would be in a position where we would be running without any profit at all."

Under all the evidence bearing on this subject, we cannot regard the uniform price of $28 as the generally accepted price of a standard Bessemer rail evidences an unlawful restraint or control of price by the railmakers of the United States.

[5] We take up next the subject of the "Gary Dinners," which (as already stated) we have reserved for separate treatment. We use the term to cover a comparatively short period, beginning at an exceptional business situation, and continuing until normal conditions were re-established. These dinners—which were business meetings with a social aspect—began in November, 1907, and were held at irregular intervals during the next 15 months, and perhaps a later date. We speak of a later date, because the government understands the term to cover committee meetings, also with some other gatherings, which were held infrequently until early in 1911. Probably it will be sufficient to say that, whether the period was longer or shorter, the element that marks it and calls for consideration now is what may be called the "co-operation" of the Steel Corporation with a large number of independent competitors, who, it will be noted are not made parties to this bill, and who comprise some 45 per cent. of the steel and iron industry of the United States. This is the only instance of such co-operation, and the whole movement was exceptional. There is some dispute in the briefs concerning the essential characteristics of these meetings, but, in our opinion, the real facts appear with sufficient clearness.

We may begin the discussion by quoting the government's concession in the original petition:

"It is not here alleged that merely assembling and mutually exchanging information and declaration of purpose amount to an agreement or a combination in restraint of trade."

With this concession we are in full accord. In these days every large business has its societies and associations, and these meet periodically to exchange information of all kinds, to compare experiences, to take note of improvements in machinery or process, to discuss

problems, and generally to profit by the interchange of ideas and the study of observed facts. When the business is manufacturing, of course, all this has a direct bearing on the subject of prices, and these conferences may therefore consider that subject specifically. It is probably unusual, however, to find such a meeting making a declaration of intention to charge such and such prices, although a mere declaration to that effect could hardly be regarded as unlawful. Freedom of speech and freedom of individual action are justly prized in American society, and no legislation forbids men to come together and speak freely to each other about every detail of their common business. And if each individual should choose to announce at such a meeting the specific price he intends to charge for his wares, we are aware of no law that forbids him so to do. But at this point we approach debatable ground, for an individual is permitted to do some things that are denied to an association of individuals; and where at a meeting of many persons such action is taken whose legality is afterwards called in question, the decision may be vitally affected by ascertaining the fact whether the action was really taken by each individual acting for himself, or whether those present were, in fact, pursuing a common object.

This country has always been committed to the principle of fair and real competition in business—the struggle between individuals to sell goods in a market free from artificial control or influence—and the Sherman Act merely repeats this principle when it condemns, in the first section, "every contract or combination in restraint of trade." When, therefore, individuals or corporations make distinct contracts with each other, either in the form of pools or other agreements, dividing territory, limiting output, or fixing prices, there can be no question about the illegality of such contracts. And it makes no difference whether or not the agreement attempts to fix a penalty for its breach. The essence of the offense is that agreement; the penalty is merely an incident; so that a so-called "gentlemen's agreement" to divide territory, etc., is quite as illegal as a formal pool with a formal penalty. In a gentlemen's agreement the sanction is the sense of honor, the moral obligation, the indefinite, but real, force that in some instances compel persons to keep their promises simply because they have promised.

But suppose what happens is this: A number of persons take no action about territory or output, their discussions being mainly concerned with the subject of price, and suppose, further, that they refrain from making a definite formal agreement, and limit themselves to an understanding, a declaration of purpose—an announcement of intention—what, then, is to be said? Have they offended against the law? This question cannot be answered until we know what the participants were really doing. It is not enough to rest upon the varying names that may be given to the transaction. It is of the utmost importance to know how these names are to be interpreted, and this is the crucial matter to be looked for in the present record. Fortunately we find no material dispute on this point after we get below the mere surface of much that has been said by the witnesses.

The first Gary Dinner was held in November, 1907, at a time of unusual financial danger, when the threat of a serious panic was still in the air, and when ruin to many important interests was by no means improbable. The meeting was attended by representatives of from 90 to 95 per cent. of the iron and steel trade, including the corporation and a large majority of its competitors, and the course of the meeting has been described by several of those in attendance. Charles M. Schwab, now president of the Bethlehem Steel Company (volume 11, p. 4194), testified:

"The steel trade promised to become in a very demoralized condition. * * * Prices had gone very low. There was a very scant demand for steel. As I stated before, many people had their warehouses full of steel. When I say there was a demoralized condition, I mean people felt that the market was going to go very low, and they were loaded with stocks. In general, there was a very uneasy feeling throughout the whole situation.

"Q. To what class was this situation—to what class, I mean, of persons interested in the steel industry, was this situation—particularly threatful?

"A. To the people who had stocks; the merchants of steel, the sellers of steel, the retailers.

"Q. The middlemen or merchants; the retailers?

"A. Exactly; the warehousemen.

"Q. Were they especially loaded up at that time?

"A. They were. * * * (Volume 11, p. 4195.) A. The keynote of the whole dinner was an address by Judge Gary, or rather a talk to all the members there, with a view of their not becoming panic-stricken; with a view of their not sacrificing the situation by too great a cut in prices, and a precipitation of bad business methods; that we ought to retain our heads and not become excited over a situation of that sort, and that we should calmly await the return of prosperity; that our usual pro rata of business would probably come to each one regardless of the prices at which it was done; and that it was unwise business policy and bad for the industry, and especially bad for the people who carried stocks to precipitate and make worse such a demoralized condition. That was the keynote of everything that was said at that dinner.

"Q. Was anything said about entering into an agreement fixing prices or output?

"A. Nothing whatever.

"Q. Were prices mentioned?

"A. Not at all.

"Q. Was any price of any product mentioned?

"A. No; not at all.

"Q. I mean a definite price for a definite product.

"A. It was not discussed at all.

"Q. Only a general talk along the line mentioned?

"A. Just a general talk along the lines indicated.

"Q. Was it voted to appoint a general committee or subcommittees at that meeting to study and take care of the situation?

"A. I do not know whether those committees were appointed at the first meeting or not, but they were ultimately, I know. Committees were formed of people in the various lines of industry, people familiar with that particular line of industry, to take up in detail the keynote expressed at the first dinner."

James Campbell, president of the Youngstown Sheet & Tube Company (volume 5, p. 1853) says:

"Q. Now, Mr. Campbell, will you describe the conditions which existed when these meetings about which you have been questioned were begun?

"A. Prior to the first Gary Dinner, in the fall of 1907, there was a money panic in New York, as they called it. Money was very tight, and you could not get currency, and you could not get credit, and the conditions to the business man and to the banker were very grave at that time. Judge Gary called the leading manufacturers in the steel business together at a dinner, and afterwards that was named the Gary Dinner.

"Q. Did the alarm as to these conditions exist among others than the manufacturers of steel and iron?

"A. Among everybody.

"Q. Was it felt by the banking interests throughout the country, by the small country banks, as well as the big banks in New York City?

"A. Yes; we had $1,750,000 on deposit with our bankers in New York and Cleveland and Youngstown at the time, and we were obliged to pay our men in clearing house certificates, rather than to try and draw that money out of the bank to pay them in currency. We felt that we ought to assist the banks to that extent in securing the currency, as it was almost impossible at that time to make up pay rolls and pay in currency.

"Q. Then the condition of affairs which existed at that time was a menace not merely to the manufacturers and the banks, but to the laboring man as well?

"A. To everybody—the laboring men and men in every class of business.

"Q. What were the conditions with respect to the jobbers especially with respect to stocks on hand; were they in danger?

"A. The jobbers had quite large stocks. It had been a very prosperous year, the largest year up to that time that we had known, and all jobbers and all consumers, as far as we could learn, had very large stocks of material on hand.

"Q. And a sudden and great fall in the value of those stocks would have been a great financial harm to those jobbers and consumers?

"A. Put about one-half of them, I think, in the hands of receivers, and would have carried down banks and business houses generally, besides bankrupting most of the small manufacturers, if they had suffered similar depreciations with reference to their material.

"Q. Were these conditions strong in the minds of you gentlemen when you commenced to meet, as you have described?

"A. They were. Those were the days when we were lying awake nights. I think everybody was alive to the situation, and everybody was alarmed.

"Q. Was there a desire on the part of you gentlemen meeting there to sink selfish interests for the general advantage in the situation?

"A. There was; yes; but it was a selfish interest after all. If we put our jobbers and consumers out of business, they would not be able to pay us for the material they already had bought from us. We all had large sums of money on our books, and nobody was in a position to pay anything at that time, and we were anxious to protect them in order to protect ourselves. It was not unselfish entirely, but, of course, I think we were all broad enough to feel that we wanted to protect the general country for the general good, because it would have been a bad thing for us, as well as anybody else, if we had had a panic that would have carried with it wreck and ruin all along its path.

"Q. Was the advantage hoped to be gained, if any was gained, that which followed from these meetings as great or greater to the independents as it was to the subsidiary companies of the United States Steel Corporation?

"A. I think it was greater to the independents, because I think it kept a number of them from going into the hands of receivers, and the corporation probably would not have failed even though they had had serious losses.

* * * * * * * * * *

"Q. Was not the purpose of those meetings to enable every one present to form his opinion as to what was the best course to follow individually under the conditions which were bound to exist, with a full knowledge of those conditions as given by all the other members present?

"A. It was."

Judge Gary, chairman of the Steel Corporation (volume 12, pp. 4775, 4887) testified:

"The trouble ordinarily with a purchaser of our commodities is that he is obliged to stock up, so to speak; he has on hand large stocks of goods which he has purchased at a certain price, and many times he has purchased those goods by borrowing money at the banks. Now, if a wide and sudden fluctuation comes, the inventory value of his stock on hand is immediately decreased accordingly, and he has a very severe loss, and his bank calls upon him for the payment of his loan, and he is unable to do it because he cannot dispose of that stock at a reasonable price, or at a price which will return him the money he had invested. * * * Just to refer to the panic of 1907, we had repeated letters and repeated calls from people we were selling goods to, who had stocks on hand, and who were not in a financial condition to survive, if the demoralization which was threatened should become actual, asking us, so far as we could, to try and steady the market in order to prevent demoralization, which would bring great loss upon them, and in many cases absolute ruin. * * * The meeting was held shortly after the beginning of the panic of 1907, after the worst had passed, but while the effect remained to a less extent. We were importuned, or, I will say, we were requested, in various ways, by various consumers, to do all we could to prevent demoralization in business. Many of our customers reported to us they had large stocks of goods on hand, and, if the prices became demoralized, as they had in previous years, there was great danger of loss to them, and perhaps failure. In those days particularly iron and steel were considered the barometers of trade, so to speak, that is, the market for steel largely affected all other business conditions. In conversation at different times with bankers and others I knew the question was asked whether or not the steel business was going to pieces; whether we were liable to get into the condition that had obtained previously. We were all in very great danger of demoralization. I believed, if the iron and steel trade got into that condition, the panic would be long continued, and a great loss and injury would result, not only to the manufacturers of steel, but to every one else who was interested in the manufacture of steel or dependent upon the manufacturers.

"I might add to that we had on our books accounts receivable aggregating hundreds of millions of dollars, and of course an ordinary old-fashioned steel war meant destructive competition, the survival of the fittest and ruin, or at least the temporary suspension of a great many people, and would result in great loss to us and loss to all other manufacturers, great hardship to our employés, and very serious injury to the business world in general. * * *

"I stated the purpose and object of the meeting were if possible to prevent the demoralization of business. I stated that the first object of the meeting was to secure a better acquaintance with each other and come into close contact in order to know one another, hoping that we might deal with and towards one another as gentlemen and not as enemies. That the purpose was, if possible, to prevent demoralization of business, to secure as far as practicable stability of business conditions, as opposed to wide and sudden fluctuations, to prevent, if possible, failures on the part of our customers, and to comply with their wishes in every respect, to prevent, if we could, a long continuance of the panic, which meant failures to a great many people and manufacturers themselves, because of their debts at the banks or because of their commitments for extensions and to customers because of the large stocks they had on hand, the sudden change in the prices of which might be very damaging, and, so far as we properly could, to maintain or to assist in maintaining business conditions generally, the opposite of which should be deplored. I am giving you the substance of it. (Page 4894.)

* * * * * * * * * *

"I stated distinctly * * * at that time that, as they all understood, we could not make any agreement, express or implied, directly or indirectly, which bound us to maintain prices or restrict territory or output; it must leave us free to do as we pleased, and must rely upon a disposition of all

others to do what they considered fair and right and for the best interests, not only of themselves, but all others who had any interest in that or any other work. I made that perfectly plain." (Page 4895.)

We think it likely that, if this first meeting had not been followed by others and by the appointment of committees to continue the association (loose as it was) that resulted from that meeting, no complaint would be heard from the government. But we think the evidence makes it plain that a period of co-operation, or action with a common object, did begin in November, 1907, between the Steel Corporation and the great majority of its independent competitors, and that this period was chiefly marked by an understanding concerning the maintenance of price. Other matters were discussed at various meetings, but the principal concern was the subject of prices, and other subjects were subordinate. Without quoting too freely from the testimony, we think the following extracts are typical: A representative of the Carnegie Company testified:

"Q. You were asked about whether you had any agreement, and you said, 'No.' What did you mean by agreement, in the sense that you answered that question?

"A. I meant a formal undertaking, either written or expressed by word.

"Q. What do you mean by a formal undertaking?

"A. I mean by a formal undertaking, an expression in a formal way.

"Q. In what way? I would like you to explain that.

"A. Either in writing, or by word of mouth.

"Q. What kind of an expression in a formal way? Do you mean something of the nature of a contract?

"A. I presume you mean by passing a promise?

"Q. No, I am not saying what I mean, but I am trying to get at what you mean.

"A. What I mean is this: That there was no absolute promise made by anybody.

"Q. That is what you meant when you said that there was no agreement?

"A. Yes.

"Q. I will ask you whether or not you left with the general understanding, each relying upon the other, that the prices announced would be maintained?

"A. Yes, sir. Yes, sir.

"Q. And what would interrupt the maintenance of that price according to that understanding that you left with?

"A. Usually one competitor would take some business away from another competitor.

"Q. As I understand you, that would be the occasion of another meeting?

"A. Yes, sir.

* * * * * * * * * *

"By Mr. Lindabury:

"Q. I will read from the bill in this case: 'It is not here alleged that merely assembling and mutually exchanging information and declaration of purpose amounts to an agreement or combination in restraint of trade.' I will mark that so you can read it and hand it to you (handing witness the paper referred to). My question—and you may pause to consider it if you choose—is whether or not, at any of these meetings you attended, beginning in the autumn of 1907, anything more was done than is there stated.

"A. No, sir.

"By Mr. Dickinson:

"Q. You said that you assembled?

"A. Yes, sir.

"Q. You exchanged information?

"A. Yes, sir.

"Q. And you declared purposes as to prices?

"A. Yes, sir.
"Q. I understood you to say, also, that you left, each relying upon the other that that price would be observed by them, and that the announcement of that price was made to the trade?
"A. Yes, sir. (VI, 2505–2509.)"

A representative of the McKeesport Tin Plate Company testified:

"Q. Was there or not what you understand as a gentlemen's agreement as to following the price that was named, until the next meeting?
"A. There would be a general understanding that we would do what we would say we would do—quote a certain figure until, as I say, we found reason to change it; and, if we found reason to change it, we would notify our competitors, or talk with them about it, when another meeting would be held and conditions discussed.
"Q. Another meeting would be held?
"A. Yes. * * *
"Q. Would or not a price be suggested?
"A. A price would always be suggested.
"Q. State whether or not, before they left, there was any difference as to what each one said he was going to charge, or whether it would be the same.
"A. It was always unanimously agreed, or the statement was unanimous on the part of all that they would quote a certain price. (V, 1777).

* * * * * * * * * *

"Q. What would you do, if anything, in regard to the future prices?
"A. Then we would say: 'Well, we will quote a certain price until we find reason to change it.'
"Q. Then you would leave with the same understanding that each was going to sell at that price?
"A. Yes, sir.
"Q. State whether or not any one made any remark at any such meetings that if they cut the price it would be found out?
"A. I think we discussed that among ourselves in general. I might say that, if any one quoted a lower price to a particular customer of mine than we did, I would find it out. (Vol. V, 1778.)

* * * * * * * * * *

"Q. Was it or not a part of your understanding, after these prices were announced, that you were under a moral obligation to sell at that price until you did notify your competitors?
"A. Yes, sir." (V, 1793.)

Now to our minds the testimony taken as a whole makes the conclusion inevitable that the result of these meetings was an understanding about prices that was equivalent to an agreement. We have no doubt that among those present some silently dissented and went away intending to do what they pleased; but many, probably most, of the participants, understood and assented to the view that they were under some kind of an obligation to adhere to the prices that had been announced or declared as the general sense of the meeting. Certainly there was no positive and expressed obligation; no formal words of contract were used; but most of those who took part in these meetings went away knowing that prices had been named and feeling bound to maintain them until they saw good reason to do otherwise, and feeling bound to maintain them even then until they had signified to their associates their intention to make a change. We cannot doubt that such an arrangement or understanding or moral obligation—whatever name may be the most appropriate—amounts to a combination or common action forbidden by law. The final test, we think, is the object and the

effect of the arrangement, and both the object and effect were to maintain prices, at least to a considerable degree.

We have said that this was the effect intended, and we believe it to be true, also, that in actual effect prices were more or less maintained. But it is quite as true that a large section of the trade paid little attention, if any, to this effort at co-operation. We need not quote again from the record to establish this point, for we have already made sufficient extracts earlier in this opinion. The testimony quoted on pages 84 to 88, will make it abundantly clear, we think, that, even during the period of co-operation, the prices announced and informally assented to at these meetings were not regarded at all by many manufacturers; for it is plain that the consumers who testified had no difficulty in buying at rates sensibly below the prices thus referred to. It is only fair to add that in our opinion the participants in this movement did not intend to act illegally. No doubt they did intend to exercise their full legal rights, but, of course, such exercise could not be wrong, and they believed they had succeeded in keeping within the proper limits. For the reasons given, we think they were mistaken; but we acquit them of trickiness or attempted evasion.

But the period of co-operation had passed away before the bill was filed, and as far as we can see it is not likely to be repeated. We do not think the Gary movement would justify us in imposing so drastic a penalty as the dissolution of the corporation; but we will, if the government moves for such action, retain the bill for the purpose of restraining any similar movement by the defendants that might be contemplated hereafter. We may perhaps suggest that under recent legislation Congress may have provided a sufficiently inclusive remedy for any future action that might have for its object the adoption or the maintenance of unreasonable prices.

In brief, the conclusions of the court are these: As to some of the defendants it is apparent the bill should be dismissed. Concerning the principal relief sought against the corporation and its subsidiaries, we are of opinion that the government has not made out a case that should be followed by a decree of dissolution, and we are also of opinion that sufficient reasons have not been afforded to justify us in now awarding an injunction. But, as already stated, if the government so desires, the court will retain jurisdiction of the cause for the purpose above outlined.

In concluding this opinion, we are requested by each of the members of this court to express the thanks of this court to all the counsel engaged in the cause and to record our appreciation of the labor on their part evidenced in their several briefs, digests, cross-references, indices, etc. It is but just to say that the thorough preliminary work on the part of counsel has greatly aided our labors and has enabled us within the limits of reasonable time, and without delaying our routine work, to reach a reasonably prompt determination of this cause.

A decree may be prepared in accordance herewith.

WOOLLEY, Circuit Judge, with whom HUNT, Circuit Judge, concurs. In an endeavor to state with brevity the matters of law and fact which have directed and controlled my judgment in this case, no

attempt will be made to review the great mass of testimony or to discuss the law bearing upon it.

[6] Whether the Steel Corporation is a combination in restraint of trade, or has monopolized, or has attempted to monopolize, commerce among the states in violation of the Anti-Trust Law, depends upon the inherent nature or effect of the combination, the evident purpose of its acts, or the intent to be inferred from the extent of the control secured over the industry, the method by which such control has been brought about, and the manner in which it has been exerted, resulting in prejudice to the public interests by unduly restricting competition or unduly obstructing the course of trade. United States v. Terminal R. R. Ass'n, 224 U. S. 383, 394, 32 Sup. Ct. 507, 56 L. Ed. 810; Nash v. United States, 229 U. S. 373, 33 Sup. Ct. 780, 57 L. Ed. 1232; Standard Oil Co. v. United States, 221 U. S. 1, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734; United States v. American Tobacco Co., 221 U. S. 106, 179, 31 Sup. Ct. 632, 55 L. Ed. 663.

There is no question that the Steel Corporation is a combination. The question is, whether it is a "combination * * * in restraint of trade," and whether the corporation, its subsidiaries, and the individual defendants who actively engaged in its organization, monopolized, or attempted to monopolize, or combined with others to monopolize or restrain, trade within the meaning of the act. Inquiry to this end may be pursued along four lines:

First. Was the direct and necessary effect of the organization of the corporation to unduly restrain trade or create a monopoly?

The important business units which at or about the time of its organization comprised the United States Steel Corporation (which in default of a better term will be called the "constituent combinations") were the Carnegie Steel Company, Federal Steel Company, National Tube Company, American Bridge Company, National Steel Company, American Steel Hoop Company, American Sheet Steel Company, American Tin Plate Company, and American Steel & Wire Company. Each of these units was in itself a combination of concerns engaged in the manufacture of the same or allied products. The effect of the organization of these combinations was to suppress competition between their component parts, and the effect of the organization of the Steel Corporation, by embracing these combinations, was to give it a control over the industry equal in the aggregate at least to that which its constituent parts and their subsidiaries had theretofore possessed. The Steel Corporation therefore is a combination of combinations, by which, directly or indirectly, approximately 180 independent concerns were brought under one business control, thereby giving it not only the assets and business of that number of producers, but the advantage of their elimination from the field of competition. It is therefore pertinent to ascertain whether the amount of competition suppressed by the combination of producing units was so great, the percentage of business acquired so large, or the resultant control over the industry so potential, as in and of itself to constitute the Steel Corporation a monopoly, independent of any question of intent.

The inherent power or the direct and necessary effect of the corporation to unduly restrain trade must be gathered from what it did with the power it had during the period between the date of its organization and the date of the institution of this suit, and what it was unable to do with that power.

What the corporation did constitutes conduct, a subject which will presently be considered, and what the corporation did not do is so related to conduct that the two will be considered together. What the corporation had the power, or did not have the power, to do, must first be determined.

The power of the corporation may be ascertained by its position in the industry. Its position has doubtless been attained by a combination of forces, which may include high efficiency of plants, excellence of organization, capacity of employés, and its measure of control over raw materials and the production of finished products. As there can be no monopoly of efficiency and capacity, inquiry concerning the power of the corporation therefore leads mainly to its dominion over the raw materials and finished products of the industry.

The ore reserves acquired by the corporation at and subsequent to its organization, the relation which such reserves bear to ore bodies then existing and subsequently discovered, and their bearing upon the question of monopoly of raw materials, are matters which have been discussed in the preceding opinion, and with the reasoning as well as with the conclusion that the corporation has not a monopoly of the raw materials of the steel industry, I am in entire accord.

A more extended consideration of the power of the corporation, derived from its ore reserves, is unnecessary, further than to dispose of a transaction connected with the acquisition of certain ore properties.

[7] Prior to the organization of the Steel Corporation, John D. Rockefeller became interested in a number of ore properties in the Mesabi Range, in Minnesota, and in properties primarily intended for the transportation of ores to the market. These properties were the Lake Superior Consolidated Iron Mines, which owned a considerable group of iron ore properties in that region; a railway company running from Mesabi Range to Duluth, called the Duluth, Missabe & Northern Railroad Company; and a steamship company, owning a group of steamers plying the Great Lakes, called the Bessemer Steamship Company. The mining company owned the railway company. John D. Rockefeller owned $^{25}/_{29}$ of the stock of the mining company. He owned all the stock of the steamship company.

After its formation, the Steel Corporation contracted with John D. Rockefeller for the purchase of his interest and the interest of the other stockholders in the Lake Superior Consolidated Iron Mines and the Bessemer Steamship Company and paid for the latter $8,500,000 in cash, and for the former, stock of the Steel Corporation at the rate of $1^{35}/_{100}$ shares of the preferred and $1^{35}/_{100}$ shares of common for each share of the Consolidated Iron Mines, reckoned on a capitalization of $48,000,000; the current market price for the Steel shares being, respectively, 83 and 38.

John D. Rockefeller and his son, John D. Rockefeller, Jr., were made directors of the Steel Corporation. The former resigned in 1904, and the latter in 1910. John D. Rockefeller disposed of all of his stock, and John D. Rockefeller, Jr., disposed of a considerable portion of his stock in the Steel Corporation, acquired by the aforerecited transaction, prior to the filing of the bill in this case.

The bill charges the acquisition of the Consolidated Iron Mines and Bessemer Steamship Company subsequent to the organization of the corporation. It also charges generally that the individual defendants named in the bill, by the subsequent acquisition and control of properties, entered into a combination with the corporation in restraint of trade; but in this connection the defendants Rockefeller are not named. The sole specific statement of fact in the bill with respect to the defendants Rockefeller relates to the sale to the corporation of stock of the Consolidated Iron Mines and the Bessemer Steamship Company, and the sole specific charge is that these defendants were largely interested in those properties, and that "both of them participated in bringing about the combination and became members of the first board of directors of the corporation."

By the prayer of the bill, the properties acquired from the defendants Rockefeller are not asked to be returned to them, or that the sale be avoided, but that the ore properties of the corporation, which of course include those acquired from the defendants Rockefeller be divided among certain corporations contemplated by a decree of dissolution in proportion to their capacity for the production of steel.

There is no evidence or assertion that the purchase of the Consolidated Iron Mines and the Bessemer Steamship Company, and incidentally the Duluth, Missabe & Northern Railroad Company, was included in the original scheme for the organization of the Steel Corporation, nor is there evidence which shows that the defendants Rockefeller took part in the promotion or organization of the corporation. By stipulation with the government, it is in evidence that, at the time the bill was filed, the defendants Rockefeller had no relation of management or control to the Steel Corporation, and there is nothing to show that they were then or are now violating or threatening to violate the statute.

We find that the transaction of the sale of the Lake Superior Consolidated Iron Mines and the Bessemer Steamship Company was no part of the original plan for the formation of the Steel Corporation; that the transaction was not only in form, but was in substance, a sale; and that the single fact that the purchase price of one of the properties was paid with stock of the corporation does not alter the legal character of the transaction as a sale or prove that it was violative of the statute. We also find that the purchase of these properties from the defendants Rockefeller did not so increase the ore reserves and the transportation facilities of the corporation as to give it a monopolistic power over the raw materials of the industry. For the reasons given, we are unanimously of opinion that the bill should be dismissed as to the defendants Rockefeller.

[8] Further inquiring whether the corporation inherently possesses monopolistic power attention is next given to its proportion of the manufacture and sale of finished iron and steel products of the industry. Upon this subject there is a great volume of testimony, a detailed consideration of which in an opinion would be quite inexcusable. As a last analysis of this testimony, it is sufficient to say it shows that, large as was the corporation, and substantial as was its proportion of the business of the industry, the corporation was not able in the first ten years of its history to maintain its position in the increase of trade. During that period, its proportion of the domestic business decreased from 50.1 per cent. to 40.9 per cent. and its increase of business during that period was but 40.6 per cent. of its original volume. Its increase of business, measured by percentage, was exceeded by eight of its competitors, whose increase of business, likewise measured by percentage, ranged from 63 to 3779. This disparity in the increase of production indicates that the power of the corporation is not commensurate with its size, and that the size and the consequent power of the corporation are not sufficient to retard prosperous growth of efficient competitors.

From the vast amount of testimony, it is conclusively shown that the Steel Corporation did not attempt to exert a power, if such it possessed, to oppress and destroy its competitors, and it is likewise disclosed by the history of the industry subsequent to the organization of the corporation that if it had made such an attempt it would have failed. It is also shown by the testimony that, acting independently and relying alone upon its power and wealth, great as they were, the corporation has never been able to dominate the steel industry by controlling the supply of raw materials, restraining production of finished products, or enhancing and maintaining the prices of either.

If in its early history the Steel Corporation, singly and alone, endeavored to dominate the steel industry in any one or several of the customary ways (and such is not disclosed by the testimony), it ceased early to rely upon its own power. In fact, its lack of power to dominate the industry alone is established by the methods it was forced to institute and pursue with respect to the important matter of the fixation of prices, the legality of which, in my opinion, becomes the main point of inquiry in the case. Instead of relying upon its own power to fix and maintain prices, the corporation, at its very beginning, sought and obtained the assistance of others. It combined its power with the power of competing corporations, and then with its competitors concerted, co-operated, contracted, and then by tacit understandings contributed to the establishment and maintenance of prices. The co-operation by the Steel Corporation with its competitors to fix and maintain prices neither sprang from its inherent nature, nor was it the direct and necessary effect of its organization. It constituted conduct, and conduct of the same character as that pursued by the corporation's competitors participating therein. The testimony does not show that the corporation in and of itself ever possessed or exerted sufficient power when acting alone to control prices of the products of the industry. The testimony abundantly shows that the power of the corporation to control prices was efficient only when in co-operation with its competitors. It has never

raised and maintained prices by its own action. It has done it only by joint action, and when joint action was either refused or withdrawn, the corporation's prices were controlled by competition. To the conduct of the corporation in fixing and maintaining prices by methods it with others employed the charge of violation of the statute is most pertinently addressed.

Distinguishing the power of the corporation from its conduct subsequent to its organization, I am of opinion, for the reasons here given, that in its inherent nature the Steel Corporation is not a monopoly, and that the direct and necessary effect of the organization of the corporation was not unduly to restrain trade.

[9] Second. Was an intent to monopolize or to unduly restrain trade shown by the circumstances which led up to and surrounded the organization of the corporation?

For several years preceding the organization of the corporation in 1901, the steel industry was undergoing a revolution in business methods. Combinations of manufacturers producing the same, as well as diversified products, were formed upon tremendous scales; embracing in many instances a majority, and in some instances nearly all, the producers of a particular product. This industrial revolution and the combinations which grew out of it have been explained upon two theories.

The first theory is based, as it is contended, upon the discovery made at or about that time that the economic manufacture of a finished steel product required the ownership of the raw material and the manufacture of the unfinished product by the same corporation, and the manufacture of the unfinished product required facilities for finishing the same in order to secure a regular and certain output. In other words, a necessity for integration developed, that is, the manufacture of steel products on a large scale, beginning with the ore and concluding with the finished product, to accomplish which aggregations of mills that produced different commodities were essential. That this was in the minds of the steel masters of that day is without question, and it is now contended by the defendants that to attain this was the object of the formation of the Steel Corporation.

The other theory advanced in explanation of the tremendous and rapid combination of steel-producing plants at that period, in which less regard was paid to combining plants producing diversified products than to combining plants producing the same products, is that by such combinations, competition in trade could be suppressed to an extent commensurate with the amount of trade combined, and that by the resultant control, prices could be raised and maintained that would yield great profits.

Much testimony has been produced in this case by the opposing parties in support of and in opposition to these opposing theories, a review of which within the limits of an opinion is quite impossible to be made. Evidence of the acts and things done at the time they were done, the character of the combinations made, and the results then and subsequently attained, as disclosed by testimony which corresponds in point of time with the doing of the things, carry to my

mind a greater probative force in determining the reasons for the combinations and the purpose of the organization of the Steel Corporation than explanations thereof made at after periods. There is much testimony given by witnesses, looking back over the history of the corporation and its constituent combinations, to the effect that the purpose of the organization of the constituent combinations and then of the larger combination, the Steel Corporation, was to assemble huge properties so as to procure perfect integration. Yet the testimony which impresses me most is that which relates to and concerns the things said and done preliminary to and connected with the organization of these various combinations at the time of their creation. These circumstances indicate that the various combinations were made upon a scale that was huge and in a manner that was wild. Properties were assembled and combined with less regard to their importance as integral parts of an integrated whole than to the advantages expected from the elimination of the competition which theretofore existed between them.

Without referring to the great mass of figures which bears upon this aspect of the case, it is clear to me that combinations were created by acquiring competing producing concerns at figures not based upon their physical or their business values, as independent and separate producers, but upon their values in combination; that is, upon their values as manufacturing plants and business concerns with competition eliminated. In many instances, capital stock was issued for amounts vastly in excess of the values of the properties purchased, thereby capitalizing the anticipated fruits of combination. The control acquired over the branches of the industry to which the combinations particularly related measured by the amount of production, extended in some instances from 80 per cent. to 95 per cent. of the entire output of the country, resulting in the immediate increase of prices, in some cases double and in others treble what they were before, yielding large dividends upon greatly inflated capital.[3]

[3] The organization of the constituent combinations, their overcapitalization, and the increase in the prices of their products are matters so complex in their recital, and embrace such a considerable portion of a record altogether unprecedented in size, that nothing more than a single instance can be briefly stated in a footnote.

The National Tube Company was incorporated in February, 1899. It was a combination of manufacturers representing from 80 to 90 per cent. of the production of iron and steel wrought tubes in the United States. (V, 1891, 1913; G. E., V, pt. II, 1785, 1794.) An expert valuation of the properties acquired, exclusive of the Western Tube Company, was the sum of $22,303,500. (V, 1867–72.) For the properties and plants, so valued at $22,303,500, personal assets estimated at $10,000,000, and $2,500,000 cash furnished by the promoters, making a total of $34,803,500, plus the value of a part interest in the Western Tube Company, the National Tube Company issued to the consolidation purchasers over $79,000,000 in stock. (G. E., No. 2, 381–384, 392–394.) Of the approximate amount of $40,000,000 of preferred and $40,000,000 of common issued to the consolidation purchasers for the properties acquired by it (G. E., II, 372–394), it appears that the common stock received by the consolidation purchasers to the amount of about $40,000,000 was to be distributed approximately as follows: To the vendors of the properties acquired, between $3,000,000 and $11,000,000 in excess of the cash valuations of their properties; to the syndicate in excess of the amount of cash furnished

The immediate, as well as the normal effect of such combinations, was in all instances a complete elimination of competition between the concerns absorbed, and a corresponding restraint of trade. That for a time during that period monopoly was created and trade unduly restrained in certain steel products by the combinations which almost exclusively produced them is seriously charged and not satisfactorily denied. Such was the common knowledge of those conversant with the steel industry; and, as many of the men who participated in the organization of such combinations participated actively in the organization of the Steel Corporation, it is difficult to believe that they did not know that to some extent, and probably to what extent, such combinations restricted and suppressed competition, and that they did not expect, by force of the multiplied absorption of trade and by the power resulting from the increased elimination of competition, the Steel Corporation would be enabled to fix and regulate the production and prices of all commodities in the industry. Such would seem to be a natural thing to expect of a combination of competing corporations which in themselves were combinations of competing corporations, and it is but fair to charge that those who created such a combination of combinations intended what in the nature of the situation would be thought to be its natural and probable consequence.

It was insistently urged by the corporation, both in the briefs and at the arguments of this case, that in the conversations between Mr. Schwab and Mr. Morgan preliminary to and during the negotiations for the combinations which were afterwards acquired by the Steel Corporation, no word passed between them concerning increased profits hoped for or expected to be derived from the elimination of competition, and that their discussions were addressed and limited to economies of manufacture and business. It is worthy of comment in this connection that, in so far as those conversations are repeated in the testimony, the word "integration" was not mentioned, and, excepting by inference, the idea of integration was not suggested by the one who gave, or by the one who responded to, the inspiration to create such a combination as the Steel Corporation. The purpose of its organization, in so far as it was expressed by either of those gentlemen, as disclosed by the testimony, was to acquire a number of mills in each of which to manufacture but one thing instead of many things, and to procure enough mills to make and manufacture every product in the steel industry, with the hope of acquiring the foreign trade. The precise reasons for the formation of such a combination, and the particular advantages to be expected therefrom, as

by it $5,000,000; to Morgan & Co., $3,500,000; and to the consolidation purchasers and Morgan & Co. for promotion between $20,000,000 and $28,000,000. The net earnings of the National Tube Company for the first six months were $7,909,060, a rate of 19 per cent. per annum on the capitalization of $80,000,000; and the net earnings for the first fiscal year, after deducting expenses, depreciation, and reserve, were $13,878,364.69, which is something over 17 per cent. on its total capitalization. Before the formation of the National Tube Company the price of tubes was $30.00 a ton. During 1899, the year of its formation, the prices of tubes rose to $67 a ton, and in the early part of 1900, reached their maximum of $89.00 a ton (XXVII, 11390, 11391, 11426, 11427, 11433).

stated by Mr. Schwab to Mr. Morgan, in the conversations which are represented to contain the ideas which suggested and which justified the formation of the Steel Corporation, are:

"That instead, as was then the practice, of having one mill to make 10 or 20 or 50 products, the greatest economy would result from having one mill make one product and make that product continuously; * * * that various lines of steel should be so specialized; * * * that great economies would result from locating mills at the point of consumption by which the cost of transportation * * * would be reduced or saved; * * * that great economic results would follow from being able to manage these concerns in a manner that would stimulate the most effective effort in the management of the different concerns; * * * that the great export business of this country in iron and steel could only be done in that way; * * *" the companies to be acquired were "such as to cover all the branches of the industry, * * *" and that "successful manufacture was only possible where every single step in the line of manufacture was carried out by some one concern; and that for the greatest economy, for the greatest development of the business, it was an absolute necessity."

Continuing, Mr. Schwab said:

"I felt, furthermore, that great economies would result in all these general items of expense which are met in the manufacture of iron and steel on account of selling, traveling, office expenses, and all the general items of each individual concern which an individual line had to cover with a full organization. That could be covered by one such organization, and I felt that such economy would result in that direction, and indeed the whole line of my talk that evening was intended to show that the next great economic step to be made in the manufacture of steel—or indeed any business in general; I did not confine myself entirely to the steel business, directly to the steel business—but in general that the great economic result to be next obtained in manufacture was in the direction of these methods, and then I made that application generally to the steel industry."

Mr. Schwab then pointed out to Mr. Morgan the plants, which if acquired, "could be made ultimately to conform to this theory." It does not appear in the testimony just what plants Mr. Schwab suggested should be acquired, nor does it appear that Mr. Morgan acquired, or attempted to acquire, any plants of any independent producers of that day. It does appear, however, that Mr. Morgan proceeded immediately to acquire, not plants, but the huge combinations themselves which had but recently been formed, and which had but recently demonstrated their ability to suppress competition.

The objects of the formation of the corporation, as stated by Mr. Schwab, were those avowed at the time of its organization, and the things done to accomplish those objects must be accepted to have been done in the light of the situation as it then existed.

The declarations of Mr. Schwab with respect to the objects of the organization, and the conduct of Mr. Morgan and his associates in creating the corporation by combining the most powerful combinations which then existed, the conspicuous features of which were overcapitalization, and the elimination of competition, constitute evidence which must be considered in seeking the purposes for which the corporation was organized. That evidence, as against the testimony to the contrary, impels me to the opinion that the primary purpose of the organization of the Steel Corporation was not integration. Integration was a result of the organization, and afterward became a neces-

sity. When integration was undertaken it was but imperfectly accomplished by employing the units acquired. It was only perfected by building new mills at a cost of over $400,000,000. After a consideration of the character and conduct of the combinations absorbed by the corporation, and of the complete knowledge of the industries possessed by those who brought the corporation into existence, I am irresistibly drawn to the conclusion that the object of the formation of a corporation which embraced such combinations, and the intent of those who undertook its accomplishment, were to secure great profits by restraining trade in the manner and upon the scale thought possible in the light of the history of the constituent combinations.

The constituent combinations absorbed by the corporation were strongest at their birth. Their percentage of output and their corresponding control over their particular branches of the industry were greatest when organized, but diminished year by year in combat with competitors who entered the field against them, supplied with ample resources, equipped with modern plants, and unincumbered with obsolete or dismantled properties. As an illustration, the American Tin Plate Company, incorporated in December, 1898, was a consolidation of 39 plants with 279 mills engaged in the manufacture of tin plate. It is charged and not denied that at the time of its formation this combination comprised 90 per cent. of the tin plate manufacturers of the country, which controlled 95 per cent. of the total output of tin plate in the United States. The result was an immediate rise in the price of its product and a decrease in the number of its producing units. As a consequence of its policy, 86 mills of 19 plants, about one-third of the mills acquired, were promptly dismantled. Notwithstanding this initial and potential control over the product and prices of the tin plate industry, it nevertheless happened that while in 1899 the American Tin Plate Company produced 95 per cent. of all the tin plate manufactured in the United States, its control from that year gradually decreased until in 1912, its proportion of the manufactured output was but 53.7 per cent. After it was absorbed by the corporation, it ceased to rely upon its own power to fix and maintain prices, complete as was its power at first, and, like the other subsidiaries, was forced to co-operate with its competitors.

The experience of the American Tin Plate Company is illustrative of the history of various combinations absorbed by the Steel Corporation. It is likewise the explanation of the seeming anomaly that the corporation, at the time of its organization, in and of itself, possessed less power as a monopoly than certain of its constituent units possessed at the dates upon which they were respectively created. The absorption by the Steel Corporation of combinations which in themselves possessed monopolistic powers, potential in their beginning, though waning as they progressed, irresistibly draws me to the conclusion that those who organized the Steel Corporation expected to accomplish permanently what had been demonstrated could be accomplished temporarily, and thereby to monopolize and unduly restrain trade. But when organized, the corporation discovered that it was confronted by forces beyond its control, that it was affected by

trade laws and conditions which in its organization were either forgotten or ignored, and that therefore it was without the power alone to do what its organizers expected of it, and was immediately forced to resort to the old device of pools in order to control and maintain the prices of its products. I am of opinion that the circumstances which led up to and surrounded the organization of the Steel Corporation show that those who organized the Steel Corporation intended it to monopolize and unduly restrain trade.

Third. Was intent to monopolize or to restrain trade shown by the after conduct of the corporation?

There are a number of customary tests by which the existence of trade restraint may be ascertained and the extent thereof may be gauged. In applying these tests to the after conduct of the corporation, the testimony responds, in my opinion, by disclosing but one line of the corporation's conduct violative of the statute.

There is nothing in the evidence that suggests that the corporation used its power to gain advantage over its competitors by securing freight rebates. On the contrary, it appears that early in its history the corporation announced a policy and promulgated a rule against soliciting and accepting rebates.

There is nothing to show that the corporation increased its profits by reducing the wages of its employés. The increased volume and reward, as well as the improved conditions of labor, for which the corporation, at considerable length, takes credit to itself, have no bearing upon the issue of monopoly, except as they tend to prove that monopoly was neither attempted nor acquired at the expense of labor.

There is nothing in the evidence that suggests the corporation increased its profits by lowering the quality of its products. The testimony that the quality of the corporation's products has not deteriorated, but has improved, is pertinent to the inquiry whether monopoly was attempted or accomplished at the expense of the quality of its products, but the considerable volume of testimony as to the high quality of its products and the excellence of its service has no probative bearing upon the issue of monopoly. The question is not whether the corporation is a serviceable monopoly. The question is whether the corporation is a monopoly.

There is nothing which discloses that the corporation either increased its power or augmented its profit by creating an artificial scarcity of its products.

The testimony does not show that the corporation oppressed or coerced its competitors. In fact, there is an abundance of testimony contributed by the competitors of the corporation to the effect that its competition, though vigorous, was fair.

The corporation did not undersell its competitors in particular localities, by reducing prices below the prices at which it sold in other localities, nor did it require its customers to enter into contracts either limiting their purchases to the corporation or restricting them in resale prices. While purchasing pig iron at prices higher than the market, in order by reflection to maintain or increase the price of steel, purchases were not made by the corporation beyond its needs, nor with the intent or re-

sult of cornering the market. It did not obtain customers of competitors by secret rebates, or departures from its published prices, so long as the prices agreed to were adhered to by others pursuant to methods presently to be considered. There is no evidence that it attempted to crush its competitors or drive them out of the market, and in its competition it seemed to make no distinction between large and small competitors. In fact, its conduct towards its competitors, as shown by the testimony, has been conspicuously free from that business brutality, meanness, and unfairness which characterized the conduct of certain large corporations found guilty of violating the Anti-Trust Law.

The charge that the corporation offered lower prices in return for large purchases running over long periods, if true, does not constitute unfair trading. In those instances, the corporation endeavored and succeeded in obtaining contracts for large purchases of unfinished, or semifinished materials, so as to secure a steady trade for a long period, and thereby secure steady and certain employment for its mills.

The corporation's reply to the charge of undue restraint of trade, by combining with others to fix and maintain prices, and the assumption to itself of credit for the benefits arising from its conduct "in *steadying* the market and preventing rapid and extreme fluctuations," is somewhat of an admission that it (with others) controlled prices by artificial means. I know of no law which makes the *steadying of the market* a justification for fixing and maintaining prices by the concerted action of otherwise competing companies, when the effect of steadying the market is to dominate the industry by establishing prices for its products. The perfection of stabilizing prices can be reached only when monopoly is perfect, and as nothing justifies monopoly, I am of opinion that the stabilizing benefits claimed by the defendants in fixing and maintaining prices are no justification or excuse for what they did. Prices are perfectly stabilized by pools, when entered into and lived up to, yet no one would contend that a pool, however beneficent its results, is either justifiable or legal. If the establishment of uniform prices for the products of an industry should ever be found advantageous or necessary, such an economic policy should be inaugurated and pursued under authority of law, and not by the will of the industry itself.

Competition with the corporation in all of its products has been real and keen from the date of its organization to the date of the filing of the bill in this suit. About this there is no question, with the possible exception of seamless tubes, which were made under important patents acquired or controlled by the corporation. Every commodity which it made was sold in substantial competition. This is conclusively proved. It is not proved, however, that the competition which existed between the corporation and its competitors extended to prices. While during that period competition was real, it was pursued along levels and at figures agreed upon expressly or tacitly by pools, or at meetings and dinners. At different times when price undertakings and understandings between the corporation and its competitors were broken, notably in 1909, the feature of prices entered into the competition, and then competition was complete and without restraint. Otherwise, and at other times, competition was real, but it was restrained as

to prices. Therefore, in searching the after-conduct of the corporation for evidence of an intent on its part to monopolize and restrain trade, the participation of the corporation in the old and the new means pursued and devised, by which prices were raised and maintained, demands serious consideration.

Before and at the time of the organization of the corporation, and for several years thereafter, a great many of the companies that became its constituents and subsidiaries were allotting trade and fixing prices for different iron and steel products by pool agreements. It is quite unnecessary in this opinion to discuss the legality of such agreements. It is sufficient to state that it was known by all that they were denounced by the law. With this knowledge, the corporation, through its president, in 1904, commanded its subsidiaries to withdraw from pools, yet notwithstanding the policy then announced, certain of its subsidiaries, notably the American Steel & Wire Company, continued in pools formed as late as 1908. It is defended, however, that the participation of the American Steel & Wire Company in the pool last mentioned was without the sanction of the corporation and without the knowledge of its president. It is really unimportant to give consideration to the corporation's claim of exoneration upon this ground, in view of the fact that the corporation itself, with the concurrence of its president, at the very same time, at periodical meetings with its competitors, was fixing prices covering a wide range of commodities, not by agreements, but by understandings by which all were morally bound, and from which no one deviated without notice to the others. By these methods the corporation and its subsidiary, the American Steel & Wire Company, were contemporaneously and quite as effectually naming and maintaining prices in different products. Measured by the successful results of each, there can be little difference between the methods employed.

When pools and associations were very generally abandoned in 1904, they were succeeded by trade meetings attended by representatives of the same concerns which theretofore had been parties to the pools. At these meetings agreements respecting prices were not made, but understandings were reached with respect to prices which quite as effectually resulted in their maintenance. The legality of these meetings was questioned, and about the year 1907 they were abandoned, and in the same year the Gary Dinners were inaugurated.

The Gary Dinners were dinners given by E. H. Gary, the president of the corporation, to which were invited representatives of steel-manufacturing concerns which theretofore had participated in the trade meetings, associations, and pools, and which produced "90 per cent. or more" of the total output of the diversified products of the steel industry of the country.

The first Gary Dinner was given on November 20, 1907, to meet an unquestioned exigency arising out of the panic then existing. The steel industry, like many industries, was demoralized and threatened with disaster by the panic which began in the month preceding. The dinner was given in order to devise ways and means to prevent calamity to the industry. Ways and means were found which no doubt con-

tributed greatly in preventing disaster, not alone to the producers of steel, but also to those intermediate consumers who were carrying large and costly supplies. The ways and means consisted then of nothing more than the urgent request of a strong man that in the stress of panic all should keep their heads and avoid the consequences of reckless cutting of prices. In this the others acquiesced, and in the light of the emergency then existing, and the disaster averted, I am of opinion that the purpose and the conduct of those who participated in the first Gary Dinner were not unlawful, improper, or questionable. But after the exigency had passed, and the means to meet it had been exerted, Gary Dinners were found to be potential things, and they were afterwards called and employed to exert their potentiality, not in averting disaster, but in creating greater profits, by raising and maintaining prices in periods of industrial calm.

Gary Dinners, while not regularly held, never adjourned. They were made continuous by the peculiar character of their organization. Being nothing more than business meetings, they were conducted in a business fashion. A general supervisory committee was appointed, and subcommittees were appointed to deal with the different products of the steel industry. These latter committees were known as the Steel Bar Committee, Ore and Pig Iron Committee, Rails and Billets Committee, etc. The membership of each committee was composed of representatives of the leading concerns which manufactured the particular product with which the committee had to do. These committees met between dinners and were accessible, through their chairmen, at all times between meetings. The only difference between the Gary Dinners and the meetings of the committees was that at the dinners the general business of the industry was discussed, while at committee meetings the business of a particular branch of the trade was discussed. At neither were agreements made concerning prices at which the participants would sell their products. In fact, it was asserted and reasserted that such agreements were impossible, because illegal; but in lieu of agreements, the parties, both at the dinners and at the committee meetings, severally made what they chose to call "declarations of purpose"—that is, declarations of the prices at which they respectively proposed to sell their products, to which prices it is testified all adhered until some one chose to deviate therefrom, in which event he was "in decency" bound to notify his dinner associates or the members of his committee.

Excepting the feature of trade allotments and money penalties, Gary Dinners were in effect pools, with the right reserved to each participant to withdraw upon notice to the others. They differed from pools only in the difference between the binding force of a moral understanding and the legal obligation of an express agreement. They were pools without penalties. They constituted a scheme which did not make it fatal for a competitor of the corporation to stay out, but made it attractive for him to stay in, the result of which was that prices were maintained with greater uniformity and stability than when the same participants engaged in pool agreements, violations of which carried penalties.

This method of co-operative price regulation was pursued uninterruptedly from November, 1907, to February, 1909. Throughout this time prices were fixed and maintained by "understandings" enforced by "moral obligations." Through the period of depression of 1908, business so decreased in volume that early in 1909 independent producers broke their "understandings" with the corporation and with one another, and sold at prices which each fixed for itself, in complete disregard of previous "understandings." The corporation attempted to maintain for its products prices at the figures understood; that is, to maintain high prices in a period of business depression, and "to force the issue against all economic conditions." It attempted this alone, and in its attempt it failed. Therefore, in that year, the corporation was forced to declare for an "open market"; that is, it sold at prices with respect to which there were no "understandings," and permitted "natural laws" to take their course. The immediate results were *lower prices* and a *largely increased volume of trade.* If the abandonment by the corporation of its co-operative policy of fixing and maintaining prices "brought out a large volume of business," it logically follows that by the pursuit of that policy "a large volume of business" had theretofore been held back—that is, restrained—and therefore that the policy of co-operation as to prices, based upon mutual understandings and enforced by moral obligations, operated effectually and unduly to restrain trade.

That the corporation did not dominate the industry by compelling the trade to sell at prices it desired is shown by the break of 1909. When the independents broke away, the corporation had to break away too. When the independents lowered prices, the corporation had to lower prices too. When they all broke away, two things happened: First, competition *in prices;* second, an increased volume of trade, indicating theretofore a limitation of the former and the restriction of the latter. This is persuasive evidence that the establishment and maintenance of prices from 1901 to 1909 were accomplished by the corporation and its competitors, by keeping agreements made by pools and adhering to understandings reached at meetings and dinners.

Coincident with the breaking of prices by the breaking of understandings made or reached at Gary Dinners, Gary Dinners were temporarily discontinued. It has been contended all along that Gary Dinners had nothing to do with the fixation and maintenance of prices; that while stabilizing prices resulted from such dinners, nevertheless their primary purpose was to secure the establishment and maintenance of good relations between competitors, and to afford opportunities for the exchange of trade information and experience. Is it not strange that a breach of an understanding as to the one matter of prices should have caused a discontinuance of the dinners, with the consequent loss of their primary benefits?

Gary Dinners were resumed in October, 1909, and with their resumption higher prices were resumed.

By the proceedings at the Gary Dinners, and at the meetings of the dinner committees, the fixing and maintaining of prices were

as successfully accomplished as by meetings called for that purpose during the period from 1904 to 1907, and by the pools created for that purpose from 1901 to 1904. It therefore appears that from the organization of the corporation in 1901 until the Gary Dinners were discontinued in January, 1911, the corporation, first by one method, and then by a second method, and then by a third method, employed means to procure the establishment and maintenance of uniform prices for its diversified products, and by these means the Steel Corporation, with its competitors, did combine and control prices, and in controlling prices restrained trade. If by the three methods pursued, in the three periods named, prices were not artificially and successfully maintained, as shown by the history covering those three periods, I am at a loss to know by what means it would be possible to fix and maintain prices that would unduly restrain trade in the sense of violating the Anti-Trust Law.

The raising and maintaining of prices of steel products from 1901 to 1911 cannot be attributed to the dominancy by the corporation over the industry, because of its size. It was due to co-operation between it and nearly all other producers in a joint effort to raise and maintain prices, in which they persisted and succeeded. Without the co-operation of independent producers, prices of steel products could not have been raised and maintained by the corporation alone. The offense of the corporation, therefore, was not its dominancy over the trade, but was an offense precisely similar to that of which every independent and co-operating producer was guilty, and consisted in the act of *combining with its competitors,* to produce an unlawful result. If it had not combined with its competitors, or if they had not combined with it, restraint of trade, due to the fixation of prices, would in my opinion have been impossible. Therefore those who participated in such meetings, with the intention of doing that which was accomplished, participated in unlawfully restraining trade. I am in no wise convinced that those competing corporations which associated themselves with the Steel Corporation, were forced, either by the conduct or the power of the corporation, to co-operate with it in fixing prices. The corporation produced less than 50 per cent. of the steel products of the country. Those of its competitors which participated with it in the fixation of prices produced more than 40 per cent. Those which comprised the 40 per cent. could have taken care of themselves, and could have competed with the corporation in prices, if they had so desired, and therefore those which comprised the 40 per cent. and which co-operated with the corporation in the methods pursued from 1901 to 1911 did so voluntarily, and not because of the dominance of the Steel Corporation. The corporation dominated only in the sense of contributing substantially to what was done and making attractive what it desired to be done, and the others yielded cheerfully. Their offense was no different from that of the corporation, and the offense of the corporation was distinguished from theirs only in the leadership it assumed in promulgating and perfecting the policy.

The record does not disclose the names of all the iron and steel

producing concerns which were represented at the Gary Dinners, and which co-operated in the price-fixing policy there inaugurated and pursued. Those corporations which were of sufficient size and importance to secure representation from time to time upon the principal committee and the subcommittees of the Gary Dinners, including the Steel Corporation, its subsidiaries, and its competitors, appear by stipulation (Record, volume 9, pp. 3745–3750), which is excerpted in the margin.[4]

The Anti-Trust Law was enacted "to protect trade and commerce against unlawful restraints and monopolies." The word "trade" means the buying as well as the selling of property, and the statute extends its protection to those who buy as well as to those who sell. A practice that is helpful to the seller, but is hurtful to the buyer, is as fully within the inhibition of the statute as a practice pursued by one seller which unlawfully restrains the trade of another seller. Therefore it may be assumed without discussion, that the statute intends to protect the purchasing public from the consequences of combinations, which, either in their purpose or effect, so raise and maintain prices that trade, in the sense of buying, cannot exist except upon terms fixed by combinations of sellers.

When the Steel Corporation and its competitors, which together produce 90 per cent. of the iron and steel output of the country, com-

[4]General Committee.—United States Steel Corporation. Competitors: Cambria Steel Company, Pennsylvania Steel Company, Bethlehem Steel Company, Jones & Laughlin Steel Company, Central Iron & Steel Company.

Ore and Pig Iron Committee.—United States Steel Corporation. Competitors: Shenango Furnace Company, Pickands, Mather & Co., Bessemer Pig Iron Association, Republic Iron & Steel Company, Thomas Iron Company, Sloss-Sheffield Iron & Steel Company, Buffalo & Susquehanna Iron Company, Warwick Iron & Steel Company, Allegheny Ore & Iron Company.

Rails and Billets.—Illinois Steel Company, subsidiary. Competitors: Pennsylvania Steel Company, Lackawanna Steel Company, Dominion Iron & Steel Company, Alan Wood Iron & Steel Company.

Billets and Sheet Bars.—Carnegie Steel Company, subsidiary. Competitors: Pennsylvania Steel Company, Republic Iron & Steel Company, Lackawanna Steel Company, Jones & Laughlin Steel Company, Youngstown Sheet & Tube Company, Alan Wood Iron & Steel Company.

Structural Material.—Illinois Steel Company, subsidiary. Competitors: Bethlehem Steel Company, Cambria Steel Company, Jones & Laughlin Steel Company.

Plates.—Carnegie Steel Company, subsidiary. Competitors: Cambria Steel Company, Central Iron & Steel Company, Lukens Iron & Steel Company, Worth Bros. Company.

Steel Bars.—Carnegie Steel Company, subsidiary. Competitors: Jones & Laughlin Steel Company, Republic Iron & Steel Company, Crucible Steel Company of America, Cambria Steel Company.

Pipes and Tubular Goods.—National Tube Company, subsidiary. Competitors: Wheeling Steel & Iron Company, Youngstown Sheet & Tube Company, Reading Iron Company, La Belle Iron Works.

Sheets and Tin Plate.—American Sheet & Tin Plate Company, subsidiary. Competitors: La Belle Iron Works, Inland Steel Company, National Enameling & Stamping Company, Youngstown Sheet & Tube Company.

Wire Products.—American Steel & Wire Company, subsidiary. Competitors: Pittsburgh Steel Company, John A. Roeblings Sons Company, Grand Crossing Tack Company.

bined, and first by one method, and then by another, and then still by another, deliberately fixed and successfully maintained almost uninterruptedly for a period of 10 years the prices at which the public was compelled to purchase their products, I am convinced that the corporation and every producer which combined with it and with one another in so fixing and maintaining prices violated the provision of the statute which declares illegal "every * * * combination * * * in restraint of trade or commerce among the several states. * * *"

Fourth. Was the corporation engaged in restraining or monopolizing trade, or was it threatening so to do, at the institution of this suit?

As the several means resorted to by the corporation, with others, for raising and maintaining prices constitute, in my opinion, the only conduct of the corporation violative of the statute, the first part of the question just propounded may be answered by ascertaining when that conduct ceased. The Gary Dinner movement ended with the dinner of January 11, 1911, and the bill in this suit was filed on October 26, 1911. The testimony does not show that since the date of the last Gary Dinner the corporation, either alone or in co-operation with others, has fixed or maintained prices of the products of the steel industry, or attempted so to do, nor does the testimony disclose anything which suggests an intention on the part of the corporation to return to its former practices. That it may do so, if it desires, unless prevented by the decree of this court, is of course obvious.

My conclusions of fact and of law are that the *organizers* of the corporation (1) intended to create a monopoly and to restrain trade, and (2) combined with others and attempted to monopolize trade, within the meaning of the act, and that the *corporation* (1) neither attempted nor possessed the power alone to do the unlawful things intended by its formation, but (2) that it unlawfully combined with others to restrain trade by controlling prices.

[10] Whatever remedy there may be against the organizers of the corporation for acts violative of the statute, certainly in this proceeding in equity a decree of dissolution cannot be awarded against the corporation for the unlawful intent and the unsuccessful attempt of its organizers to violate the law. Upon the finding that the corporation, in and of itself, is not now and has never been a monopoly or a combination in restraint of trade, a decree of dissolution should not be entered against it. Having found, however, that the corporation violated one of the provisions of the statute by combining with others to unduly restrain trade, and that it possesses the power to again unlawfully combine with others to do the same unlawful acts, and though not actively threatening, yet because of the disposition displayed throughout the larger portion of its history, it may again do so, I am of opinion, that the corporation should be prevented doing the things and repeating the practices respecting the fixing and maintaining of prices herein viewed illegal. The ordinary relief, obviously, is the injunction process of the court, which, in an ordinary situation, would follow such a finding as of course. I am satisfied, however, that the same end will be attained, in a manner consistent with recent legislation, by retaining jurisdiction of the bill, if desired by the government, for the purpose

of restraining the defendants against engaging in the price fixing practices found illegal.

Having stated the reasons for my conclusions, and the matters which have principally controlled my judgment in this case, I join in the decree to be entered.

THE DAVID C. RITCEY.

THE L. V. STODDARD.

(District Court, E. D. Pennsylvania. April 29, 1915.)

Nos. 52 and 53.

COLLISION ⇐45—STEAM AND SAILING VESSELS—FAILURE TO MAINTAIN EFFICIENT LOOKOUT.

A collision at night outside the Delaware Capes between a steamship passing out and turning to the northward around the Five Fathoms Bank lightship at a speed of 9 miles an hour and a schooner approaching from the northward at 3 miles an hour *held* due solely to the fault of the steamship in failing to sooner see the lights of the schooner, which were burning brightly; the evidence showing that the schooner kept her course, that the night was clear, and that she saw the lights of the steamer, as they approached the lightship on courses approximately at right angles to each other, in ample time for the steamship to have kept out of her way.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 51; Dec. Dig. ⇐45.]

In Admiralty. Suit for collision by Colin D. Ritcey, master and part owner of the British schooner David C. Ritcey, against the steamship L. V. Stoddard, Boston & Virginia Transportation Company, claimant, with cross-libel against the Ritcey. Decree for libelant.

Howard M. Long, of Philadelphia, Pa., for the D. C. Ritcey.

Harris Livermore, of Boston, Mass., and Arthur E. Hutchinson, of Philadelphia, Pa., for the L. V. Stoddard.

DICKINSON, District Judge. This controversy involves the consequences of and the responsibility for a collision between two vessels. The case has taken the form of two actions, a libel and a cross-libel. It was stipulated between the proctors of the parties that the cross-libel should be considered as an answer to the libel, and the libel in its turn an answer to the cross-libel. The evidence was introduced, testimony given, and case heard as if the cases were in fact one case. We therefore dispose of it as such.

The original libelant's vessel is of fore and aft rig and of the type of vessel known as a three-masted coasting schooner or coaster. The schooner has a length of 126 feet and a carrying capacity of 550 tons. The original respondent is a steamer having a length of 250 feet and was of a tonnage of 3,700 tons. The speed of the vessels at the time of the collision was about three miles per hour for the schooner and nine miles for the steamer. The first thought with which one is impressed is the contrast in size and power of the vessels. The steamer

had twice the length, three times the speed, and nearly seven times the tonnage capacity of the schooner.

The collision occurred on November 18, 1914, at about 9:45 p. m. The steamer was outward bound through the Delaware Capes. Her destination after passing out was to the northward. The schooner was passing southward along the New Jersey coast and bound to Philadelphia. The place of the collision was near the Five Fathoms Bank lightship, about the point where outgoing vessels bound north turn to go up the coast. The second thought with which any one passing upon such a controversy as this is impressed is that the locality is fraught with danger of collisions, with a knowledge of which the steamer, and indeed both vessels, are chargeable.

The night was clear. Each vessel was carrying its proper lights, all of which were burning brightly, and there were no other craft in the vicinity to confuse the navigators on either vessel. If the testimony of those aboard the respective vessels is to be credited, a sharp lookout was being kept by each. There was ample sea room, and indeed on one side the wide expanse of the Atlantic in which the vessels could maneuver. This forces upon us the third thought, that a collision under such circumstances must be the fruit of negligence in the management of one of the boats or both of them.

The case presents the not unusual feature that each represents itself as the victim of the other; the schooner alleging that it was run down by the steamer, and the steamer that it was run into by the schooner. There lies upon the surface of the controversy the suggestion that it can be easily understood how the schooner, without any fault on its part, might have been run down by the steamer; but the query arises how the steamer, without fault on its part, could have been run down by the schooner. Certainly if the schooner had been trying to ram the steamer, and those on board the latter had been on the alert, it is difficult to understand how the schooner could have accomplished her purpose. The commander of a naval vessel, who under like conditions suffered his ship to be thus lost or damaged, would have been promptly disciplined by his superiors.

We therefore do not need the aid of the rules of navigation to realize that the steamer must make out a clear case of exculpation of itself before the mind could rest easily upon the conviction that the schooner was wholly at fault. The steamer has, however, essayed this somewhat difficult task. It is aided in this by the diagram drawn by witnesses for the schooner illustrating what they described to have been the course of the steamer before the collision. This course, as delineated by these diagrams, gives one the impression that the witnesses assert that the steamer, without any reason for so doing, rounded Five Fathoms Bank lightship and immediately swung around to a return course which almost paralleled that which she had been before pursuing. That the steamer should have taken a course involving such a turn as that described is at first sight incredible. No one, however, can read the testimony of those who were aboard the schooner, and indeed aboard the steamer as well, without having the firm conviction, after its perusal, that the collision did occur substantially as

is stated on behalf of the schooner. These seemingly inconsistent impressions are reconciled, if the thought is added that the witnesses who were on board the schooner are describing, not the course which the steamer traversed before the collision, but their inference of what the course was from the position of the vessels shortly after the collision, which was the time at which the witnesses took their mental picture of what had happened.

Without going into any discussion in detail of the facts testified to and which are in evidence, we have no difficulty in reaching a satisfactory conclusion as to the why of this collision. As the steamer was passing out of Delaware Bay with the purpose in mind of passing to the southward of the lightship and then turning to the northward in a course headed for the Northeast End lightship, she was intending to take a course which substantially paralleled in reverse that which the schooner was taking, with the purpose in her mind of passing to the eastward of Five Fathoms Bank lightship and then turning into the bay, in a course which in turn would have paralleled in reverse the course which the steamer had pursued in passing out. As each vessel was approaching the common turning point, they were pursuing courses which were approximately at right angles to each other. It is clear from this statement that it was the duty of the schooner to have held her course and of the steamer to have kept clear of the schooner. The position of the schooner was such with respect to the lightship, which the steamer first reached, that the steamer would be expected to pass with the schooner on her port side. Had those aboard the steamer seen the schooner's lights as soon as those aboard the schooner made out the steamer's red light, this is the course which the steamer would without doubt have taken. Instead of doing this, the steamer passed to the eastward across the line of the course which the schooner was taking, so as to make her bear off the schooner's port bow. The helm of the steamer was then put to starboard, with the thought in the mind of her navigator to have her round the lightship and swing to the northward until she was steadied on her course up the coast, which would have been N. E. by N. or ½ N.

Up to this time those aboard the steamer, for some reason which is unexplained, had not as yet made out the schooner. The steamer had not been steadied on her new course when the schooner was made out, but was still swinging when the danger of a collision was forced upon the attention of those in command of the steamer. The inquiry was made, "How is your helm"? and the answer was given, "Hard astarboard." The command then followed, "Keep her so." The reasons which governed this action are manifest. The steamer was swinging to port on a starboard helm when the schooner was made out. The schooner was so near at hand that the attempt to check the swing of the steamer and steady her, so that the vessels could pass port to port, was an extremely hazardous undertaking. The only thing left to do, therefore, was to make the effort to let her continue to swing on her starboard helm in the expectation that she would safely cross the bow of the schooner. In this she failed. This swing, and the checking of her speed from the engine room, and the effect of the collision

itself, would have brought about the position of the vessels to which all the witnesses testified, viz., that they were then side by side, with bows pointing in the same direction. If this idea of the happening is visualized, the testimony of those aboard the schooner is made clear, and its substantial correctness established. The steamer would have showed to them first her white or masthead lights, next her port light, then both red and green lights, and then only the green light, in exact accord with the testimony. More than this, the at first incredible description of the loop in the course of the steamer is accounted for, and is seen to be, not merely consistent with the to be expected course of the steamer, but a necessary accompaniment.

This theory of how the collision came about involves the findings of negligence on the part of the steamship and the absence of any negligence on the part of the schooner. The theory of counsel for the steamship that the schooner must have changed her course is a theory of fact, not only not called for by what happened, but also unsupported by anything in the evidence, and flatly denied by the witnesses, whose credibility is enforced by their opportunities for knowledge and the clearness, frankness, and evident truthfulness with which they have testified. The negligence of the steamer consists in this: The night was of a kind in which lights could be readily made out. The schooner's lights were burning brightly. The steamer's side lights were made out by the schooner at a distance which afforded an ample margin of space for the safe maneuvering of the vessels. There is no ground for finding that the schooner's lights could not have been made out from aboard the steamer at a distance which would have enabled the steamer to have avoided the collision. There is not sufficient ground to convict the steamship of negligence in having failed to maintain a lookout, or for mismanagement of the ship after the schooner was made out.

The explanation for the occurrence is found in the two facts that the collision could not have been avoided after the schooner was seen, and she was not sooner seen because the steamer, in coming out of the capes, was headed to the eastward, and the presence of the schooner was not observed until the steamer had made her swing to the northward, thus placing the schooner before the eyes of those aboard the steamer. This explains how the collision came about, but does not excuse the steamer from responsibility for the consequences, nor acquit it of the charge of negligence. The suggestion that the schooner might have avoided the collision by a change of her course, when it was discovered that a collision was close at hand, is readily met. Had the schooner changed her course, it is apparent that the defense would then have been that the collision was due to her having done this very thing. It was the clear duty of the schooner to have held her course, and nothing but imminence of a collision so great as to have offered no other escape would have justified her in changing it.

Another answer to the suggestion is that the schooner was expecting a pilot boat, and when the steamer showed she was rounding up by changing her course to the westward, it was thought by at least some aboard the schooner, and the mate so announced, that the steamer was

the pilot boat rounding up, so as to lay alongside of the schooner, in order that a pilot might board her.

The other suggestion made, that this error on the part of the schooner in mistaking the steamer for the pilot boat was the cause of the collision, is supported neither by the evidence of what did happen, nor by anything which under such circumstances might be expected to happen, and the fact is found against the steamship. The theory based upon the suggestion of this mistake of the schooner that her captain, intending to lay her alongside the pilot boat when she rounded up, misjudged the distance and ran his vessel into the steamer, has no other support than the ingenious imaginings of counsel.

There would appear to be no controversy over the extent of the damages to the schooner, nor the amount of the expense of her repair.

The usual decrees, finding the steamer to be responsible for the damages done to the schooner, and that the schooner was without fault, may be drafted and submitted by counsel.

UNITED STATES v. MILLER.

(District Court, S. D. Georgia. May 14, 1915.)

(Syllabus by the Court.)

1. COSTS ⊜310—TAXATION—FEES OF WITNESSES—CRIMINAL CASE.
   In criminal cases the fees of witnesses who are subpœnaed by the government, but who are not sworn and used as witnesses in the case, are not chargeable against the defendant upon his conviction, in the absence of equitable reasons therefor.
   [Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 1177–1184; Dec. Dig. ⊜310.]

2. COSTS ⊜310—TAXATION—FEES OF WITNESSES—CRIMINAL CASE.
   Where a defendant was indicted on several counts, and found guilty upon one, and expressly acquitted upon the other counts, the fees of a witness whose testimony related solely to the counts of the indictment as to which he was acquitted are not chargeable against the defendant.
   [Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 1177–1184; Dec. Dig. ⊜310.]

3. COURTS ⊜357—PROCEDURE—APPEAL—DOCKET FEES—CRIMINAL CASE.
   In criminal cases the defendant is not chargeable with the attorney's docket fees in the Supreme Court and the Circuit Court of Appeals.
   [Ed. Note.—For other cases, see Courts, Cent. Dig. § 938; Dec. Dig. ⊜357.]

4. COURTS ⊜357—PROCEDURE—COSTS—APPEAL—TRANSCRIPT—CRIMINAL CASE.
   A defendant in criminal cases is chargeable with the expense of the transcript of the record in the District Court in carrying the same to the United States Supreme Court.
   [Ed. Note.—For other cases, see Courts, Cent. Dig. § 938; Dec. Dig. ⊜357.]

Harvey C. Miller was convicted of violating Interstate Commerce Act Feb. 4, 1887, c. 104, 24 Stat. 379 (U. S. Comp. St. 1913, §§ 8563–

8596), and, his conviction being affirmed by the Circuit Court of Appeals and the costs being taxed against him, he moves to retax the costs. Ordered that costs be retaxed.

See, also, 187 Fed. 375.

E. M. Donalson, Dist. Atty., of Macon, Ga., for the United States.
Osborne & Lawrence, of Savannah, Ga., for defendant.

LAMBDIN, District Judge. This is a motion on the part of the defendant to retax the costs in the case. The defendant, who is the movant here, was indicted upon several counts for violation of the Interstate Commerce Act. He demurred to this indictment, and the District Court sustained the demurrer. He thereupon carried the same to the Supreme Court of the United States, where the judgment of the court below was reversed. The case then proceeded to trial, and he was found guilty on one of the counts and acquitted on all the others, and sentenced to pay a fine of $5,000, together with costs of court. He carried this conviction to the Circuit Court of Appeals, where same was affirmed. The clerk taxed the costs against him, and he now makes a motion to retax these costs, and claims that they are erroneous in the particulars hereinafter set forth.

[1] 1. He claims that he is not chargeable with the fees of certain witnesses who were subpœnaed by the government, but who were not introduced as witnesses on the trial of the case, and did not testify in same, and also claims that he should not be charged with the costs of issuing and serving subpœnas upon these witnesses. At the hearing no special reason was shown why these witnesses were not used. It does not appear that any unexpected turn in the case, any ruling of the court, any admission on the part of the defendant, or other reason, rendered the testimony of these witnesses unnecessary on the trial. Under such circumstances the conclusion is that the testimony of these witnesses was not material, and that they were unnecessarily brought to court as witnesses. The defendant should therefore not be charged with the fees of these witnesses, or with the costs attendant upon issuing and serving subpœnas upon them. This seems to be a well-settled rule of law and practice in the federal courts. Simpkins v. Atchison, T. & S. F. R. Co. (C. C.) 61 Fed. 999, and cases cited therein; United States v. Wilson (C. C.) 193 Fed. 1007; The Persiana (D. C.) 158 Fed. 912. Such was the ruling of the Supreme Court of Georgia before the first Code of the state was adopted. Mason & Waldrip v. Dean & Nash, 10 Ga. 443. This principle is now expressly set out in the Civil Code of Georgia of 1910, § 5990; Penal Code Ga., § 1106. See, also, Herrington v. Flanders, Sheriff, 115 Ga. 823, 42 S. E. 222.

[2] 2. The defendant shows, also, that the testimony of one of the witnesses related solely to counts of the indictment as to which he was acquitted, and he claims that he should not be charged with the costs of subpœnaing this witness, or with his witness fees. It would seem that the defendant is correct in this contention also. Each count in the indictment is in the nature of a separate indictment, and upon reason it would seem that the defendant should not be charged with the costs of a witness whose testimony related solely to the counts upon which

the defendant was acquitted. Commonwealth v. Ewers, 4 Gray (Mass.) 21; 11 Cyc. p. 29.

[3] 3. The defendant was taxed in the bill of costs with attorney's docket fees of $20 each in the District Court, in the Supreme Court, and in the Circuit Court of Appeals. I do not think he should be charged with the docket fees in the Supreme Court and in the Circuit Court of Appeals. In the first place, the mandates which were sent down from these two courts did not carry these costs. Osborn v. United States, 131 U. S. cxxxvii, appendix, 23 L. Ed. 871. Rule 24 of the United States Supreme Court (32 Sup. Ct. xi) and rule 31 of the Circuit Court of Appeals (150 Fed. xxxv, 79 C. C. A. xxxv) provide that such docket fees cannot be taxed either for or against the United States in those courts, and these rules are controlling.

[4] 4. It appears that the defendant is also taxed with the expense incurred by the United States in having a transcript of the record in the court below made so as to carry the case to the United States Supreme Court. No authorities are presented as to the correctness or incorrectness of this item, and I have been unable to find any. The expense of procuring this record was incurred in the District Court, and not in the United States Supreme Court, and therefore the costs of such transcript is not a part of the Supreme Court costs, but is taxable in the District Court. Supreme Court rule 24, cited above. This rule prohibits the taxing of the expense of this transcript in the Supreme Court, but contains no prohibition against taxing it in the court below. Such being the case, and as, under the general rules governing such matters, the prevailing party is entitled to recover the costs necessarily expended by him, I am inclined to think that the defendant should pay the costs of this transcript. Lee Injector Mfg. Co. v. Penberthy Injector Co., 109 Fed. 964, 48 C. C. A. 760.

The clerk of this court will therefore retax the costs in this case in accordance with the foregoing opinion.

In re LOUISVILLE & CINCINNATI PACKET CO.

(District Court, E. D. Kentucky. April 3, 1915.)

No. 2948.

1. SHIPPING ⊂⊃209—LIMITATION OF LIABILITY—JURISDICTION OF PROCEEDINGS.

Rev. St. §§ 4283–4285 (Comp. St. 1913, §§ 8021–8023), giving to shipowners the right to limit their liability in certain cases, originally enacted in 1851, contemplate a distribution of jurisdiction of proceedings thereunder in accordance with the general principles of jurisprudence, and apart from admiralty rule 57 (29 Sup. Ct. xlvi), relating to procedure in such cases, first adopted by the Supreme Court in 1872, and subsequently enlarged, any District Court having custody or control of the vessel or property to be distributed, or having such property within its district so that such custody could be acquired under its process, had jurisdiction of the proceedings.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 646–655, 659, 661, 662; Dec. Dig. ⊂⊃209.]

2. SHIPPING ⟸209—LIMITATION OF LIABILITY—JURISDICTION OF PROCEEDINGS—"MAY BE."

In admiralty rule 57 (29 Sup. Ct. xlvi), relating to proceedings by shipowners for limitation of liability, as amended by the addition of the provision that, "when the said ship or vessel has not been libeled, * * * and suit has not been commenced against the said owner, * * * or has been commenced in a district other than that in which the said ship or vessel may be, the said proceedings may be had in the District Court of the district in which the said ship or vessel may be, and where it may be subject to the control of such court for the purposes of the case," the words "may be" must be construed as referring to the time when the limitation proceedings are commenced, and the District Court of the district where the vessel then is has jurisdiction of such proceedings, although suits against the owner have been brought in another district, and although the vessel may have been in such district when they were commenced, where she was not libeled.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 646–655, 659, 661, 662; Dec. Dig. ⟸209.

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

In Admiralty. In the matter of libel of the Louisville & Cincinnati Packet Company, as owner of the steamboat Indiana, for limitation of liability. On motion to dismiss for want of jurisdiction. Motion denied.

R. C. Kinkead, of Louisville, Ky., for claimants.
Harvey Myers, of Covington, Ky., for Louisville & C. Packet Co.

COCHRAN, District Judge. This cause is before me on motion by claimants to dismiss the libel for want of jurisdiction. They contend that jurisdiction thereof is in the District Court for the Western District of this state.

The libelant is a Kentucky corporation. It owns and operates a line of steamboats between Cincinnati, Ohio, and Louisville, Ky., for the carriage of freight and passengers. The course over which it operates them is mainly in this district. All of it is therein except so much thereof as is in Jefferson and Oldham counties, Ky., in the first of which Louisville is located. As required by the statute of Kentucky, on May 6, 1901, the libelant filed with the Secretary of State a statement wherein it set forth that its places of business in Kentucky were Louisville and Covington, and that a certain person, named, of Louisville, and two certain persons, named, of Covington, were their agents thereat upon whom process might be served in any suit that might be brought against it within the state of Kentucky. This statement was made at Cincinnati, Ohio, by its secretary, on its behalf.

Counsel for claimants has it that it sets forth that Louisville is the home office of the libelant. But they are mistaken as to this. That on which reliance is had to substantiate this position is not part of the statement made by the libelant to the Secretary of State. It is merely an indorsement thereon made by the Secretary of State. Louisville is not the home office or principal place of business of the libelant. As appears from the affidavit of its secretary, with which everything else

agrees, that office and place of business is at Cincinnati. Its president, general manager and treasurer, and secretary reside, the two former at Covington, and the last in Campbell county, opposite Cincinnati, in this district, and its vice president at Cincinnati, and no officer of it resides at Louisville, or in the Western district. The home port of its steamboats is at Cincinnati. Its harbor or place of landing for its steamboats, when out of commission and laid up on account of low water, is at Newport, in Campbell county.

One of the libelant's steamboats is named Indiana. On the night of July 4, 1914, as it was proceeding on one of its return trips from Louisville to Cincinnati, at a point above Patriot, Ind., and about 50 miles from Cincinnati, in this district, it collided with a gasoline launch, named Sunshine, on board of which the claimants, nine in number, then were, going in the same direction. They were residents of Louisville, and so also was the owner of the launch. Thereafter they brought separate suits against the libelant in the circuit court of Jefferson county to recover damages for injuries which they claimed they had sustained by reason of the collision, the amounts sued for therein totaling the sum of $109,400. At the time five of them were commenced—the first five to be brought—the Indiana was at Louisville. At the time the libel herein was filed she was laid up, out of commission, and tied to the bank at the libelant's harbor or place of landing at Newport on account of low water. The limitation of liability sought herein is to the value of the Indiana immediately after the collision and her then pending freight.

The motion to dismiss is made by eight of the claimants. The ground upon which they contend that jurisdiction of the libel is in the District Court for the Western District, and not in this court, is that at the time it was filed the libelant was then sued in the Western district, in the circuit court of Jefferson county, as hereinbefore stated, and at the time the first five of the suits were commenced the Indiana was in that district at Louisville. This contention is based on the fifty-seventh rule in admiralty (29 Sup. Ct. xlvi), by which jurisdiction of libels to limit liability is attempted to be distributed.

[1] Before considering how the matter stands under this rule it should be viewed apart therefrom. Clearly it was not essential that the Supreme Court promulgate any rule on this subject in order for the District Courts to have the right to exercise such jurisdiction. In its absence, at least, such jurisdiction would be distributed in accordance with the general principles of jurisprudence. Such is the case now as to the general jurisdiction in admiralty. There is no statute or rule promulgated by the Supreme Court distributing it. In the case of In re Louisville Underwriters, 134 U. S. 488, 10 Sup. Ct. 587, 33 L. Ed. 991, it was held that suits in admiralty did not come within the venue or distributing clause of section 1 of the general jurisdictional act of 1887-88 (Act March 3, 1887, c. 373, § 1, 24 Stat. 552), and that, therefore, a libel in personam can be maintained for any cause within the jurisdiction of a court of admiralty wherever a monition can be served upon the libelee, or an attachment made of any personal property or credit of his. This is in accordance with the general principles

of jurisprudence. According thereto a court has jurisdiction to proceed against a person when it has served him with its process within its territorial jurisdiction or against his property when it has so seized it, if it has jurisdiction of the subject-matter. For a long time there was no rule distributing the special jurisdiction involved herein. The statute creating it was enacted March 3, 1851, and the rules relating to it were first promulgated May 6, 1872. The fifty-seventh rule as then promulgated did not distribute all cases of such jurisdiction. It was enlarged April 22, 1889 (130 U. S. 705, 9 Sup. Ct. iii), and even as thus enlarged it does not cover all cases thereof. Clearly, then, until the original promulgation in 1872, jurisdiction of this character was distributed in accordance with such principles, and until the enlargement of 1889, in so far as it was not covered by the rule, it was so distributed. It could not otherwise have been exercised.

Besides, the statute creating the jurisdiction contemplates such distribution. It consists of three sections, to wit, 4283, 4284, and 4285, Rev. St. U. S. (Comp. St. 1913, §§ 8021–8023). On their face section 4283 is substantive in character, and sections 4284 and 4285 are adjectival or procedural. The two latter are not as broad as the former. White v. Island Transportation Co., 233 U. S. 346, 34 Sup. Ct. 589, 58 L. Ed. 993. Section 4283 is negative in its terms. It merely provides that in cases covered by it the liability of the owner of the vessel shall not exceed the amount or value of his interest in the vessel and her freight then pending. It does not expressly confer on the vessel owner a right to institute a proceeding to limit his liability thereto. But it does confer such right by implication. The basis of the implication is the circumstance that sections 4284 and 4285 authorize the vessel owner in cases of injuries to property, where there is a plurality of claimants, to institute such a proceeding. The sense of section 4283 is completed by inference from sections 4284 and 4285. It is to be gathered therefrom that it is the thought of section 4283 that the vessel owner, not only in cases covered by sections 4284 and 4285, but in all cases covered by that section—i. e., where there are injuries to person as well as to property, and where there is a single claimant, as well as where there is a plurality of claimants—may institute a proceeding to limit his liability to the value of the vessel, or to the vessel itself, as he may prefer, and her pending freight, as much so as if the same had been expressed therein; that no provision is made for a proceeding in cases where the injuries are to the person, or where there is but a single claimant, where the injuries are to property and there are several claimants, is not against the vessel owner's right to institute a proceeding in such cases; it being the thought of section 4283 that where a proceeding may be had in such case the character thereof is to be determined by analogy to the proceedings authorized in sections 4284 and 4285 in the cases covered by them.

This is a third instance which I have come across recently of a statute undertaking to provide how a right conferred by a previous general provision shall be exercised, not as broad as such provision, and I deal with the situation in the same way. The other two are to be found in the cases of Ky. Coal Lands Co. v. Mineral Dev. Co. (C. C.)

191 Fed. 899, 908, and L. & R. R. Co. v. Bosworth (D. C.) 209 Fed. 380, 416. I would therefore make out the right of the vessel owner to institute a proceeding to limit his liability in cases of injuries to person, or where there is but a single claimant, and his method of procedure in such cases, not by broadening sections 4284 and 4285, but by filling out section 4283 and applying by analogy to such cases the method of procedure authorized by those two sections. Butler v. B. & S. S. Co., 130 U. S. 527, 9 Sup. Ct. 612, 32 L. Ed. 1017; White v. Island Transportation Co., supra. That this statute creating this special jurisdiction contemplates its distribution in accordance with the general principles of jurisprudence is evident from the fact that section 4284 enacts that the proceeding therein provided for may be taken in "any court," and section 4285 that the appointment of the trustee therein provided for shall be by "any court of competent jurisdiction." Though not so expressed, the court referred to in section 4284 is any court of competent jurisdiction, and in both instances the court referred to is any admiralty court of competent jurisdiction. In the case of Norwich R. Co. v. Wright, 13 Wall. 104, 20 L. Ed. 585, Mr. Justice Bradley said:

"The act does not state what court shall be resorted to, nor what proceeding shall be taken, but that the parties, or any of them, may take 'the appropriate proceeding in any court, for the purpose of apportioning the sum for which,' etc. Now, no court is better adapted than a court of admiralty to administer precisely such relief. It happens every day that the proceeds of a vessel, or other fund, is brought into that court to be distributed amongst those whom it may concern. Claimants are called in by monition to present and substantiate their respective claims, and the fund is divided and distributed according to the respective liens and rights of all the parties. Congress might have invested the Circuit Courts of the United States with the jurisdiction of such cases by bill in equity, but it did not. It is also evident that the state courts have not the requisite jurisdiction. Unless, therefore, the District Courts themselves can administer the law, we are reduced to the dilemma of inferring that the Legislature has passed a law which is incapable of execution. This is never to be done if it can be avoided. We have no doubt that the District Courts, as courts of admiralty and maritime jurisdiction, have jurisdiction of the matter; and this court undoubtedly has the power to make all needful rules and regulations for facilitating the course of proceeding."

That this statute so contemplates is settled by the decision in the case of Ex parte Slayton, 105 U. S. 452, 26 L. Ed. 1066. When that case arose the fifty-seventh rule had not been enlarged. As it then stood it provided that the proceeding should be instituted in any District Court of the United States in which the ship or vessel may be libeled, or, if it be not libeled, in the District Court in which its owner may be sued. It made no provision whatever for the case where the ship or vessel may not be libeled, or its owner is not sued. Indeed so far as their express terms were concerned, the four rules originally promulgated were limited to the case where either the ship or vessel may be libeled, or its owner sued. The Supreme Court, at the time of their promulgation, does not seem to have contemplated the institution of such a proceeding in any other contingency. In the Slayton Case the ship or vessel was not libeled, nor the owner sued. It was bound on Lake Michigan from Grand Haven, Mich., to Chicago,

Ill., and was sunk on the trip. Some portions of the wreck were washed ashore in Michigan between Grand Haven and Chicago, and its pending freight amounted to $196. The libel for limitation of liability was filed in the District Court of the Northern District of Illinois, in which Chicago is located. On its filing a trustee was appointed, and transfer made to him of the portions of the wreck and pending freight. The jurisdiction of that court was upheld. Some emphasis was made on the circumstance that the vessel was bound for the port of Chicago. But the real basis of the decision was that the court had acquired control of portions of the wreck, notwithstanding it did not appear that they had been gathered together and brought within the Northern district of Illinois, and of the freight. Mr. Chief Justice Waite said:

"Section 4284 * * * allows the owner to institute * * * proceedings in any court—that is to say, any court of competent jurisdiction—for the purpose of apportioning the sum for which he is liable among the proper parties. Section 4285 provides that it shall be deemed a sufficient compliance on the part of the owner with the requirements of the act if he shall transfer * * * his interest in the vessel and freight to a trustee appointed by the court for the persons who may prove to be legally entitled thereto. Any court, therefore, which gets actual possession of the things to be transferred, and about which the concourse of claimants is to be had, is a court of competent jurisdiction to try the questions that will properly arise upon the apportionment to be made. Even though proceedings should be instituted by the owner before he or his vessel is sued, the courts will either follow our rules as far as practicable, or do something which is equivalent, to obtain jurisdiction of the thing about which the litigation is to be had. No monition can properly issue either under the operation of our rules, or otherwise, until this jurisdiction of the thing has been in some way secured."

Again he said:

"Such being the case, we cannot say the court (upon the showing here made) has not acquired jurisdiction of the thing about which the litigation arises, to-wit, the fund to be apportioned among the parties who may prove to be legally entitled thereto. It has the freight money in its possession, and its trustee is in a condition to gather up the remnants of the vessel, if it has not already been done. The jurisdiction of the court is not dependent at all on the amount, but on the rightful possession of that which is to be divided."

And again he said:

"With the possession and control of the property the court has jurisdiction."

This case settles, therefore, not only that apart from the fifty-seventh rule the special jurisdiction in question is distributed in accordance with the general principles of jurisprudence, but recognizes that according to those principles a District Court which has the custody and control of the ship or vessel or some part of it or of its pending freight has jurisdiction of the libel. For it is a well-recognized principle of such jurisprudence that a court which has the custody and control of property has jurisdiction to determine interests in and claims against it and to dispose of it. And not only this, but that as to property within its territorial jurisdiction it has jurisdiction to acquire custody and control thereof. As to cases of total loss, where it is not possible for an admiralty court to acquire custody and control of any property or fund, which, when no suit has been brought against the owner, are not covered by the rule in

its enlarged form, Mr. Justice Bradley had this to say in the case of P. & N. Y. S. Co. v. Hill Mfg. Co., 109 U. S. 578, 3 Sup. Ct. 379, 617, 27 L. Ed. 1038:

"When cases arise in which the vessel and freight have been totally lost, and no District Court has, or can have, possession of any fund to distribute, resort may probably be had with propriety to the District Court of the district in which the owners reside, or where the vessel perished. It will be time enough, however, to consider what is proper in such exceptional cases when they arise."

We reach the conclusion, then, that apart from the fifty-seventh rule this court has jurisdiction of this proceeding. The statute has in view a distribution of the jurisdiction covered by it in accordance with the general principles of jurisprudence and according to those principles it has jurisdiction thereof. The Indiana at the time of its institution was in the district. It was tied up to the bank at libelant's regular landing and harbor therein on account of low water. When in service, save when within the bounds of Jefferson county, it was always therein. It was only a comparatively small period of time, therefore, that it was ever out of it. In addition, the place of the commission of the tort complained of was in the district, and the Indiana, at the time, was proceeding to a port in the district.

How, then, does the matter stand under that rule? It is questionable, to say the least, whether the Supreme Court had power to promulgate a rule denying this court jurisdiction of this proceeding. As we have seen, according to the general principles of jurisprudence, apart from the rule, this court has jurisdiction thereof, and the statute creating the right contemplates a distribution of jurisdiction of proceedings to enforce it in accordance with those principles. The right of the Supreme Court to promulgate any rules on the subject was not given by that statute. In the case of Ex parte Phenix Insurance Co., 118 U. S. 610, 7 Sup. Ct. 25, 30 L. Ed. 274, Mr. Justice Blatchford said:

"The provisions of the Revised Statutes on the subject of the limitation of liability were taken from the act of March 3, 1851 (9 Stat. 635). There is nothing in that act, nor the corresponding enactments in the Revised Statutes, in regard to the promulgation of any rules by this court for procedure in the matter."

They were promulgated under section 6 of the act of 1842 (5 Stat. 518), carried into sections 862 and 917 of the Revised Statutes (Comp. St. 1913, §§ 1470, 1543). By section 862 it is provided that:

"The mode of process in causes of admiralty and maritime jurisdiction shall be according to rules now or hereafter prescribed by the Supreme Court except as herein specially provided."

And by section 917 it is provided that:

"The Supreme Court shall have power to prescribe, from time to time, and in any manner not inconsistent with any law of the United States, the forms of writs and other process, the modes of framing and filing proceedings and pleadings, of taking and obtaining evidence, of obtaining discovery, of proceeding to obtain relief, of drawing up, entering, and enrolling decrees, and of proceeding before trustees appointed by the court, and generally to regulate the whole practice, to be used, in suits in equity or admiralty, by the Circuit and District Courts."

By section 913 (section 1536) it is further provided that:

"The forms of mesne process and the forms and modes of proceeding in suits of equity and of admiralty and maritime jurisdiction in the Circuit and District Courts of the United States shall be according to the principles, rules, and usages which belong to courts of equity and * * * admiralty, respectively, except when it is otherwise provided by statute or by rules of court made in pursuance thereof; but the same shall be subject to alteration and addition by the said courts, respectively, and to regulation by the Supreme Court, by rules prescribed, from time to time, to any Circuit or District Court, not inconsistent with the laws of the United States."

It is difficult to find any authority in either of these provisions conferring on the Supreme Court power by its rules to distribute any admiralty jurisdiction save in the general language at the end of section 917 whereby it is empowered "generally to regulate the whole practice to be used in suits in * * * admiralty by the * * * District Courts." That which it is thereby empowered to do is limited by the requirement that it shall not be "inconsistent with any law of the United States."

In the Phenix Insurance Co. Case jurisdiction of a District Court of a libel by a vessel owner to limit his liability for a nonmaritime tort, which it was held did not exist under the statute, was attempted to be upheld by these rules, but it was held that they were insufficient for that purpose.

The Norwich Case was the first case to arise under this statute. At that time no rules had been promulgated, and it was the occasion of the promulgation of rules 54, 55, 56, and 57 as they were originally (13 Wall. xii, xiii). Concerning the power of the court in the matter Mr. Justice Bradley said:

"This court undoubtedly has the power to make all needful rules and regulations for facilitating the course of proceeding."

Again he said:

"For aiding parties in this behalf, and facilitating proceedings in the District Courts, we have prepared some rules which will be announced at an early day."

In the case of The Scotland, 105 U. S. 24, 26 L. Ed. 1001, he said:

"Without adverting to the fact that these rules were not in existence until long after this litigation had been pending, we may say, once for all, that they were not intended to restrict parties claiming the benefit of the law, but to aid them. Some form of proceeding was necessary to enable shipowners to bring into concourse the various parties claiming damages against them for injuries sustained by mishaps to the ship or cargo, where they were entitled, or conceived themselves entitled, to the law of limited responsibility, and where they were subjected or liable to actions for damages at the suit of the parties thus injured. The rules referred to were adopted for the purpose of formulating a proceeding that would give full protection to the shipowners in such a case. They were not intended to prevent them from availing themselves of any other remedy or process which the law itself might entitle them to adopt."

And in the Slayton Case Mr. Chief Justice Waite said:

"Our rules were not intended to prevent an owner from availing himself of any other remedy or process which the law itself entitled him to adopt, but to aid him in bringing into concourse those having claims against him arising from the acts of the master or crew."

In the case, however, of P. & N. Y. S. Co. v. Hill Mfg. Co., supra, Mr. Justice Bradley, speaking generally, said:

"We are clearly of opinion that the authority thus vested in this court was adequate and sufficient to enable it to make the rules before referred to."

Is it to be said, then, that the Supreme Court has power to promulgate a rule denying to a District Court jurisdiction of a libel to limit liability of which according to the general principles of jurisprudence it has jurisdiction, as, for instance, in a case like that which we have here? The necessities of this case do not call for an answer to the question. It is clear that the fifty-seventh rule should not be construed as denying jurisdiction in such a case unless no other construction can be placed upon it.

[2] This brings us to the fifty-seventh rule, to ascertain how it undertakes to distribute this jurisdiction. As originally promulgated it provided that the libel or petition should be filed and the proceedings had in the District Court "in which said ship or vessel may be libeled, * * * or if the said ship or vessel be not libeled, then in the District Court for any district in which the said owner or owners may be sued." As heretofore noted, no provision for a case where the vessel had not been libeled and the owner had not been sued was made. In case the vessel had been libeled, the requirement was that the proceedings should be had in the District Court where this had taken place; i. e., in the same court. Benedict on Admiralty, p. 321, says that the words "may be libeled" in this rule mean "where the vessel has been libeled and she or her proceeds is in custody (for the word 'libeled' in the rule cannot mean merely the filing of a libel without arrest)." Hence it is that in this contingency the proceeding is required to be had, not only in the District Court of the district where the vessel then is, but in the District Court which then has custody of the vessel. In so far the rule does not conflict with the requirements of such principles. But when we come to the other alternative—i. e., where the vessel has not been libeled, but its owner has been sued—it is different. The rule was indifferent as to the court where the suit had been brought. It need not have been a District Court of the United States; i. e., a court of admiralty. It was sufficient if it was a Circuit Court of the United States. Nor need it have been a federal court at all. It was sufficient that it was a state court. Gleason v. Duffy, 116 Fed. 298, 54 C. C. A. 100.

The requirement, however, is that in such contingency the libel shall be filed and the proceeding had in the District Court of any district in which the owner or owners may be sued; not the same court in which the suit has been brought, but in the court of admiralty for the same district. Now, in so far as the rule permitted the proceeding to be brought in such court, it cannot be said to have been in conflict with such principles. By instituting the proceeding in such court, as was held in the Slayton Case, the vessel owner would subject the vessel to its custody and control. But in so far as it may have prohibited the proceeding being brought in the District Court of another district in which the vessel then was, and to whose jurisdiction it was subject according to those principles, and required it to be brought in the dis-

trict where suit has been brought, it was in conflict therewith. In the case of P. & N. Y. S. Co. v. Hill Mfg. Co., supra, at the time the libel for limitation of liability was filed, suits had been brought in two districts, to wit, that of Massachusetts and the Southern district of New York. The tort complained of happened in the latter district, and the remains of the vessel were located therein. The proceeding was instituted in the District Court for that district. It was instituted May 14, 1872, just shortly after the promulgation of the rules, which was on May 6, 1872. The jurisdiction of that court was upheld. It is true that suit had been brought in that district, as well as the district of Massachusetts, but the emphasis in support of the jurisdiction was on the fact that the remains of the vessel were in that district. Mr. Justice Bradley said:

"In the present case, the proper court undoubtedly was the District Court of the United States for the Southern District of New York, where the remains of the vessel were situated, and where suits were brought against the owners. Proceedings under the act having been duly instituted in this court, it acquired full jurisdiction of the subject-matter; and having taken such jurisdiction, and procured control of the vessel and freight or their value, constituting the fund to be distributed, and issued its monition to all parties to appear and present their claims, it became the duty of all courts before which any of such claims were prosecuted, upon being properly certified of the proceedings, to suspend further action upon said claims."

Though the Supreme Court's attention was called to the fact that the fifty-seventh rule did not cover the case where neither the vessel had been libeled nor the owner sued as early as the Slayton Case, it took no step to enlarge the rule until the case of Butler v. B. & S. S. Co., supra, came before it. When the decision in that case was handed down it at the same time promulgated the rule in its enlarged form and as it now is. It seems to have taken note at that time, not only that such a contingency was not covered by the rule, but also that in its then form, if effective, it prevented the institution of a proceeding in the District Court of the district where the vessel then was, if suit had been brought against the owner in another district, and hence in so far ran counter to the principles referred to. For the enlargement met both of these defects in the rule. The addition to the rule covering both these matters is in these words:

"When the said ship or vessel has not been libeled, * * * and suit has not been commenced against the said owner or owners, or has been commenced in a district other than that in which the said ship or vessel may be, the said proceedings may be had in the District Court of the district in which the said ship or vessel may be and where it may be subject to the control of such court for the purposes of the case as hereinbefore provided."

As thus enlarged there would seem to be hardly any room to claim that the rule in any contingency negatived the jurisdiction of such proceeding on the part of the admiralty court of the district in which the vessel then was. If the vessel has been libeled the proceeding is to be had in the same court. If it has not been libeled, but the owner has been sued in the same district in which the vessel then is, then it is to be had in the admiralty court of that district. If the vessel has not been libeled, and the owner has been sued in another district than the one in which the vessel then is, the proceeding is to be had in the admiralty court

of the district in which the vessel then is. The rule in its distribution of the jurisdiction of such proceeding was thus brought into entire harmony with the general principles of jurisprudence.

But in the case of the Enterprise (D. C.) 196 Fed. 404, a position was taken to the contrary of this. There there had been a collision between a steamboat and a gasoline launch in the Mississippi river near Memphis, Tenn., in the Western district of Tennessee. Of the occupants of the launch—four in number—three were drowned and one saved. The personal representatives of two of the three decedents brought suits in personam in the District Court of the Western District of Tennessee against the owner of the steamboat to recover damages for the wrongful death of their decedents. They had recovered judgments, to which writs of error had been taken to the United States Circuit Court of Appeals, Sixth Circuit, and which were then pending. The personal representative of the third decedent brought an action at law in the proper state court against the owner, which was then pending undetermined. The steamboat's home port was at Pittsburgh, Pa. In this state of things, and when the steamboat was at that port, the owner thereof instituted a proceeding for limitation of liability in the District Court of the Western District of Pennsylvania, within which Pittsburgh is located. It was held that that court was without jurisdiction, and that the proceeding should have been instituted in the District Court of the Western District of Tennessee in which the owner had been sued. This seems to me to be in the face of the rule, as well as such principles. In order that some force could be given to so much of the rule as provided that, when the owner was sued in another district than that in which the vessel then was, the proceeding might be instituted in the District Court of the district in which the vessel then was, it was held that it had application where different suits were brought in different districts, or where the suit in the other district had been brought in the state court. I am unable to see anything in the rule to justify such distinctions. The court seems to have been influenced by two considerations. One was that, if jurisdiction was upheld, that court would be brought in conflict with the District Court of the Western District of Tennessee. But not so. If its judgments were affirmed, they would have been res adjudicata of the questions involved in those suits, in the limitation proceedings, as was held in the case of In re Sanford Ross, 204 Fed. 248, 122 C. C. A. 516. The other was the inconvenience to the parties and witnesses of having to go to Pittsburgh from Memphis. But they did not have to go there, and the inconvenience to parties and witnesses is never a consideration in determining a question of jurisdiction. Jurisdiction of the person depends upon service of process within the territorial jurisdiction of the court and of a person's property upon its location therein.

Thus far I have considered the question of jurisdiction of this libel, without taking note of how claimant's attempt to make out that by the fifty-seventh rule this court is without such jurisdiction, and it is in the District Court of the Western District. It remains to take note thereof. In order to present claimants' position clearly, the rule

should be considered somewhat in detail. It consists of two parts—the old and the new. The old, in terms, is imperative. It provides that "the petition or libel shall be filed and the said proceedings had." The new, in terms, is permissive. It provides that "the said proceedings may be had." The old requires the libel to be filed and proceedings to be had in either one of two District Courts, to wit, that in which the ship or vessel "may be libeled," or, if it "be not libeled," then that of the district in which the owner "may be sued." The new permits the proceeding to be had in but one District Court, to wit, that "of the district in which the said ship or vessel may be and where it may be subject" to its control; i. e., the district where the ship or vessel may be at the time the libel is filed. And it so permits in either of two contingencies, to wit, "when the said ship or vessel has not been libeled * * * and suit has not been commenced against the said owner or owners," or when suit "has been commenced in a district other than that in which the said ship or vessel may be." We have to do with so much of the rule only as covers the case where suit has been commenced against the owner and the vessel has not been libeled. The old part of the rule requires that in such a case the libel shall be filed and the proceedings had in the District Court of the district where the suit is pending, but the new part permits in such a case the proceedings to be had in the District Court of the district where at the time of the filing of the libel the ship or vessel may be, if the suit "has been commenced in a district other than that in which the said ship or vessel may be." In order in such a case for the proceeding to be had in the District Court of the district where at that time the ship or vessel may be, it must come within this contingency. If it does not, then it is not permitted to be filed in such District Court, but is required to be had in that of the district where the owner has been sued.

Now the position of the claimants is that this case does not come within that contingency, and hence the libel should have been filed in the District Court of the Western District, in which the libelant has been sued. The way in which they make this out is this: The meaning of the rule as to this contingency is that, if suit has been commenced in a district other than that in which the ship or vessel was at the commencement of the suit, and not at the time of the filing of the libel, and, as the Indiana was at Louisville, in the Western district, at the time the first five of the suits to be brought were commenced, those suits had not been so commenced, but had been commenced in the same district in which the Indiana at that time was. The position is somewhat involved, and I have been at some pains to make it clear. Two arguments are advanced in support of it. One is that the two "may be's" in the old part of the rule mean "may have been." It is claimed that this was so decided in the case of In re Luckenbach (D. C.) 26 Fed. 870. It is assumed that the question involved in that case was whether those words meant "may have been libeled" and "may have been sued," or "could possibly be libeled" and "could possibly be sued." But there was no such question in that case. There a vessel had been libeled in the District Court of the Eastern District of New York. The libel was pending on appeal at the time the libel for limitation of liability was

filed. It was filed in the District Court of the Southern District of New York. It was held that it should have been filed in the District Court of the Eastern District of New York, where the vessel had been libeled, though the libel was not then pending therein. The court said:

"The words 'may be libeled,' in the previous clause, must be construed as including cases in which the vessels may have been libeled."

The case, therefore, does not hold that the words "may be" in the old part of the rule do not have a present significance. It merely holds that such signification does not exclude a proceeding which has been concluded in the District Court and is pending in the appellate court. But this "may be" came into the rule with the three other "may be's" which follow it. And it is more reasonable to hold that it takes color from them, and not from the two contained in the old part of the rule. They do not have reference to the time of the commencement of the suit.

The other argument in support of this position is that, otherwise, practically no case is left where the district in which suit has been brought is determinative of jurisdiction, and so far the rule is ineffective. It is thus put:

"If where the vessel 'may be' referred to the time when this proceeding was filed, then why the rule with reference to suits being filed at all. The owner at all times could move the vessel into any other district into which the waters on which it was extended. It might have been moved to Pittsburgh or New Orleans and filed the petition there. The owner is the only one who can file the proceeding. The court did not mean to allow only the owner to select the jurisdiction. If suits were brought in the district where the presence of the vessel was, then the vessel could not be removed to another district and these proceedings taken there."

But the rule, in so far as it relates to suit against the owner having to do with jurisdiction of the proceeding, practically nugatory if claimants' position is not sound. It can have application to a case where the ship or vessel is entirely lost and there is no pending freight. Where this is not the case, it must be conceded that in so far the rule is practically nugatory on any other basis than the soundness of claimants' position. And this is as it should be. There should be no rule denying jurisdiction to the District Court of the district where the ship or vessel is at the time the libel is filed. For it to so do is to run counter to the general principles of jurisprudence, which the statute contemplates should govern in the matter of the distribution of the jurisdiction created by it. And no doubt so much of the addition to the rule as is involved here was made to prevent this, the particular shape which the matter was given being due to the fact, in all probability, that this result was brought about by an addition to the rule, and not by rewriting it.

A conclusive answer to the position of claimants is that there is no conceivable reason why the presence or nonpresence of the vessel in the district at the time suit is commenced against the owner should be determinative of the question whether the District Court of the district where the ship or vessel may be at the time the libel is filed has jurisdiction of the proceeding. The case of The John K. Gilkinson (D. C.)

150 Fed. 454, is against this position and supports the jurisdiction of this court of this proceeding. The proceeding there was instituted in the District Court of the Southern District of New York, where the vessel then was. Prior to the institution, suit had been brought against the owner in the Circuit Court of the District of New Jersey, and that suit was then pending. It was held that the court in which the proceeding was instituted had jurisdiction. It is true that it does not appear whether the vessel was in the district of New Jersey at the time the suit had been commenced. That matter was not inquired into. It was evidently regarded as a matter not affecting the question of jurisdiction.

The motion to dismiss is overruled.

GREAT NORTHERN RY. CO. v. OKANOGAN COUNTY (two cases).

(District Court, E. D. Washington, N. D. April 10, 1915.)

Nos. 1922, 1972.

1. TAXATION ⊂⊃446½—ASSESSMENT—AUTHORITY TO MAKE ASSESSMENT—DELEGATION.

Where the state board of equalization classified railroads for purposes of taxation, and arbitrarily included in one class all railroad grades or rights of way upon which ties had not been laid or had been removed, whether the right of way had been abandoned or whether the railroad was under construction, and directed county assessors to assess such rights of way at 25 cents per lineal foot, the county officers of a county, if they deemed such instructions unjust or unequal as applied to a railroad grade and right of way lying wholly in that county, had the privilege, if not the duty, of disregarding such instructions, as the authority to value the property in the county for purposes of taxation is vested in the county officers, and they cannot shift or delegate it to any other board or officer.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 788; Dec. Dig. ⊂⊃446½.]

2. TAXATION ⊂⊃390—ASSESSMENT—RAILROADS—ELEMENT OF VALUE.

In assessing a railroad for taxation, the cost of construction or reproduction, the income, the earning capacity, and the value of stock and bonds should all be taken into consideration, but none of such elements are controlling.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 652–655, 658, 659; Dec. Dig. ⊂⊃390.]

3. TAXATION ⊂⊃543—RECOVERY OF TAX PAID—BURDEN OF PROOF.

In an action to recover the amount of a tax paid under protest on the ground that the assessment was excessive, the burden was on plaintiff to show that the tax was oppressive and illegal, and where its evidence was uncertain and inconclusive, and did not satisfy the court as to the actual value of the property, or that the assessment as made was so excessive as to give rise to an implication of fraud or mala fides, plaintiff could not recover.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1006–1016; Dec. Dig. ⊂⊃543.]

At Law. Actions by the Great Northern Railway Company against Okanogan County. Judgments for plaintiff for a part of the amount sued for, as stipulated, and for defendant as to the balance sued for.

F. V. Brown, of Seattle, Wash., and Charles S. Albert and Thomas Balmer, both of Spokane, Wash., for plaintiff.

J. W. Faulkner and Charles A. Johnson, both of Okanogan, Wash., and C. H. Neal, of Oroville, Wash. (Francis A. Garrecht, of Spokane, Wash., of counsel), for defendant.

RUDKIN, District Judge. For some years last part the Great Northern Railway Company has been the owner of a railroad right of way extending from the town of Pateros to the town of Oroville, in Okanogan county, a distance of approximately 74 miles, upon which a railroad grade consisting of cuts and fills was constructed and completed prior to the 1st day of March, 1912. For the year 1912 the county assessor of Okanogan county fixed the value of this right of way, for purposes of taxation, at $1 per lineal foot, or $5,280 per mile. But, while the assessed value was as above stated, the true and fair value in money was fixed at double that amount, as all property in Okanogan county for the year in question was assessed at only 50 per cent. of its true and fair value. No change in this valuation was made or permitted by the county board of equalization. In due course, taxes to the amount of $13,821.46 were levied against the property thus assessed, and on the 12th day of March, 1913, these taxes were paid under protest. The present action was thereafter instituted by the plaintiff to recover back the greater part of the taxes so paid.

The validity of the taxes is assailed on two grounds; First, because, for purposes of taxation, the state board of tax commissioners of the state of Washington had fixed a valuation of 25 cents per lineal foot, or $1,320 per mile, on grades and rights of way of like character throughout the state during the same period; and, second, because the assessor and county board of equalization of Okanogan county fixed a valuation on other property, for taxation purposes, during the same year, at from 10 to 30 per cent. of its true and fair value in money, while the value of the property in question was fixed at at least five times its true and fair value in money, and this action was taken designedly by the county officers for the purpose of requiring and compelling the railway company to bear more than its just share or proportion of the burdens of taxation in the county. The complaint contains other allegations charging a wrongful assessment of a portion of the right of way as personal property, thus depriving the plaintiff of the rebate allowed by law for the prompt payment of taxes on real property; also a wrongful extension of road and school districts over the Indian reservation by the board of county commissioners; but such allegations were abandoned before the trial, except as to the question of rebates, and the foregoing statement is deemed sufficient to a proper understanding of the case as presented at the hearing.

[1] Some time prior to the month of January, 1906, the state board of equalization divided the railroads of the state into seven classes for the purposes of taxation, designated as "first class," and so on up to the "seventh class." Railroads of the fifth class were described as follows:

"All railroad grades or rights of way upon which ties have not been laid, or have been removed, shall constitute the fifth class."

A convention of the county assessors of the state, held at the state capital in January, 1906, adopted this classification and fixed the valuation of railroads of the fifth class, for the purposes of taxation, at the sum of $1,320 per mile, or 25 cents per lineal foot. The proceedings of this convention, in pamphlet form, and entitled, "Instructions to County Assessors by the State Board of Tax Commissioners," were distributed to the various county assessors, who were instructed by the state board to conform thereto. How long these instructions continued in force is a question upon which members and ex-members of the state board do not agree. Some members testified that the instructions continued in force during subsequent years, and were sent out to county assessors whenever an inquiry was made concerning the valuation of this class of property for the purposes of taxation, and tax agents of several railroads testified that the unused and abandoned rights of way belonging to their companies were assessed on this basis after 1906. Other members of the state board testified that the instructions were not observed after 1906, and it was an admitted fact on the trial of this case that entirely different instructions were given by the state board to the county assessor of Okanogan county in relation to the valuation of the property now in question for the year 1912.

But the instructions of the state board of tax commissioners are in my opinion utterly immaterial in this case. Authority to fix the value of private property in Okanogan county for the purposes of taxation is vested by law in the county officers of that county, and this authority they cannot shift or delegate to any other board or officer. The classification referred to would seem to be arbitrary and lacking in uniformity and equality at best. Why should an abandoned railroad right of way, of little or no value to the owner or anybody else, which may never again be used for railroad purposes, be valued the same as a right of way upon which a railroad is under construction, ready to receive the ties and rails? A railroad right of way of necessity increases in value daily as construction work progresses until the road is finally completed; and if the county officers of Okanogan county deemed the instructions of the state board unjust or unequal in their results as applied to this grade and right of way, in their then condition, it was their privilege, if not their duty, to disregard them. In Great Northern Railway Company v. Snohomish County, 48 Wash. 478, 93 Pac. 924, and 54 Wash. 23, 102 Pac. 881, the Supreme Court of the state held that, inasmuch as the state board of tax commissioners was empowered to exercise general supervision over assessors and county boards of equalization, to the end that assessments should be equal and uniform as between the different counties, the state board might fix the value of railroads extending through more than one county for the purposes of taxation; but that holding gives no sanction to an attempt on the part of the state board to fix or determine the value of local property wholly within Okanogan county for taxation purposes, if any such attempt has in fact been made. The validity of the taxes is therefore not affected by any action taken by the state board of tax commissioners.

[2] Before attempting to fix the value of the right of way, it might be well to inquire into its characteristics. Strictly speaking, it

is neither railroad property nor land; but it partakes more of the nature of the former than of the latter, and must be treated as railroad property for the purposes of taxation and in other cases where its value is called in question. The narrow strip contained in the right of way loses its chief value as land the moment it is severed from the adjacent tracts, and the more it is improved for railroad purposes the less valuable it becomes for other purposes. Viewed in this light, how should its value be determined? The value of a completed railroad is not easy of ascertainment. Railroads are not usually bought and sold on the open market. Their value is in use, rather than in exchange, and many elements go to make up that value. The cost of construction or reproducing, the income, the earning capacity, the value of stock and bonds, have all been taken into consideration by the courts. None of these elements are controlling, however. A railroad may cost more or less than its actual worth; its income or earning capacity may depend on the future development of the country through which it passes, and the stock market may be demoralized. And when we come to consider the value of an uncompleted railroad, without stock or bonds, without business or earning capacity, these difficulties are greatly enhanced. Perhaps, in the absence of any showing to the contrary, taxing officers and courts have a right to presume that the railroad company is engaged in a legitimate business enterprise for gain, and that the right of way and grade are worth the money invested in them up to any given point of time. Thus, in State v. Central Pac. Co., 10 Nev. 47, 74, Mr. Justice Beatty says:

"To determine the value of a railroad, then, the very first inquiry is as to its actual cost. That, prima facie, is its value. But if it appears that the actual cost was in excess of the necessary cost, the necessary cost is the proper standard. If it further appears that the net income of the road does not amount to current rates of interest on its necessary cost, and is not likely to do so, or if the business of the road is likely to be destroyed or impaired by competition or other cause, or, in short, if the utility of the road is not equal to its cost, then its value is less than its cost, and must be determined by reference to its utility alone."

[3] Such being the elements that go to make up the value of railroad property, what is there in the record in this case to guide the court to a correct conclusion? The county assessor of the defendant county testified that he applied to the state board of tax commissioners and to the plaintiff company for data and information concerning the value of the property, but received no aid from these sources. He then resorted to some engineering guide or handbook, showing the average cost per mile of the right of way and grade of the plaintiff company in this state and of other railroads in other states, and from this determined that the true and fair value, in money, of the right of way and grade in question, was approximately $2 per lineal foot. On 50 per cent. of this he based his assessment. I refer to this testimony without criticizing or approving the course pursued, because the court is concerned with results rather than with methods. It only goes to show the uncertain basis upon which the valuation was fixed by the county in the first instance. The burden of proof

was upon the plaintiff, however, to show that the tax was oppressive and illegal, and the testimony produced by it was equally uncertain and equally inconclusive. Three witnesses testified in its behalf, fixing the value of the right of way and grade at perhaps less than 25 per cent. of that fixed by the county authorities; but none of these witnesses qualified as experts on the value of property such as I hold this to be, and apparently could not so qualify. The record further shows that their opinion or estimate was based upon a comparison between the land embraced in the right of way and other adjacent lands, and that their opinion was controlled largely, if not entirely, by the value they placed on adjacent lands of like kind and quality. If their premise was false, their conclusion was erroneous, and the court finds itself wholly unable to say from the testimony adduced what the actual value of the property was on the 1st day of March, 1912, or that the assessment as made was so excessive as to give rise to an implication of fraud or mala fides.

The plaintiff is therefore entitled to no redress beyond a recovery of the rebate on a portion of the taxes paid, as stipulated at the trial. The conclusion here reached also disposes of case No. 1972 between the same parties, submitted on the same record.

Let findings and judgment be entered accordingly.

UNITED STATES v. PHILADELPHIA & R. RY. CO.

(District Court, E. D. Pennsylvania. May 10, 1915.)

No. 2398.

CARRIERS ⊂⊃37—TRANSPORTATION OF ANIMALS—STATUTES.

Act June 29, 1906, c. 3594, 34 Stat. 607 (Comp. St. 1913, §§ 8651–8654), prohibits carriers in interstate commerce from confining animals in cars longer than a specified time without unloading for rest, water, and feed, and provides that animals so unloaded shall be fed and watered during the rest, and declares that any carrier knowingly and willfully failing to comply with the act shall be liable to a penalty. A contract for the carriage of live stock called for delivery at a private siding of the consignee, but custom required the carrier to place the cars at a point on the siding opposite a runway provided for unloading. The carrier did not place the cars at the point of unloading within the time, but confined the stock in the cars beyond the statutory period without unloading the same for rest, water, or feeding. Nothing prevented the carrier from unloading, feeding, and watering the stock. *Held*, that the carrier was liable to the penalty, for the delivery of the stock was not complete until each car was placed opposite the runway for unloading, since, as long as the responsibility or the carrier rested on it, the responsibility for the care of the stock continued, so that it was required to provide for the care of the stock until its duties as carrier had been fulfilled by complete delivery.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 95, 927; Dec. Dig. ⊂⊃37.]

Action for a penalty by the United States against the Philadelphia & Reading Railway Company. Judgment for the United States.

Robert J. Sterrett, Asst. U. S. Atty., and Francis Fisher Kane, U. S. Atty., both of Philadelphia, Pa.

Wm. Clarke Mason, of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. This is an action for a penalty under the provisions of the act of June 29, 1906. It was by agreement tried before the court without the intervention of a jury under the provisions of the Revised Statutes. There were several cases tried at the same sitting of the court, although kept separate in form. The facts are not in controversy. The present case is in effect a case stated. There is but one question involved in it. The question is whether the defendant carrier had been relieved from responsibility for the care of cattle shipped over its road. Whether so relieved turns upon the question of delivery. For the purpose of having this question squarely met, and having no other questions involved in the case, the defendant admits its act to have been knowingly and willfully committed, within the meaning of the act of Congress.

The shipment concerned was one of cattle. They were consigned to J. J. Felin & Co., of Philadelphia. The shipments came on two cars, L. V. Nos. 89919 and 90000. There were 27 cows in each car. The cars were loaded in Buffalo, and came over the tracks of the Lehigh Valley Railroad to East Penn Junction, and were there transferred to the tracks of the defendant company and transported to Nicetown, their destination. They were loaded September 30, 1912, at 1:40 p. m., and arrived at their destination October 2, 1912. There had been an extension of the time during which the cattle could be confined. They arrived at the place of destination within the time limit. A bill of lading called for a delivery on the siding of the consignees to which cars were taken by the defendant company. This siding belonged to the consignees, and the defendant company had no connection therewith, beyond the right to enter upon the said siding for the purpose of there delivering cars consigned to the owners of the siding and the further purpose of taking cars therefrom. Adjacent to the siding is a permanent runway, which affords the only means for loading and unloading live stock to and from cars on the siding. Although the cars reached the siding within the time limit, as above stated, the cars stood there unloaded for a considerably longer time. The time limit was 36 hours. In the case of car L. V. No. 89919 a period of at least 46 hours elapsed from the time the Lehigh Valley Railroad took charge of them until unloaded. In the case of car L. V. No. 90000 a like time of 68 hours elapsed. Neither of cars had been unloaded en route, and the cattle had been kept in the cars without rest, water, or feed for the lengths of time above mentioned, respectively.

The only explanation for the delay is to be found in the fact that when the cars arrived there was an unloaded car then standing opposite the runway. The defendant company removed this car, and pushed the two cars first referred to over the siding and beyond the runway, and then replaced the car which had been removed. Afterwards the defendant company removed the last-mentioned car when it had been emptied, and moved one of the first-mentioned loaded

cars opposite the runway or chute. After this had been unloaded, at the request of the consignees, this car was removed, and the second of the first-mentioned cars was placed opposite the runway and unloaded. There was no provision in the contract of hiring for such switching service; the contract of carriage calling for delivery at the siding only. The stipulation entered into by the parties makes the ruling of the case to pivot upon the point of whether the delivery was complete when the cars were placed upon the siding, or not until the cars were placed opposite the runway or chute, which was the only place at which practically the unloading could be accomplished.

The contract is a Pennsylvania contract. As illustrative of the law of Pennsylvania on the subject of delivery by carriers by rail, we have been referred to the case of McMasters v. Penna. Railroad, 69 Pa. 374, 8 Am. Rep. 264, and Allan v. Railroad, 183 Pa. 174, 38 Atl. 709, 39 L. R. A. 535. These cases rule that the question of delivery is determined by contract and by custom. If not controlled by express terms in the contract, a clearly established custom will prevail, if reasonable and otherwise within the rule of good customs. We therefore get the principle that the question of when delivery is complete, in the sense of the responsibility of the carrier ending, depends upon the contract of shipment, construed and interpreted in the light of established custom in general cases and the practice with particular shippers. In other words, the terms of the formal contract are to be considered as modified by the practice. The practical application of the principle to this case is that the contract is to be assumed to mean that the cattle would be delivered on the siding in accordance with the usual practice. The inference is irresistible from the facts stipulated that the practice of the railroad company in its dealings with shipments of this character was not to limit the carriage to the placing of the cars on the siding, but to continue it to the placing of the cars opposite the chute. What was done in this case conformed to this practice. That the formal terms of the printed contract of shipment did not disclose any contractual obligation upon the carrier after the cars had reached the siding is aside from the question here involved, because the practice is to be written into the printed terms, and when so read the contractual obligation does arise.

This principle of interpretation of the contract of delivery is peculiarly applicable in respect of the relations of the carrier to the provisions of the act of Congress and of the purposes of the latter. The purpose is to assure proper care of the animals shipped. Primarily the obligation of the railroad company is that of a carrier only. Sustenance care rests upon the owner. The law, however, imposes it upon the carrier as well. The carrier cannot relieve itself from this law-imposed duty by contract. As long as the responsibility of the carrier rests upon it, the responsibility for the care of the animals continues. It must therefore provide for their care until its duties as a carrier have been fulfilled. As under the facts in this case, by its contract with the consignees as modified by its practice under that form of contract, it did not deliver to the consignee until

the car was placed opposite the runway, its responsibility as a caretaker continued to that time, and, as more than the statutory time limit had elapsed, the liability to imposition of the fine follows.

The case is formally disposed of by the following findings of fact and conclusions of law:

Findings of Fact.

1. The formal written contract of carriage called for delivery at the private siding of the consignee at Nicetown, Philadelphia.

2. The custom and practice in like deliveries by the carrier to the consignee was that the carrier should place the cars at a point on the siding opposite the runway provided for the unloading of cattle from the cars.

3. So far as it is a question of fact, the fact is found that the contract of carriage between the carrier and the consignee called for delivery at a point on the siding opposite the runway.

4. The defendant railroad, Philadelphia & Reading Railway Company, between September 29, 1912, and October 4, 1912, transported two car loads of cattle, containing 27 cows each, from one state, to wit, the state of New York, into and through another state, to wit, the state of Pennsylvania, and confined the said cattle in said cars for a longer period than 36 consecutive hours without unloading the same into pens or otherwise for rest, water, or feeding, without such unloading having been prevented by any accidental or unavoidable cause, and said animals were not at the time carried in cars in which they could have had proper feed, water, space, and opportunity to rest, nor did said cattle have in fact proper food, water, space, or opportunity to rest.

5. The said defendant, Philadelphia & Reading Railway Company, knowingly and willfully failed to comply with the provisions of the statutes of the United States in the respect above mentioned. The time during which said failure to provide said cattle with proper feed, water, space, and opportunity to rest was in respect to one of said cars, to wit, L. V. No. 89919, for and during a period of 46 hours, and with respect to the other of said cars, L. V. No. 90000, was for and during the period of time of 68 consecutive hours.

Conclusions of Law.

1. So far as it is a question of law, the delivery of the cattle by the carrier to the consignee was not complete until each car in which the cattle were loaded was placed opposite the runway on the siding of the consignee.

2. So far as it is a conclusion of law, delivery of car L. V. No. 89919 to the consignees had not been made until 46 hours after delivery to the carrier, and delivery of car L. V. No. 90000 was not made to the consignee until after the lapse of 68 hours from the time of delivery to the carrier.

3. The United States is entitled to judgment in its favor and agains. the defendant for the sum of $100 penalty prescribed by the act of Congress.

4. The United States is entitled to costs.

UNITED STATES v. PHILADELPHIA & R. RY. CO.

(District Court, E. D. Pennsylvania. May 11, 1915.)

No. 2846.

1. CARRIERS ⟸37—TRANSPORTATION OF ANIMALS—STATUTES.
The purpose of Act June 29, 1906, c. 3594, 34 Stat. 607 (Comp. St. 1913, §§ 8651–8654), prohibiting carriers in interstate commerce from confining animals in cars longer than a specified period without unloading for rest, water, and feed, and providing that animals so unloaded shall be properly fed and watered, is to make sure that animals confined in cars shall not go without feed and water and rest for more than the specified time, and the duty of complying with the act is placed on the carrier; but the duty imposed on a carrier is imposed on it in its relation as carrier to the shipment.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 95, 927; Dec. Dig. ⟸37.]

2. CARRIERS ⟸37—TRANSPORTATION OF ANIMALS—STATUTES.
A contract for the shipment of live stock called for delivery at a town, but practice required delivery at the consignee's private unloading chute. The carrier placed cars in unloading position at the chute, and notified the consignee thereof, nearly two hours before the expiration of the time limit prescribed by Act June 29, 1906; but the stock was not unloaded until nearly three hours overtime. The carrier had no reason for believing that the animals would not be unloaded until after the time limit. *Held*, that the carrier's responsibility as such for the shipment terminated within the time limit, and it did not knowingly and willfully fail in performing the statutory duty.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 95, 927; Dec. Dig. ⟸37.]

Action for a penalty by the United States against the Philadelphia & Reading Railway Company. Judgment for defendant.

Robert J. Sterrett, Asst. U. S. Atty., and Francis Fisher Kane, U. S. Atty., both of Philadelphia, Pa., for the United States.

Wm. Clarke Mason, of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. This case is one of an action for the imposition of a penalty under the provisions of the act of Congress of June 29, 1906. By agreement it was heard by the court without a jury. The actual facts are not in controversy. The differences of the parties arise out of the inferences to be drawn from those facts and the conclusions of law which flow from the ultimate facts found. Without other classification the questions involved may be thus formulated:

(1) Had the responsibility of the carrier for the shipments ended before the violation of the law began?

(2) Did the defendant knowingly and willfully fail in the performance of its statutory duty?

[1, 2] A statement of the conditions of duty and fact involved will give us a helpfully clarifying view of the proper answers to these questions. The purpose of the act of Congress is to make sure that cattle confined in cars shall not go without water, etc., for more than

36 hours. The duty of seeing to compliance with this requirement is placed upon the carrier. The shipment here consisted of 142 hogs, consigned by Zimmer Bros., of Buffalo, N. Y., to Louis Burk, at Philadelphia. The defendant company received the consignment and transported the hogs over its line from South Bethlehem in car M. S. C. 10818. The time limit began at 5 o'clock p. m. May 13, 1913, and the car was placed in unloading position at the unloading chute of the consignee and the consignee duly notified at 3:08 o'clock a. m. May 15th. This was nearly 2 hours before the expiration of the time limit. The hogs were in fact, however, not unloaded until 7:40 o'clock a. m., 2 hours and 40 minutes overtime. The track is one of a network of tracks in defendant company's yard, but goes to the private stock barn of this consignee, and is used exclusively for shipments to him. The defendant company had no notice or intimation or reason for expectation that the hogs would not be unloaded until after the time limit, beyond the fact that the consignee's place was closed from 6 p. m. to 6 a. m. The contract of shipment called for delivery at Philadelphia. It was the practice to deliver as this delivery was made.

These facts call for an answer to each of the questions raised exonerating the defendant. Such a construction should be given the act of Congress as that evasion of the duties imposed upon carriers shall not interrupt its enforcement. The rights of defendant, however, cannot be ignored or overridden. The duty is imposed upon railroads in their relation as carriers to the shipments. There is neither justice nor sound policy to be served in extending the period of the responsibility of the carrier beyond the time of delivery, where there is time left after delivery to unload, and the carrier has neither notice nor reasonable ground of expectation that the cattle will not be cared for as the act of Congress requires. There is no occasion for special findings in this case.

Judgment is rendered in favor of defendant by the dismissal of the proceedings against it.

UNITED STATES v. PHILADELPHIA & R. RY. CO.

(District Court, E. D. Pennsylvania. May 14, 1915.)

No. 3296.

1. CARRIERS ⇐37—TRANSPORTATION OF ANIMALS—STATUTES.
The obligation imposed on carriers by Act June 29, 1906, c. 3594, 34 Stat. 607 (Comp. St. 1913, §§ 8651–8654), prohibiting carriers in interstate commerce from confining animals in cars for a longer period than specified without unloading for rest, water, and feed, and providing that animals so unloaded shall be fed and watered during the rest, and declaring that any carrier knowingly and willfully failing to comply with the act shall be liable to a penalty, is imposed on carriers as such, and only as long as the animals are in the course of transportation, and a carrier must provide itself with the means of the performance of the duty imposed on it, by having relay stations at such places along its lines, so that the animals during transportation may be unloaded, watered, and fed, and any failure

of the carrier to comply with the act must be knowingly and willfully done to subject it to a penalty.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 95, 927; Dec. Dig. ⟸37.]

2. CARRIERS ⟸37—TRANSPORTATION OF ANIMALS—STATUTES.

Failure of a carrier to unload animals during transportation for rest, water, and feed, as required by Act June 29, 1906, must be without any excuse by the intervention of unavoidable or unanticipated causes, and the act meets special exigencies and conditions; and where the transportation ends within the time limit a carrier need not, to escape liability therefor, provide for the care of the animals.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 95, 927; Dec. Dig. ⟸37.]

3. CARRIERS ⟸37—TRANSPORTATION OF ANIMALS—STATUTES—REGULATIONS—"WILLFULLY."

A carrier of animals delivered them on the consignee's private track opposite a runway for unloading, and notified the consignee to unload, within the time limit fixed by Act June 29, 1906; but the animals were not unloaded until about six hours after the expiration of the time limit, because the consignee's place of business was closed at the time the cars were placed for unloading, and because stormy weather rendered unloading impracticable. The carrier had notice of the conditions prevailing at the place of delivery. *Held*, that the carrier was not subject to the penalty imposed, though the act committed by it was knowingly done, for it was not guilty of willfully confining the animals in cars beyond the time limit, for the word "willfully" carries with it the thought of an intentional ignoring of the law or of indifference to its provisions.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 95, 927; Dec. Dig. ⟸37.

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

Action for a penalty by the United States against the Philadelphia & Reading Railway Company. Judgment for defendant.

Robert J. Sterrett, Asst. U. S. Atty., and Francis Fisher Kane, U. S. Atty., both of Philadelphia, Pa., for the United States.

Wm. Clarke Mason, of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. This is an action for the penalty imposed by the act of Congress of June 29, 1906. By agreement trial by jury was waived and the cause heard by the court. It is one of several like, or at least similar, cases. The questions involved arise out of this state of facts:

A car load of 150 hogs were shipped from the National Stockyards in Chicago, consigned to A. H. March Packing Company at Bridgeport. They were unloaded, watered, and fed in Pittsburgh, and there transferred to car P. L. 647680 and transported over defendant's railroad to destination. The place of delivery at which the carriage ended was in the freightyard of defendant at a point on a siding opposite a runway or chute leading into a cattle pen. This consisted of a space inclosed with a fence. There was no shelter provided, and no construction other than the inclosing fence. The car reached the chute at 8 o'clock, and the consignees were notified at 9:30 p. m. of March 6, 1914, to unload. The latter hour was 2 hours within the time limit.

The hogs were not unloaded until 6:15 a. m., 6 hours and 45 minutes beyond the time limit.

There were two causes of delay, both of which were operating to prevent unloading. One was that the consignees' place of business was closed between 5:30 p. m. and 6 o'clock a. m., and there were no men at hand to drive the hogs, and besides this it was not practicable to drive them in the dark. The other cause was that a storm, which could be fairly characterized as a blizzard, was raging at the time. The weather was cold and there was a heavy fall of snow upon the ground. Good judgment dictated that the hogs be kept in the car, in preference to being turned into the open pen. The practice was to turn hogs into the pen. From this they were taken by the employés of the consignees to the yards of the latter, which were from one-fifth to one-quarter of a mile away.

The defendant company had direct notice of the conditions prevailing at this place of delivery. Shipments of hogs reached the siding at times after dark, and the hogs could not be taken from the pen until the next morning, and after the expiration of the feeding time limit. The A. H. March Company was the only consignee to whom deliveries were made at this pen. For whatever bearing this fact may have upon the case, it is found that the siding and pen were maintained for the sole use of this consignee. The notice of conditions was directly given to the railroad company in an application to have the railroad company provide a pen which gave shelter to the hogs—proper and suitable protection. This the railroad company declined to do, thinking it would involve providing like accommodations to every shipper. This would have been impracticable.

[1] Before formulating the specific questions which arise in this case out of its special facts, a few general observations may be helpful. It is to be recalled that the primary obligation of feeding these hogs was not upon the railroad. The obligation which is imposed upon them by the act of Congress is imposed upon them as a carrier, and only as long as the animals are in the course of transmission over the railroad. Moreover, what the railroad is required to do is required of it because of the default of the owner of the animals from whom by law the railroad can recoup the expenses to which it has been subjected. All of which the railroad company is called upon to do is therefore done during the carriage, and cannot be done after the carriage has ended. The motive behind this legislation is in one of its phases at least what may be characterized as humanitarian. The element of cruelty enters into the act of omission for which the penalty is imposed. The act of the carrier must have been "knowing and willful."

[2] More than this, or as part of it, the act of omission must be one without the excuse of the intervention of unavoidable or unanticipated causes interfering with or preventing the things required to be done. In the instant case, the carriage was complete and the "transporting" was at an end. Had the hogs been unloaded in fact, the delivery would have been complete, and the responsibilities of the carrier would have ended, unless this further obligation rests upon them to

have constructed and maintained such a pen as would permit the care required by the Act to be given the animals. As a practical matter, this is the real question in the case. The act of Congress is one enacted for such a purpose that the obligation which it imposes should not be weakened, nor its binding force lessened, by mere construction. It is just as clear, however, that there was no purpose or intention to impose unjust restrictions or duties impracticable of performance upon carriers. The exceptions and provisos introduced into the act give it the elasticity required to meet special exigencies and conditions. It is the fair intendment of the act that the carrier should provide itself with the means of the performance of the duty imposed upon it. This the defendant company has done by having relay stations at such places on its lines as that animals during transportation may be unloaded, watered, and fed.

We do not find in the act any requirement, where the transportation ends within the time limit, that they shall provide for the care of the animals thereafter. We therefore cannot find in this case the obligation was upon the railroad company to have provided the shelter sheds suggested. Where the delivery place is one of common delivery, and the carrier has reason to anticipate that cattle unloaded there will or may be kept beyond the time limit before being passed over to the care of the consignee, the obligation in such cases might be visited upon it; but it could only be because there the delivery under such circumstances might be held not to be complete.

[3] We are further unable to find in this case that the defendant company knowingly and willfully confined these hogs in the cars for more than 36 consecutive hours. The confinement beyond the limit here was due, as we find, to the fact that the care of the animals was prevented by storm, and causes which were unavoidable and could not have been anticipated or foreseen under all the circumstances affecting this shipment. This conclusion is in accordance with the adjudged cases. The act of omission committed by defendant was "knowingly" done. "Willfully," however, is an attitude of mind and will. It carries with it the thought of an intentional ignoring of the law, or of indifference to its provisions. There is nothing to justify such a finding in this case. It cannot be found in the bald fact that the hogs were confined more than 36 hours, when it also appears that they were not in transit after the time limit. The act was intended "to prevent cruelty to animals in transit," or at least "while in custody for transit." B. & O. v. U. S., 220 U. S. 106, 31 Sup. Ct. 368, 55 L. Ed. 384.

Had there been the further element of a free choice on the part of the railroad managers, had there been, or to meet the requirements of the act should have been, an unloading place to which the animals might have been taken, a different finding might have resulted. The facts are, however, these: The railroad had performed its task of transportation within the time limit. An exigency confronted it. This called for the exercise of judgment. For all we know, the carriage of the car to a place of unloading would have been fruitless of benefit to the hogs. To have technically relieved the carrier of responsibility by unloading the hogs upon the consignee would have been an added

cruelty. It cannot be said the railroad did not do the best which could have been done under the circumstances. Its managers certainly cannot be said to have been guilty of "willful cruelty," nor can the railroad justly be said to have failed in the performance of its duty, unless its duty was to have provided unloading sheds at every place of delivery. Criticism of the railroad in this case is indeed confined to this. The answer is that, whenever it is the will of Congress to place this measure of duty upon them, the law will so read.

We have followed the rulings in the cases of St. Josephs v. U. S., 187 Fed. 104, 110 C. C. A. 432; Chicago v. U. S., 194 Fed. 342, 114 C. C. A. 334; U. S. v. Lehigh Valley, 204 Fed. 705, 123 C. C. A. 9; U. S. v. Chicago (D. C.) 211 Fed. 724. There is no occasion for special findings. We find the defendant not to have been guilty of the acts calling for the imposition of the fine.

Judgment, therefore, is directed to be entered in favor of the defendant.

UNITED STATES v. PHILADELPHIA & R. R. CO.

(District Court, E. D. Pennsylvania. May 13, 1915.)

No. 3294.

CARRIERS ⇐37—TRANSPORTATION OF ANIMALS—STATUTES.

Act June 29, 1906, c. 3594, 34 Stat. 607 (Comp. St. 1913, §§ 8651–8654), prohibits carriers in interstate commerce from confining animals longer than a specified time without unloading for rest, water, and feed, and declares that any carrier knowingly and willfully failing to comply with the act shall be liable to a penalty. A carrier placed cars of live stock on the consignee's siding for delivery, and notified the consignee thereof, within the time limit. The consignee refused to unload, because its place of business was closed, and because of the cold and stormy weather. The carrier had provided proper unloading pens, but they were not within available distance. The carrier confined the animals in the cars, and hauling the cars to its pens would not have released the animals sooner than was done. The carrier knew of the conditions of the consignee's siding and had refused to erect a shed there. *Held*, that the carrier was not liable for a penalty, because the act did not impose a duty to provide shelter pens at every place of delivery of car load shipments of animals, and because it did not confine the animals beyond the time limited in cars while in transit, and because there was no willful failure of the carrier to comply with the act.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 95, 927; Dec. Dig. ⇐37.]

Action for penalty by the United States against the Philadelphia & Reading Railroad Company. Judgment for defendant.

Robert J. Sterrett, Asst. U. S. Atty., and Francis Fisher Kane, U. S. Atty., both of Philadelphia, Pa., for the United States.

Wm. Clarke Mason, of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. This case is one of an action for the recovery of the penalty imposed by the act of June 29, 1906. The facts are, as far as the imposition of the penalty is concerned, the same as in

case No. 2398, 223 Fed. 202, and in No. 3296, 223 Fed. 207, with these differences: In No. 2398, the defendant company admitted its acts were "knowingly and willfully" done. In No. 3296 the cars were in fact placed opposite the unloading chute within the time limit, but defendant denied any willful omission of duty. In the present case the cars were placed on the siding, and in like manner willfulness is denied. The cause was by agreement tried without a jury.

The facts in the case are these: The case concerns a car load of 167 hogs. They were last cared for at Pittsburgh, en route from beyond the state of Pennsylvania, and were there loaded on defendant's car March 9, 1914, at 11:30 a. m., consigned to A. H. March Packing Company at Bridgeport. The car arrived at the place of delivery at 8 o'clock p. m. March 10, 1914, and the consignee notified at 9:30 p. m. The consignee refused to unload. There were two reasons for this: The place of delivery was on a siding in defendant's yard about one-fifth to one-quarter of a mile from the plant of consignee. The siding was used exclusively for the shipments of this consignee. The arrangements made consisted of an unloading chute, which led into an open pen. This consisted merely of a fence-inclosed space. There was no shelter or overhead construction of any kind. One of consignees' reasons for refusing to unload was that their place of business was closed from 5:30 p. m. until the next morning. There were no men to handle the hogs, and besides it was not practicable to drive them at night. The other reason was that the night was cold and stormy, and the hogs, if turned out of the car into the pen, would have perished. Upon the refusal of the consignees to unload, it then became a matter of judgment what to do with the hogs. It was decided to leave them in the car. The defendant company had provided proper unloading pens for animals, so as to assure their not being confined over the time limit while in transit. There was no evidence, however, of any such pen being within available distance. It will be observed that the car reached its destination within the time limit. This had been extended to 36 hours, and there were 3½ hours to spare after arrival of the car, and 2 hours after notification to the consignees. The car could not be taken to the chute, because the car which figured in case No. 3296 had been placed there. The only courses open to the railroad managers were to have hauled the car away, to have unloaded the hogs into the open pen, or to have done what they did do. We cannot find under the evidence that hauling the car away would have released the hogs sooner than was done. The unloading of them to face perishing in the storm would have been cruelty. The only thing left to be done was to do just what was done. The erection of a sheltered pen, where animals could be taken care of, would have met the exigencies of the situation. The defendant company had knowledge of the conditions, having been asked to erect such a shed. This they had declined to do. They can, therefore, be found to have acted with knowledge; but there is no justification for a finding of "willful" failure to comply with the requirements of the act of Congress, unless it was their legal duty to supply accommodations for animals at each place of delivery.

The legal principles involved have been fully discussed in connection

with case No. 3296. There is no occasion to discuss them further, and none for special findings. We therefore content ourselves with a statement of the conclusions reached, which are:

1. The act of Congress does not impose a duty upon railroads to provide shelter pens at every place of delivery of car load shipments of animals.

2. The defendant did not confine these hogs beyond the time limit in cars while in transit.

3. There was no willful failure on the part of the defendant to comply with the requirements of the act of Congress.

Judgment is therefore entered in favor of the defendant.

UNITED STATES v. PHILADELPHIA & R. RY. CO.

(District Court, E. D. Pennsylvania. May 13, 1915.)

No. 3434.

CARRIERS ⟸37—TRANSPORTATION OF ANIMALS—STATUTES—KNOWINGLY AND WILLFULLY.

Act June 29, 1906, c. 3594, 34 Stat. 607 (Comp. St. 1913, §§ 8651–8654), prohibiting carriers in interstate commerce from confining animals in cars longer than a specified time without unloading for rest, water, and feed, and declaring that any carrier knowingly and willfully failing to comply with the act shall be liable to a penalty, imposes on a carrier the performance of a duty primarily resting on the owner to feed his own stock, and a failure to obey the act is not made punitive unless it is with knowledge and is willful, and a carrier confining animals in cars beyond the time limited, through a clerical error of the receiving clerk failing to note the loading time at initial point and to mark the shipment for unloading at a point for unloading for rest, water, and feed, is not subject to the penalty, because the carrier's act was not knowingly and willfully committed.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 95, 927; Dec. Dig. ⟸37.]

Action for penalty by the United States against the Philadelphia & Reading Railway Company. Judgment for defendant.

Robert J. Sterrett, Asst. U. S. Atty., and Francis Fisher Kane, U. S. Atty., both of Philadelphia, Pa., for the United States.

Wm. Clarke Mason, of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. This is an action for the penalty imposed under the act of Congress of June 29, 1906. Trial by jury was waived by agreement, and the case tried before the court.

The facts are these: A car load of 168 hogs was shipped from Cincinnati, Ohio, consigned to J. J. Felin, at Nicetown, Philadelphia. The hogs were unloaded, watered, and fed at Pittsburg. They were then loaded on car P. L. 658237, April 22, 1914, at 6 o'clock a. m. The time limit had been extended and expired at 6 p. m. April 23d. The hogs were, however, kept confined in the car until 7:40 p. m. The time limit was thus exceeded by 1 hour and 40 minutes. The defendant

took charge of the transportation of the car at Rutherford, Pa. The next point for unloading was Reading. It was the duty of the receiving clerk at Rutherford to have noted the loading time as 6 a. m. April 22d, and to have marked the shipment for unloading, etc., at Reading. Through a clerical error this was not done. In consequence, the car was not unloaded at Reading, but went on through to Philadelphia. There was no other excuse for or explanation of the failure to unload.

The question in the case is whether under this state of facts the defendant has "knowingly and willfully" failed to comply with the requirements of the law. We do not regard the question as open to but one answer. It is disposed of for us by the case of U. S. v. Lehigh Valley, 204 Fed. 705, 123 C. C. A. 9. We do not view the doctrine laid down in that case to be fraught with the danger to the enforcement of the law which the argument for the United States assumes to be present in it. It must be borne in mind that the act of Congress requires the railroad to perform a duty which primarily is imposed on the owner to feed his own stock. Properly, therefore, failure to obey is not made punitive unless the failure is with knowledge and willful. In a word, it must reach the grade of disobedience. Carriers are, of course, bound to know the law. Knowing it, they know the time of confinement on the connecting line must be computed. Means of knowledge within reach must be resorted to. A refusal to avail themselves of such means would be evidence of that attitude of mind which is conveyed by the word willful. Mere negligence is clearly, however, at least not necessarily inclusive of willfulness. There is in common speech the phrase "willful negligence." Whether willfulness or mere negligence is a question of fact.

The argument for the United States overlooks the feature of this case that there is in it the concession of the fact that the "failure" was due to the "error"—the "clerical mistake"—of making the wrong entry on the card. The only modification of this conceded fact is that the error might have been discovered by other employés of the defendant than the clerk who made the entry, if they had assumed to supervise his work. This added fact only gives us added proof of negligence, and if it was the duty of the other employés to correct the errors of the clerk, it would only add to the number to be convicted of negligence. It does not weaken or take away from us the legal consequences of the concession that the failure of the defendant to comply with the law was due to a clerical mistake. If so, the act of omission was not "knowingly and willfully" committed.

Judgment is entered in favor of the defendant.

UNITED STATES v. PHILADELPHIA & R. RY. CO.

(District Court, E. D. Pennsylvania. May 7, 1915.)

No. 2296.

1. RAILROADS ⟸229—STATUTORY REGULATIONS—SAFETY APPLIANCE ACTS.
Safety Appliance Act March 2, 1893, c. 196, 27 Stat. 531 (Comp. St. 1913, §§ 8605–8612), is essentially a police regulation, and its general purpose is the safeguarding of employés from injury and death.
[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 743; Dec. Dig. ⟸229.]

2. RAILROADS ⟸229—STATUTORY REGULATIONS—SAFETY APPLIANCE ACTS—"CAR."
Within Comp. St. 1913, § 8606, providing that it shall be unlawful for interstate carriers to haul or permit to be hauled or used any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the cars, a locomotive engine is a "car."
[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 743; Dec. Dig. ⟸229.
For other definitions, see Words and Phrases, First and Second Series, Car.]

3. RAILROADS ⟸229—STATUTORY REGULATIONS—SAFETY APPLIANCE ACT.
A locomotive engine was equipped at each end with automatic couplers. Through an accident the coupling on the front end became inoperative, the uncoupling device being put out of commission, though the coupling feature remained intact. The engine was used for some time in that condition, employés being notified that the front coupler should not be used, and no car was coupled to the front end. Had a car been so coupled to the front end, it would have coupled automatically, and could have been uncoupled without going between the cars by the use of the uncoupling device on such car. *Held*, that the company violated Comp. St. 1913, § 8606, since, while a locomotive engine need not be so designed that cars may be coupled at its front end, if intended in its use to be coupled at either end, it must have a coupling device at each end.
[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 743; Dec. Dig. ⟸229.]

Action for a penalty by the United States against the Philadelphia & Reading Railway Company. On a trial before the court without the intervention of a jury. Findings and conclusions in favor of the government.

Robert J. Sterrett, Asst. U. S. Atty., and Francis Fisher Kane, U. S. Atty., both of Philadelphia, Pa., for the United States.

Wm. Clarke Mason, of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. This case was by agreement heard by the court without the intervention of a jury. It comes before us as if on a case stated. The facts are not in dispute. The question is one of the proper construction of sections 8606, 8610, and 8621 of the Compiled Statutes, embodying certain provisions of the Safety Appliance Acts. The general question is one of the proper adjustment of two contending principles. On the one hand, we have presented the duty of so construing and enforcing the law as that there

shall be no failure in the accomplishment of its beneficent purpose. On the other, we have the principle of protection which is the right of defendant against the imposition of penalties not culpably incurred.

[1] The Safety Appliance Act is essentially a police regulation. Its general purpose is humanitarian—the safeguarding of employés from injury and death. The broad aim of the second section is to eliminate the risk of injury by an absolute prohibition of the use of any car unequipped with such a coupling device as that cars may be coupled and uncoupled "without the necessity of men going between the ends of the cars." It is the act of using such a car in interstate commerce which visits the penalty imposed upon common carriers by the statute. The provision made in section 8621 of the Compiled Statutes for couplings put out of commission while in use emphasizes the imperativeness of the general rule.

[2] The questions which arise out of the special facts of this case can be best stated in connection with the facts. The car in use was a locomotive engine. The first question is whether an engine is a car within the meaning of the act. This has been answered for us in the affirmative by the cases of Johnson v. Southern Pacific, 196 U. S. 1, 25 Sup. Ct. 158, 49 L. Ed. 363, and Southern Railway Co. v. Crockett, 234 U. S. 725, 34 Sup. Ct. 897, 58 L. Ed. 1564.

[3] The "car" thus in use by the defendant was admittedly equipped with couplers in full compliance with the law. This engine was designed and constructed to be attached to other cars at either end. It was equipped with couplers in front and rear. Early in the morning of March 23, 1912 (5:30 a. m.) the coupling apparatus on the front end became (through an accident) inoperative to the extent that the uncoupling device was out of commission; the coupling feature remaining, however, intact and fully operative. The engine was at the time two miles from "the nearest available" repair point. It was not, however, immediately taken to the repair shop, but was kept in use the whole of that day to 6 o'clock p. m. The provisions of section 8621 have, therefore, no application. The spirit of the provisions of the Safety Appliance Law was complied with by the precautions taken to make it unnecessary for men to go "between the ends of the cars." The men were notified that the front coupler was broken and should not be used, and all coupling done while the engine was in use was done at the rear end and by the undamaged coupling device.

Further facts are in the case, a fuller statement of all of which is that not only was no coupling made of another car to the front end of the engine, and in consequence no one had occasion to go between cars, but the other cars were equipped with such a coupling device that, had a car been coupled to the engine at the front end of the latter, the cars could have been coupled and uncoupled "without the necessity" of the men going between the cars.

To make this condition of the situation clearer, the coupling device on the front end of the engine was still undamaged and fully operative. It was only the uncoupling function which had been destroyed. Another car might therefore have been attached to the front end of the engine and the coupler would have worked "automatically." When it came to the uncoupling, although the engine itself did not

provide the necessary uncoupling device, the attached car did, and the operation would be again "automatic." This accomplishment is due to the fact that the cars are equipped with such an apparatus as that the one on each car is complementary or supplementary to the one on the other car, and the uncoupling can be done with the device on either car.

These facts give rise to the second question in the case, which is: Are such complementary devices a compliance with the act, or must each car be equipped with an apparatus which is complete in itself and operative by itself, without aid from any auxiliary device on the attached car?

We have for our guidance to the proper answer to this question the ruling that a car intended in its use to be coupled at either end must have a coupling device at each end (U. S. v. P. & R. Railway Co. [D. C.] 160 Fed. 696), and the further ruling that a locomotive engine need not be designed and constructed so that cars may be coupled to it at its front end (Wabash R. Co. v. U. S., 172 Fed. 864, 97 C. C. A. 284).

There is no inconsistency in these two rulings. It is the use of the car which controls, and therefore the intended use which determines the equipment. The facts of this case suggest these observations. The requirement of the law is not that some kind of coupling device shall be provided so that cars may be coupled without risk to human life or limb, but the requirement is that no car shall be used unless it has the equipment called for by the act.

The precautions taken by a carrier might afford as complete, or indeed fuller, protection to its employés than the means demanded by the law. It none the less follows that imposition of the penalty must be visited upon the carrier guilty of a noncompliance with the act of Congress. The principle by which the present question is to be determined was indeed declared for us by Judge McPherson in U. S. v. P. & R. Ry. Co., above cited.

The case is disposed of by a finding of fact and conclusions of law as follows:

Finding of Fact.

1. The defendant, Philadelphia & Reading Railway Company, being at the time a common carrier engaged in interstate commerce by railroad, on March 23, 1912, hauled, permitted to be hauled, and used on its line a car, to wit, locomotive engine No. 1151, used at the time in moving interstate traffic, which was not at the time equipped with couplers coupling automatically by impact, and which could have been uncoupled without the necessity of men going between the ends of the cars.

Conclusions of Law.

1. The defendant, Philadelphia & Reading Railway Company, is liable to a penalty of $100 under the provisions of the act of Congress approved March 2, 1893, and the amendments thereof and supplements thereto (Comp. St. 1913, §§ 8605–8650).

2. The United States is entitled to recover in this action the amount of said penalty of and from said defendant.

3. The United States is entitled to costs.

The United States has leave to move for judgment in accordance with this opinion.

In re SHEINBERG.

(District Court, S. D. New York. May 12, 1915.)

BANKRUPTCY ⟸408—DISCHARGE OF BANKRUPT—GROUNDS FOR REFUSAL.

Bankr. Act July 1, 1898, c. 541, § 29b (2), 30 Stat. 554 (Comp. St. 1913, § 9613), makes it an offense to make a false oath in relation to any proceeding in bankruptcy. Section 21a provides that a court of bankruptcy may require any person, including the bankrupt, to appear for examination concerning the acts, conduct, or property of the bankrupt. A bankrupt, examined at an adjourned first meeting of creditors, gave false and evasive testimony concerning an alleged bank deposit which he had listed in his assets in a statement made to a mercantile agency. *Held*, that such false testimony required the denial of a discharge, though it was not shown that any creditor relied upon the statement to the agency, this not making the false oath immaterial, since, where a bankrupt is interrogated respecting a matter going to the question of his discharge, such interrogation relates to a proceeding in bankruptcy, and the oath is made in regard to a relevant subject.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 732–736, 759, 762, 763; Dec. Dig. ⟸408.]

In Bankruptcy. In the matter of Hyman Sheinberg, bankrupt. Report of special master confirmed and discharge denied.

Leonard Bronner, of New York City, for the motion.

Abraham Brill, of New York City, opposed.

MAYER, District Judge. The bankrupt gave a statement to the commercial agency known as R. G. Dun & Co., on February 12, 1912, which was as follows:

Firm name, Hyman Sheinberg.
Engaged in Men's Furnishing Business at No. 66 Delancey St., City of N. Y., County of N. Y., State of N. Y.
From inventory of Feb. 10th, 1912. Dated Feb. 12th, 1912.

	Assets.	
Merchandise on hand		$3,000
Machinery, furniture, and fixtures		600
Cash on hand		200
Cash in bank, in savings bank		1,100
Total available assets		$4,900
	Liabilities.	
For merchandise not due	$350	
Total liabilities		350
Surplus in business		$4,550

In this comparatively modest list of assets the $1,100, representing cash in bank and in savings bank, was a substantial proportion. At the

first meeting of creditors before the referee in bankruptcy a somewhat extended examination was engaged in for the purpose of ascertaining whether, in point of fact, the bankrupt had on deposit in the savings bank in February, 1912, the sum of $1,000. I do not place a great deal of importance on the testimony at page 18, Stenographer's Minutes, which was to the effect that the statements given by the bankrupt to his creditors and to the agencies were true. I say this, because these questions were rather general, and the bankrupt's attention should have been called to some particular statement or statements. On page 19 the bankrupt answered truthfully that he did not have a savings bank account in 1912 in the Dry Dock Savings Bank, but had such an account in 1911. On page 20 the question as to giving a statement to "the agency" was put too indefinitely. It would have been just as easy to ask the bankrupt whether he had made a statement to the Dun Agency as to ask the general question, and it might be urged that, in view of the questions as to the Paragon Company, the context was not clear.

The examination in which the questions just referred to were asked took place on November 19, 1913, and had the inquiry ended at that time there would not be enough upon which to predicate a denial of discharge to the bankrupt. On January 6, 1914, there was a further examination at an adjourned first meeting of creditors. At this time it appeared that the bankrupt had given R. G. Dun & Co. the statement on February 12, 1912, mentioned supra. It turned out that the bankrupt did not have any account in his name at the Dry Dock Savings Bank on the date in question; his account at that bank having been closed on January 6, 1911. There was an account in this same savings bank to the credit of his brother, Barnett Sheinberg, which had been opened on January 9, 1911, with a deposit of $750, to which had been added $26.47 between that date and February 12, 1912, so that the total at that time was $776.47. Thus, on February 12, 1912, the brother did not have $1,000 to his credit. From this point on the testimony of the bankrupt before the referee was evasive, and I think the referee was right in his conclusion that the testimony was false.

The bankrupt endeavored to account for his statement that he had $1,000 in the Dry Dock Savings Bank on February 12, 1912, by saying that his brother Barnett had deposited the $1,000 in his own name, instead of that of the bankrupt, and beginning with page 40 we have the all too frequent "I don't remember" testimony. The sooner some of these men learn that the bankruptcy court will strain every effort to prevent an unjust result by the resort to the "I don't remember," the better for the administration of the act. The alleged bankrupt is, according to the testimony, only about 30 years of age, and if he had been truthful he might have started over again with his debts wiped off the slate. It is taxing credulity to ask a court to believe that a man cannot remember the details concerning the disposition of $1,000, when the total of his assets on his own showing is not quite $5,000.

The motive for this false statement is perfectly clear to any one familiar with proceedings of this character. The bankrupt doubtless thought that in some way he would be held responsible for the false

statement made to the Dun Agency, and with that sort of cunning which ultimately trips up the man who indulges in it he thought that he could evade the consequences of his false statement by the kind of testimony which appears in this record.

No testimony was adduced to show that any creditor relied upon the statement to the Dun Agency, and the result is that, so far as that statement was concerned, nobody was hurt. But because one of several specifications on objection to discharge fails for lack of testimony, that result does not affect the question of a false oath. One of the grounds upon which a discharge must be denied is that set forth in section 29b (2) of the Bankruptcy Act, which, in defining offenses, refers to a person who knowingly and fraudulently "made a false oath or account in, or in relation to, any proceeding in bankruptcy."

I do not propose to give to this provision of the statute the narrow construction contended for by counsel for the bankrupt. The argument in effect is that, because the objectant did not succeed in showing that the statement to the Dun Agency was relied upon, therefore the false statement made no difference, and therefore the false oath in the proceeding before the referee was immaterial. But the result of the proceeding cannot be the test of the immateriality of the false oath. Wide latitude is accorded in this district to an inquiry under section 21a, for this court has long held the view that a prompt and comprehensive examination, sensibly conducted, may lead swiftly to the discovery of wrongdoing. If, therefore, a bankrupt is interrogated in respect of subject-matter which goes to the question of his discharge, such interrogation is clearly "in relation to" a "proceeding in bankruptcy," and a false oath made in the course of an examination under the statute, and in regard to a relevant subject of inquiry, is the kind of a false oath which, in my opinion, the Congress intended should bar discharge.

For the reasons outlined, the report of the special master is confirmed, and the discharge is denied.

UNITED STATES v. ORR et al.

(District Court, D. Rhode Island. May 19, 1915.)

No. 77.

1. CONSPIRACY ⇐43—OFFENSES AGAINST REVENUE LAWS—SUFFICIENCY OF INDICTMENT.

Oleomargarine Act (Act Aug. 2, 1886, c. 840, 24 Stat. 212 [Comp. St. 1913, § 6229]) § 17, provides that when any person manufacturing oleomargarine defrauds, or attempts to defraud, the United States of the tax thereon, he shall be punished. Cr. Code (Act March 4, 1909, c. 321, 35 Stat. 1096 [Comp. St. 1913, § 10201]) § 37, provides that if two or more persons conspire to commit an offense against the United States, or to defraud the United States, and one or more of such parties do any act to effect the object of the conspiracy, each of them shall be punished. An indictment charged that defendants conspired to defraud the United States of internal revenue taxes upon oleomargarine, specified when the taxes were to become due, and alleged that the United States was to be defrauded by the removal of the oleomargarine from the place of manufacture for sale without coupon stamps showing the payment of a tax,

and without such tax having been paid or secured. *Held*, that the indictment charged a conspiracy to defraud the United States, rather than a conspiracy to commit the offense described in section 17, and hence it was not defective, though it showed that defendants were to act only as employés, agents, or officers of the corporation, and did not charge that they were to be engaged in carrying on the business of manufacturing oleomargarine.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 79, 80, 84–99; Dec. Dig. ⟸43.]

2. CONSPIRACY ⟸33—OFFENSES AGAINST REVENUE LAWS—INTENT TO DEFRAUD.

A purpose on the part of employés, agents, or officers of a corporation to evade the payment of a tax on oleomargarine supplied the intent to defraud, essential to a conspiracy to defraud the United States, whether the taxes were to become due from the corporation or from such employés, agents, or officers.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. § 60; Dec. Dig. ⟸33.]

James S. Orr and others were indicted for an offense. On demurrers to the indictment. Demurrers overruled.

See, also, 223 Fed. 222.

Harvey A. Baker, U. S. Atty., of Providence, R. I. (Peter C. Cannon, Asst. U. S. Atty., of Providence, R. I., on the brief), for the United States.

Wilson, Gardner & Churchill, of Providence, R. I., for defendants.

BROWN, District Judge. [1] The defendants demur to this indictment for conspiracy, based upon section 37 of the Criminal Code of the United States.

A principal part of the defendants' argument on demurrer is to the effect that the indictment must be regarded as an attempt to charge a conspiracy to commit the offense defined by section 17 of the Oleomargarine Law, which provides forfeiture and penalty in case of fraud by "any person engaged in carrying on the business of manufacturing oleomargarine." It is urged that the indictment insufficiently charges that the defendants were to be so engaged, and also that it appears upon its face that they were to act only as employés, agents, or officers of a corporation, and therefore were not within the terms of section 17.

The indictment, however, upon a fair reading, charges a conspiracy "to defraud the United States" rather than a conspiracy to commit the offense described in section 17 of the Oleomargarine Law. While that section seems limited in its application to persons engaged in carrying on the business of a manufacturer, section 37 of the Criminal Code is of broader application. Curley v. United States, 130 Fed. 1, 64 C. C. A. 369; United States v. Curley (C. C.) 122 Fed. 738.

The indictment charges that the defendants conspired to defraud the United States of a large sum of money to become due for internal revenue taxes upon oleomargarine. The mode in which the taxes were to become due is set forth at considerable length, and also the mode in which the United States was to be defrauded; i. e., by the removal of the oleomargarine from the place of manufacture, for sale, etc., without coupon stamps representing and denoting the payment of a tax, and without such tax having been paid or secured by any person.

[2] It seems sufficiently certain that the conspiracy contemplated the production of a taxable commodity, acts upon which there would become due to the United States taxes thereon, the noncompliance with the provisions of law for affixing stamps, and the nonpayment of taxes by anybody, and the defrauding of the United States of the taxes to which it would become entitled upon the facts alleged. Whether the taxes were to become due from the corporation or from the defendants, or from both, it is clear that upon the facts alleged a tax would be due, and a purpose to evade the payment by anybody of this tax is sufficient to supply the intent to defraud.

Construing the indictment as based upon the second clause of section 37 of the Criminal Code, and as charging a conspiracy to defraud, I am of the opinion that an offense under section 37 is sufficiently charged.

Demurrers overruled.

UNITED STATES v. ORR et al.

(District Court, D. Rhode Island. May 19, 1915.)

No. 78.

1. INTERNAL REVENUE ⟸40—OFFENSES AGAINST REVENUE LAWS—PARTIES LIABLE.

Oleomargarine Act (Act Aug. 2, 1886, c. 840, 24 Stat. 212 [Comp. St. 1913, § 6229]) § 17, provides that when any person engaged in carrying on the business of manufacturing oleomargarine defrauds or attempts to defraud the United States of the tax thereon, he shall be punished as therein provided. Cr. Code (Act March 4, 1909, c. 321, 35 Stat. 1152 [Comp. St. 1913, § 10506]) § 332, makes one who aids, abets, etc., the commission of an offense a principal. *Held*, that the offense denounced by section 17 can be committed only by a person engaged in carrying on the business of manufacturing oleomargarine, and no matter how active the co-operation of third persons, they are not subject to the penalties thereby imposed, unless there is a concurring act of a person engaged in such business, and unless such third persons aid and abet, or otherwise bring themselves within section 332.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 97–101, 103–106, 142, 143; Dec. Dig. ⟸40.]

2. INTERNAL REVENUE ⟸39—OFFENSES AGAINST REVENUE LAWS—PARTIES LIABLE.

The offense of defrauding, or attempting to defraud, the United States of the tax on oleomargarine, denounced by Oleomargarine Act, § 17, may be committed by a corporation.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 97–108, 142, 143; Dec. Dig. ⟸39.]

3. INTERNAL REVENUE ⟸47—OFFENSES AGAINST REVENUE LAWS—SUFFICIENCY OF INDICTMENT—"MANUFACTURER OF OLEOMARGARINE."

An indictment purporting to charge an offense under Oleomargarine Act, § 17, recited that defendants did the acts charged while engaged as officers, agents, and employés of a corporation in carrying on the business of a manufacturer of oleomargarine; that one of such defendants as president, and the other as agent and employé, of such corporation (each of them being actively engaged in the management and control of the business and affairs thereof) "in their several capacities for and in the

name of said corporation" carried on such business of a manufacturer of oleomargarine. Oleomargarine Act, § 3, as amended by Act May 9, 1902, c. 784, § 2, 32 Stat. 194 (Comp. St. 1913, § 5977) provides that every person who manufactures oleomargarine for sale shall be deemed a "manufacturer of oleomargarine." Cr. Code, § 332, makes one aiding, abetting, etc., the commission of an offense a principal. *Held*, that the indictment was insufficient; it neither alleging that the corporation was engaged in carrying on the business of a manufacturer of oleomargarine, or that it defrauded the United States, nor that defendants were engaged in carrying on such business; the allegation that what defendants did was in "their several capacities" being inconsistent with the contention that they themselves were the principals.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 144–150; Dec. Dig. ⊂⇒47.]

James S. Orr and another were indicted for an offense. On demurrer to the indictment. Demurrers sustained.

See, also, 223 Fed. 220.

Harvey A. Baker, U. S. Atty., of Providence, R. I. (Peter C. Cannon, Asst. U. S. Atty., of Providence, R. I., on the brief), for the United States.

Wilson, Gardner & Churchill, of Providence, R. I., for defendants.

BROWN, District Judge. [1] This is an indictment which the United States contends sets forth an offense under section 17 of the statute relating to oleomargarine, etc. (Act of August 2, 1886, 24 Stat. 212):

"That whenever any person engaged in carrying on the business of manufacturing oleomargarine defrauds, or attempts to defraud, the United States of the tax on the oleomargarine produced by him, or any part thereof, he shall forfeit the factory and manufacturing apparatus used by him, and all oleomargarine and all raw material for the production of oleomargarine found in the factory and on the factory premises, and shall be fined not less than five hundred dollars nor more than five thousand dollars, and be imprisoned not less than six months nor more than three years."

The fraud punishable under the section is only that committed by particular persons; by

"Any person engaged in carrying on the business of manufacturing oleomargarine."

An indictment under this section must definitely charge that a person of such description defrauded, or attempted to defraud, etc.

No matter how active the co-operation of third persons, they are not subject to the penalties imposed by the act unless there is the concurring act of a person engaged in the business of manufacturing oleomargarine, and unless such third persons are charged with aiding and abetting, or otherwise are brought within section 332 of the Criminal Code, which makes one who aids, abets, counsels, commands, induces, or procures the commission of an offense a principal. Coffin v. United States, 162 U. S. 664, 669, 16 Sup. Ct. 943, 40 L. Ed. 1109.

[2] The offense defined by section 17 of the Oleomargarine Act is one that may be committed by a corporation. New York Central R. R. v. United States, 212 U. S. 481, 29 Sup. Ct. 304, 53 L. Ed. 613.

[3] The chief difficulty with the present indictment is that it does not follow the terms of the statute and charge directly that the de-

fendants were engaged in carrying on the business of manufacturing oleomargarine, but qualifies the language of the statute by alleging that the defendants—

"while engaged as officers, agents, and employés of the Narragansett Dairy Company, a corporation of the state of Rhode Island, in carrying on, for and in the name of said corporation, the business of a manufacturer of oleomargarine, that is to say, throughout said period of time said James S. Orr as president and said Clarence H. Orr as agent and employé of said corporation (each of them being actively engaged in the management and control of the business and affairs thereof), in their several capacities, for and in the name of said corporation, did carry on, at No. 512 South Main street in said city, said business of a manufacturer of oleomargarine," etc.

This qualifies all allegations in the indictment as to the manufacture of the oleomargarine.

The indictment does not charge directly that the Narragansett Dairy Company, a corporation, was engaged in carrying on the business of a manufacturer of oleomargarine, nor that the Narragansett Dairy Company defrauded the United States of the tax on the oleomargarine produced by it. The indictment therefore is not aided by section 332 of the Criminal Code.

Neither does it sufficiently charge that the defendants were engaged in carrying on the business of manufacturing oleomargarine.

Section 17 is directed at the principal, and does not, like many other statutes, in terms make agents or employés of a principal or officers of a corporation, liable as principal offenders.

The allegations that the defendants in "their said several capacities" did carry on said business is inconsistent with the contention that they themselves were the principals. Neither does the definition of a manufacturer in section 3 of the act as amended by act of May 9, 1902 (32 Stat. 193), assist the indictment.

Even if it could be held unnecessary to charge specifically the facts which make a person a manufacturer of that special class (which is doubtful), it would still be necessary to charge directly, substantially in the language of the statute, that the defendants were engaged in the business of manufacturing.

As the indictment fails to do this, I am of the opinion that it does not, with requisite directness and certainty, charge the defendants either as principals under section 17, or as principals under section 332 of the Criminal Code.

Demurrers sustained.

MUSTARD et al. v. ELWOOD.

(Circuit Court of Appeals, Ninth Circuit. May 10, 1915.)

No. 2513.

1. INTOXICATING LIQUORS ⊂=55—LICENSES—"BARROOM."

Pen. Code Alaska, § 468, provides that a retail or barroom license shall be required of every hotel, tavern, boat, barroom, or other place in which intoxicating liquors are sold by retail, and that every place where liquors are sold in quantities as prescribed for retail dealers by the Revised Statutes shall be regarded as a "barroom." An unincorporated social club, organized for the entertainment of its members, purchased intoxicating liquors with the common funds of the club, and dispensed them to its members and guests to be drunk upon the premises, charging therefor a price per drink or per bottle, fixed by it. *Held*, that it was selling intoxicating liquors, and was required to have a license.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 55, 56; Dec. Dig. ⊂=55.

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

2. STATUTES ⊂=224—CONSTRUCTION—ADOPTION OF STATUTE SUBSEQUENT TO JUDICIAL CONSTRUCTION.

Congress, having enacted for Alaska a license law material parts of which are copied from a similar law for the District of Columbia, must be deemed to have enacted it with the construction previously placed upon the act enacted for the District of Columbia by the highest court of that district

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 300, 302–306; Dec. Dig. ⊂=224.]

3. CRIMINAL LAW ⊂=13—CRIMINAL OFFENSES—STATUTORY PROVISIONS.

Pen. Code Alaska, § 472, provides that any one engaging in the sale of intoxicating liquors, who is thereby required to have a license, without first having obtained a license, shall upon conviction be fined not less than $100 nor more than $2,000, or be imprisoned for not less than one month nor more than one year. *Held*, that the statute is not indefinite and uncertain, as failing to disclose the place of imprisonment, or to define the nature of the offense; it being clear, from the punishment prescribed, that the section deals with the offense as a misdemeanor and not as a felony.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 13, 14; Dec. Dig. ⊂=13.]

Ross, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the Second Division of the District of Alaska; J. R. Tucker, Judge.

Action by E. C. Elwood against John H. Mustard and others. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

G. J. Lomen and O. D. Cochran, both of Nome, Alaska, and W. H. Metson, Metson, Drew & MacKenzie, Thos. R. White, and Fink & White, all of San Francisco, Cal., for appellants.

F. M. Saxton, U. S. Atty., of Nome, Alaska, amicus curiæ.

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

GILBERT, Circuit Judge. The plaintiff, on behalf of himself and a minority of the members of the "Eni" or "Log Cabin Club," of

Nome, Alaska, brought this suit for the purpose of testing the right of said club to furnish intoxicating liquors to its members without having first applied for and secured a barroom license under the license law of the territory. The court below overruled a demurrer to the complaint, which was interposed on the ground that the same stated no cause of action, and, the defendants declining to plead further, judgment was rendered in accordance with the prayer of the complaint.

[1] The question presented on the appeal is whether an unincorporated social club, organized for the entertainment of its members, which purchases intoxicating liquors with the common funds of the club, and dispenses the same to its members and guests to be drunk upon the premises, charging therefor a price per drink or per bottle, fixed by the club, sells intoxicating liquors within the meaning of the license law. The question is one upon which the decisions are at variance, but we think the weight of authority and the better reasoning lead to the conclusion that such a transaction is a sale. South Shore Country Club v. People, 228 Ill. 75, 81 N. E. 805, 12 L. R. A. (N. S.) 519, 119 Am. St. Rep. 417, 10 Ann. Cas. 383; Spokane v. Baughman, 54 Wash. 315, 103 Pac. 14; State v. Kline, 50 Or. 426, 93 Pac. 237; Beauvoir Club v. State, 148 Ala. 643, 42 South. 1040, 121 Am. St. Rep. 82; State v. Easton Social Club, 73 Md. 97, 20 Atl. 783, 10 L. R. A. 64.

But it is said that ground for holding that Congress did not intend the provisions of the license law of Alaska to apply to clubs incorporated or organized for social and literary purposes is found in the fact that in the act passed for the regulation of the sale of intoxicating liquors in the District of Columbia March 3, 1893 (27 Stats. 563, c. 204), express mention was made of clubs, whereas, in the Alaska license law, enacted in 1899 (Act March 3, 1899, c. 429, 30 Stat. 1337 et seq.), no mention was made of such clubs. The only mention of clubs in the District of Columbia act is in section 6, which regulates the business of liquor selling, and prescribes the hours during which liquor may be sold. That section contains a proviso that clubs, if they so desire, may obtain a license to sell for longer hours than others. The language of the proviso is:

> "And provided, further, the said excise board may in its discretion issue a license to any duly incorporated club on * * * petition of the officers of the club, and that the said excise board may in its discretion grant a permit to such club to sell intoxicating liquors to members and guests between such hours as the Board aforesaid may designate in said permit."

In Army and Navy Club v. Dist. of Columbia, 8 App. D. C. 544, decided on May 19, 1896, the Court of Appeals of the District of Columbia construed the act of May 3, 1893, above referred to. The club had denied its liability to pay the license fee fixed by the act. The court affirmed its liability, not by virtue of implied authority contained in the terms of the proviso quoted above, but under the terms of section 8 of the act, which declares that a barroom license shall be required for every hotel, tavern, barroom, or other place in which intoxicating liquors are sold by retail, and which defines the word "barroom" as:

"Every place where distilled, malt, or fermented wines, liquors, or cordials are sold in quantities as prescribed for retail dealers by section 3244, Revised Statutes of the United States, to be drunk upon the premises, shall be regarded as a barroom."

[2] The language of that definition is precisely repeated in section 468 of the Alaska law, and in fact all the portions of that law which are essential to the decision of the present case are copied from the law for the District of Columbia. This is especially true of sections 462, 468, and 472, which are, respectively, sections 1, 8, and 12 of the act for the District of Columbia. In the case just cited, it was the contention of the club that the proviso in section 6 gave them the option to apply for a license or not, as they might see fit. But the court held that the club was a barroom within the meaning of the definition contained in section 8, and said that the proviso in section 6 was additional proof that the well-known usage of such clubs to furnish liquor to members was, in the contemplation of the framers of the law, a sale, and nothing else. Congress, having thereafter enacted the law for Alaska, must be deemed to have enacted it with the construction placed upon the similar act by the highest court of the District of Columbia, and that construction is controlling here. The proviso referring to clubs was omitted from the license law of Alaska, for the reason that that law contains no regulation of the hours when liquor may be sold.

There is nothing in the other provisions of the statute for Alaska which shows the intention of Congress to exclude clubs from the requirement to obtain a license. The proposition that evidence of such an intention is found in the provision that a license shall not be granted to any person to conduct such business within 400 feet of a private house or public school, etc., is not sustainable, for that provision is also found in the act for the District of Columbia. Other provisions of the act for Alaska, such as those which require that the person receiving the license shall frame it in a conspicuous place, etc., and that the marshal or United States commissioner shall have opportunity to examine the premises where liquor is sold, are not incompatible with the intention of Congress elsewhere expressed that a club is a person, corporation, or company within the meaning of the act. The important features of the act are:

"A retail or barroom license shall be required of every hotel, tavern, boat, barroom, or other place in which intoxicating liquors are sold by retail"

—and the definition of a barroom as a place where liquor is sold to be drunk upon the premises.

[3] No merit is found in the contention that section 472, which prescribes the punishment for violation of the act, is indefinite and uncertain, in that it fails to prescribe the place of imprisonment, and does not define the nature of the offense, whether a felony or misdemeanor. The section declares that violators of the provisions of the act shall, upon conviction, be fined not less than $100, nor more than $2,000, or be imprisoned for not less than one month, nor more than one year. It is clear that the section deals with the offense as a misdemeanor, and not as a felony, for whether the terms of the prescribed punishment are measured by the definition of a felony found

in the new Criminal Code, or by the law as it was applied before the new Code went into effect, it is clear that the punishment provided is not for a felony.

The judgment is affirmed.

ROSS, Circuit Judge (dissenting). The sole question in this case is whether a certain incorporated club, organized "in good faith, for social and literary purposes, and not for profit, and not with any intent to circumvent or violate any of the laws of the district of Alaska," and owning and maintaining a clubhouse in the city of Nome, of that territory, and "furnished as a reading room, dining room, billiard and pool room, also a kitchen and buffet or bar, of the value of about fifteen thousand dollars, and known as the 'Log Cabin,'" the monthly expenses of which are about $1,000, and the receipts of which, from all sources, which are derived from its members, do not materially exceed the expenses, is required to procure a license as authority to dispose of wines and liquors to its members.

The status of such clubs in respect to that question, under the statutes and ordinances of the various states, has been the subject of consideration by the Supreme Court of many of the states, the decisions of which are irreconcilable, and which conflict has been often referred to by text-writers. It is fair to presume, therefore, that Congress was well aware of the conflicting state decisions. And such presumption is strengthened into practical certainty by the fact that in passing, on the 3d day of March, 1893 (27 Stat. 563, c. 204), the act entitled "An act regulating the sale of intoxicating liquors in the District of Columbia," prohibiting, among other things (except as provided in the act), the sale within the District of Columbia of any intoxicating liquor, therein declared "to include whisky, brandy, rum, gin, wine, ale, porter, beer, and all other fermented and distilled liquors," and creating an excise board to which all applications for license to sell such intoxicating liquors should be presented Congress expressly provided that:

"The said excise board may in its discretion issue a license to any duly incorporated club on the petition of the officers of the club, and that the said excise board may in its discretion grant a permit to such club to sell intoxicating liquors to members and guests between such hours as the board aforesaid may designate in such permit."

By section 5 of that act Congress made various provisions respecting applications "for a barroom license," and, among other things, defined as constituting a barroom "every place where intoxicating liquors are sold to be drunk on the premises shall, for the purpose of this act be regarded and considered a barroom, and the possession of intoxicating liquors and the selling or disposing of the same to be drunk on the premises shall constitute and make the place a barroom," with certain provisos not important to be mentioned.

It is thus seen that Congress, in its enactment of March 3, 1893, supra, did not leave any uncertainty as to whether in the District of Columbia a duly incorporated club is required to secure a license for the sale of intoxicating liquors. In the light of that enactment we are to consider its legislation for the district of Alaska upon the subject

in question, in none of which has there ever been any express provision for a license to an incorporated club. By section 14 of the act of May 17, 1884, providing a civil government for Alaska (23 Stat. 24, 28, c. 53), it was enacted that:

"The importation manufacture and sale of intoxicating liquors in said district [of Alaska] except for medicinal, mechanical, and scientific purposes is hereby prohibited under the penalties which are provided in section nineteen hundred and fifty-five of the Revised Statutes for the wrongful importation of distilled spirits. And the President of the United States shall make such regulations as are necessary to carry out the provisions of this section."

By section 1955 of the Revised Statutes the President is given—

"power to restrict and regulate or to prohibit the importation and use * * * of distilled spirits into and within the territory of Alaska. * * * And any person willfully violating such regulations shall be fined not more than $500, or imprisoned not more than six months."

By the executive order of May 4, 1887, the landing of intoxicating liquors at any port or place in the territory of Alaska is prohibited, except upon a permit of the chief officer of the customs at such port or place, to be issued upon evidence satisfactory to such officer that the liquors are imported and are to be used solely for sacramental, medicinal, mechanical, and scientific purposes. By the executive order of March 12, 1892, the sale of intoxicating liquors for medicinal, mechanical, and scientific purposes can be made only by such persons in the territory as shall have obtained a special permit from the governor of the territory to sell intoxicating liquors therein upon certain specified conditions. Endleman v. United States, 86 Fed. 457, 30 C. C. A. 186.

By the Penal Code of Alaska of March 3, 1899, as amended and now embraced in the Compiled Statutes of that territory, the above-mentioned statutes and orders were repealed, and the following provisions enacted:

"Sec. 2569. That any person or persons, corporation, or company prosecuting or attempting to prosecute any of the following lines of business within the district of Alaska shall first apply for and obtain license so to do from a District Court or a subdivision thereof in said district, and pay for said license for the respective lines of business and trades as follows, to wit: [Enumerating various classes of business and the amounts to be paid per annum]."

The next section provides a penalty for doing business in violation of the provisions of section 2569. Section 2571 is as follows:

"That no person, corporation, or company shall sell, offer for sale, or keep for sale, traffic in, barter, or exchange for goods in said district of Alaska any intoxicating liquors, except as hereinafter provided; but this shall not apply to sales made by a person under provisions of law requiring him to sell personal property. Wherever the term 'intoxicating liquors' is used in this act, it shall be deemed to include whisky, brandy, rum, gin, wine, ale, porter, beer, hoochinoo, and all spirituous, vinous, malt, or other fermented or distilled liquors."

Subsequent sections provide for the issuing of licenses and the proceedings to be taken therefor. Section 2577, so far as pertinent, is as follows:

"That the liquor licenses authorized and provided for by this act shall be of two classes, namely, wholesale and barroom. * * * That the fee for a wholesale license shall be two thousand dollars per annum, and for a barroom

or retail license one thousand dollars per annum: Provided, that the fee for a retail license for road-houses on regular post-roads or trails where the population within two miles of the place where the business is to be conducted does not exceed fifty people, or for a steamboat or steamer operating on the inland rivers of Alaska during the season of open navigation, shall be five hundred dollars per annum: Provided, that said steamboat or steamer shall not be authorized to sell intoxicating liquor while in port or dock: And provided, that the words towns, camps, or settlements, as used in this act shall be construed to embrace the population within a radius of two miles of the place wherein the business is to be conducted under the license.

"That a retail or barroom license shall be required for every hotel, tavern, boat, barroom, or other place in which intoxicating liquors are sold at retail. * * *

"That every place where distilled, malt, or fermented wines, liquors, or cordials are sold in quantities as prescribed for retail dealers by section thirty-two hundred and forty-four of the Revised Statutes of the United States, to be drunk upon the premises, shall be regarded as a barroom; and the possession of malt, distilled, fermented, or any other intoxicating liquors, with the means and appliances for carrying on the business of dispensing the same to be drunk where sold, shall be prima facie evidence of a barroom within the meaning of this act, and the license therefor shall be known as a barroom license: Provided, that no license shall be granted for the sale of liquors at either wholesale or retail in any other than a substantial building which shall have cost for construction not less than five hundred dollars.

"Sec. 2578. That every person receiving a license to sell under this act shall frame it under glass and place it in a conspicuous place in his chief place of sale of such liquor, so that any one entering such place of sale may easily read such license.

"Sec. 2579. That all applicants for license and persons holding licenses shall allow the clerk of the court, or any United States marshal or deputy United States marshal, or any United States commissioner, full opportunity and every facility to examine at any time during business hours the premises where intoxicating liquor is sold, and for which a license has been asked or has been granted."

"Sec. 2581. That any one engaging in the sale of intoxicating liquors, as specified in this act, in the district of Alaska, who is required by it to have a license as herein specified, without first having obtained a license to do so as herein provided, or any person who shall engage in such sale in any portion of the district where the sale thereof is prohibited, upon conviction thereof shall be fined not less than one hundred dollars nor more than two thousand dollars, or be imprisoned for not less than one month nor more than one year; and upon every subsequent conviction of a like offense shall, in addition to the penalty above named, be imprisoned not less than two months nor more than one year."

Section 2582, among other things, provides:

"That no minor under sixteen years of age shall be allowed to enter any place where liquors are sold, other than a hotel, without the consent of the parent or guardian of such minor."

"Sec. 2584. That license for any of the purposes specified shall not be granted to any person to conduct such business within four hundred feet of a public schoolhouse, private school, or house of religious worship, except in such places of business as may have been located previous to the erection or occupation of such schoolhouse, private school, or house of religious worship owned or occupied in the district of Alaska, measured between the nearest entrance to each by the shortest course of travel between such place of business and the schoolhouse, private school, or house of religious worship."

I am of the opinion that the foregoing existing legislation of Congress for the territory of Alaska does not apply to a duly incorporated club for purely social and literary purposes, first, because it is reasonable to think that as Congress, in order to avoid the conflict and conse-

quent uncertainty that exists in the laws of the various states upon the subject, expressly declared in its legislation for the District of Columbia that that liquor legislation should apply to such clubs in that District, it would have made like specific reference to such clubs in its similar legislation for the territory of Alaska had it been its intention to include them therein; and, secondly, because the very language of the enactment for the district of Alaska clearly indicates to my mind that it was not intended to apply to such clubs. This I think apparent from each section of the statutes in which reference is made to the licensing of the liquor traffic. Throughout it is spoken of as a *business;* but to guard against any evasion of its requirements it specifically provided, as has been seen in section 2577:

"That every place where distilled, malt, or fermented wines, liquors, or cordials are sold in quantities as prescribed for retail dealers by section thirty-two hundred and forty-four of the Revised Statutes of the United States, to be drunk upon the premises, shall be regarded as a barroom; and the possession of malt, distilled, fermented, or any other intoxicating liquors, with the means and appliances for carrying on the business of dispensing the same to be drunk where sold, shall be prima facie evidence of a barroom within the meaning of this act, and the license therefor shall be known as a barroom license: Provided, that no license shall be granted for the sale of liquors at either wholesale or retail in any other than a substantial building which shall have cost for construction not less than five hundred dollars."

In other words, whatever the place, means, or appliances resorted to for *carrying on the business of dispensing* the wines, liquors, etc., "to be drunk where sold, shall be prima facie evidence of a barroom within the meaning of this act, and a license therefor shall be known as a barroom license." The next section—2578—also clearly indicates that the act was not intended to apply to incorporated clubs for purely social and literary purposes, for it expressly declares, as has been seen:

"That every person receiving a license to sell under this act shall frame it under glass and place it in a conspicuous place in his *chief place of sale* of such liquor, so that any one *entering such place of sale* [italics mine] may easily read such license."

The inapplicability of the act is further manifested by the next section—2579—which reads, as has been seen:

"That all applicants for license and persons holding licenses shall allow the clerk of the court, or any United States marshal or deputy United States marshal, or any United States commissioner, full opportunity and every facility to examine at any time *during business hours the premises* [italics mine] where intoxicating liquor is sold, and for which a license has been asked or has been granted"

—and by section 2581, which provides:

"That any one *engaging in the sale of intoxicating liquors as specified in this act* [italics mine] in the district of Alaska, who is required by it to have a license as herein specified, without * * * having obtained a license to do so as herein provided"

—shall be punished in a prescribed way upon conviction thereof, and is further manifested by the provisions of section 2584, which declares:

"That license for any of the purposes specified shall not be granted to any person *to conduct such business* [italics mine] within four hundred feet of a public school-house, private school, or house of religious worship"

—with certain exceptions not necessary to be stated.

A club organized for purely social and literary purposes has no "business hours," and is rarely, if ever, open to the public, but, on the contrary, is designed solely for the use, comfort, benefit, and enjoyment of its members and guests; and such an establishment "within four hundred feet of a public schoolhouse, private school, or house of religious worship" was not, I think, intended to be prohibited by Congress.

DORRINGTON v. CITY OF DETROIT.

(Circuit Court of Appeals, Sixth Circuit. April 6, 1915.)

No. 2574.

1. SALVAGE ⊜22—LIABILITY OF SALVORS FOR NEGLIGENCE OR WANT OF SKILL.

Persons undertaking a salvage service are bound to exercise reasonable care and such skill as persons performing such services ordinarily possess, especially where competent assistance is at hand; and where through their negligence or want of such skill injury results to the vessel they are attempting to assist, they may not only forfeit all right of salvage, but may render the salving vessel liable for damages, whether or not their efforts are successful.

[Ed. Note.—For other cases, see Salvage, Cent. Dig. § 52; Dec. Dig. ⊜22.]

2. SALVAGE ⊜22—UNSUCCESSFUL SERVICES—LIABILITY OF SALVORS.

When liability is sought to be fastened on a salving vessel solely because the attempted service was ineffectual, no independent injury having been caused by the salvor, there is no responsibility if the service was rendered in good faith, without clear evidence of culpable negligence or willful misconduct.

[Ed. Note.—For other cases, see Salvage, Cent. Dig. § 52; Dec. Dig. ⊜22.]

3. ADMIRALTY ⊜19—JURISDICTION—MARITIME TORTS.

A court of admiralty has jurisdiction of a suit to recover damages for injury to a vessel in navigable waters caused by the negligent management of a drawbridge over such waters.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 233, 234; Dec. Dig. ⊜19.]

4. NAVIGABLE WATERS ⊜20—DRAWBRIDGES—LIABILITY FOR NEGLIGENT OPERATION.

A city which maintains a drawbridge over a navigable stream may be held liable in admiralty, regardless of state statutes, for injury to a vessel caused by negligence in the discharge of their duties of those to whom it has intrusted the management of the bridge.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 73–99; Dec. Dig. ⊜20.]

5. NAVIGABLE WATERS ⊜20—DRAWBRIDGE—NEGLIGENT OPERATION—LIABILITY FOR INJURY TO VESSEL.

A schooner anchored in the river at Detroit dragged her anchors during a high wind and drifted slowly northeastward toward the Belle Isle

drawbridge, maintained by the city across the American channel. A fire boat maintained by the city was sent to her assistance, but the fastenings of the towing cable twice broke, the last time leaving the schooner opposite and near the draw of the bridge, and the fire boat then signaled for the opening of the draw. The assistant engineer in charge of the draw refused to open it because of the high wind, but it appeared from the evidence that it could have been safely done, and would have been if the chief engineer had been present. The schooner drifted against the draw and was practically wrecked. *Held*, that under Act March 23, 1906, c. 1130, § 4, 34 Stat. 85 (Comp. St. 1913, § 9964), which provides that if such a bridge "shall be constructed with a draw then the draw shall be opened promptly by the persons owning or operating such bridge, upon reasonable signal, for the passage of boats and other water craft," the city had the burden of showing that the violation of the express requirement of the statute, not only did not contribute to the injury of the schooner, but could not have done so, and that, having failed to sustain such burden, it was liable for such injury.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 73–99; Dec. Dig. ⊂⊃20.]

Appeal from the District Court of the United States for the Eastern District of Michigan; Arthur J. Tuttle, Judge.

Suit in admiralty by John J. Dorrington against the City of Detroit. Decree for respondent, and libelant appeals. Reversed.

The libelant and appellant, Dorrington, owned the Maria Martin, a three-masted schooner, built in 1866. She was well built and well rigged; had been an important sailing vessel on the lakes, and was known in her prime as the "Pride of the Lakes." She was 175 feet long and 35 feet at the beam; drew 5 to 6 feet light and 14½ feet loaded. Dorrington had owned her a number of years prior to November 21, 1906, and in the year 1899 she had earned $5,500 net, but for the succeeding five or six years she had earned practically nothing, the owner intending to convert her into a steamship, but was not able to do so through lack of means. Within a few months from November 21, 1906, he had refused separate offers of $6,000 and $6,500, which were regarded by apparently competent witnesses as cheap figures.

During the five years in which she was practically out of commission, she lay at anchor in one place or another in the Detroit river at Detroit, and on the day named was held by two anchors, one of 1,800 pounds, the other of 2,000 pounds, to which were attached iron chains 360 feet long. On that day Dorrington was on board, and at some time after noon a southwest wind arose, which, by 4 o'clock, had developed into a gale which caused the ship to drag her anchors. Her anchorage was about one-half mile from, and about southwest of, the Belle Isle bridge, owned and constructed by the city of Detroit under the supervision of the Secretary of War, leading from the city across the American channel to Belle Isle, one of the city's parks. The American channel of the river is about northeast and southwest, the water flowing southwestwardly. The bridge lies northwest by north and southwest by south, and for present purposes may be described as having three piers, the distance between the middle pier and each of the other two being about 160 feet. The bridge had a draw 318 to 320 feet in length, resting at its center, and swung upon the middle pier, which had an extension southwestwardly of 160 feet, so that when the draw was swung one end of it stood over the end of the middle pier which, in the testimony, is called the "crib," the "cradle" and sometimes the "bridge." The machinery for turning the draw and the men in charge were housed at the center of the draw over the crib upon which the draw rested and turned on rollers when opening. So, when the bridge was opened, there were passageways for boats, one on each side of the crib, and each about 160 feet in width, the depth of the water being about 20 feet. On or in the bottom of the river from the city to the island there was an eight-inch pipe carrying water from the city to the

island. The bridge was in charge of a chief engineer and two assistants, but on the day mentioned one Martin, an assistant engineer, was in charge, and under him, two gatemen who did not have anything to do with the management of the draw. Martin had been assistant engineer for about a year, and had had no previous experience in the handling of drawbridges. According to him, the engine operating the draw was of 40 horse power. The chief engineer makes it about 20 horse power. Ordinarily 2 horse power would turn the draw. The machinery was appropriate for the kind of work it was called on to do, answered the purpose very well, and was an oscillating engine, working either way according to the way in which the steam was introduced. The speed was regulated by the amount of steam introduced and by reversing the engine. From all the testimony it may be gathered that the machinery was adequate to swing and handle the draw in a high wind or gale. There was no apparatus on the bridge for determining the velocity of the wind, which the assistant engineer said was, on that day, about 50 miles an hour; and there was other evidence tending to show that it was from 55 to 60 miles an hour. The chief engineer was not on the bridge that afternoon, and did not know an unusual wind was blowing. A 50-mile gale was not unusual in November.

The ship was drifting upstream and toward the bridge. Probably, if her course had not been changed by what took place, she would have struck the south pier, or not far to the right of that, at the bridge extending from the south pier to the island. When the ship began to drift, Dorrington, who was an experienced navigator, thinking it best to seek help, got into his skiff and pulled to Detroit for that purpose. He called on the telephone a company owning tugs, and learned that he could get but one tug, which was the only available tug in the harbor. The ship continued to drift, and the city authorities ordered the fire boat Elliott to take charge of her. It may be gathered from the testimony of the captain of the Elliott that the primary purpose was to prevent damage to the bridge, and it appears that he did not regard the ship as being of any value because of her age. He said she had lain so long in the roadway that she had become a "joke," and that from time to time when his boat passed her, as she lay at anchor, rotten wood would be churned out of her hull by the waves made by his boat. He afterwards said he was so told. There is nothing in the evidence to indicate that the ship was in so desperate a condition of decay as that, and the captain's further statement that he was afraid of walking on the deck lest he might go through was not warranted by anything in the testimony. The only time he was on her deck was just before dark, and before he left darkness had set in, as will appear.

The Elliott left her moorings at 4:45 p. m., and the ship struck the crib at about 5:15. It is uncertain how long the Elliott was engaged in attempting to prevent the ship from striking the bridge, for the time varies in the testimony from half an hour to five minutes. The ship was drifting sternway upstream and going toward the bridge. She was going slowly, the evidence fairly disclosing that it took about two hours for her to drift from her anchorage to the crib of the bridge. That would be about 22 feet a minute. Primarily the Elliott was not a tug, nor was it her duty ordinarily to tow vessels. Her crew consisted of seven men, none of whom, excepting the pilot, being seamen. They were firemen. She was in charge of a captain and managed by the pilot, who took her wherever the captain directed. The Elliott overtook the drifting ship at a point about 500 feet southeast of the crib, coming up on the starboard, aft. The sea was high, the waves running as much as four feet, which was unusual. The captain and another jumped aboard the ship and carried, or there was thrown, from the fire boat, a heaving line attached to a hawser, which the captain or his assistant attached to some post, whether a tow post, or a quarter post, or a cleat, does not clearly appear. At any rate, when the fire boat started to pull the stern of the ship around, that is to say, northwardly, the hawser came away. Thereupon the captain and his assistant hauled it back to the ship and there fastened it, probably to a quarter post used for light towing when the strain is fore and aft, which was not, however, suitable for such a side strain as was necessarily imposed upon it by the effort of the fire boat to haul the

stern of the ship around. There were two tow posts located just forward of the cabin, and at perhaps one-third of the length of the ship from the stern. These tow posts went through to the keelson, and were anchored there. The quarter posts were further toward the stern, and nearer the gunwale of the ship. They went through, too, to the skin of the vessel, but were only anchored by heavy bolts going through the heavy beam running transversely of the vessel and on which the deck rested. It is probable that on the second attempt to fasten the hawser the quarter post came away under the strain. Dorrington described it as having been "pulled out by the roots." The captain of the Elliott said the post he fastened to, whatever it was, was rotten. It is here found that skillful seamen, accustomed to towing vessels, would not ordinarily hitch to such a quarter post in order to pull a vessel around. When the second attempt was made the ship was about 10 feet from the end of, and toward the south of, the crib. These two attempts to pull the stern around had been, to some extent, successful. The ship had been brought around so as to present her side to the wind, which caused her to lie somewhat broadside to the bridge, the draw not having been opened. She struck first at the stern, aft, and, according to one witness, the assistant engineer, 25 to 50 feet from the end of the crib, and her stern chewed along the crib while her jib-boom struck the railing of the bridge. It broke, as did also other masts, spars, and yards, which came tumbling to the deck, whereupon the captain and his assistant jumped onto the crib and called to or motioned the fire boat to go home, which it did. In the meantime, the only tug (the Lorimer) available to assist in the rescue had been sent out by its owner, at Dorrington's request, for the purpose, and reached the scene at about the time the second attempt of the fire boat was being made. There is uncertainty as to the length of time the Lorimer was there. Her captain saw the two men on board the ship and the efforts of the fire boat to prevent the ship's striking the crib, and, thinking they could take care of her, went away for the purpose of assisting another vessel, which had slipped its moorings and to whose assistance also he had been sent.

The Elliott was a powerful boat owned by the city of Detroit, and was used for the purpose of putting out fires at the docks and property near by, or upon vessels, and was well equipped with tow lines and other apparatus suitable for towing vessels. She was a much more powerful boat than the Lorimer, whose captain testified, however, that he could have pulled the ship out of danger. The captain of the fire boat says the Lorimer came within 50 feet of the ship, or maybe 100 feet from her bow, or 125 to 150 feet from his boat while he was on the ship, and he did not signal for her assistance. He said he thought the ship would sink, and for that reason made no further effort that night to haul her away. The captain of the Lorimer said he got there between 4:30 and 5:00 o'clock, and was there probably 10 minutes. The ship's stern was pounding against the crib, and her rigging was going to pieces through contact with the unopened draw.

In the meantime no attempt was made by the assistant engineer to open the draw. He had for a long time seen the ship drifting toward the bridge. Three whistles were blown by the fire boat, but he did not open the draw. The captain of the Lorimer testified: "I was there 10 minutes any way. I don't know of any reason why the draw should not have been opened if a boat should blow for it. I heard three whistles blown. That is a recognized signal to open the bridge. There was nothing in the position of the Martin at that time which prevented the draw from being opened. They could have swung the bridge free from the vessel."

Dorrington had gone with his skiff to the dock at or near the Detroit end of the bridge, and testified: "When the fire boat was alongside trying to get a line on the Maria Martin at the foot of this center pier under the draw of the bridge, there was no reason why the draw of the bridge could not open. They could swing that bridge either way before a vessel got up there. At that time they could have swung the bridge the opposite way around, and left that south opening of the draw clear. That could have been done even when she drifted up against the bridge. They could have swung that bridge at any time until after the spars and rigging fell over."

The assistant engineer testified: "With the position of the Maria Martin

lying up against the cradle of the bridge it was not possible to open it. We could have swung away from it if there had not been any wind. The fire-tug Elliott had hold of the stern of the Martin when she came up near the bridge. The fire-tug Elliott didn't lay near the bridge. The firemen tried to get on it, but they could not, nor could I have safely swung the bridge. If we swung the bridge to the right, it would have hit the Maria Martin and struck her rigging, and if the bridge had been swung in the other direction it would have hit the fire-tug or her smoke stack. I could not swing it either way; it would have been apt to spin; I could not swing it in that wind. In a 50-mile wind it is not safe to swing the bridge in either direction, and that is due to the fact that I hadn't any brake on it."

He said: "It is not safe to open the draw in a gale of that kind. We have no brackets or brakes on when the bridge is ready to be opened and the wind takes hold of it and starts it right around and we can't stop it. If the draw were open in a 50-mile wind, it would be apt to spin the draw. Q. Now, Mr. Martin, do you mean to say that in a 50-mile gale that wind would twist the bridge around? A. Yes, sir. Q. Don't you know as a matter of fact, Mr. Martin, that that bridge has been turned in a 50-mile gale a good many times? A. No, sir; I don't. Q. It is customary about November in the fall of the year to have gales, is it not? A. Yes, sir. Q. And a 50-mile gale is not an unusual gale at that time of the year is it? A. No, it is not. Q. And that bridge has been operated for a number of years has it not? A. Yes, sir. Q. Did you ever have any other experience on a bridge before 1905 when you were employed there? A. No. * * * Q. What has been your experience; have you ever refused to turn her in a 25-mile gale? A. I would not say it was blowing 25 miles an hour if I refused to turn her; it might have been blowing 45. Q. Was that the smallest wind at which you ever refused to turn her, 45 miles an hour? A. I would not say. Q. Have you ever refused to turn her? A. Yes, sir. Q. In how heavy a wind have you refused to turn her? A. I should judge it would be about 45 miles an hour. Q. That is the only wind you refused to turn her in? A. That is the only time a boat has asked for passage when the wind is blowing strong. Up to the time of this accident I had never refused to turn the bridge for any other boat except the Maria Martin. I had never seen that bridge in operation in a 45-mile wind before that. Q. Then why did you refuse to turn the bridge in that wind? A. Because it was dangerous to swing it. Q. Why was it dangerous for you to swing her? A. There was no way of holding it. Q. Were you acting on what you had been told in regard to that? A. I may have."

He afterwards said he was told by the chief engineer not to swing the bridge in a gale; that is to say, "a strong wind when you can't regulate it, when you can't hold the bridge." He made up his mind perhaps earlier than 4 or half-past 4 o'clock, on his own responsibility, that it was too high a wind for him to open the draw. He says: "I had decided in case I was signaled that I would not open it because the draw could not be opened safely in the wind. At that time when that signal was given, the fire boat was in a position so that if she had turned with the American side end of the draw downstream, that I think it would have hit the fire boat. The fire boat had hit the end of the cradle already. The fire boat was on the American side of the crib. The Maria Martin was on the south of the crib and the fire boat was on the north. The fire boat was a little bit farther north up the stream than the Maria Martin. The fire boat was under steam and I knew she could back up so that was not any reason why I did not open the draw. * * * I do not think I have refused to open the draw for a boat on a signal at any time late in the season. To my knowledge, the engineer in charge never refused to open the draw for any boat on signal, so that from the time of my employment up to the year after, that was the only time I know of the opening of the draw being refused. That is the only time I know of that boat ever coming up there in a storm to get through. I make it a practice to use my own discretion in opening that draw for boats that come up there in storms. I always open it at other times. I remember that same season of swinging the draw and sinking another boat in October or November. I don't remember the name of the boat. * * * It wasn't

caused by my refusing to open the draw originally. We have a counter signal; we are provided with a whistle. There are recognized counter signals on the part of the bridge when they do not intend to open. The bridge blows four whistles to show she will not open. Four whistles were not blown by the bridge at this time. I don't know just why they were not. I was in charge. When the fire boat wanted to get through she did not have hold of the other boat. The fire tug did not want to go through. Q. How do you know the fire tug did not want to go through? A. She could not do anything up there. Q. What? A. I didn't surmise she wanted to go through anyhow. Q. What did she give you the signal for opening the draw for? A. I could not say what she gave the signal for. Q. You surmised she didn't want to go through, is that right? A. Yes, sir. Q. And yet she had given you the signal to open the draw? A. Yes, sir. Q. Why did you surmise such a thing? A. Well I could not say. Q. Now you volunteered this statement and cannot tell why you surmised that? A. Oh, I don't know why. Q. Is it customary for the fire boat to give signals to open the draw when she does not want to go through? A. No, I don't think so. Q. Then when she gave the signal to you to open the draw did it not mean that she wanted to go through? A. Well I didn't think she did. Likely it meant she wanted to go through, and I didn't think she did want to go through because of the circumstances that she was in, in trying to pull that other boat. I judge she blew to let the other boat go through and I saw the other boat could not go through and that was the reason I think why I did not try to open the draw."

The chief engineer, in answer to the question, "In your experience at the bridge would you think it was a safe operation to swing the draw for a boat to pass through in a 60-mile gale?" said, "If I was there and they insisted on coming through I would undertake to swing it, but I would give them warning there was danger coming through if there was any way of warning them. They would go through at their own risk, because I would not say that engine would hold the bridge in a gale of 60 miles an hour. Where the wind works both ways—it don't always work both ways, sometimes it catches the corner and you might lose control of it. The only way to keep control of her is not to let her go fast."

The pilot of the Elliott said: "I backed her around and she was coming along all right until we got almost over to the draw, and when we got almost over to the draw she let go, this stern post let go, and she hit the bridge, and we went down and over on the north side of the pier."

There he tried to pick up the captain of the Elliott and his assistant, who had jumped off the ship onto the crib. But they could not get aboard in the heavy sea and went up the iron ladder from the crib to the bridge and the fire tug went home. Having related this, the pilot went on: "It was impossible to get aboard, so I swung her around and backed, and there is a kind of pocket in there between that cradle and the dock, just like a pocket. Then with that wind I swung around the best I could, and backed, and I was afraid she would not make it in that corner, so I blowed three whistles to the bridge and the bridge didn't open, so I managed to get around and get home all right. * * * That pocket lay between the American bank and the cradle, and that is on the north side of the draw. The reason we blew the three whistles was because we were afraid we could not get out of that pocket, and we wanted the bridge swung so that we could get through. After the second line had taken hold of the Martin, we did succeed in pulling the Martin a little distance. We were coming down the river, and when we backed down far enough we could have turned around and went head first down the river, and then suddenly the timber post or the tow post let go, and by that time the Martin had been pulled over to a position near the draw. We were probably at that time 100 feet south of the draw, and the Martin was probably about 50 feet away from us. Then after the line parted or the tow post parted, the wind blew the Martin against the bridge. From where I was I could not tell whether the cradle or the bridge was hit first. In fact I was busy watching ourselves, that we would not hit something else. As soon as we let go we shot away from her. I could not tell you which end hit first. * * * After this breaking the second time the line gave way,

and the fire tug went to the north side of the draw or this cradle. We were considerably below, you know, and I tried to but could not get alongside because the waves were slashing the deck. * * * We were 50 to 75 feet towards the span of the draw then. The pier below the bridge is the length of the draw itself, half the distance of the bridge. It sticks out down below. It is more than 100 feet, I guess. We were in that pocket. That is when I signaled. My intention was to get out of that pocket and to go through the draw. The only way I understand the bridge could have swung was to eastern because they were fastened with the cables and things that went over on the bridge. If we had swung then the smokestacks and everything would have been knocked off. We were broadsides to the wind at that time. Our own power was able to get us out of that hole, because it did. We were afraid it would not. I didn't blow those whistles to open the draw of the bridge for the purpose of attempting to get through and hauling the Maria Martin through."

The captain of the Elliott, who was then standing on the crib, said: "When our boat blew three whistles, they [meaning the ship] were about halfway alongside the cradle of the bridge; and this boat was fast here and fast here."

He probably meant by that that its stern was against the pier and its rigging against the unopened draw. "That was when we blew our three whistles and our tug was further *east*."

The man with the captain of the Elliott said: "We took hold as you say and it gave way, and we also took another hold and that gave way. The Martin was about in a position to go through the south side of the draw, that is when our lines parted, backing up, left the Martin on the south side and us on the north side, and in fact we were a little ahead of the Martin in going through the bridge. The Martin was farthest from the bridge, and the pilot gave him two or three blasts to open the bridge. Then the Martin passed into the bridge. She went in broadsides. * * * The stern of the Maria Martin struck the cradle. Whether the bow of the Maria Martin went against the bridge I could not say. I was not on the Martin at that time. * * * When it went against the cradle I jumped off, then the wind continued to blow the Martin against the bridge."

Dorrington said that the pilot of the fire boat told him afterwards his intention was, after the line gave way and they blew the whistle for the bridge to open, to go up through on the north side of the crib and come down to the Martin and pull her through the south side. Dorrington boarded his vessel after she got into the bridge, stayed aboard all night, and tried to protect the vessel by fending her off as much as possible where she was chewing against the crib. He says that the stern of his ship was swinging underneath the draw, and if the draw had been opened the vessel could not have jammed because her stern was free.

In answer to the question, "As a matter of fact it is all guesswork whether or not she would go through?" he said, "Not with that wind because the stern swung up under the bridge that night, and so it is possible she would have gone through. Q. You mean that boat would have gone through the draw if she struck the bridge, if the bridge had been open? A. Yes, sir."

The libelant claims the city of Detroit is liable to him for the loss of his ship growing out of: First, the negligence of the fire boat in the way she handled herself and his ship, in failing to ask assistance, and in the abandonment of his ship; second, negligence in failing to provide proper equipment for the fire boat; third, negligence of the bridge tenders in that the bridge was not open when, as claimed by libelant, his ship was in the control of the fire boat, and that upon proper signal the draw was not opened.

The appellee in its answer below admitted, among other things alleged in the libel: "That said city of Detroit had placed said bridge and the operation of its said draw in charge of one or more bridge-tenders, whose duty it became and was to maintain a watch for all vessels of sufficient size which might wish, or be obliged, to pass through said draw, and that it was the duty of said city and its officials and employés to open said draw upon [being informed and notified of] the approach of vessels desiring to pass through said bridge, whether ascending or descending the American Channel of said

Detroit river, said river being a navigable water of the United States, upon which the vessels of the United States have a right to navigate freely and without hindrance."

The answer denied the allegation that the fire boat had control of the ship; denied signaling the engineer on duty at the bridge to open it; avers that it would have been unsafe to have drawn the bridge in a gale of wind blowing at the rate of 60 miles per hour, as it was at the time the ship collided with the bridge; charges the ship with being old, dismantled, and abandoned, and as of no value for the purpose of engaging in navigating the waters of the Great Lakes; charges the libelant with contributory negligence in failing to properly anchor his ship and man her sufficiently; denies negligence, and charges that after the accident the ship was taken to a point near Belle Isle; that she remained there unattended and neglected, and a menace to navigation, and was finally removed by the government of the United States.

The District Court, holding against the libelant on all questions, dismissed the libel. On appeal here all of the assignments of error which require consideration have to do with the several claims of negligence referred to. The parties have agreed that in the event the judgment of the court below is reversed, the question of damages may be inquired into de novo.

M. H. O'Brien, of Detroit, Mich., for appellant.

Walter Barlow, of Detroit, Mich., for appellee.

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

HOLLISTER, District Judge (after stating the facts as above). That the ship had some value cannot be doubted. It is also true, since the decision of the Supreme Court in Workman v. New York City, 179 U. S. 552, 21 Sup. Ct. 212, 45 L. Ed. 314, that in whatsoever capacity a municipality owns, controls, or uses a fire boat, the expense of which the city defrays, an action in admiralty will lie against the city for negligence in the operation of its fire boat.

The respondent's claim of contributory negligence may be disposed of by the statement that the testimony shows activity on the part of the libelant to save his ship. When danger to her seemed probable, he obtained the services of the only tug in the harbor available for use. Indeed, if the fire boat had not undertaken the rescue, it seems quite clear that the Lorimer would have succeeded in saving the drifting ship, and we agree with the court below that contributory negligence is not to be ascribed to the libelant.

[1] We come, then, to the charges of negligence. Whether or not it was the duty of the fire boat to have volunteered to save the ship is not now decided. She was instructed to do so, and it is probable her primary purpose was to save the bridge rather than the ship. Be that as it may, she attempted to save the ship and thereby established a relation between herself and the ship calling for the exercise of care commensurate with the extent of the duty such relationship imposed. It will be observed that the fire boat was not a salvor, for the reason that success did not attend her efforts. It is said in The Sabine, 101 U. S. 384, 25 L. Ed. 982, that:

"Three elements are necessary to a valid salvage claim: 1. A marine peril. 2. Service voluntarily rendered when not required as an existing duty or from a special contract. 3. Success in whole or in part, or that the service rendered contributed to such success."

The city of Detroit is not making a claim for salvage, and clearly could not do so. The fire boat failed to save the ship. She was at no time in control of her, for the reason that her hawser would not hold. If it had held the ship would not have struck. The rule applicable to a salvor is that she shall—

"use reasonable care for the protection of rescued property, and may lose all right to salvage award, or even render herself affirmatively liable for an independent injury sustained after a successful salvage service."

It is so stated by Judge Lurton, speaking for this court in The S. C. Schenk, 158 Fed. 54, 59, 85 C. C. A. 384, citing The Mulhouse, 17 Fed. Cas. 962, No. 9,910; Serviss v. Ferguson, 84 Fed. 202, 28 C. C. A. 327; The Henry Steers, Jr. (D. C.) 110 Fed. 578, 582; The Bremen (D. C.) 111 Fed. 228; The Duke of Manchester, 2 Wm. Rob. 471; The Neptune, 1 Wm. Rob. 297. The same rule is applicable to cases in which an unsuccessful attempt is made to save a ship in distress. It will be found in The Henry Steers, Jr. (D. C.) 110 Fed. 578, 581, et seq., and in The S. C. Schenk, 158 Fed. 54, 60, 85 C. C. A. 384, 390. In the latter Judge Lurton says:

"When a distinguishable injury has resulted from the negligence of one undertaking a salvage service, there may be not only forfeiture of all right of salvage, but an affirmative award of damages against the salving vessel. This is as far as the reported cases seem to go."

Speaking of those who claim salvage, Dr. Lushington said, in The Cape Packet, 3 Wm. Rob. 122, 125:

"I do not mean to say that they must be finished navigators; but they must possess and exercise such a degree of prudence and skill as persons in their condition ordinarily do possess, and may fairly be expected to display."

In the case of The Dygden, 1 Eccl. and Mar. Cases, 115, that learned admiralty judge denied salvage to fishermen who, without competent knowledge of seamanship and when competent assistance was at hand, undertook to save a ship in distress and failed. He said (pages 116, 117):

"When persons offer their services to vessels in distress, and there are no other individuals on the spot capable of rendering more efficient assistance, this court must look with considerable indulgence at their efforts; because, being the only aid that can be procured, and offered in a state of great exigency, every allowance must be made if they are not possessed of adequate knowledge to perform the duty they had undertaken. But different considerations will apply to the conduct of individuals who assume the character of salvors, when there are persons competent to discharge those duties."

[2] The test to be applied is good faith and reasonable judgment and skill. The Laura, 14 Wall. 336, 344, 20 L. Ed. 813.

Whether on the first trial the line slipped, or that to which it was attached broke, cannot, from the testimony with any reasonable certainty, be said. All of the posts were 40 years old. We have only the owner's word for it that they were sound. The captain of the fire boat and his assistant had had little experience in towing, and attached the hawser to, what seemed to them, posts provided for the purpose. The time after they boarded the ship was sufficient to have made a secure fastening to a tow post proper, assuming that

would have stood the strain. But quick action was required. That is certain from the facts and from the opinions of those qualified to judge. The sea was heavy, the wind was high, and it was getting dark. When the second attempt was made the ship was within 10 feet of the crib, and a secure fastening must be found within about one-half minute. The captain of the fire boat believed, and had reason to believe, he could pull the ship around, and while he probably ought not to have fastened to the quarter post, yet he did not know that, and it presented the appearance of being there for the purpose of use in towing. He did not know the Lorimer was coming to assist until she was near by and about the time he was making the second attempt to fasten his hawser. There was at that time no reason to suppose he could not pull the ship away. One may imagine it was a time of much excitement. We are not able to say that the District Judge was wrong in exonerating the fire boat from the charge of negligence in tying to the quarter post, and should not, in any event, disturb his finding unless it were against the decided preponderance of the evidence. City of Cleveland v. Chisholm, 90 Fed. 431, 33 C. C. A. 157 (C. C. A. 6); The Edward Smith, 135 Fed. 32, 67 C. C. A. 506 (C. C. A. 6). We do not find such preponderance here. In some respects the case is like that of The S. C. Schenk referred to. So far as the captain of the fire boat knew, the ship was lost unless he went to her rescue. What he did in attempting to fasten the hawser was probably what any one would have done except one of great experience in towing vessels. To hold him negligent in not seeking some post which would certainly hold, if any of them would have held, would be to discourage laudable attempts to save vessels in distress by the deterrent fear of a claim for damages if the attempt failed.

There certainly is no clear evidence of culpable negligence or willful misconduct. What Judge Lurton says in the Schenk Case is particularly applicable (158 Fed. 60, 85 C. C. A. 390):

"But when, as here, liability is sought to be fastened upon a salving vessel solely because the attempted service was ineffectual, no independent injury having been caused by the salvor, there is no responsibility if the service was rendered in good faith, without clear evidence of culpable negligence or willful misconduct."

We reach a similar conclusion with respect to the claim of having negligently abandoned the ship after she struck. Well might the captain of the fire boat have thought the ship would sink, 40 years old as she was, though stauncher than he knew, with waves four feet high dashing on her and the crib, all in the darkness of night, with the broken spars, masts, and yards falling on deck, and with, apparently, to him, no place on the ship to which to tie sufficiently strong to stand the strain of towing.

[3, 4] The claim of negligence for the failure of the assistant engineer to open the bridge gives us more concern. It requires a consideration of the duties and responsibilities of a municipal corporation operating a drawbridge over navigable waters, and calls for the consideration of rules not involved in cases of salvage, or in unsuccessful attempts to rescue ships in distress. Whatever the law

may be in some of the states exonerating municipalities from liability for negligence in the maintenance and management of drawbridges operated, not for the pecuniary benefit of the municipality, but in behalf of the public and in governmental capacity, or in cases in which it is declared there is no liability for the manner of construction or carelessness in the operation of a drawbridge unless the liability is expressly imposed by statute, it may be regarded as settled that liability in the management of this drawbridge may be fixed upon the municipality if the facts show negligence in the discharge of their duties by those to whom the municipality had intrusted its management. This is so because the locality of the injury to the vessel was in navigable waters, which brings the case within the admiralty jurisdiction of the courts of the United States. In The Plymouth, 3 Wall. 20, 33 (18 L. Ed. 125) it is said by Mr. Justice Nelson:

"It is admitted by all the authorities that the jurisdiction of the admiralty over marine torts depends upon locality—the high seas, or other navigable waters within admiralty cognizance; and, being so dependent upon locality, the jurisdiction is limited to the sea or navigable waters not extending beyond high-water mark."

And it is said by Mr. Justice Field in The Rock Island Bridge, 6 Wall. 213, 215 (18 L. Ed. 753):

"* * * The jurisdiction of the admiralty extends to all cases of tort committed on the high seas, and in this country on navigable waters."

And then he goes on to say that redress for such torts may be had in courts of admiralty in personam in other cases than those in which proceedings may be had in rem for the enforcement of a maritime lien.

And while it is shown by Judge Jenkins in Milwaukee v. The Curtis (D. C.) 37 Fed. 705, that no action would lie in admiralty against the owner of a vessel for damage done by it through its negligence to a bridge for the reason that the locality of the injury was on the land, the bridge being on land, yet he makes it very clear that the locality of the thing to be considered is of the thing injured, and not of the agent causing the injury, and that when the injury is to a vessel afloat, even though the negligence originated on land, the tort is maritime and is within the jurisdiction of the admiralty. See cases cited by him, and by Judge Addison Brown in Leonard v. Decker (D. C.) 22 Fed. 741.

In Daly v. New Haven, 69 Conn. 644, 38 Atl. 397, the Supreme Court of Connecticut, in holding that the duty of operating a drawbridge which was a part of a public highway over a navigable river is a public governmental duty and no liability attached to a municipal corporation charged with that duty for negligence in the operation of the draw, unless the liability was imposed by statute, referred to the case of Greenwood v. West Port, decided in the United States District Court for the District of Connecticut, and reported in 62 Conn. 575, 53 Fed. 824, and 63 Conn. 587, 60 Fed. 560, as not in conflict with the court's view of the public governmental character of the municipality's duty in the management of the drawbridge, and said (69 Conn. 649, 38 Atl. 398):

"* * * That decision rests upon the somewhat peculiar and exceptional state of facts in that case, and upon principles of maritime law that have no application here."

In that case, which was a libel in personam, a steam barge signaled her approach and desired to pass through a drawbridge. Her signals being unheeded, she was compelled to wait, was caught by the ebb tide, struck the bottom, and sank. This was held to be a maritime tort, and that the court had jurisdiction for an injury done to a vessel on navigable water by a bridge or permanent structure, citing Boston v. Crowley (C. C.) 38 Fed. 202, 204, and Assante v. Charleston Bridge Co. (D. C.) 40 Fed. 765, 767.

Judge Townsend was of opinion that after the municipality had undertaken to manage and control the drawbridge, it was liable for misfeasance, although it might not have been originally charged with the duty of opening the draw, and he cites Judge Addison Brown in Edgerton v. The Mayor, etc., of New York (D. C.) 27 Fed. 233, and other cases, in support of the statement that—

"in constructing the bridge with a draw, and in undertaking to open and manage the draw, so as to allow vessels to pass, the state and the city have recognized the right of vessels to pass through without any appeal to the national authority to protect that right." People v. Saratoga, etc., R. R. Co., 15 Wend. 113, 134, 136, 30 Am. Dec. 33; Escanaba Co. v. Chicago, 107 U. S. 678, 683, 2 Sup. Ct. 185, 27 L. Ed. 442; Miller v. Mayor, etc., of New York, 109 U. S. 385, 393, 3 Sup. Ct. 228, 27 L. Ed. 971.

Judge Brown states the rule (quoted by Judge Townsend with approval):

"Having thus recognized the rights of commerce and undertaken to provide accommodations for the passage of vessels, the corporation is bound that the custodians of the bridge shall use ordinary diligence to avoid accidents to vessels going through the draw at customary hours and in the customary manner, as one of the incidents of the care, management and control of the bridge itself. It is responsible, therefore, for the want of ordinary care and diligence in its servants, and for the consequent damage."

The bridge was an obstruction to navigation. It was so held by the Circuit Court of Appeals in the Seventh Circuit in Clement v. Metropolitan, etc., Ry. Co., 123 Fed. 271, 59 C. C. A. 289, and that the right of navigation was paramount; that the bridge must be so constructed that it might be readily opened to permit the passage of vessels, and must be placed in charge of competent persons and be equipped with lights and signals, and give timely warning to approaching vessels, if for any reason it could not be opened.

[5] It would seem that, without any statutory requirement of the United States relative to the operation of drawbridges over navigable waters, the city, in the management of the draw of the bridge, must be held to ordinary care, having in mind the purposes for which the draw was made and the circumstances of the case.

But Congress have expressly imposed positive duties in the management of such drawbridges. Section 5, Act Aug. 18, 1894, c. 299, 28 Stat. 362, Comp. St. 1913, § 9973, provides:

"That it shall be the duty of all persons owning, operating and tending the drawbridges now built, or which may hereafter be built across the navi-

gable rivers and other waters of the United States, to open, or cause to be opened, the draws of such bridges under such rules and regulations as in the opinion of the Secretary of War the public interests require to govern the opening of drawbridges for the passage of vessels and other watercrafts, and such rules and regulations, when so made and published, shall have the force of law. * * *"

We have not been favored with those rules and regulations, but Congress have provided, also, that:

"If the bridge shall be constructed with a draw, then the draw shall be opened promptly by the persons owning or operating such bridge upon reasonable signal for the passage of boats and other water craft. * * *" Act March 23, 1906, c. 1130, § 4, 34 Stat. at L. p. 85 (Comp. St. 1913, § 9964).

While we have found no cases dealing with these requirements relating to a drawbridge, yet the measure and extent of the duty imposed by these statutes may, by analogy, be drawn from other statutory regulations applicable to cases of negligence within the jurisdiction of the courts of admiralty.

It is required by article 16, Act Aug. 19, 1890, c. 802, § 1, 26 Stat. 326, Comp. St. 1913, § 7854, 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."

In the case of Clyde S. S. Co. (D. C.) 134 Fed. 95, 97, it was held that failure to observe this requirement created a presumption of fault. See, also, The Georgic (D. C.) 180 Fed. 863.

The mates of vessels are required to be licensed. U. S. Comp. St. 1913, § 8200. It was held in The Eagle (D. C.) 135 Fed. 826, that when one of two vessels in collision was in charge of an unlicensed mate there is a presumption that that fact caused or contributed to the collision, and the burden is upon the vessel to show that the collision was not attributable to that fact.

Again, under the act of April 29, 1864 (Comp. St. 1913, § 7963):

"Every steam-vessel, when approaching another vessel, so as to involve risk of collision, shall slacken her speed, or, if necessary, stop and reverse. * * *"

It was held in the case of Fred W. Chase (D. C.) 31 Fed. 91, 94, that this rule applied notwithstanding the existence of a gale.

Judge Swan held in The Lansdowne (D. C.) 105 Fed. 436, 443, that under the decisions of the English and American courts in case of collision, it is incumbent upon a vessel which has disregarded a rule of navigation to show that its violation not only did not contribute to the collision, but could not have done so.

The whole subject is comprehended in what Mr. Justice Strong says in The Pennsylvania, 19 Wall. 125, 136 (22 L. Ed. 148):

"The liability for damages is upon the ship or ships whose fault caused the injury. But when, as in this case, a ship at the time of a collision is in actual violation of a statutory rule intended to prevent collisions, it is no more than a reasonable presumption that the fault, if not the sole cause, was at least a contributory cause of the disaster. In such a case the burden rests

upon the ship of showing not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been. Such a rule is necessary to enforce obedience to the mandate of the statute."

While it might probably be going too far to say that the failure to open the bridge caused the injury to the vessel, yet the city, having disobeyed the positive statutory mandate, as well as a duty imposed upon the municipality by reason of undertaking to manage the drawbridge, should show that its failure could not have contributed to the injury.

It is not necessary to decide that negligence is to be ascribed to the owner of a drawbridge, competently built and manned, because of his failure to turn the draw even upon signal, when a competent engineer would, to preserve the bridge, decline to turn the draw in an unusual gale of such force as to cause him to believe that to turn the draw would result in destruction to the bridge or destruction to a boat which had signaled for the opening of the draw. That is not this case. It is here shown that the chief engineer, had he been on duty, would have turned the draw. While it appears that an unusual gale was raging, there is no evidence at all that its character would entitle it to be defined as "vis major" or "act of God." And there is no satisfactory evidence in the case from which an inference may be drawn that the turning of the bridge would probably have resulted in its destruction, or destruction of the smokestacks of the fire boat. We say this notwithstanding the testimony of the assistant engineer who gave at least two reasons why he did not turn the draw, reasons not at all dependent upon or related to each other. The evidence tends to establish the fact that the bridge could have been handled in safety if care were taken that it go not too fast. Anxiety of the assistant engineer for the smokestacks of the fire boat was not justified. His view is shared by the captain and pilot of the fire boat, all testifying for the municipality, their employer. They are, however, expressing mere opinions which do not agree with the opinions of the owner of the ship and the captain of the Lorimer, both apparently competent navigators. The facts must tell the story.

If the fire boat was in the pocket described, what shall be said of the reason her pilot gives for blowing the three whistles? It was—

"because we were afraid we could not get out of that pocket, and we wanted the bridge swung so that we could get through."

In another part of his testimony he says his smokestack would have been knocked off if the bridge had swung. He said the only way the bridge could have been swung "was to eastern because they were fastened with the cables and things that went over on the bridge." If, when he whistled, the spars of the ship were in contact with the bridge, the draw could not have been swung to eastern; certainly not without destroying all masts of the ship and probably the ship itself. The captain of the Elliott, standing on the bridge, described his boat as "about halfway alongside the cradle of the bridge," and that the ship was then fast in the bridge. The man with the captain testified that the Martin passed into the bridge broadside *after* the whistles were blown.

The assistant engineer in charge, although he says he thought the draw might hit the smokestacks of the fire boat, says:

"The fire boat was under steam and I knew she could back up, so that was not any reason why I didn't open the draw."

The fact probably is that the fire boat, when the second attempt failed, shot off on the north side of the crib not far from its end. It was completely in control; was a powerful boat and was not in any danger of having her smokestacks struck by the turning of the draw, unless she voluntarily had stayed in a place of danger, if, indeed, she was in such a place; certainly not, if a competent person, careful not to let the draw go too fast in a heavy wind, had been in charge.

Why did the fire boat whistle at all if she did not intend that she, or the ship, or both, should be given the opportunity of going through the draw, and if the fire boat was in the pocket and in danger of her smokestack being knocked off by the turning of the draw, why, in such a situation, did she invite certain disaster to herself if her pilot knew, as he must have known, if it were true, that the draw could not turn eastwardly because the masts and spars of the ship were already in the bridge and falling by reason of contact with the draw itself. The inference is quite clear that when the signal was given the draw could have been turned eastwardly, if not both ways, and that if it could have been turned only westwardly that the fire boat could easily have gotten out of the way. In this state of the facts, it must be held that this reason for not turning the bridge is not a good reason, and not one which would have governed the conduct of a reasonably prudent and reasonably competent engineer. The fact is that the testimony of the assistant engineer in charge is so uncertain and unsatisfactory and contradictory that it is entitled to little, if any, weight. The opening of the draw was the only chance the ship had. She might not have gone through, but, on the other hand, it is highly probable that she would have done so. It does not appear that she had actually jammed between the crib and the pier at any time. During the night her stern had swung around under the draw, and the ship was only prevented from going through by such rigging as was not broken catching on it. So says her owner; and it is not without significance that the man with the captain of the Elliott said that after the second hold gave way "the Martin was about in a position to go through the south side of the draw; that is when our lines parted." It is true her anchors might have fouled the water pipe and held there, but her cables were 360 feet long, and she would have ridden at anchor that distance away from the bridge. The pipe might have broken, and the wind, continuing as it did until the next early morning and growing gradually less in force, might have carried her upstream some distance further, and she might have eventually come to grief.

In view of the broad admission by the city, in its answer, of its duty, and of the failure of the assistant engineer to open the draw when reasonable regard for the safety of the ship, and more especially when the statute expressly required him to open it, we are of opinion that it was incumbent upon the city to show that the injury to the ship could not have resulted from the failure to open the draw. In the ab-

sence of such showing we must and do find the city liable for negligence.

It follows that the judgment below must be reversed and the cause remanded, with instructions to enter a decree in accordance with this opinion, and to determine, by reference to a master, or otherwise, the loss to which the libelant is entitled.

BENTLEY v. TIBBALS.

(Circuit Court of Appeals, Second Circuit. March 9, 1915.)

No. 186.

1. COPYRIGHTS ⟸1—STATUTORY PROVISIONS.

The exclusive right of multiplying and vending copies of an intellectual work is of purely statutory origin.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 1; Dec. Dig. ⟸1.]

2. COPYRIGHTS ⟸86—INFRINGEMENT—EQUITABLE RELIEF.

An alien and subject of Great Britain, who secured in 1906 a copyright under the laws of the United States for a book entitled "Bentley's Telegraph Cyphers," and who subsequently published in London a larger book, entitled "Bentley's Complete Phrase Code," and secured for that work a British copyright, on the title page of which appeared the statement that the copy included the "Telegraph Cyphers" entered under act of Congress, and who, prior to and subsequent to 1910, sold copies of the later work in the United States printed from type set up in London, in violation of Copyright Act March 4, 1909, c. 320, 35 Stat. 1075, was not guilty of misconduct justifying denial to him of an injunction restraining the publication and selling of his book, copyrighted under the laws of the United States, within the maxim that one coming into equity must come with clean hands, for the maxim is limited to misconduct connected with the matter in litigation, and does not apply to misconduct which is unconnected therewith, for the unlawful importation and vending of the book is not so connected with the subject-matter of the suit as to justify the application of the maxim; the offense committed being against the United States, and one of which it alone may take cognizance.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. §§ 79, 80; Dec. Dig. ⟸86.]

3. EQUITY ⟸42—PLEADING OF DEFENSES—NECESSITY.

The maxim that one who comes into equity must come with clean hands need not be pleaded to be available, and where the evidence discloses the unconscionable character of a transaction, equity will of its own motion apply the maxim and deny relief.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 119, 120; Dec. Dig. ⟸42.]

4. COPYRIGHTS ⟸29—ACQUISITION—NOTICE.

The statutory requirements as to notice of a copyright must be strictly complied with, though a slight variance in the words, or in the order of the words, does not invalidate the notice, where the matter is substantially the same.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. §§ 29, 30; Dec. Dig. ⟸29.]

5. COPYRIGHTS ⟸63—ACQUISITION—ABANDONMENT.

An alien author, procuring a copyright in the United States of a work, and then publishing a larger work in the foreign country, including the

copyrighted work, and obtaining in the foreign country a copyright, with notice that the work includes the work copyrighted in the United States, may not restrain one from publishing the work published in the foreign country, where no one inspecting the foreign work can tell what portion of it has been taken from the work copyrighted in the United States, and what part is not.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 60; Dec. Dig. ⟸63.]

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

This cause comes here on appeal from a decree of the District Court of the United States for the Southern District of New York, entered on November 4, 1914, granting an injunction restraining the defendant from printing, publishing, and vending books or cyphers like or substantially like the book and cyphers copyrighted by plaintiff and entitled "Bentley's Telegraph Cyphers," and awarding plaintiff profits and damages.

George H. Gilman, of New York City, for appellant.
Henry M. Wise, of New York City, for appellee.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge. The bill of complaint is filed by an alien and subject of the king of Great Britain. The complainant resides and has his principal place of business in London, England. The defendant is a citizen of the United States, residing in the city of New York, state of New York, and does business under the name of the American Code Company.

Complainant alleges that he secured in 1906 a copyright under the laws of the United States for a book entitled "Bentley's Telegraph Cyphers," and that he is the sole and exclusive owner of the copyright in that work. He states that the defendant, without his license, and against his will, and in violation of his rights, and in infringement of his copyright, has unlawfully, wrongfully, and injuriously printed, published, and sold books containing telegraph cyphers which are exact fac simile copies of complainant's cyphers as contained in the copyrighted book. He seeks an injunction, an accounting of the profits, and damages.

[1] The English House of Lords, in Donaldson v. Becket, 4 Burr. 2408 (1774), decided that the exclusive right of multiplying and vending copies of an intellectual work is of purely statutory origin. And the Supreme Court of the United States rendered a similar decision in Wheaton v. Peters, 8 Pet. 591, 8 L. Ed. 1055 (1834). The earliest statute on the subject was passed in England in 1710. St. 8 Anne, c. 19. Connecticut passed a copyright act in 1783, which was entitled "An act for the encouragement of literature and genius." It recited in its preamble that:

"It is perfectly agreeable to the Principles of Natural Equity and Justice that every Author should be secured in receiving the Profits that may arise from the Sale of His works, and such Security may encourage Men of Learning and Genius to publish their Writings; which may do Honor to their Country and Service to Mankind." Acts and Laws of Conn. Jan. Sess. 1783.

By that act copyrights were to be granted for 14 years, with the benefit of a second term of the same length. The act was passed in January and Massachusetts passed a like act in March and New Jersey in May of the same year. St. 1782, c. 58. Virginia followed in 1785 (12 Henning's St. at Large, p. 30), and New York in 1786 (Laws 1786, c. 54). These acts were all passed prior to the adoption of the Constitution of the United States. But Congress, in the exercise of the power conferred upon it by the Constitution "to promote the progress of science and the useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries," passed the first federal statute on the subject on May 31, 1790. 1 Stat. p. 124, c. 15.

The act of 1790 granted copyright to such author only as may be "a citizen of the United States or resident therein," and this continued to be the policy of Congress in the subsequent acts passed upon the subject until 1891. Prior to that time, and beginning as early as 1837, Congress was asked many times to grant protection to foreign authors and it repeatedly refused to do so. In this respect the United States pursued for years a policy less liberal than Great Britain and other foreign nations.

By the act of Congress of March 3, 1891, the provisions of the copyright laws of the United States were extended to citizens and subjects of a foreign state or nation only when such state or nation permits to citizens of the United States of America the benefit of copyright on substantially the same basis as to its own citizens, or when such foreign state or nation is a party to an international agreement which provides for reciprocity in the granting of copyright, by the terms of which agreement the United States of America may at its pleasure become a party to such agreement. 26 Stat. p. 1106, c. 565. And the President of the United States, acting under the provisions of the act, issued a proclamation on July 1, 1891, in which he declared that, as citizens of the United States had the benefit of copyright in Great Britain on substantially the same basis as the subjects of that country, those subjects were entitled to the benefits given under the Copyright Act of Congress of 1891. 27 Stat. pp. 981, 982. And under the Copyright Act of 1909 the subjects of Great Britain are still entitled to the benefit of the privileges of copyright in the United States.

The act in section 8 declares that the author of any work made the subject of copyright by the act shall have copyright for such work under the conditions and for the terms specified in the act:

"Provided, however, that the copyright secured by this act shall extend to the work of an author or proprietor who is a citizen or subject of a foreign state or nation, only:

"(a) When an alien author or proprietor shall be domiciled within the United States at the time of the first publication of his work; or

"(b) When the foreign state or nation of which such author or proprietor is a citizen or subject grants, either by treaty, convention, agreement or law, to citizens of the United States the benefit of copyright on substantially the same basis as to its own citizens, or copyright protection substantially equal to the protection secured to such foreign author under this act or by treaty; or when such foreign state or nation is a party to an international agreement which provides for reciprocity in the granting of copyright, by the terms of

which agreement the United States may, at its pleasure, become a party thereto.

"The existence of the reciprocal conditions aforesaid shall be determined by the President of the United States, by proclamation made from time to time, as the purposes of this act may require." Act March 4, 1909, c. 320, 35 Stat. 1077 (Comp. St. 1913, § 9524).

In accordance with the provisions of the act the President of the United States on April 9, 1910, issued his proclamation declaring that under the conditions of the act the subjects of Great Britain were entitled to the benefits of the act. 36 Stat. pt. 2, p. 2685.

[2, 3] The complainant alleges in his bill that at the time he took out his copyright in the United States and subsequent thereto the kingdom of Great Britain and Ireland—

"grants by treaty, convention, agreement, and law to citizens of the United States the benefit of copyright on substantially the same basis as to its subjects, and copyright protection substantially equal to the protection secured to plaintiff under the provisions of the laws of the United States relating to copyrights."

The defendant does not deny the complainant's right to take out his copyright, or that he failed in doing so to comply in all respects with the requirements of the statute. It appears, however, that complainant, after having secured his copyright in the United States of "Bentley's Telegraph Cyphers," published in London in 1907 a larger book entitled "Bentley's Complete Phrase Code," which contained a substantial amount of the "Cyphers," together with additional matter, and secured for that work a British copyright, on the title page of which appeared the following statement:

"This Code includes the Telegraph Cyphers entered according to act of Congress in the year 1906, by E. I. Bentley in the office of the Librarian of Congress at Washington, D. C. All rights reserved. Entered at Stationer's Hall."

Copies of this work, both prior to and subsequent to 1910, he sold, not only throughout the United Kingdom, but in the United States and other foreign countries; and it is claimed that "Bentley's Complete Phrase Code" has acquired a recognized and enviable reputation both in England and the United States for reliability, usefulness, and economy in telegraphing or cabling. And it further appears that defendant is selling in the city of New York a book of the same size and color of binding as the complainant's work, and on the cover of which he has placed the words "Bentley's Complete Phrase Code" in gilt letters of the same size as are used in the English publication, and that it contains an exact and complete phrase code published by plaintiff, as to subject-matter, preface, specimens, and title page, with certain unimportant exceptions. It is this work which it is claimed infringes the copyright which complainant secured in this country in 1906 upon "Bentley's Telegraph Cyphers"; the essential features of the "Cyphers" being embodied in the work.

The defendant bases his defense upon the fact that complainant had never taken out a copyright in this country of "Bentley's Complete Phrase Code," and that complainant lost his United States copyright in the "Cyphers," so far as he had published them in "Bentley's Com-

plete Phrase Code." In other words, his claim is that he had a perfect right to copy an uncopyrighted book, and that complainant, by importing into this country "Bentley's Complete Phrase Code" and by selling it here, lost his right to be protected in this country on anything which it contained; that the publication of parts of a copyrighted book as parts of an uncopyrighted book involves an abandonment of the copyright.

The act of Congress provides that, during the existence of the American copyright in any book, the importation into the United States of any copies thereof, although authorized by the author or proprietor, is prohibited unless they have been printed from type set within the limits of the United States, or if the text be produced by lithographic process or photo-engraving process that has been wholly performed within the limits of the United States. Act 1909, §§ 15 and 31. And such prohibition existed both prior to and subsequent to 1910, when "Bentley's Complete Phrase Code" was imported. R. S. U. S. § 4956 (3 U. S. Comp. Stat. 1901, p. 3408; and U. S. Comp. Stat. 1911, p. 1482; Comp. St. 1913, §§ 9536, 9552). The evidence shows that the book was printed from type set in London. The importation of it into the United States by the complainant was in itself a wrongful act, and books so imported are liable to forfeiture under the law. In Harper & Bros. v. Donohue & Co. (C. C.) 144 Fed. 491, 499 (1905), it was held that a defendant who had imported a book published in England and not copyrighted there, and who reprinted it in this country, could not defend his infringement of the American copyright of the same matter by alleging that he had copied the uncopyrighted English book. As he had imported the work the importation of which was prohibited by statute, the court declared that he could not found legal rights on acts made unlawful by being prohibited.

Has the plaintiff been guilty of iniquity, so as to debar him from relief in a court of equity? It is a venerable maxim of equity that one who comes into equity must come with clean hands. A court which seeks to enforce on the part of the defendant uprightness, fairness, and conscientiousness also insists that, if relief is to be granted, it must be to a plaintiff whose conduct is not inconsistent with the standards he asks to have applied to his adversary. In other words, the plaintiff's own conduct must not have been characterized by a want of good faith or a violation of the principles of equity and righteous dealing.

In Edward Thompson Co. v. American Law Book Co., 122 Fed. 922, 59 C. C. A. 148, 62 L. R. A. 607 (1903), this court declared that an author who pirated a large part of his work from others would not be entitled to ask to have his copyright protected. This conclusion was based upon the general proposition that equity would refuse its aid to a suitor who had himself been guilty of the same inequitable conduct which he denounced in others. In that case complainant was the publisher of two encyclopædias of law, and defendant was engaged in compiling its Cyclopædia of Law and Procedure, two volumes of which had at that time appeared. The method adopted by complainant in preparing the articles for its publication was similar to that employed by defendants, but the latter had not copied a word of complainant's

text, and its editors had not been permitted to so much as open complainant's books.

Counsel stated upon the argument that complainant, having imported his English work into this country in violation of the act of Congress, is not in a position to invoke the aid of a court of equity in this suit. To this counsel for defendant replied that the defense of unclean hands must be affirmatively pleaded, and that plaintiff not only had not pleaded it, but had failed to urge it before the trial judge, and therefore could not have the benefit of this defense in this court. We think that both counsel for complainant and counsel for defendant have fallen into error. The maxim to which reference has been made need not be pleaded. When the evidence discloses the unconscionable character of a transaction, the court, whether the maxim is pleaded or not, will of its own motion apply the maxim. Dunham v. Presby, 120 Mass. 285 (1876); Teoli v. Nardolillo, 23 R. I. 87, 49 Atl. 489 (1901). We do not, however, think the maxim invoked is applicable to the case before the court. The maxim does not apply to every unconscientious act or inequitable conduct of the plaintiff. It it limited to misconduct connected with the matter in litigation, and does not apply to misconduct which is unconnected with the matter in litigation. 1 Pomeroy's Eq. Jur. § 399. It is true that complainant violated the law of the United States in importing the Phrase Code into this country and selling it here. But, as was pointed out in Kinner v. Lake Shore, etc., R. Co., 69 Ohio St. 339, 344, 69 N. E. 614, 615 (1903):

"A court of equity is not an avenger of wrongs committed at large by those who resort to it for relief."

It is not sufficient to debar a suitor for relief that he has committed an unlawful act, unless that unlawful act affects the matter in litigation. The offense which Bentley committed in wrongfully importing the work was not a wrong done to this defendant, or one which in any wise prejudiced him. It was an offense committed against the United States, and one of which it alone could take cognizance. The unlawful importation and vending of the book here is not so connected with the subject-matter of the present suit as to justify the application of the maxim to the plaintiff's suit.

The act of Congress of June 18, 1874 (18 Stat. 78, c. 301), provided as follows:

"Sec. 4962. No person shall maintain an action for the infringement of his copyright unless he shall give notice thereof by inserting in the several copies of every edition published, on the title-page or the page immediately following, if it be a book; or if a map, chart, musical composition, print, cut, engraving, photograph, painting, drawing, chromo, statue, statuary, or model or design intended to be perfected and completed as a work of the fine arts, by inscribing upon some * * * portion" of the face or front thereof, or on the face of "the substance on which the same shall be mounted, the following words, 'Entered according to act of Congress in the year ——— by A. B., in the office of the Librarian of Congress, at Washington.'"

The history of this provision seems to begin with the act of April 29, 1802 (2 Stat. 171, c. 36), which required every person seeking to obtain a copyright of a book to cause a copy of the record to be in-

serted at full length in the title page, or in the page immediately following the title of the book.

The act of February 3, 1831 (4 Stat. 436, c. 16), declared that no person should be entitled to the benefit of that act unless he should insert the prescribed words in the published copies of the book. And the act of July 8, 1870 (16 Stat. 198, c. 230), changed the language of the act of 1831, so as to declare that no person should maintain an action for the infringement of his copyright unless he inserted in the several published copies of the book the notice prescribed. The act of March 3, 1905 (33 Stat. 1000, c. 1432) providing for copyright for foreign publications makes the notice necessary only in all copies of such books sold or distributed in the United States. And the act of March 4, 1909, provides:

"That any person entitled thereto by this act may secure copyright for his work by publication thereof with the notice of copyright required by this act; and such notice shall be affixed to each copy thereof published or offered for sale in the United States by authority of the copyright proprietor, except in the case of books seeking ad interim protection under section twenty-one of this act." Comp. St. 1913, § 9530.

In Thompson v. Hubbard, 131 U. S. 123, 9 Sup. Ct. 710, 33 L. Ed. 76 (1889), the Supreme Court held that the requirement of the statute in regard to printing the prescribed notice of copyright in the book was a condition precedent to the perfection of the copyright. Bentley printed the notice in his American book, and no question is raised but that he did everything which the law required him to do in perfecting his original copyright. Whatever difficulty exists in this case grows out of what he did or failed to do afterwards.

[4] The courts hold that the statutory requirements as to notice must be strictly complied with, although a slight variance in the words, or in the order of the words, if the matter is substantially the same, will not invalidate the notice. See Burrow-Giles v. Sarony, 111 U. S. 53, 4 Sup. Ct. 279, 28 L. Ed. 349 (1884); Falk v. Schumacher (C. C.) 48 Fed. 222 (1891); Hefel v. Whitely Land Co. (C. C.) 54 Fed. 179 (1893); Bolles v. Outing Co., 77 Fed. 966, 23 C. C. A. 594, 46 L. R. A. 712; Id., 175 U. S. 262, 20 Sup. Ct. 94, 44 L. Ed. 156 (1899).

The only object of the notice required by the statute is to give notice of the copyright to the public. Thompson v. Hubbard, supra. It is given to the public to prevent any person from making himself subject to the penalty imposed for violation of the copyright without knowledge of the copyright. Sarony v. Burrow-Giles (C. C.) 17 Fed. 591 (1893). And when the notice is printed on the title page, or on the page immediately following it, of the book copyrighted, there is no possibility of the public being misled as to what matter is copyrighted. But where copyrighted matter is afterwards reprinted in an uncopyrighted work, the question of what notice should be given to the public of the copyrighted matter, if the copyright as to such republished matter is to be preserved, is a question of some difficulty.

[5] In United Dictionary Company v. Merriam Company, 208 U. S. 260, 266, 28 Sup. Ct. 290, 291 (52 L. Ed. 478) (1907), Mr. Justice Holmes, writing the opinion of the court, stated that it was in that case

"unnecessary to discuss nice questions as to when a foreign reprint may or may not be imported into the United States under the present provisions of our law." The facts of the present case do not impose that duty upon us, but they do impose the duty of determining the effect of a publication by the author in England of a substantial part of a work copyrighted by him in the United States, which English publication is imported and sold by him in this country. In the case the Supreme Court had before it the question whether an injunction could issue to restrain the infringement of copyright in "Webster's High School Dictionary." The American publishers of the work made a contract with English publishers under which it furnished them with electrotype plates of the work and they published it in England, omitting notice of the American copyright. The English work had a different title, "Webster's Brief International Dictionary," and had some other differences on the first 3 and last 34 pages, but otherwise was the same. The English publishers agreed not to import any copies of their work into this country, and also to use all reasonable means to prevent an importation by others. The United Dictionary Company, which did not own the American copyright, purchased in England and brought to this country a copy of the English work, and proposed to reprint it in the United States, claiming that the failure to insert in it notice of the American copyright forfeited the right of the owner of the copyright to bring suit for its infringement. The question was whether the omission of notice of the American copyright from the English publication, with the assent of the American owner, destroyed the latter's rights, under the act of Congress requiring notice to be inserted "in the several copies of every edition published." The court declared that the statute did not require notice of the American copyright on books published abroad and sold only for use there, and the decree of the court below sustaining the bill was affirmed. The court in the course of its opinion said:

"But it hardly would be argued that because no copyright had been taken out in England and therefore the reprint there was lawful, an American copyright could be defeated by importing the English book and reprinting from that."

In the case at bar it is sought to defeat the American copyright by importing an uncopyrighted English book containing a substantial part of the copyrighted American book. The book having been imported, defendant claims the right to reprint the entire English work. It is, however, to be noted that in the case at bar the importation and sale of the English work was not only not "without the consent of the owner," but was the act of that owner. Bentley, the owner of the American copyright, published the English book, and then imported and sold it in this country. By so doing he may have made those portions of his American book which he incorporated into the English book publici juris.

It is conceded that copyrighted matter may be included with uncopyrighted matter and not lose the protection of the statute. In Black v. Henry G. Allen Co. (C. C.) 42 Fed. 618, 9 L. R. A. 433 (1890), it was held that a book copyrighted in this country and published by the con-

sent and license of the author as a part of a foreign encyclopædia, the remainder of which was the production of aliens not protected by the copyright laws of the United States, did not thereby become public property, and could not be used without the consent of the author in a reprint of the Encyclopædia. The plaintiffs in that case, Adam and Charles Black, of Edinburgh, Scotland, were the publishers of the Encyclopædia Britannica, Ninth Edition. Three of the articles contained in the twenty-third volume of the Encyclopædia had been copyrighted in the United States. One of those articles had been written by Francis A. Walker, who had assigned to the Blacks the right to republish it in the "Encyclopædia Britannica, Ninth Edition" and not otherwise, "the said Walker retaining the right to print, publish, copy, and vend the said copyrighted book in every form and manner other than as a part of said Encyclopædia Britannica." Another of the articles had been written by Professor Alexander Johnston of Princeton University, who had made a similar assignment to the Blacks, and whose administrator was one of the plaintiffs in the suit.

The defendant printed an American edition of the Britannica, including the twenty-third volume, and as a part of it the matter copyrighted by Walker. Suit for infringement was brought by the Blacks and Walker. The court declared the question to be:

"Does the fact that the proprietor of a book copyrighted in this country has permitted an alien publisher of an encyclopædia to publish his book as part of such encyclopædia enable another person, without other authority, to publish in this country the copyrighted article as a part of his reprint of such encyclopædia, the remainder of which is publici juris?"

The court answered the question in the negative.

"If a poem or an essay for which a copyright had been secured in this country by the author, a citizen of the United States, should be permitted to be inserted in a volume of poems or essays, a part of which was publici juris, it could not reasonably be claimed that the author had thereby abandoned his copyright, and that his book could be reprinted, by itself, without his consent, in this country. It cannot be contended that the defendant would have a right to reprint Walker's or Johnston's treaties in separate volumes without the consent of the respective proprietors. Can, then, the poem or essay be printed, without the consent of the author, as a part of an unauthorized reprint of the entire volume?"

The defendant based his defense in that case on two grounds. The first was that the work as a whole was a foreign work, and the bulk of the volume publici juris; aliens then not being able to secure copyright in the United States. The second was that the insertion of Walker's and Johnston's articles was for the manifest purpose of preventing citizens of the United States from reprinting that volume, which would have been, but for those articles, publici juris, and therefore was an attempt which should not receive the favor of the court. Neither of these contentions found favor with the court. "If the author has a valid copyright," said Judge Shipman, "it is valid against any unpermitted reprint of his book; and the fact that his book is bound up in a volume with 50 other books, each of which is open to the public, is immaterial." The complainants obtained an injunction and an accounting. See Black v. Henry G. Allen Co. (C. C.) 56 Fed. 764

(1893). But the fact is not to be overlooked that in Black v. Henry G. Allen Co. the Blacks inserted in the several copies of every edition of the Encyclopædia the following notice printed on the title page.

"The following article in this volume is copyrighted in the United States of America, viz.:

"United States.

"Part I. History and Constitution. Copyright 1888 by Alexander Johnson.

"Part II. Physical Geography and Statistics. Copyright 1888 by Josiah D. Whitney.

"Part III. Political Geography and Statistics. Copyrighted 1888 by Francis A. Walker."

And in that part of the Encyclopædia in which the matter written by Professor Johnson appears there is inserted at the head of the article, "Copyright 1888 by Alexander Johnson." A similar notice is inserted at the head of the article written by Mr. Whitney and at the head of that written by President Walker. It was possible, therefore, for any one to tell on an inspection of the volume the exact copyrighted matter it contained, and there was no necessity to seek out the original American copyrighted book, and then compare it with the English publication, in order to ascertain what was and what was not copyrighted.

The case at bar involves a different state of facts. In this case the author of the English work is informed that it "includes the Telegraph Cyphers entered according to act of Congress in the year 1906, by E. L. Bentley in the office of the Librarian of Congress, at Washington, D. C." But no one, on inspecting the English work, can tell what portion of it has been taken from the Telegraph Cyphers and what part has not. That he can only ascertain by securing a copy of the Telegraph Cyphers and comparing it word by word with the Code. In other words, there is nothing which indicates to the reader what portion of the work is protected by American copyright and what is not, but he is left to ascertain that fact for himself by a verbal comparison, word for word, of the American and English publications.

The conclusion at which we have arrived is that the complainant is not entitled to an injunction to restrain the defendant from publishing and selling "Bentley's Complete Phrase Code" as prayed for in the bill. We have arrived at this conclusion, not because he reprinted the matter in England without taking out copyright in that country. That he could do without impairing any of his rights in the United States. But his difficulty arises out of the facts that in his English publication of the Code he embodied the Telegraph Cyphers, or a substantial part of that work, and imported the same into the United States, and sold it here, without any notice in it by which the public could know by inspection the copyrighted from the uncopyrighted matter.

In our opinion one who so embodies copyrighted with uncopyrighted matter that one reading his work cannot distinguish between the two has no right to complain if the book is republished by third parties. It is true that Bentley did insert the statutory notice in the Code by which he directed attention to the fact that the Telegraph Cyphers were included in the new publication, but the statutory notice was in-

tended by Congress to apply to publications as a whole—where the author is copyrighting the work as a whole. It was not intended by Congress that, by inserting notice in an uncopyrighted work that it contains copyrighted matter, the author could thereby prevent the republication by a stranger of the uncopyrighted book. In this case the English book covers more than 200 large pages and the original American work less than 40. One cannot ascertain what part of the English book contains the copyrighted matter taken from the American book, unless he is able to obtain from some source a copy of the original work and compare it letter by letter and word by word with the book subsequently published in England. This we do not think he is called upon to do. If one intends to assert his exclusive right to publish and sell copyrighted matter, he must so clearly indicate the matter in which he has the exclusive right that the public upon inspection can determine the question of its own rights therein. He cannot require the public to search the markets to find a copy of his copyrighted book, then purchase it, and then compare it word by word with the uncopyrighted work.

We do not decide in this case that Bentley has lost his copyright in the Telegraph Cyphers, so that any one is at liberty to reprint that book. Whether he has or has not lost that right is not before us and is not decided. What we do decide is that he has no standing in court to prevent by injunction the publication of the Complete Phrase Code, which is an uncopyrighted work, the whole of which the defendant was at liberty to reprint, including the matter taken from the Telegraph Cyphers, although copyrighted, as there is nothing in the work which indicates the copyrighted from the uncopyrighted matter.

The decree should be reversed, and the bill dismissed; and it is so ordered.

KLINGER v. HYMAN et al.

(Circuit Court of Appeals, Second Circuit. February 19, 1915.)

No. 204.

1. FRAUDULENT CONVEYANCES ⟸74—INTENT—CONSIDERATION.

Under the statutes prohibiting fraudulent conveyances, it is the fraudulent intent that invalidates the conveyance, and a conveyance made for full value may be invalidated, if made with actual fraudulent intent, though absence of consideration is the most usual evidence of fraudulent intent, and as a rule is sufficient to render the conveyance void against existing creditors.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 186–190; Dec. Dig. ⟸74.]

2. FRAUDULENT CONVEYANCES ⟸1—LAW GOVERNING—REAL PROPERTY.

The law of the state where real property is situated governs in determining whether a conveyance of such property is fraudulent.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 1; Dec. Dig. ⟸1.]

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3. FRAUDULENT CONVEYANCES ⟸1—LAW GOVERNING—PERSONAL PROPERTY.
A transfer of personal property by a debtor, valid under the law of the debtor's domicile or where the transfer was made, is valid wherever the property is, unless contrary to the policy of the law of that place.
[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 1; Dec. Dig. ⟸1.]

4. FRAUDULENT CONVEYANCES ⟸95—VOLUNTARY CONVEYANCE—CONVEYANCE TO WIFE.
Under 2 Birdseye's Rev. St. N. Y. (8th Ed.) p. 3058, prohibiting fraudulent conveyances of real property, and providing that the question of fraudulent intent is one of fact and not of law, and that a conveyance is not invalid solely because not founded on the valuable consideration, and 3 Birdseye's Rev. St. N. Y. (8th Ed.) pp. 2635, 2636, prohibiting fraudulent transfers of personal property, and providing that the existence of fraudulent intent is a question of fact and not of law, the mere fact that a voluntary conveyance was made by a husband to his wife does not invalidate it, and it will be sustained if, after close scrutiny, it is shown to be fair and honest, and not a contrivance to place the property beyond the reach of creditors, and is a settlement by the husband on the wife not disproportionate to his means, and which still leaves ample property with which to meet his debts.
[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 243–288; Dec. Dig. ⟸95.]

5. FRAUDULENT CONVEYANCES ⟸277—PRESUMPTIONS—VOLUNTARY CONVEYANCE.
Under the law of New York, a voluntary conveyance by one indebted at the time is presumptively fraudulent.
[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 799, 809–814; Dec. Dig. ⟸277.]

6. BANKRUPTCY ⟸303 — FRAUDULENT CONVEYANCE — SUFFICIENCY OF EVIDENCE—INTENT—VOLUNTARY CONVEYANCE.
In a suit by a trustee in bankruptcy to set aside voluntary conveyances made by the bankrupts to their wives nearly a year before the adjudication, evidence *held* not to rebut the presumption of fraudulent intent arising from such conveyances.
[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 Southern District of New York.

This cause comes here on an appeal from a decree of the United States District Court for the Southern District of New York. The facts are stated in the opinion.

Prince & Nathan, of New York City (Alfred B. Nathan, of New York City, of counsel), for appellants.

Feiner & Maass, of New York City (Herbert H. Maass and Ira Skutch, both of New York City, of counsel), for appellee.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge. The question in the case is whether certain voluntary transfers of property made by Isaac B. Hyman and Montague E. Hyman to their respective wives, Florence H. Hyman and Florence S. Hyman, are fraudulent and void as against Benjamin Klinger, the trustee in bankruptcy of Isaac B. and Montague E. Hy-

man. The court below found the transfers fraudulent, and ordered them canceled, annulled, and set aside. The claim of the trustee is that the transfers of the property were made at a time when the husbands were either insolvent or so involved that insolvency followed in the natural sequence of events and that the transfers were made with the intent to hinder, delay, and defraud their creditors. The facts are these:

The firm of I. B. Hyman & Co. started in business in the city of New York in 1901 and was engaged in the manufacture of waists and dresses. It began business on borrowed money and in a small way. But the business prospered, and in June, 1911, the assets amounted to about $142,000. In addition to the assets which the copartners owned as usual assets of business, they were the owners of an apartment house in West Eighty-First street, in the borough of Manhattan, in the city of New York, also of 15 lots at Long Beach, Long Island, and of 50 shares of the capital stock of the corporation of Bonwit, Teller & Co., of the par value of $5,000. The value of the apartment house, the Long Beach lots, and the Bonwit-Teller stock was estimated to be over $40,000.

The copartners in October, 1912, incorporated their business under the name of I. B. Hyman & Co., Incorporated, and transferred to the newly organized corporation all the assets of the partnership, except the specific properties above referred to, in exchange for the capital stock of the corporation, of the par value of $100,000. The corporation assumed payment of the partnership debts. After the business of I. B. Hyman & Co. was incorporated, there was no change in the management or in the business. Isaac Hyman, as formerly, had charge of the manufacturing of dresses and waists, and his brother Montague had charge of the selling. No new interests were taken into the corporation. Of the 1,000 shares of the capital stock, Isaac held 600 shares, and Montague held the remainder.

Two months later, on December 20, 1912, the two Hymans transferred to their wives the Long Beach lots, and on December 24, 1912, the apartment house in Eighty-First street, Manhattan, New York. And about the same time they also transferred to them the Bonwit, Teller & Co. stock. The deed dated December 20, 1912, was recorded January 2, 1913, and the deed dated December 24, 1912, was recorded on January 7, 1913. Two days thereafter, on December 26, 1912, Florence H. Hyman and Florence S. Hyman transferred the properties they had received from their husbands to the San Diego Realty Company, Incorporated, receiving in exchange therefor the entire capital stock of the corporation, of the par value of $10,000. The deeds, dated December 26, 1912, were recorded on January 8, 1913.

The affairs of the San Diego Realty Company were managed by the two Hymans and by Ellis Hyman, their father; the three constituting the board of directors and officers of the company. The wives were the sole stockholders, but they attended no meetings, knew nothing about the management of the property, and took no part in the conduct of its affairs. They never received the rents from the properties. The rents from the apartment house, it was stated by Ellis Hyman, who

was the agent for the property and collected the rents, were expended in repairs and payment of the taxes and the interest on the mortgages on the property. At no time were the wives consulted with reference to the steps to be taken in connection with the property of the corporation. Almost a year after the transfer of the property to the wives, and on November 11, 1913, Isaac B. and Montague E. Hyman were adjudicated bankrupts, individually and as members of the firm of I. B. Hyman & Co.

The reason given by Isaac B. Hyman for the incorporation of the business of the partnership, the transfer to the wives, and the transfer by the wives to a separate corporation, was that his health had been seriously impaired by an automobile accident. He testified that for a time he was unable to go to business at all for three months and that he could not walk. After a time he was able to be about, first on crutches and then with a cane. He had water on the knee. Both legs and his jaw had been injured. The ligaments of both sides of his right knee had been torn. Then, he testified, he got a swelling or enlargement of the spleen, and the consequence of that was that he could not lie down; therefore he could not sleep; it pressed upon his stomach, and he could not eat, and naturally he became very weak and very much out of condition, and he practically got nervous prostration from it, and lost weight and became "like a shadow," and could not attend to any business. Tuberculosis had developed before the accident occurred, and when that happened he testified that he felt as though his end might come at any time. That being the condition he found himself in, he went over the subject with his brother, and it was decided that in view of the precarious state of his health it was best to incorporate the business and that they should turn over certain properties to their wives. It was also thought wise to form the San Diego Realty Company, and to that company the wives transferred all the properties they received from their husbands. The reason assigned by the brothers for the creation of the San Diego Realty Company was that the wives were not business women and knew nothing about business, and it was thought advisable, therefore, to create a corporation to manage the properties for the women.

The corporation began to lose money in February, 1913, and the explanation given of the failure by Isaac Hyman is interesting. The main part of the business from 1905 to 1913, consisted in the manufacture of lingerie and cotton dresses, lace trimmed, although waists were also manufactured. The lingerie dress business was at its height in 1911 and 1912, but in 1913 lingerie dresses ceased to be longer in style. "In other words," he testified, "overnight, women did not want any more lingerie dresses. The character of the business changed. Whereas our big months were from February and until July 1st, instead of doing a big business, our business fell off 50 per cent. for the whole year. In other words, our business for the spring season fell off about 75 per cent. So that was absolutely the reason I. B. Hyman & Co., Incorporated, started to lose money in February, 1913. And that eventually led up to the financial troubles and difficulties it had. There was no more lingerie dresses."

It is admitted that the transfers to the wives were voluntary, and that the grantors were indebted at the time the transfers were made. At the trial below it was impossible to ascertain the exact amount of the indebtedness, the partnership books of account having disappeared. Isaac Hyman testified that on July 1, 1912, several months prior to the incorporation of the business and the transfer to the wives, the assets of the firm amounted to $100,000 above the liabilities, and on July 1, 1913—which was several months after the incorporation and the transfer to the wives—the assets above the liabilities were somewhere between $16,000 and $20,000. Asked how much commercial paper he and his brother were personally and individually liable for at the time they transferred the property to their wives, he answered that he did not know exactly.

Isaac Hyman testified that at the time the properties were transferred no action had been brought by any creditor and that no suits were threatened by any creditor; as bills matured they were paid; debts owing by the partnership or the corporation at the time of the transfer of the property by him and his brother to the wives were paid. But the evidence leads rather to the conclusion that the "payments" to which he refers were not payments in fact, but were rather renewals and extensions of the prior existing indebtedness.

The Hymans place stress upon the fact that a month prior to the transfers of the property their financial statement showed that, exclusive of the property transferred their assets amounted to $136,000, or excluding the good will of the business to about $97,000, and their liabilities amounted to about $36,000, leaving a surplus of not less than $50,000, and that six months after the transfers the statement showed assets, exclusive of good will, of $63,000, and liabilities of $46,000, leaving a surplus of $17,000. But the worth of these financial statements, both those made before the transfers and those made after the transfers and prior to the bankruptcy, depends upon the value placed by the Hymans themselves on the merchandise they allege they possessed at the time the financial statements were made.

It ought to be added that the testimony discloses the fact that within seven months of the time the transfers were made a business which is alleged to have been prosperous and successful, with a solvency of over $60,000, was reduced to bankruptcy, with liabilities in excess of $40,000, and the assets turned over to the trustee and subsequently sold realized a sum not in excess of $6,000; the creditors receiving only a 5 per cent. dividend.

Montague E. Hyman was in court ready to testify, and was not put on the stand in order to save time. That fact appears in the record, and the further fact that it was agreed by counsel on both sides that he would corroborate his brother's testimony.

Too much reliance cannot be placed on the testimony of Isaac Hyman. He testified that at the time the properties were transferred to the wives, or about that time, he notified the assistant cashier of the Second National Bank, who was its credit man, of the transfers of the property to the San Diego Realty Company, and that all the real property and stocks, except the stock of I. B. Hyman & Co., Incorporated,

had been so transferred. This bank was the largest individual creditor of the Hymans with a claim of $17,000. But this conversation never took place at the time Isaac said it did, if the testimony of the assistant cashier of the bank is believed. He testified that after the transfers had been made Isaac represented that among the assets he and his brother possessed was the real estate in question, and that the bank had no knowledge to the contrary until August, 1913, when Isaac stated that he could not meet his obligations.

There was a mortgage on the Eighty-First street apartment house in favor of Ellis Hyman, who is alleged to have bought the mortgage from one Jennie Hawkins, probably in 1911. Ellis foreclosed the mortgages, and the property was sold at public sale, and there were no bidders, so that he bought it in to protect himself, and the title is now vested in him. The Long Beach lots were also bought in by Ellis, having been sold by the sheriff on judgments obtained by him for moneys he claimed to have advanced to the San Diego Realty Company to take care of its properties. It was a little over a year from the time that the San Diego Realty Company was organized and took over the properties before these judgments were entered. And the Bonwit, Teller & Co. stock was sold by the San Diego Realty Company, and the entire proceeds of $2,500 were transferred also to Ellis Hyman in part payment of an alleged indebtedness to him. The result is that the title to all the properties which the husbands transferred to the wives, and which this proceeding was instituted to set aside and avoid, is now of record in Ellis Hyman, the father of Isaac and Montague; and the defendants Florence H. and Florence S. and the San Diego Realty Company have appeared and disclosed hands empty of any proceeds of the conveyances which the trustee is seeking to annul. And Ellis is the one member of the Hyman family who was not joined in the present suit. If the action of the court below is affirmed, and the transfers are annulled, another action will be necessary to reach the assets in the hands of Ellis Hyman, if the trustee should be advised by his counsel that in his opinion Ellis Hyman is not a bona fide purchaser for value and without notice and is not entitled to retain in his possession the assets which reached his hands.

Creditors have always constituted a favored class. The preservation of their rights has been a fundamental policy of all enlightened nations. Under Roman law a debtor who failed to pay his debts was liable to be put to death, or to be sold into foreign slavery beyond the Tiber. Under the law of England imprisonment for debt was the fate of those who incurred debts and failed to discharge them. No step was taken in England to relieve persons from liability to imprisonment for debt until the act of 1808 was passed exempting judgment debtors from imprisonment for debts not exceeding £20. Other statutes followed in 1844, 1845, and 1846. And it was not until 1869 that imprisonment for debt was abolished altogether in that country, except in the case of dishonest debtors. In this country, also, it was usual under the early laws to imprison debtors. The early laws of New York, those of England, and those of other states in this country, permitted their imprisonment. But the act of February 13,

1789 (Laws 1789, c. 24), amended March 10, 1791 (Laws 1791, c. 29), provided for the discharge of debtors imprisoned on execution for an amount not exceeding £1,000 upon their executing an assignment of their property for the benefit of the creditors who charged them in execution. In 1819 (Laws 1819, c. 101) an act was passed which provided for the exoneration of insolvent debtors arising ex contractu, upon a surrender of all their property for the benefit of their creditors. But the noted Stilwell Act of 1831 (Laws 1831, c. 300) seems to be regarded as the act which finally abolished in that state imprisonment for debt based on contract when the defendant was innocent of fraud. See People ex rel. Levine v. Shea, 201 N. Y. 474, 94 N. E. 1060 (1911). However, even now debtors may still be imprisoned for debt in New York in a variety of circumstances. See sections 549 and 550 of the Code.

In 1839 (5 Stat. 321, c. 35) Congress enacted that no person should be imprisoned for debt in any state on process issuing out of a federal court, where by the laws of the state imprisonment for debt had been abolished; and where imprisonment for debt was allowed under conditions and restrictions, then it should be allowed upon federal process only under the same conditions and restrictions.

The policy of the law of England on the subject is disclosed in the language of Justice Hyde, in Manby v. Scott, 1 Mod. 132 (1659), in which he said:

"If a man be taken in execution and lie in prison for debt, neither the plaintiff at whose suit he is arrested, nor the sheriff who took him, is bound to find him meat, drink or clothes, but he must live on his own, or on charity of others; and if no man will relieve him, let him die in the name of God, says the law, and so say I."

And so it was under the law of New York, which provided that he was to be—

"safely kept in secure custody in the manner prescribed by law, at his own expense, until he should satisfy the execution or be discharged according to law."

The abolition of imprisonment for debt was accomplished with difficulty, encountering the opposition of many eminent and influential persons, who believed the change threatened the commercial prosperity of the country.

The Great Charter of King John provided that no freeman should give or sell away his lands, so that no residue would remain to the lord of the fee out of which the service pertaining to the fee might be enforced. And in 1376 the Parliament of England began to legislate on the subject of fraudulent conveyances, enacting St. 50 Edw. III, c. 6, which was followed three years later by St. 2 Rich. II, c. 3. In 1487 St. 3 Henry VIII, c. 4, was passed. Then in 1570 there was enacted the most celebrated and important of the statutes against fraudulent conveyances, St. 13 Eliz. c. 5, perpetuated in 1587 by St. 29 Eliz. c. 5. In the United States the statute of 13 Eliz. has in practically all the states been adopted or re-enacted in more or less similar terms. Mr. Justice Story says "that it has been universally adopted in America as the basis of our jurisprudence upon the sub-

ject." Story's Eq. Jur. § 353. And Chancellor Kent, in Sands v. Codwise (1808) 4 Johns. (N. Y.) 536, 596, 4 Am. Dec. 305, writing of the statute, says that it is "only in affirmance of the principles of the common law." As the Supreme Court of Alabama expressed it in an early case, the common law enjoins integrity as a virtue paramount to generosity. Planters', etc., Bank v. Walker, 7 Ala. 926, 946 (1845).

[1] Under the statutes it is the fraudulent intent which invalidates the conveyance. A transfer of property, even though there had been a full, adequate, and valuable consideration, may be void under the statutes, if it is effected with fraudulent intent. Twyne's Case, 3 Coke, 212. But the most usual evidence of a fraudulent intent is found in the absence of consideration. And it has been laid down as a rule that a voluntary alienation of property is, in general, void as against creditors. There are two requisites to the validity of the transfer: (1) It must be made in good faith. (2) It must be for a good consideration, which the courts have construed to mean a valuable consideration. Hence a transfer to a wife or child, however meritorious it may be, is not valid as against creditors, if it is made under circumstances that would invalidate it if it had been made to a stranger. For a voluntary transfer to a stranger, and to a wife as well, may under some circumstances be sustained. Any one may make a gift, if the value of that which is given bears such an insignificant proportion to his estate that his remaining property is ample to discharge his debts. The gift is valid—

"if the donor has, at the time, the pecuniary ability to withdraw the amount of the donation from his estate without the least hazard to his creditors, or in any material degree lessening their prospects for payment." Jenkyn v. Vaughan, 3 Drew, 425; Kent v. Riley, L. R. 14 Eq. 190.

The law recognizes legal obligations to creditors as superior to the moral obligations one is under to a wife or children. That one engaged in hazardous pursuits owes a sacred duty to his wife and children to set apart a reasonable portion of his estate to secure them against the ills of poverty is not denied. But in the discharge of the moral obligation to wife and children one is not at liberty to forget that he is under legal as well as moral obligations to his creditors. The law will not allow him to hinder, delay or defraud the latter. It is not that the law is oblivious of the moral obligations due from a husband to his wife. It is only that in discharging them he must not be dishonest.

In Bispham's Equity, § 247, the law is stated as follows:

"The extent to which a man has the power to make a voluntary disposition of his property is frequently called into question in the cases of settlements made by a husband upon his wife. There are many decisions to the effect that a gift from a husband to a wife, to be sustained even as against subsequent creditors, must be reasonable—that is, it must bear a just and fair proportion to the actual amount of his property and to his condition and prospects in life. A man cannot denude himself of all or a greater part of his means for the purpose of making a gift to his wife. To allow him to do so would be to open a wide door to fraud, for by putting his property in his wife's name he might practically secure the means of support for himself, and at the same time obtain for his property a complete immunity from his liabilities. What the amount of this reasonable provision should be seems to be a matter of some little doubt."

In Seitz v. Mitchell, 94 U. S. 580, 24 L. Ed. 179 (1876), the Supreme Court of the United States said of a conveyance by a husband to his wife, where the wife claimed to have purchased the property from her husband, and the creditors of the husband sought to reach it for payment of his debts:

"There is nothing to show that the wife had any opportunity for obtaining money except from her husband. Purchases of either real or personal property made by the wife of an insolvent debtor during coverture are justly regarded with suspicion, unless it clearly appears that the consideration was paid out of her separate estate. Such is the community of interest between husband and wife; such purchases are so often made a cover for a debtor's property, are so frequently resorted to for the purpose of withdrawing his property from the reach of his creditors and preserving it for his own use, and they hold forth such temptations for fraud, that they require close scrutiny. In a contest between the creditors of the husband and the wife, there is, and there should be, a presumption against her, which she must overcome by affirmative proof. Such has always been the rule of the common law; and the rule continues, though statutes have modified the doctrine that gave to the husband absolutely the personal property of the wife in possession, and the right to reduce into his possession and ownership all her choses in action. Authorities to this effect are very numerous."

In Schreyer v. Scott, 134 U. S. 405, 409, 10 Sup. Ct. 579, 33 L. Ed. 955 (1890), the court had occasion to pass upon the validity of a conveyance made by a husband to his wife, and it said:

"In determining the rules applicable to such transactions, reference should be had, not only to the decisions of this court, but also to those of the courts of New York, where the parties lived and the transactions took place."

The question involved in that case related to the right of a subsequent creditor to attack the validity of a voluntary conveyance made by a husband to his wife. In its opinion the court considered the case of Todd v. Nelson, 109 N. Y. 316, 16 N. E. 360, and cited several other of the New York cases to which we find it unnecessary to refer. The same court in Smith v. Vodges, 92 U. S. 183, 23 L. Ed. 481 (1875), said:

"In order to defeat a settlement made by a husband upon his wife, it must be intended to defraud existing creditors, or creditors whose rights are expected shortly to supervene, or creditors whose rights may and do so supervene; the settler purposing to throw the hazards of business in which he is about to engage upon others, instead of honestly holding his means subject to the chance of those adverse results to which all business enterprises are liable."

[2, 3] In McGoon v. Scales, 9 Wall. 23, 27, 19 L. Ed. 545 (1889), the Supreme Court declared that:

"It is a principle too firmly established to admit of dispute at this day that to the law of the state in which land is situated must we look for the rules which govern its descent, alienation, and transfer, and for the effect and construction of conveyance."

If there is a legal proposition which is supported by a long and unbroken line of authorities, which no one assumes to question anywhere, it is that the lex loci rei sitæ must determine the effect to be given to a conveyance of lands. And a transfer of personal property valid by the law of the domicile of the debtor, or of the place where it is made, is a valid transfer of the property wherever it is situated, unless it is made in conflict with the settled policy of the law of the place where

the property is situated. Green v. Van Buskirk, 5 Wall. 307, 18 L. Ed. 599 (1866); Frank v. Bobbitt, 155 Mass. 112, 29 N. E. 209 (1891); Ward v. Connecticut Pipe Mfg. Co., 71 Conn. 345, 41 Atl. 1057, 42 L. R. A. 706, 71 Am. St. Rep. 207 (1899); Keller v. Paine, 107 N. Y. 83, 13 N. E. 635 (1887).

In the case at bar, both the real and personal property transferred were situated in the state of New York, and the domicile of the debtors was likewise in that state, and there it was that the transfers were executed. The validity of the transfers must be determined, therefore, by the law of New York.

[4] The Revised Statutes of the state of New York provide as follows, concerning transfers of real property:

"A conveyance or assignment in writing or otherwise, of an estate, interest or existing trust in real property or the rents or profits issuing therefrom, or a charge on real property, or on the rents or profits thereof, made with the intent to hinder, delay or defraud creditors, or other persons, of their lawful suits, damages, forfeitures, debts or demands, or a bond or other evidence of debt given, suit commenced or decree or judgment suffered, with the like intent, is void as against every person so hindered, delayed or defrauded." Birdseye's Revised Statutes, vol. 3 (8th Ed.) p. 3058.

And:

"The question of fraudulent intent in a case arising under this article, shall be deemed a question of fact and not of law; and a conveyance or charge shall not be adjudicated fraudulent as against creditors, purchasers or encumbrances, solely on the ground that it was not founded on a valuable consideration." Id. vol. 3, p. 3058.

The provision concerning transfers of personal property is as follows:

"Every transfer of any interest in personal property or the income thereof, made with the intent to hinder, delay or defraud creditors or other persons, of their lawful suits, damages, forfeitures, debts or demands, and every bond or other evidence of debt given, suit commenced, or decree or judgment suffered with such intent, is void as against every person so hindered, delayed or defrauded." Id. vol. 2, p. 2635.

And:

"The question of the existence of fraudulent intent in cases arising under this article, is a question of fact and not of law." Id. vol. 2, p. 2636.

The mere relationship of husband and wife between the parties to a transfer is not sufficient ground for setting aside a conveyance. Childs v. Connor, 48 How. Pr. (N. Y.) 513 (1875). But transactions between husband and wife to the prejudice of the husband's creditors will be closely scrutinized by the courts in New York, as elsewhere, to see that they are fair and honest and not mere contrivances resorted to for the purpose of placing the husband's property beyond the reach of creditors. White v. Benjamin, 150 N. Y. 258, 44 N. E. 956.

In Carr v. Breese, 81 N. Y. 584 (1880), the Court of Appeals declares that a husband is authorized to make a settlement of a suitable amount of his property upon his wife if he has no dishonest purpose in view. In that case a husband, having property worth from $21,000 to $22,000 and doing a prosperous business, purchased and caused to be conveyed to his wife premises costing $16,300, of which sum

$10,600 was paid by him by mortgage on his real estate and the balance secured by a mortgage on the premises. The settlement was upheld by the court as one not unsuitable or disproportionate to his means. He continued prosperous for three years after this settlement upon the wife, was in good credit and standing financially, continued in the same business in which he had previously been engaged, and incurred no extraordinary or unusual risks. Reverses came unexpectedly, and he had paid every debt in full which he had contracted before the title to the property was vested in his wife. The deed to his wife had been placed at once upon the public records. "Under such circumstances," said the court, "the presumption of any fraudulent intent is rebutted, and it is manifest that he had done no more than any business man has a right to do, to provide against future misfortune when he is abundantly able to do so."

[5] In 1892 the Court of Appeals in Kain v. Larkin, 131 N. Y. 300, 307, 30 N. E. 105, in an opinion written by Chief Judge Earl, held that under the express terms of the New York statute it was not sufficient to condemn a conveyance of land as a fraud upon creditors that it was not founded upon a valuable consideration. A person assailing such a conveyance, the court declared, must go further and show by other evidence that it was made with the fraudulent intent, condemned in the statute.

"An owner of real estate can make a voluntary settlement thereof upon his wife and children without any consideration," said the court, "provided he has ample property left to satisfy all the just claims of his creditors. If the grantor remains solvent after the conveyance and has sufficient property left to satisfy all his just debts, then the conveyance, whatever his intention was, cannot be a fraud upon his existing creditors; and when a judgment creditor assails a conveyance made by the judgment debtor, he cannot cast upon the grantee the onus of showing good faith and of establishing that the grantor was solvent after the conveyance by simply showing that the deed was not founded upon a valuable consideration. But the person assailing the deed assumes the burden of showing that it was executed in bad faith, and that it left the grantor insolvent and without ample property to pay his existing debts and liabilities; and so it has been repeatedly held."

The above case was decided in March, and in June of the same year the question was before the court again in Smith v. Reid, 134 N. Y. 568, 31 N. E. 1082, and no decision was rendered until October of that year. The subject presumably received, along with the other questions involved, careful consideration. The court in its opinion does not refer to the case of Kain v. Larkin, but announces a conclusion which is flatly contrary to that which it declared in the former case.

"But the rule is well settled," it declares, "that a voluntary conveyance by one indebted at the time is presumptively fraudulent. Seward v. Jackson, 8 Cow. [N. Y.] 406; Erickson v. Quinn, 47 N. Y. 410; Dunlap v. Hawkins, 59 N. Y. 346; Cole v. Tyler, 65 N. Y. 78."

In 1912 the question came again before the Court of Appeals in Kerker v. Levy, 206 N. Y. 109, 99 N. E. 181, and in a brief per curiam opinion the court declared that it held that:

"The rule stated in Smith v. Reid, 134 N. Y. 568 [31 N. E. 1082], that a voluntary conveyance by one indebted at the time is presumptively fraudulent as against existing creditors is the law of this state, rather than the rule laid down in Kain v. Larkin, 131 N. Y. 300 [30 N. E. 105]."

[6] As a voluntary conveyance by one indebted at the time is, under the law of New York, prima facie fraudulent, the burden was on the defendants to rebut the presumption of fraud. The court below had the benefit of seeing and hearing the witnesses and could judge of their credibility. It came to the conclusion that the transfers were designed to put the property of the Hymans beyond the reach of their creditors. It stated it as "an irresistible conviction" that the incorporation of the different companies was a scheme on the part of the Hymans to render more plausible their individual transactions with their respective wives. It declared that it—

"was a palpable attempt on the part of the Hymans to use their wives as an anchor to protect their families in case of probable insolvency and to throw the hazards and risks of their business upon those who might and did credit them."

We see no reason for believing that the court misjudged the witnesses and came to a wrong conclusion concerning their intent. In our opinion the defendants have not sustained the burden of proof imposed upon them by the law.

The testimony in the case, instead of rebutting the presumption of fraud arising from its voluntary character, has produced a contrary impression. It is true Isaac B. Hyman has testified to the absence of fraudulent intent, and the deeds were at once recorded, and it is represented that sufficient property was retained to pay all creditors and leave a surplus. But the circumstances are so very suspicious, the failure followed so suddenly upon the transfers, the assets realized so little, and the fact that the testimony of Isaac is flatly contradicted in a material and very important matter impairs confidence in his testimony as a whole, including the financial statements upon which defendants so much rely, and lead to the conviction that the conclusion reached in the court below should not be disturbed.

The conveyances assailed by the trustee were properly set aside, as having been made with intent to hinder, delay, and defraud the creditors.

Decree affirmed.

WHITCOMB v. SHULTZ.

(Circuit Court of Appeals, Second Circuit. April 13, 1915.)

No. 34.

1. COURTS ⊜342—UNITED STATES COURTS—EQUITABLE DEFENSE IN ACTION AT LAW.

The defense of fraud inducing a contract under seal sued on in a federal court at law is not available, and defendant must resort to equity, in the absence of statute allowing equitable defenses.

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

Equitable defenses in actions at law, see note to Standard Portland Cement Corp. v. Evans, 125 C. C. A. 5.]

2. JUDGMENT ⊂⊃403—EQUITABLE RELIEF—RESTRAINING ENFORCEMENT.
A court of equity has jurisdiction in a proper case to restrain proceedings at law, and the jurisdiction may be exercised at any stage of the case, and an injunction may be issued to stay a trial or prevent execution or assignment of the judgment.
[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 764; Dec. Dig. ⊂⊃403.]

3. JUDGMENT ⊂⊃430, 443 — EQUITABLE RELIEF — RESTRAINING ENFORCEMENT.
A court of equity will not interfere with a judgment at law, unless complainant has an equitable defense unavailable at law, or unless he has a good defense at law of which he was prevented from availing himself by fraud or accident, but not by his own or his agent's negligence.
[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 785, 809, 836, 838; Dec. Dig. ⊂⊃430, 443.]

4. JUDGMENT ⊂⊃443—EQUITABLE RELIEF—FRAUD.
Equity will grant relief against a judgment for fraud which relates to the procuring of it, and not to the transaction forming the basis of it.
[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 785, 836, 838; Dec. Dig. ⊂⊃443.]

5. JUDGMENT ⊂⊃403—RESTRAINING ENFORCEMENT—EQUITABLE JURISDICTION.
Where a defense to an action at law on which a judgment was rendered was not available to defendant, but the defense was available in equity, defendant, not guilty of laches, may resort to equity to restrain the enforcement of the judgment.
[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 764; Dec. Dig. ⊂⊃403.]

6. EQUITY ⊂⊃11—JURISDICTION—GROUNDS—FRAUD.
Fraud is an original ground of equitable jurisdiction, and material fraudulent representations are a good defense in equity.
[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 21, 23, 24; Dec. Dig. ⊂⊃11.]

7. CONTRACTS ⊂⊃98—FRAUD—REMEDIES.
One induced by material fraudulent representations to enter into a contract has ordinarily several remedies, including the right to defeat enforcement of the contract when sued on in a court of law, unless the contract relied on is under seal, in which case the defense of fraud is available only in equity, in the absence of statute allowing equitable defenses in actions at law.
[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 447; Dec. Dig. ⊂⊃98.]

8. COURTS ⊂⊃342—EQUITABLE DEFENSES IN ACTION AT LAW.
A defendant in an action at law on a specialty may not, prior to Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1087) § 274b, as added by Act March 3, 1915, providing that in actions at law equitable defenses may be interposed by answer, plea, or replication, without filing a bill on the equity side of the court, interpose a defense of fraudulent representations.
[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 912, 913; Dec. Dig. ⊂⊃342.]

9. PRINCIPAL AND SURETY ⊂⊃39—CONTRACT WITH SURETY—MISREPRESENTATION.
A contract of suretyship is not one requiring the utmost good faith of the creditor or obligee, who need not communicate every material fact which would in the ordinary course of things affect the mind of the other party in entering into the contract, and need only use good faith toward a surety pending the negotiations, and representations forming a ground

for not enforcing the contract must in general relate to a material fact constituting an inducement to the contract, and it must be the very ground on which the transaction took place, though it is not necessary that it should have been the sole cause.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 82–85; Dec. Dig. ⟸39.]

10. PRINCIPAL AND SURETY ⟸39—CONTRACT WITH SURETY—MISREPRESENTATION.

A sales company contracted with a manufacturing company for the manufacture by the latter of machines. A stockholder of the sales company guaranteed performance by it of its part of the contract. Misrepresentations inducing him to make the contract related to the manufacturing company. *Held*, that the misrepresentations were immaterial, and did not relieve the stockholder from liability.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 82–85; Dec. Dig. ⟸39.]

11. PRINCIPAL AND SURETY ⟸41—LIABILITY OF SURETY—FRAUD.

That a contract has been obtained by fraud justifies a surety's release from his guaranty of performance of the contract by a party thereto, though the party does not sue to annul the contract, but the fraud must relate to material matters.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 78–81; Dec. Dig. ⟸41.]

Ward, Circuit Judge, dissenting.

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

This cause comes here on appeal from a judgment entered upon an order made by the United States District Court for the Southern District of New York, which order was filed August 7, 1914, and which dismissed the bill of complaint on the ground that it did not state a valid cause of action in equity.

James A. Whitcomb was and is a citizen of the state of Oklahoma. George S. Shultz was and is a citizen of the state of New York. The Robertson Sales Company was and is a corporation existing under the laws of the state of New Jersey, as is the Great American Automatic Vending Machine Company. The Robertson Sales Company, hereinafter referred to as the Sales Company, was engaged in the exploitation of certain automatic vending machines which were manufactured for it by one Plumb, who is described as a large and experienced manufacturer of machines operated by clockwork. The machines were manufactured for the Sales Company under certain patents held by it. The machines manufactured by Plumb are said to have been in every way satisfactory, but, on account of Plumb's inability to make deliveries as rapidly as the necessities of the Sales Company's business required, negotiations were entered into with the Great American Automatic Vending Machine Company, hereinafter referred to as the Machine Company, looking to the manufacture of the machines for the Sales Company. On December 3, 1908, the Sales Company and the Manufacturing Company entered into a contract for the manufacture of 10,000 of the machines for the sum of $46,000. That contract contained the following provision:

"Now, therefore, this agreement witnesseth: That for and in consideration of the payment to be hereinafter made by the party of the first part and covenants entered into by the party of the first part, the party of the second part does hereby agree to manufacture for the party of the first part ten thousand (10,000) vending machines like to the model deposited by the party of the first part with the party of the second part, on which patents are pending as aforesaid (except such alterations as have been agreed upon as set forth

below) and all of the dies, patterns, and special tools necessary for the purpose of manufacturing to be completed as follows."

The day after the above contract was signed, the plaintiff, Whitcomb, was informed that, as the Sales Company was a comparatively new company, some of the directors of the Manufacturing Company desired a guaranty, and he was asked, being a stockholder and officer of the Sales Company, to execute an assurance or guaranty that the Sales Company would carry out the terms of the contract. Thereupon the plaintiff executed the following agreement under seal: "In consideration of the sum of one dollar ($1) to me in hand paid by the Great American Automatic Vending Machine Company, and in further consideration of the making of said contract, I do hereby promise and agree to and with them that the within-named Robertson Sales Company, party of the first part, will faithfully perform and fulfill everything in the foregoing agreement on its part and behalf to be performed and fulfilled at the time and in the manner in said contract provided, and I do hereby waive and dispense with any demand upon the said Robertson Sales Company, and any notice of nonperformance on its part."

The Sales Company, subsequently professing dissatisfaction with the manner in which the Manufacturing Company performed the contract, refused to pay for certain machines which had been turned over to it by the latter company. That company thereupon executed to George S. Shultz, the defendant herein, an assignment of its claim. Shultz brought an action at law to recover the damages sustained by the Manufacturing Company. The case coming on for trial, the jury found that the Sales Company was indebted to Shultz, assignee, in the amount of $24,607.95, for which a judgment was rendered against the plaintiff herein as surety.

The plaintiff thereupon commenced this suit in equity in which he asked for an injunction to restrain Shultz from enforcing his judgment or from assigning it. He also asks that a decree be entered for the surrendering up and canceling of the contract of suretyship, and that he be discharged from all liability thereon.

Joseph M. Gazzam, of New York City (Charles F. Carusi, of Washington, D. C., Walter B. Grant, of Boston, Mass., and Joseph M. Gazzam, of New York City, of counsel), for appellant.

Kellogg & Rose, of New York City (Abram J. Rose and Phillip M. Brett, both of New York City, of counsel), for appellee.

Before COXE, WARD, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge (after stating the facts as above). [1] The plaintiff has come into a court of equity to obtain the cancellation of a contract of suretyship into which he entered, and he asserts that he is entitled to be discharged from all liability therein because of the fraud practiced upon him in inducing him to enter into the aforesaid contract. And as an action at law was brought against him on the contract, and a judgment was obtained in the amount of $24,607.95, which this court affirmed in 215 Fed. 75, 131 C. C. A. 383 (1914), an injunction is sought to restrain the defendant from enforcing it. At the trial of the law action the defendant in that action, who is plaintiff in this, offered evidence tending to show the alleged false and fraudulent representations upon which he now relies, but the evidence was excluded by the trial judge. As the contract was under seal, the defense was of an equitable character, and could not be interposed in an action at law brought in a federal court. The plaintiff has therefore come into the equity court to obtain that relief from the contract which he thinks he is entitled to and which was denied to him at law.

The representations upon which he relies, and which he asserts were fraudulent, are stated in his complaint as follows:

"At the time of said negotiations, which was slightly prior to December 3, 1908, representations were made by or on behalf of the said Manufacturing Company to the plaintiff herein and to the said Sales Company to the effect that the said Manufacturing Company did a large business and had great experience in the manufacture of vending machines; that its factory was so equipped for work of that character, both in machinery and expert mechanics and workmen, as to enable it to meet the demands of the said Sales Company for more rapid deliveries and a larger output, and that, if the said Sales Company should enter into a contract with the said Manufacturing Company, it would at its own plant and under the supervision of its own experts manufacture the machines required by the said Sales Company in substantial compliance with a model shown it, which was one of the machines manufactured by the said Plumb, and that it would make or procure and keep in proper working order for use in its own factory all dies, patterns, and special tools which might be necessary for the manufacture of these particular machines. During the course of said negotiations, it was further represented by and on behalf of the said Manufacturing Company that its facilities for making at its own plant said machines were superior to the facilities of the said Plumb, and that it already had at its factory every machine, tool, and appliance necessary for the making of said vending machines, except the dies, patterns, and special tools which were to be especially made for the manufacture of said machines."

"Plaintiff says that the statements made to him and to the said Sales Company, as an inducement to enter into said contract of December 3 and December 4, 1908, upon the truth of which he relied, and as a result of which he had entered into said contract of suretyship, were in fact wholly false and untrue, and were known by the said Manufacturing Company, and its officers and agents making such representations, to be wholly false and untrue; and that, so far from said factory being suitably equipped for the speedy manufacture and delivery of vending machines of the kind exhibited in said model hereinabove referred to, said factory was as a matter of fact without the necessary appliances and machinery, and without the workmen who were experts in the manufacture of vending machines of said character, or even experienced in this character of work; that so far from said machines being manufactured by said Manufacturing Company, it was never its intention that they should be manufactured in its own plant, by its own machines, or by its own workmen. On the contrary, said Manufacturing Company had the design, at the time said representations were made, of letting out bids to the cheapest bidder in various sections of the country to supply the different parts deemed necessary for the construction of the said vending machines; and, further, its design at the time of making said representations was that only the work of assembling the various parts so secured from other manufacturers should be done at said factory and under the supervision of its own employés. And plaintiff says that each and every one of the representations made to him as an inducement for the execution of the principal contract by his company, and of the contract of suretyship by him, was essentially false, and that almost immediately after the execution of said contracts said Manufacturing Company, so far from carrying out the alleged intentions hereinabove set forth, secured bids from various factories throughout the country, and in fact did nothing more than assemble the various parts so secured."

And he avers that in entering into the contract of suretyship he relied upon the pretended responsibility, skill, mechanical ability, and facilities of the Manufacturing Company, and that, but for his belief in the truth of the representations made, he would not have executed the contract of suretyship upon which the judgment has been obtained against him.

When the case was before this court on writ of error, we did not comment upon the exclusion of this testimony in the action at law.

As the exclusion of the testimony was proper, we disposed of the case upon other points. But as a misunderstanding seems to exist on the part of counsel for appellant in regard to the matter, we shall in a subsequent part of this opinion state fully the reason why the testimony was inadmissible in the former action. We did not hold, as the bill of complaint avers that we did, that fraud in the inducement of a contract of suretyship was a purely equitable defense, and one not cognizable in an action at law. There is not a word in the opinion upon that subject, and if the fraudulent representations relied upon were of such a nature as have no material relation to the contract involved, the exclusion of the testimony either at law or in equity, and whether the contract had been sealed or unsealed, could not have been reversible error.

[2, 3] The complainant has asked that an injunction issue restraining the defendant from assigning or enforcing the judgment which he obtained in his action at law. It is well established that under certain circumstances courts of equity will interfere to restrain proceedings at law, and its jurisdiction to stay legal proceedings may, in a proper case, be exercised at any stage of the legal cause. An injunction may be granted to stay trial, or after verdict to stay judgment, and after judgment to stay execution, and to prevent an assignment of the judgment. In the great case of the Earl of Oxford, 1 Ch. Rep. 1 (1615), Lord Chancellor Ellesmere discussed the principles on which equity restrains proceedings under a judgment obtained at law and declared that:

"The use of the chancery has been in all ages to examine equity in all cases, saving against the king's prerogative."

And that:

"When a judgment is obtained by oppression, wrong, and a hard conscience, the chancellor will frustrate and set it aside, not for any error or defect in the judgment, but for the hard conscience of the party."

By which he simply meant that a court of equity would prevent a party from taking advantage of a judgment if it was inequitable for him to do so. It was in this case that the Lord Chancellor opened his opinion by saying:

"The law of God speaks for the plaintiff. Deut. 28. And equity and good conscience speak wholly for him. Nor does the law of the land speak against him."

And Chief Justice Marshall, 100 years ago, in Marine Insurance Co. of Alexandria v. Hodgson, 7 Cranch, 332, 336, 3 L. Ed. 362, said:

"Without attempting to draw any precise line to which courts of equity will advance, and which they cannot pass, in restraining parties from availing themselves of judgments obtained at law, it may safely be said that any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a court of law, or of which he might have availed himself at law, but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agents, will justify an application to a court of chancery."

The rule is undoubted that a court of equity will not interfere with judgments at law, unless the complainant has an equitable defense of

which he could not avail himself at law, or had a good defense at law of which he was prevented from availing himself by fraud or accident, unless by his own or his agent's negligence. Knox County v. Harshman, 133 U. S. 152, 10 Sup. Ct. 257, 33 L. Ed. 586 (1890).

[4-6] The complainant in the case at bar asks to be relieved from this judgment on the ground that he was induced to enter into his guaranty upon which the judgment was obtained, by the fraudulent representations made by the defendant's assignor. It is a well-established principle that equity will afford a remedy where fraud has been practiced in procuring a judgment or decree, but the fraud must relate to the procuring of the judgment or decree, and not the transaction which was the basis of the decree. Smith v. Nelson, 62 N. Y. 286 (1875); Smith on Fraud, § 235, p. 253; Id. § 225, p. 233. Here the fraud complained of is not fraud in procuring the judgment, but in inducing the complainant to enter into the contract which is the basis of the judgment. It is, of course, true that, if complainant's defense to the action in which the judgment was obtained was one which he could not avail himself of at law, but might avail himself of in equity, and he has not been guilty of laches, he can come into equity to restrain the enforcement of the judgment. That fraudulent representations, if material, constitute a good defense in equity, is not questioned. Indeed, fraud is an original ground of equitable jurisdiction.

[7] When one is induced by fraudulent misrepresentations of a material kind to enter into a contract, it is agreed that he ordinarily has several remedies, and among them is the right to defeat the enforcement of the contract when sued upon in a court of law. See Page on Contracts, vol. 1, § 136, p. 218, and the cases there cited. Fraud vitiates all contracts. Courts of law and courts of equity as a general rule have concurrent jurisdiction in cases of fraud. In Viele v. Hoag, 24 Vt. 46, 51 (1851), the law is laid down as follows:

"The subject of equitable relief in behalf of sureties is one of original jurisdiction in a court of chancery. The peculiar rights of a surety originated in, and are exclusively the growth of, equity. Formerly it was held in several instances that the remedy of the surety was only in equity, and could not be made available in courts of common law. But it is now held as a general rule 'that the liability of sureties is governed by the same principles at law as in equity.' And probably with few exceptions the same considerations which are sufficient in equity to discharge the surety will be available for the same purpose at law. 2 Lead. Cases in Equity, 365, 386, in notes to Ress v. Berrington."

But, while fraud vitiates all contracts, it was necessary to reach it in some regular and authoritative mode, and it was not true that in every case it could be reached in a court of law as well as in a court of equity. Whether it could be reached in a law court depended upon the circumstances of the particular case. Fraud could not be pleaded in bar of an action at law upon a common-law specialty in England until the introduction by the Common-Law Procedure Act of 1854, of pleas in equitable grounds. See Ames, Cases in Equity, vol. 2, p. 122, note, and 9 Harv. L. Rev. 51, where the authorities are collected. And in the United States in the Code states a plea of fraud to a sealed instrument might be good at law. 9 Cyc. 434. But in the federal courts the court of law originally could no more take cognizance of

an equitable defense than a court of equity could entertain a suit upon a purely legal title. Burnes v. Scott, 117 U. S. 582, 587, 6 Sup. Ct. 865, 29 L. Ed. 991 (1886). And the Supreme Court of the United States in 1856 in Hartshorn v. Day, 19 How. 211, 222, 15 L. Ed. 605, declared that in an action upon a sealed instrument in a court of law proof of fraud in the transaction out of which the consideration arose could not be admitted for the purpose of avoiding the obligation, and especially where there had been a part performance of the contract, although fraud in the execution of the instrument might be shown. The doctrine was reiterated by the court in George v. Tate, 102 U. S. 564, 570, 26 L. Ed. 232 (1880). We have applied the rule in a number of cases. Hogg v. Maxwell, 218 Fed. 356, 134 C. C. A. 164 (1914); Drobney v. Lukens, 204 Fed. 11, 122 C. C. A. 325 (1913); De Lamar v. Herdeley, 167 Fed. 530, 93 C. C. A. 239 (1909).

[8] An act of Congress, passed on March 3, 1915, since this case was argued, has changed the law, and hereafter an equitable defense can be interposed in the federal courts in common-law actions. The statute reads as follows:

"Sec. 274b. That in all actions at law equitable defenses may be interposed by answer, plea, or replication without the necessity of filing a bill on the equity side of the court. The defendant shall have the same rights in such case as if he had filed a bill embodying the defense of seeking the relief prayed for in such answer or plea. Equitable relief respecting the subject matter of the suit may thus be obtained by answer or plea. In case affirmative relief is prayed in such answer or plea, the plaintiff shall file a replication. Review of the judgment or decree entered in such case shall be regulated by rule of court. Whether such review be sought by writ of error or by appeal the appellate court shall have full power to render such judgment upon the records as law and justice shall require."

In accordance with the provision of the above act, had it been in force when the action at law was instituted, the matter now in issue in this court might have been disposed of in that proceeding. But not being then in force when the complainant in this suit sought as defendant in the law action to interpose the fraudulent representations upon which he now relies as a defense to that action he was properly not permitted to do so. There was no error in excluding in that action all testimony as to these representations. And as he could not avail himself of the alleged fraud in the law action, he is entitled now in this court to have the effect of those representations upon the validity of his agreement fully considered.

[9] A contract of suretyship is not one requiring uberrima fides on the part of the creditor in the sense in which that expression is used in contracts of marine and fire insurance. And the creditor or obligee is not bound to communicate every material fact which would in the ordinary course of things affect the mind of the other party in entering into the contract. Hamilton v. Watson, 12 Cl. & F. 118 (1845); Wythes v. Labouchere, 3 Dog. & J. 593; White & Tudor's L. C. in Equity (8th Ed. 1912) vol. 2, p. 576. In Brandt on Suretyship (3d Ed., 1905) § 447, the law is stated as follows:

"If any material part of the transaction between the creditor and his debtor is by the creditor, or with his knowledge or consent, misrepresented to the surety, the misrepresentation being such that, but for the same having been

made, either the suretyship would not have been entered into at all, or, being entered into, the extent of the surety's liability might be thereby increased, the surety is in such cases generally held to be not bound by his obligation."

It is no doubt the duty of the obligee to use good faith toward a surety pending the negotiations. But the representations which are claimed as a ground for not enforcing a contract must in general relate to a material fact constituting an inducement to the contract. The fact represented as true must be material to the transaction. If it relates to an immaterial matter, the contract cannot be set aside. It must be the very ground on which the transaction took place, although it is not necessary that it should have been the sole cause. Smith on Fraud (1907) § 61, pp. 77, 78. The law is clear that false or fraudulent representations on a material matter, made to a surety at the time of the execution of the contract or during the negotiations leading up to it, is sufficient ground for the annulment of the contract. Cooper v. Joll, 1 De G. & J. 240; Folmar v. Siler, 132 Ala. 297, 31 South. 719; Roper v. Sangamon Lodge, 91 Ill. 518, 33 Am. Rep. 60. But the surety is liable if the false representation is not material. 32 Cyc. 60; London West v. London Guarantee, etc., Co., 26 Ont. 520.

[10] This brings us to inquire what the contract of suretyship was from which complainant seeks to be relieved. In it he promised and agreed that the Sales Company would—

"faithfully perform and fulfill everything in the foregoing agreement on its part and behalf to be performed and fulfilled at the time and in the manner in said contract provided."

What complainant undertook was that he would be responsible for the faithful performance by the Sales Company of its promises, and he did not undertake to be responsible for the performance by the Manufacturing Company of its promises. None of the representations made, and upon which complainant relies to avoid his guaranty, related to the ability of the Sales Company to perform its part of the contract assumed, and it was that which complainant guaranteed. Complainant was not misled or deceived in any respect concerning his principal, nor was any concealment practiced upon him which in the slightest degree affected the risk he assumed. If there were misrepresentations, as complainant alleges, and his allegation for the purposes of this case must be accepted as true, those misrepresentations related, not to the Sales Company, whose contract he had guaranteed, but to the Manufacturing Company, whose contract he had not guaranteed. No damage could result to the complainant from misrepresentations which did not relate to the obligation the performance of which he had guaranteed.

The Manufacturing Company never agreed to manufacture in its own plant all the parts of the vending machines. It only agreed to manufacture machines substantially like the model submitted to it. And this court has held that it fulfilled its contract according to its terms, although it employed third parties to make some of the parts and then assembled the parts and constructed the machines making them conform to the model. We have closely scanned the allegation of the

complainant in this suit as to the representations which the Manufacturing Company is said to have made, and we fail to find any allegation that the company would not employ any third party to make any part which it might be necessary to make in order to manufacture the machines, or that it would itself make any or all parts in its own plant.

If complainant had guaranteed that the Manufacturing Company would perform its contract, and the question was whether he could be relieved from his guaranty because of the false representations as to the ability of the company to make the parts in its own plant, there would be more reason in the application. But even in such a case the application would fail. For if under the contract the company had the right to have the parts manufactured for it outside its plant, any representations that it was so equipped that it could manufacture the parts inside the plant would be immaterial.

Although the original contract between the Sales Company and the Manufacturing Company did not require the latter to make the parts within its plant, yet if the Manufacturing Company in order to induce complainant to give the guaranty, had promised that it would make them within the plant, the complainant would be entitled to be released from his guaranty by showing that the company failed to do as it agreed. But that is not the case. There is not one word in the record to show that any such promise was asked or made.

The complainant's statement in his complaint that in guaranteeing performance by the Sales Company he relied upon the pretended responsibility, skill, mechanical ability, and facilities, not of the Sales Company, but of the Manufacturing Company, is, in our opinion, altogether beside the case. The inducement by which he was led to give his guaranty is that stated by him under seal in his contract of guaranty, which reads as follows:

"In consideration of the sum of one dollar ($1) to me in hand paid by the Great American Automatic Vending Machine Company, and in further consideration of the making of said contract, I do hereby promise and agree to and with them."

The inducement was the making of the contract between the Sales Company and the Machine Company which the complainant as an officer of the Sales Company wished to have made and carried into effect. Moreover, an allegation that one relies on a certain or specific representation is to be disregarded if the representation is one which is seen to be immaterial. Courts will set aside contracts which have been induced by false representations, where those representations relate to material matters, but never where they relate to immaterial matters, even though the party alleges he relied upon them. It may be that the Sales Company and complainant supposed and intended that the Manufacturing Company would itself make all the parts, but that cannot avail inasmuch as this court has decided that the Manufacturing Company never so agreed.

This is not a suit to cancel the contract to manufacture machines into which the Sales Company and the Manufacturing Company entered. But it is an attempt to cancel the contract of suretyship made

between the complainant and the Manufacturing Company. The complainant in his bill—

"avers that in making said contract of suretyship he relied upon the pretended responsibility, skill, mechanical ability, and facilities of said Manufacturing Company, and that but for his belief in the truth of the representations made he would not have executed said contract; and that he is advised and believes, and therefore avers, that the fraud practiced upon him in inducing him to enter into said contract rendered his own contract of suretyship of December 4th null and void, and that in equity and good conscience he is not and never was under any liability whatsoever to the said Manufacturing Company by reason of the execution of said contract of suretyship."

It may be the duty of a court to direct the surrender of a contract of suretyship if any fraudulent representations are made either to a principal or to a surety, which are material and false, and which are reasonably relied upon by either of them. But it cannot be the duty of a court to cancel a contract of suretyship because of any misrepresentations on immaterial matters which are foreign to the obligations which either the principal or the surety may have assumed. If the Sales Company, the principal in this case, asked because of these immaterial misrepresentations that its contract be canceled, relief would have to be denied. And it has been held that a surety cannot be discharged on the ground of fraudulent representations made to the principal except when that principal would be entitled to avoid the contract. Bryant v. Crosby, 36 Me. 562, 58 Am. Dec. 767 (1853). The fact that such representations as were made to the principal were repeated to the surety cannot be construed as giving to the latter a right of avoidance which is denied to the former on the same representations.

[11] If a contract has been obtained by fraud, the courts have held that that fact would be sufficient justification for a surety's release from his guaranty, even though his principal may have failed to bring suit to annul the original contract. No cause has been brought to our attention in which it is stated to be the law that when a person has obtained an obligation by fraud he can wipe out the fraud by obtaining a surety to the obligation. The contrary is declared to be the law in Bryant v. Crosby, supra. The courts say it is always open to a surety to show that the contract which he has guaranteed was obtained from his principal by fraud or duress. And such was the rule of the civil law. Strahan's Domat, bk. 3, tit. 4, § 5, art. 2; Id. bk. 3, tit. 4, § 1, art. 10; Dig. 44,·1, de exceptionibus, c. 7, § 1; Cod. 2, 24 (23), de fide juss, 2. We do not controvert that proposition. What we do say is that the fraud must relate to material matters.

This is not an application to cancel an executory contract of suretyship, but to release a surety from his obligation to the obligee after the obligee has performed his part of the obligation in strict accordance with its terms and to the amount of $25,000. And this is asked upon the ground that certain untrue representations were made which we find related to immaterial matters. The application must be refused.

Judgment affirmed.

WARD, Circuit Judge (dissenting). The decree appealed from was entered upon an order granting a motion to dismiss the bill. Accord-

ingly we must take all its allegations of fact to be true. They are substantially that the Manufacturing Company, on applying to the Sales Company and subsequently to Whitcomb to act as surety for the faithful performance by the Sales Company of its contract with the Manufacturing Company, represented that it (the Manufacturing Company) had large experience in manufacturing vending machines, with a body of expert workmen, that it would manufacture at its own plant machines like the Plumb model, which statements were wholly false, the Manufacturing Company having no such plant, nor body of expert workmen, and being unable itself to manufacture the machines, and capable only of assembling parts manufactured by others; that Whitcomb relied upon these representations, and would not have executed the contract of suretyship, but for his belief that they were true.

If these allegations could have been proved in the action at law, I do not see how Whitcomb could have been held as surety. The court seems to think that if the principal, the Sales Company, could not set aside the contract, Whitcomb could not be discharged as surety, and that false representations, to be availed of by him, must have been as to the Sales Company and its contract, and not as to the Manufacturing Company. The Sales Company has not been sued on the contract, and there is nothing to show whether it could set it aside or not. Generally speaking, the rights of the surety are the same as those of the principal; if the latter is bound, the former is bound. But clearly a surety may have rights entirely independent of the principal or of his contract; for instance, if one is induced to act as surety on the assurance of the obligee that the principal is owner of property which he does not own, the surety would be discharged; so, if he agreed to act on payment of a premium by the obligee which was not paid, or upon the assurance that the obligee had given the principal debtor six months' credit, whereas he had really given him credit for a year, or that a cosurety would be provided. Many other instances of representations made by the obligee to the surety might be mentioned, in no way connected with the principal or with the transaction between the obligee and the principal, which, if false, would discharge the surety.

It is said that, because the Manufacturing Company was held in the action at law to have furnished machines like the Plumb model, it performed its contract and the surety was therefore bound by his engagement. In that action the surety pleaded that the Manufacturing Company had not performed the written contract with the Sales Company. I quite agree that upon the contract alone the Manufacturing Company was properly held to have the right to use parts manufactured by other persons.. The covenant that it would "manufacture" did not imply that it would personally make all the parts; but the surety also pleaded as a defense the matters set up in this bill, and he was not allowed to prove them, on the ground that the contract had not been rescinded, nor any objection made for a year after it had been in operation. This reason could only apply to the Sales Company, which was not a party to the action. Surely the surety could not have rescinded the contract. The testimony was, however, properly ex-

cluded, because such a defense could not be maintained in an action at law upon a sealed instrument. Hogg v. Maxwell, 218 Fed. 356, 134 C. C. A. 164. If proof of the facts alleged had been admitted, the construction of the contract between the Manufacturing Company and the Sales Company would have been, or might have been, different. These detailed representations as to its qualifications would have been wholly unnecessary, if it intended only to supply a machine like the model. Had these allegations been continued as a recital in the contract actually executed, the construction of the word "manufacture" would, or at least might, have been different. Certainly the surety, setting up these false representations made to him, would not necessarily have been bound by the written contract between the Manufacturing Company and the Sales Company.

It seems to me a remarkable result that the judgment in the action at law, where the defense of false representations was properly excluded, should defeat the surety's right to rely upon the same facts in the suit in equity. It should be given its day in court to try out this question. I agree that the court has jurisdiction in the action on the supersedeas bond, but think that the decree in each case should be reversed.

AMERICAN SURETY CO. OF NEW YORK v. SHULTZ.

(Circuit Court of Appeals, Second Circuit. April 13, 1915.)

No. 135.

1. COURTS ⊜284—FEDERAL COURTS—JURISDICTION—"ARISING UNDER LAWS OF UNITED STATES."

An action to enforce liability on a bond given in a proceeding in a federal court arises under the laws of the United States, of which a United States court has jurisdiction, irrespective of the citizenship of the parties.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 820–826, 831; Dec. Dig. ⊜284.

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

2. COURTS ⊜264—FEDERAL COURTS—JURISDICTION—"ORIGINAL SUIT."

A suit on a bond given on appeal in a suit in a federal court is not an "original suit," and the jurisdiction of the original suit gives jurisdiction over the subject-matter of the suit on the bond.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 801; Dec. Dig. ⊜264.

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

3. COURTS ⊜284—FEDERAL COURTS—JURISDICTION.

A supersedeas bond to secure a stay pending a review by the United States Circuit Court of Appeals of a judgment of the District Court is an indemnity given in pursuance of a law of the United States, and the rights of the parties depend on a law of the United States and rule of the Supreme Court, within the rule governing jurisdiction of federal courts.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 820–826, 831; Dec. Dig. ⊜284.]

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

This cause comes here on appeal from a judgment entered in the United States District Court for the Southern District of New York dismissing the bill of complaint on the ground of the insufficiency of the facts alleged to constitute a valid cause of action in equity.

Henry C. Willcox, of New York City, Charles F. Carusi, of Washington, D. C., and Walter B. Grant, of Boston, Mass. (Joseph M. Gazzam, of New York City, of counsel), for appellant.

Kellogg & Rose, of New York City (Abram J. Rose and Philip M. Brett, both of New York City, of counsel), for appellee.

Before COXE, WARD, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge. This suit was instituted to obtain an injunction restraining the prosecution of an action at law commenced by the defendant against the plaintiff on a supersedeas bond given by the plaintiff as surety to secure a stay pending a review by this court on writ of error of a judgment of the District Court for $25,106.50 in favor of George S. Shultz against James A. Whitcomb as guarantor for the faithful performance of a contract between the Robertson Sales Company and the Great American Automatic Vending Machine Company for the manufacture of vending machines.

[1-3] The technical objection has been raised that the District Court had no jurisdiction of the action on the supersedeas bond because no diversity of citizenship was alleged, and the plaintiff was and is still a corporation organized under the laws of the state of New York, while the defendant was and is a citizen of the city, county, and state of New York and a resident thereof. The objection is without merit. An action brought to enforce liability on a bond given in a proceeding in a federal court is an action arising under the laws of the United States, of which a United States court has jurisdiction, irrespective of the citizenship of the parties. The authorities are decisive of the point, and the question cannot be regarded as in any sense an open one. A suit on a bond given on appeal is not an original suit, but an outbranch of the suit in which the bond was given, and the jurisdiction of the original suit gives jurisdiction over the subject-matter of the suit on the bond. The bond is an indemnity given in pursuance of a law of the United States, and the measure of the rights of both parties depend upon a law of the United States and a rule of the Supreme Court of the United States. In such a case, as a question is presented which arises under the laws of the United States, the courts of the United States have jurisdiction. Arnold v. Frost, 9 Ben. 267, Fed. Cas. No. 558 (1877); Crane v. Buckley (C. C.) 105 Fed. 401 (1900); Egan v. Chicago, Great Western (C. C.) 163 Fed. 344 (1908).

The facts upon which the suit is founded are identical with the facts alleged in the complaint in the suit of Whitcomb v. Shultz, 223 Fed. 268, — C. C. A. —, decided by this court during the present term, except that in the present suit the additional contention has been made, which we have already considered, that the District Court was without

jurisdiction because no diversity of citizenship has been alleged. This case was submitted at the same time the case of Whitcomb v. Shultz was argued, and, as the facts are fully stated in our opinion in that case, no repetition of them in this case is needed. As we reached the conclusion in that case that the alleged misrepresentations relied upon related to immaterial and irrelevant facts, and afforded no ground for equitable relief from the judgment which Shultz had obtained at law against Whitcomb, it necessarily follows that no error was committed in the court below in dismissing the bill of complaint by which the American Surety Company sought to be relieved from its liability as surety for Whitcomb upon the supersedeas bond given by Whitcomb to Shultz. As Whitcomb failed to be relieved, and the matter of his liability has been determined, the plaintiff in the present suit is not entitled to the relief it seeks, as it can now safely pay to Shultz the amount due to him under the bond.

Judgment affirmed.

SHARUM v. WHITEHEAD COAL MINING CO.

(Circuit Court of Appeals, Eighth Circuit. April 14, 1915.)

No. 4322.

1. MINES AND MINERALS ⟸68 — MINING LEASE — CONSTRUCTION — NEGATIVE COVENANTS.

Complainant's predecessor in title leased to defendant a tract of land "for the sole purpose of prospecting for and mining coal and asphalt, the party of the second part to occupy so much only of the surface * * * as may be reasonably necessary to carry on the work of prospecting for, mining, storing, and removing such coal and asphalt." The lessee covenanted "to commit no waste upon said premises and to suffer no waste to be committed thereon," and that it would not use said premises "for any other purpose than that authorized in this lease, nor allow them to be used for any other purpose." The consideration for the lease was a royalty upon the products mined. The bill alleged that defendant had sunk shafts upon the premises, from which it had extended tunnels into adjacent lands, from which it was mining large quantities of coal and removing the same through such tunnels and shafts; that it was dumping large quantities of shale and waste brought from such adjacent lands upon the surface of the leased premises, and occupying a large part of such surface with buildings and dwellings for the use of employés engaged in said outside mining operations. *Held*, that the terms of the lease restricted the use of the leased premises to prospecting for and mining coal and asphalt on such premises, that the law would imply a negative covenant not to use the premises for any other purposes, which covenant might be enforced in equity, and that the bill stated a cause of action for injunctive relief.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 188–191; Dec. Dig. ⟸68.]

2. MINES AND MINERALS ⟸68—MINING LEASES—EQUITY JURISDICTION TO ENFORCE NEGATIVE COVENANTS.

A court of equity may interpose by injunction and indirectly enforce specific performance of negative covenants in mining leases, by preventing the use of the leased premises for purposes inconsistent with that for

which they were demised, where such use would operate to the injury of the lessor, although damages therefor may be recoverable at law.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 188–191; Dec. Dig. ⊂⊃68.]

3. EQUITY ⊂⊃71—LACHES—SUIT TO ENJOIN VIOLATION OF MINING LEASE.

Delay in commencing suit to prevent the use of premises by a mining lessee contrary to the terms of the lease, while it may affect the question of damages, cannot deprive the lessor of the right to protection against further trespasses.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 204–211; Dec. Dig. ⊂⊃71.]

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

Suit in equity by A. H. Sharum against the Whitehead Coal Mining Company. Decree for defendant, and complainant appeals. Reversed.

B. B. Wheeler and W. H. Davis, both of Muskogee, Okl. (Ezra Brainerd, Jr., of Muskogee, Okl., on the brief), for appellant.

William M. Matthews, of Okmulgee, Okl., for appellee.

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

CARLAND, Circuit Judge. This is an appeal from a judgment dismissing appellant's amended bill on motion. The grounds of the motion are as follows:

"(1) Because said amended bill of complaint sets up a new and independent cause of action from that set up in the original bill of complaint, the said amended bill of complaint having changed the cause of action from a suit to cancel a lease to an injunction enjoining the defendant from committing a trespass.

"(2) Because the complainant has a complete and adequate remedy at law, and this court has no power to grant the relief asked for in said amended bill of complaint.

"(3) Because there is a misjoinder of causes of action.

"(4) Because there is a defect of parties, in that Hugh Henry is not made a party to this suit.

"(5) Because said amended bill of complaint fails to state facts sufficient to constitute a cause of action in favor of complainant and against this defendant."

[1] The bill, after alleging the citizenship of the parties and the amount in controversy, proceeded as follows:

"Fourth. That your complainant is the owner, in fee simple, of the east half (E. ½) of the northwest quarter (N. W. ¼) of section thirteen (13), township eleven (11) north, range twelve (12) east, containing eighty (80) acres of land, more or less, situate in Okmulgee county aforesaid, in the state of Oklahoma; and that your complainant derived title thereto under and by virtue of a certain warranty deed, dated August 21, A. D. 1905, executed by one Hugh Henry, who was, prior to and upon said day and at the time of the execution and delivery of said warranty deed, the owner of said land."

"Sixth. That said warranty deed, as aforesaid, was executed and delivered, for a good and valuable consideration by your complainant to the said Hugh Henry duly paid, and conveyed to your complainant an absolute title in fee simple to said land, subject only to the terms and conditions of a certain coal and asphalt mining lease, so called, bearing date November 19, 1903, and ex-

ecuted and delivered by the said Hugh Henry to the defendant herein. * * * Said coal and asphalt mining lease is in words and figures following, to wit:

" 'Coal and Asphalt Mining Lease,

" 'Creek Nation, Indian Territory.

" 'This indenture of lease, made and entered into, in quadruplicate, on this 19th day of November, A. D. 1903, by and between Hugh Henry of Henryetta, Indian Territory, party of the first part, and Whitehead Coal Mining Company, a corporation duly organized and existing under the laws of the territory of Arizona, and duly authorized to carry on business in Indian Territory by compliance with the act of Congress approved February 8, 1901 (31 Stat. 794), of Henryetta, Indian Territory, party of the second part, under and in pursuance of the provisions of section 17 of the act of Congress approved June 30, 1902 [32 Stat. 504, c. 1323], and ratified by the Muskogee or Creek National Council of July 26, 1902, and the rules and regulations prescribed by the Secretary of the Interior relative to mining leases in the Creek Nation, witnesseth: That the party of the first part, for and in consideration of the royalties, covenants, stipulations, and conditions hereinafter contained and hereby agreed to be paid, observed, and performed by the party of the second part, its heirs, executors, administrators, successors, or assigns, do hereby demise, grant, and let unto the party of the second part, its heirs, executors, administrators, successors, or assigns, the following described tract of land lying and being within the Creek Nation and within the Indian Territory, to wit: The south half (S. ½) of the southeast quarter (S. E. ¼) of section twelve (12), and the east half (E. ½) of the northwest quarter (N. W. ¼), less amount occupied as right of way by St. Louis, Oklahoma & Southern Railway, amounting to 8.40 acres, of section thirteen (13), of township eleven (11) north, of range twelve (12) east of the Indian meridian, and containing 151.60 acres, more or less—for the full term of fifteen years from the date hereof, for the sole purpose of prospecting for and mining coal and asphalt; the party of the second part to occupy so much only of the surface of said land as may be reasonably necessary to carry on the work of prospecting for, mining, storing, and removing such coal and asphalt.

" 'In consideration of the premises the party of the second part hereby agrees and binds itself, its heirs, executors, administrators, successors, or assigns, to pay, or cause to be paid, to the party of the first part as royalties the sums of money as follows, to wit: On asphaltum the sum of ten cents per ton for each and every ton of crude asphalt produced, weighing 2,000 pounds, or the sum of sixty cents per ton on refined asphalt. On the production of all coal mined under this lease the sum of eight cents per ton of 2,000 pounds on mine run, or coal as it is taken from the mines, including what is commonly called "slack."

" 'And the party of the second part further agrees and binds itself, its heirs, executors, administrators, successors, or assigns, to pay, or cause to be paid, to the lessor, as advanced annual royalty on this lease, the sums of money as follows, to wit: Fifteen cents per acre per annum, in advance, for the first and second years; thirty cents per acre per annum, in advance for the third and fourth years; and seventy-five cents per acre per annum, in advance, for the fifth and each succeeding year thereafter of the term for which this lease is to run—it being understood and agreed that said sums of money so paid shall be a credit on the stipulated royalties, should the same exceed such sums paid as advanced royalty, and, further, that should the party of the second part neglect or refuse to pay such advanced annual royalty for the period of sixty days after the same becomes due and payable, then this lease shall, at the option of the lessor, be null and void, and all royalties paid in advance shall become the money and property of the lessor. All royalty accruing for any month shall be due and payable on or before the 25th day of the month succeeding.

" 'It is agreed by the parties hereto that the land described herein shall not be held by the party of the second part for speculative purposes, but in good faith for mining the minerals specified, and a failure for one year by the party of the second part to do a reasonable amount of development work or of min-

ing shall be held as a want of compliance with the purposes of this lease and shall render it null and void.

" 'The party of the second part further agrees and binds itself, its heirs, executors, administrators, successors, or assigns, to pay, or cause to be paid, to the party of the first part the royalty as it becomes due. The party of the second part further covenants and agrees to exercise diligence in the conduct of the prospecting and mining operations and to open mines and operate the same in a workmanlike manner and to the fullest possible extent on the leased premises; to commit no waste upon said premises or upon the mines that may be thereon and to suffer no waste to be committed thereon, to take good care of the same and to surrender and return the premises at the expiration of this lease to the party of the first part, or to whomsoever shall be lawfully entitled thereto, in as good condition as when received, ordinary wear and tear in the proper use of the same for the purposes hereinbefore indicated and unavoidable accidents excepted, and not to remove therefrom any buildings or improvements erected thereon during said term by said Whitehead Coal Mining Company, the party of the second part, but said buildings and improvements shall remain a part of said land and become the property of the owner of the land as a part of the consideration for this lease, in addition to the other considerations herein specified, except engines, tools, boilers, boiler houses, and machinery, which shall remain the property of said party of the second part; that it will not permit any nuisance to be maintained on the premises, nor allow any intoxicating liquors to be sold or given away for any purpose on the premises, and that it will not use the premises for any other purpose than that authorized in this lease, nor allow them to be used for any other purpose; that it will not at any time during the term hereby granted assign, transfer, or sublet its estate, interest, or term in said premises and land, or the appurtenances thereto, to any person or persons whomsoever, without the written consent thereto of the party of the first part being first obtained, subject to the approval of the Secretary of the Interior.

" 'And the said party of the second part further covenants and agrees that it will allow said lessor and his agents, from time to time, to enter upon and into all parts of said premises for purposes of inspection, and agree to keep an accurate account of all mining operations, showing the whole amount of mineral mined or removed, and make report thereof promptly, under oath, at the end of each month to the lessor, and to the Secretary of the Interior, through such officer as he may designate, and that all sums due as royalty shall be a lien on all implements, tools, machinery, and other personal chattels used in said prospecting and mining operations, and upon all the mineral obtained from the land herein leased, as security for the payment of said royalties.

" 'And the party of the second part agrees that this indenture of lease shall in all respects be subject to the rules and regulations heretofore or that may hereafter be lawfully prescribed by the Secretary of the Interior relative to such mineral leases in the Creek Nation; and said party of the second part expressly agrees that should it, its sublessees, its heirs, executors, administrators, successors, or assigns, violate any of the covenants, stipulations, or provisions of this lease, or fail, for the period of sixty days, to pay the stipulated monthly royalty provided for herein, then the party of first part shall be at liberty, in his discretion, to avoid this indenture of lease and cause the same to be annulled, when all the rights, franchises, and privileges of the party of the second part, its sublessees, executors, administrators, successors, or assigns, hereunder shall cease and end without further proceedings. If the lessee makes reasonable and bona fide effort to find and mine coal and asphalt in paying quantity, as herein required of it, and such effort is unsuccessful, it may at any time thereafter, with the approval of the Secretary of the Interior, surrender and wholly terminate this lease upon the full payment and performance of all its then existing obligations hereunder: Provided, however, that approval of such surrender by the Secretary will be required only during the time his approval of the alienation of the land is required by law.

" 'It is further agreed and understood that this lease shall be of no force or effect unless the party of the second part shall, within sixty days from the date of approval of the application filed in connection herewith, furnish a

satisfactory bond in accordance with the regulations of July 10, 1903, prescribed by the Secretary of the Interior. * * * That this plaintiff, by said purchase, has secured for himself all the rights, privileges, and remunerations heretofore possessed, owned, and held by said Hugh Henry under and by virtue of the terms of said lease.' "

"Ninth. That the defendant, acting under and by virtue of the authority and license of said coal and asphalt mining lease, has entered upon said land so as aforesaid owned by your complainant, and has thereon sunk shafts, excavated underground passages and corridors, erected hoists, shaft houses, engine and boiler houses, and has constructed upon the surface of said demised premises railroad tracks, ponds for the storage of water, storage bins, and buildings suitable and proper for use in connection with the business of prospecting for, mining, removing, storing, and shipping coal, and has constructed and erected upon the surface of the premises so owned by your complainant large numbers of houses and dwellings to be rented, used, occupied, and inhabited by its employés and workmen employed by it in its business of prospecting for, mining, and shipping coal as aforesaid, and that said defendant is still maintaining and operating on said premises of your complainant said shafts, passages, corridors, hoists, engine and boiler houses, railroad tracks, ponds, storage bins, buildings, and dwelling houses, and said constructions and erections, so as aforesaid enumerated and described, occupy and cover a large portion of the surface of said land so owned by your complainant."

"Fifteenth. That said defendant, claiming and asserting its right so to do under said lease, has extended its openings, passageways, and corridors from the shaft sunk on your complainant's premises under your complainant's land, and into and under the surface of other lands not described in nor mentioned in said lease, and owned by divers persons, firms, and corporations, whose names are to your complainant at present unknown, but in and to which your complainant is informed and believes, and therefore so avers, the defendant has acquired some interest.

"Sixteenth. That said defendant is now engaged, and for a long time hitherto has been engaged, in mining, removing, and shipping coal located under the surface of the lands adjacent to your complainant's lands, and for the purpose of removing, mining, and shipping said coal so located under the surface of lands not owned by your complainant, and not included in nor mentioned in said lease, the said defendant has, during all said time, the exact period of which is to your complainant unknown, but wholly within the knowledge of the defendant, been and still is using, employing, and occupying the corridors, passageways, and shafts located in and under your complainant's land, and has been during all said time and still is using and employing the various buildings, erections, structures, ponds, and railroad tracks hereinbefore enumerated as having been erected upon the surface of your complainant's land under said lease for the mining and removal of coal located on adjacent tracts of land not owned by your complainant and not mentioned in said lease.

"Seventeenth. That said defendant, during all said time, has been and still is using and employing the surface of the ground owned by your complainant, as aforesaid, for the purpose of dumping thereon shale, rock, and other waste materials, removed from under said adjacent lands, and has deposited and still is depositing and dumping on the surface of your complainant's land large quantities of rock, shale, and other waste material taken from and originally located under the surface of said lands adjacent to the lands mentioned in said lease, and during all said time has and still is renting to, leasing to, and otherwise permitting and causing the houses erected on the surface of your complainant's land, as well as the surface lands of your orator adjacent thereto, to be used and occupied by its employés, who are engaged in mining and removing coal from under the lands located adjacent to the lands mentioned in this lease, and from under lands not mentioned in nor included in said coal and asphalt mining lease.

"And your complainant further avers that the said defendant, using for that purpose the aforesaid shafts, corridors, and passageways located in and under your complainant's premises, as aforesaid, and using for that purpose

the shaft houses, hoists, engine and boiler houses, railroad tracks, ponds, storage bins, buildings, and dwelling houses, and using for that purpose a large portion of the surface of your complainant's premises, has mined and removed from under the surface of the premises adjacent to your complainant's said land, and from under the surface of lands not mentioned in said lease, a large quantity of coal, the exact amount of which, by reason of the false and fraudulent statements, concealments, and misrepresentations of the defendant, as aforesaid, your complainant is unable to state, but which is fully known to the defendant, and which exceeds, as your complainant is informed and believes, and therefore so avers, one hundred and twenty thousand tons of two thousand pounds each.

"Your complainant further shows that it was a condition of said coal and asphalt mining lease that said defendant should exercise diligence in the prospecting and mining operations to be conducted thereunder, and should open mines and operate the same to the fullest possible extent on said leased premises; that said defendant has largely abandoned the operation of mines by it opened on said leased premises, so far as the same applies to the removal of coal located within the boundary line of said leased premises, and is largely engaged in the removal through the mines so opened on your complainant's premises, and through the corridors, shafts, and passageways thereof, and with the aid of the structures, buildings, hoists, shafts, railroad tracks, and other appliances located on the surface of your complainant's land, of large quantities of coal located outside the boundary line of said leased land, and located in and under lands not owned by your complainant and not described in said lease.

"That there now exists in the coal veins and mines underlying the premises owned by your complainant, as aforesaid, large quantities of coal not yet mined and suitable to be mined under said lease, and that said defendant has been for a long space of time, the exact length of time being to your complainant unknown and wholly within the knowledge of the defendant, and still is, largely engaged as hereinbefore set forth in removing and mining coal located under lands not included in said lease, to the neglect of like mining operations which ought to, and otherwise might, have been carried on in and under the lands of your complainant and in and under the lands described in said coal and asphalt mining lease.

"That said defendant claims and insists that under said coal and asphalt mining lease it has the right and is lawfully entitled to proceed as hereinbefore set forth and to use the shafts, passageways, and corridors of the mines opened upon, in and under your complainant's said land, and to use the shaft houses, engine and boiler houses, railroad tracks, storage ponds, and storage bins located on the surface of your complainant's land for the mining and shipping of coal taken from under lands not owned by your complainant, and not mentioned nor described in said lease, and to use, occupy, and employ the houses and the grounds of your complainant adjacent thereto as habitations and dwellings for its servants and employés engaged in the mining and shipping of coal taken from under lands not mentioned in nor described in said lease, and that said defendant claims and insists that it has the right and is lawfully entitled to use the surface of your complainant's land for the purpose of depositing and dumping thereon rock, shale, and other waste material removed from under said lands adjacent to the lands mentioned in said lease, and not being the, or any of the, lands described therein.

"That said defendant, notwithstanding it insists and claims a right under said coal and asphalt mining lease to engage in said mining operations for the removal of coal from under the lands adjacent to your complainant's land, but not mentioned in said lease, to the neglect of mining operations which might otherwise have been conducted in accordance with said lease within the lands of your complainant, and notwithstanding it has, at all times, insisted and still insists, upon using, engaging, and employing, and at all times has used, engaged, and employed, the shafts, corridors, and passageways of the mines opened in your complainant's land and the shaft houses, engine and boiler houses, storage ponds, and storage bins, railroad tracks, and dwelling houses erected upon the surface of the ground thereof, as well as large portions of the surface of your complainant's land, in and to all of which said defendant

has no right, title, interest, license, or easement, except such as it granted and conveyed by said coal and asphalt mining lease, for the purpose of mining and shipping coal which said defendant is taking and removing from and under said adjacent lands, and not from and under any of the lands described in said lease, and claims and insists that all said operations, as aforesaid, are authorized and permitted by, and are within the intent and purpose of, said coal and asphalt mining lease, yet said defendant has hitherto wholly failed and refused, and still fails and refuses, to account to the complainant on account of any of said operations conducted outside, or in part outside, the boundaries of said lands of your complainant, and refuses to pay to or to account to your complainant for the stipulated royalty of eight cents for each and every ton of coal of two thousand pounds so mined, but, on the contrary, threatens to continue and still does continue to prosecute and conduct said mining operations for the removal of coal located outside said land described in said coal and asphalt mining lease, and to use the mines of and in your complainant's land, and the shafts, corridors, and passageways thereof, as well as the surface of your complainant's land and the shaft houses, engine and boiler houses, storage ponds, storage bins, railroad tracks, dwelling houses, and other appliances erected thereon for the mining and shipping of coal located and taken from under land not mentioned in said lease without accounting or paying to your complainant any compensation therefor."

There were other allegations in the bill bearing upon the prayer for an accounting, which we omit. In the view we take of the facts alleged in the bill, appellant is not entitled to an accounting for coal mined on adjacent lands not included within the lease. The bill, however, contained a prayer for alternative relief in the following language:

"And your complainant further prays that if upon hearing your honorable court shall consider that the complainant is not entitled to the relief hereinbefore specifically prayed for, that in that event your honorable court will cause to be made and entered its decree perpetually restraining and enjoining the defendant, its successors and assigns, and its and their agents, servants, and employés, from further employing or making use of the shafts, corridors, and passageways in and under the lands of your complainant and the surface of the ground thereof, as well as each and all and any of the shaft houses, engine and boiler houses, storage ponds, and storage bins, railroad tracks, dwellings, and other structures erected or situated upon the premises of your complainant for the mining, removal, storage, or shipping of any coal or asphalt originally located, taken, or removed from, in, or under lands not mentioned or described in said coal and asphalt mining lease, and that said defendant, its successors and assigns, and its and their servants, agents, and employés, be by said decree likewise perpetually restrained and enjoined from dumping or depositing upon the surface of your complainant's land aforesaid any rock, shale, or other waste material removed from or taken from, in or under any lands not described in said coal and asphalt mining lease, and that they be, each of them, perpetually restrained and enjoined from passing in, over, through, or upon your complainant's land aforesaid for the purpose of prospecting, mining, or removing, or transporting in, through, or over your complainant's land any coal or asphalt originally discovered, found, located, or taken from, in, or under any lands located outside the boundary lines of the land described in said coal and asphalt mining lease, and from removing or conveying in, over, or through the lands of your complainant, or in or through the corridors, passageways, or shafts thereof, or over the surface thereof, any coal or asphalt not taken or located by nature within the lands described in said coal and asphalt mining lease."

We are of the opinion that the facts appearing in the bill as above detailed constituted a good cause of action and warranted the relief prayed for in the alternative prayer of the bill. The language of the lease is:

"Do hereby demise, grant and let * * * for the sole purpose of prospecting for and mining coal and asphalt; the party of the second part to occupy so much only of the surface of said land as may be reasonably necessary to carry on the work of prospecting for mining, storing and removing such coal and asphalt. * * *" The lessee agreed "to commit no waste upon said premises and to suffer no waste to be committed thereon, * * * and that defendant will not use the premises for any other purpose than that authorized in this lease, nor allow them to be used for any other purpose."

The lease did not become valid until approved by the Secretary of the Interior, and it was at all times subject to his rules and regulations relative to mineral leases in the Creek Nation. It does not seem reasonable that the Secretary of the Interior would approve a lease which, properly construed, would permit a lessee to use the premises as a dumping ground for shale and other waste taken from mines upon other premises than those described in the lease. If the lease shall receive the construction contended for by appellee, then, there is no limit as to the use to which the premises may be put with reference to the mining of coal and asphalt upon adjacent land not included within the lease. If the lessee is entitled to use the shafts, tunnels, and surface of the land in connection with mining operations upon land adjacent to the land described in the lease, then the lessee may use it in connection with mining operations in land not adjacent. We ought not to permit a construction to be given to the lease which would allow the lessee to ruin the surface of the leased premises by dumping shale and waste from mining operations carried on in land not mentioned in the lease. It is plain, we think, that the use of the premises leased was restricted by the express terms of the lease to prospecting for and mining coal and asphalt on the premises leased. This view is sustained by the fact that the consideration for the lease was to be paid in royalties upon the coal and asphalt mined and an advance royalty at so much per acre on the land leased. As appellant is not entitled to royalties on coal and asphalt mined from adjacent land, the consideration for the lease would fail if the construction contended for by appellee should prevail. This being so, the law will imply a negative covenant not to use the premises for any other purposes than those specified; and a court of equity will protect the lessor or the appellant in this case against a violation of the negative covenant.

[2] It is also well settled that a landlord is not confined to his remedy at law by an action for damages. Kraft v. Welch, 112 Iowa, 695, 84 N. W. 908; Steward v. Winters, 4 Sandf. Ch. (N. Y.) 587; Taylor, Land. & Ten. § 691; 2 McAdam, Land. & Ten. (3d Ed.) 1429; De Wilton v. Saxon, 6 Ves. 106; Moore v. Price, 125 Iowa, 353, 101 N. W. 91. Although no damages are shown growing out of improper use of entries, an injunction will be granted. Thos. Beck & Sons v. Economy Coal Co., 149 Iowa, 24, 127 N. W. 1109; Peters v. Philipps, 63 Iowa, 550, 19 N. W. 662; Robbins v. Archer, 147 Iowa, 743, 126 N. W. 936; State Security Bank v. Hoskins, 130 Iowa, 339, 106 N. W. 764, 8 L. R. A. (N. S.) 376; Lemmon v. Guthrie Center, 113 Iowa, 36, 84 N. W. 986, 86 Am. St. Rep. 361. In Schobert v. Pittsburgh Coal & Mining Co., 254 Ill. 474, 98 N. E. 945, 40 L. R. A. (N. S.) 826, Ann. Cas. 1913B, 1104, it was decided that courts of equity will frequently interpose by injunction and indirectly enforce specific performance

of purely negative covenants annexed to or contained in contracts or leases by prohibiting their breach, and will entertain bills for injunction to prevent their breach, although a violation of the covenants will occasion no substantial injury, and although the damages, if any, be recoverable at law. In Consolidated Coal Co. of St. Louis v. Mary Ann Schmisseur, 135 Ill. 371, 25 N. E. 795, it was decided that where a contract of leasing is certain, and the use of the demised premises for a specified purpose is clearly fixed by the agreement of the parties, the appropriation of the premises to a use inconsistent with that for which they are demised will afford ground for the interposition of a court of equity by way of injunction where the change will operate to the injury of the lessor.

In Brasfield v. Burnwell Coal Co., 180 Ala. 185, 60 South. 382, it was decided by the Supreme Court of Alabama that the execution of a lease to mine coal under lands will not authorize the lessee to dump slate and refuse upon the surface of the land unless the right is expressly granted, and that where a mining lease did not authorize the lessee to use openings and apertures on the demised land to mine adjacent property not belonging to the lessor, the use of the openings for that purpose will be enjoined, as the lessee took no right except under the lease and the failure of the lease to grant that privilege impliedly negatives the privilege, thus raising an implied negative covenant which in analogy to specific performance will be enforced by injunction. It must be borne in mind that this case does not involve the absolute sale of mineral lying under the land. In Lillibridge v. Lackawanna Coal Co., 143 Pa. 293, 22 Atl. 1035, 13 L. R. A. 627, 24 Am. St. Rep. 544, it was decided that, where there has been an absolute sale of the mineral lying under land and a severance of the estate in the mineral from the estate in the surface, the title thus obtained by the owner of the mineral is an estate in fee which terminated when the mine had been exhausted, and that where there are no restrictions in the grant, reservation, or exception which creates the estate, the space which may be left by the removal of the mineral, and by the removal of so much of the containing strata as may be reasonably required for the operation of mining, remains a part of the property of the miner only until the exhaustion of the mine and may be used by him during the continuance of the estate as he may see fit, provided that such user does no injury to the surface, and this includes the right to haul mineral and turn water through such space from other mines. To the same effect are Webber v. Vogel, 189 Pa. 156, 42 Atl. 4; Moore v. Indian Camp Coal Co., 75 Ohio St. 493, 80 N. E. 6; Consolidated Coal Co. of St. Louis v. Schmisseur, supra; Schobert v. Pittsburgh Coal Co., supra.

[3] It will be noticed that in each case where an injunction was refused in the case of the absolute sale of mineral it appeared there was no injury to the surface. We have no doubt that the appellant is entitled under the facts stated in his bill to the alternative relief prayed for. We are also of the opinion that there was no abuse of discretion by the trial court in allowing the amended bill to be filed; that there is not a misjoinder of causes of action, nor a defect of parties. It is contended by counsel for appellee that appellant has acquiesced in

the conduct of appellee of which he complains for almost 10 years, during which time extensive improvements have been made, and this delay ought to preclude him from obtaining equitable relief. It does not appear by the bill as to how long appellant has known of the use being made of the premises in question contrary to the terms of the lease, but delay, while it might affect the question of damages, cannot interfere with the right of appellant to prevent further trespass. Matulys v. Philadelphia & Reading Coal & Iron Co., 201 Pa. 70, 50 Atl. 823.

Counsel for appellee also urges upon us the proposition that although the appellee is not entitled to use the shaft and entries for the purpose of removing coal from adjoining land, nevertheless, if the issuance of an injunction would cause great injury to the appellee and little benefit to the appellant, it would be the duty of the court to refuse that form of equitable relief. There is no question about the right and duty of a court of equity in issuing injunctions to take into consideration the comparative injury of the different parties to the suit. This court, however, is now considering an appeal from the judgment of the court below dismissing the bill on motion. We simply decide that there is an equitable cause of action stated in the bill. All that we may do in pursuance of our decision is to reverse the judgment below, with instructions to overrule the motion to dismiss and to allow the appellee to answer the bill, if it shall be so advised. If appellant shall finally prevail upon the merits, or if, prior to final hearing, application is made for a temporary injunction, the court below has full power to deal with the question of issuing an injunction upon the facts as they then may appear. We are simply deciding the case upon the facts stated in the bill. If upon application for a temporary injunction, or upon final hearing a case is made for injunction in accordance with the views of this court, the trial court will have full power as a court of chancery to act as law and justice may require, and may, if it shall be deemed proper, withhold the injunction upon the execution of a bond with surety by appellee conditioned to pay all damages arising from the unlawful acts of appellee in the past or which may be caused in the future up to the time of the expiration of the lease.

The judgment below is reversed, and the case remanded, with instructions to overrule the motion to dismiss and to allow appellee to answer the bill within a time to be named, if it shall be so advised, and to otherwise proceed with the case as law and justice may require, not inconsistent with the views herein expressed.

ODELL v. H. BATTERMAN CO.

In re BARWIN REALTY CO.

(Circuit Court of Appeals, Second Circuit. March 9, 1915.)

No. 174.

1. APPEAL AND ERROR ⟸78—APPEALABLE ORDER—"FINAL ORDER"—DENYING LEAVE TO SUE RECEIVER.

An order, in receivership proceedings against a tenant, denying a landlord leave to sue the receiver in ejectment for the possession of the premises on account of breach of covenant by the tenant before the receiver was appointed, and permitting application in the receivership proceedings only subject to the possession of the receiver, is a final order which is appealable, since a "final order" is one which determines a substantial right against a party in such a manner as leaves him no adequate relief except by appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 426, 434, 464–477, 480, 481; Dec. Dig. ⟸78.

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

2. RECEIVERS ⟸71—POSSESSION OF PROPERTY—LEASEHOLD.

A receiver, appointed to take charge of property of a tenant, cannot maintain possession of the leasehold against the landlord, where the tenant had breached the lease, so that the landlord was entitled to declare a forfeiture thereof.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 127, 128; Dec. Dig. ⟸71.]

3. RECEIVERS ⟸176—ACTIONS—LEAVE TO SUE.

Where a court of competent jurisdiction has taken possession of property through a receiver appointed by it, no other court can acquire jurisdiction over the same property, or render any judgment which interferes with the possession, unless the court shall grant leave to sue its receiver; but the court appointing the receiver has ancillary jurisdiction to determine all questions relative to the possession of such property, even if it would have no original jurisdiction of those questions.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 345; Dec. Dig. ⟸176.]

4. RECEIVERS ⟸174—ACTIONS—LEAVE TO SUE—DISCRETION.

It is an abuse of the discretion of the court appointing a receiver for a tenant to refuse permission to the landlord to sue in another court, or to apply to the court appointing the receiver, to recover possession of the property from the receiver for the tenant's breach of the lease, which entitles the landlord to forfeit it.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 333–343; Dec. Dig. ⟸174.]

5. APPEAL AND ERROR ⟸843—QUESTIONS PRESENTED FOR REVIEW—DENIAL OF LEAVE TO SUE RECEIVER—DEFENSES TO ACTION.

On appeal from an order denying to a landlord leave to sue a receiver of a tenant for possession of the property, because of the tenant's breach of the provisions of the lease, the defenses of the tenant to the action for possession will not be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3331–3341; Dec. Dig. ⟸843.]

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

This cause comes here on appeal from an order entered in the District Court of the United States for the Eastern District of New York on October 26, 1914.

For opinion below, see 217 Fed. 305.

The complainant is a citizen of the state of New Jersey and a resident of the city of Newark, and is a creditor of the defendant corporation, and upon his application receivers of the property of defendant were appointed. The defendant is a corporation organized and existing under and by virtue of the laws of the state of New York, and is a citizen of said state. The Barwin Realty Company is also a corporation organized and existing under and by virtue of the laws of the state of New York, and is a citizen of said state.

William D. Guthrie, of New York City, and Henry A. Ingraham, of Brooklyn, N. Y., for appellant.

Richard Welling, of New York City, for appellee H. Batterman Co.

Corbitt & Stern, of New York City (Arthur F. Gotthold and Ernest J. Ellenwood, both of New York City, of counsel), for appellees receivers.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge. In 1894 the defendant corporation was organized for the purpose of conducting a general department store. It had an authorized capital stock of $250,000, all of which it issued. On July 11, 1909, it entered into a lease with the Barwin Realty Company, hereinafter designated as landlord, while the defendant corporation is hereinafter referred to as tenant. Under the terms of the lease the landlord agreed to let and the tenant agreed to hire the premises in the borough of Brooklyn, Kings county, city and state of New York, at Broadway, Graham, and Flushing avenues, since occupied by the tenant as a store, together with the store fixtures and furnishings. The lease was to run for a term of 21 years, which term was to commence on July 11, 1909, and end on July 11, 1930, at 12 o'clock noon of that day, unless sooner terminated in accordance with its terms. The rent to be paid was $70,000 a year, and in addition the tenant was to make all repairs and pay all taxes and ordinary assessments levied against the property during the continuance of the lease, as well as all water rents and water charges. It was also to keep the property insured, $750,000 on the buildings and $100,000 on the fixtures. The tenth covenant of the tenant is as follows:

"To comply at the expense of the tenant with all rules, orders, ordinances, and regulations of each and every department or bureau of the city, county, state, or national government applicable to the said premises and of the New York Board of Fire Underwriters."

The lease also states that it is specifically understood and agreed between the landlord and tenant that:

"(4) If the tenant shall make default in fulfilling any of the covenants and conditions of this lease, or in making any payments herein provided, or in case the tenant abandons the premises and the same shall become vacant, the landlord may re-enter said premises and remove all persons therefrom, either by any suitable action or proceeding at law or by force or otherwise, without being liable to indictment, prosecution or damages therefor; and in any such case the landlord may give to the tenant five days' notice of its election to end the term under this lease, and thereupon the term under this lease shall ex-

pire, and all right of occupation thereunder on the part of the tenant shall end, and the tenant will quit and surrender the said premises to the landlord, and at the option of the landlord it may relet the premises as the agent of the landlord and receive the rents therefor, applying the same first to the payment of such expenses as it may be put to and then to the payment of the rent and other payments which may be or become due according to the terms of the lease, and the balance, if any, at the expiration of the term of this lease shall be paid over to the tenant."

On March 4, 1914, the fire department of the city of New York issued an order, known as order No. 15,688F, requiring the defendant within 60 days after the service thereof to provide inclosures of fire-retarding material around stairways and additional stairway and hallway in fireproof inclosure. It also issued another order, known as order No. 15,689F, requiring defendant within 10 days from date of service thereof to provide certain fireproof doors, automatic fireproof doors, fireproof inclosures, fireproof covers, and fireproof receptacles with respect to the premises so leased as aforesaid. But the defendant, it is alleged, failed and neglected to comply with the orders, although they were duly served upon it.

The defendant became financially embarrassed having outstanding obligations to the amount of several hundreds of thousands of dollars and being further indebted in large sums for merchandise. Receivers were accordingly appointed under an order made on June 25, 1914, and under the terms of that order all persons were enjoined from commencing any action against the defendant or its receivers. The landlord accordingly applied to the court for permission to commence an action of ejectment in the Supreme Court of the state of New York against the tenant and the receivers, claiming that, inasmuch as the changes directed to be made by the fire department had not been complied with, the lease was subject to forfeiture according to its terms, and the landlord was entitled to recover possession of the premises, having already given the notice required by the lease that it elected to end the term of the lease and demanded that possession of the demised premises be surrendered. While the application for leave to sue was pending the receivers proceeded to complete the work necessary to comply with the order No. 15,689F. But order No. 15,688F still remained unfulfilled. This application for permission to sue in ejectment was denied, unless—

"the landlord wishes a limited permission to begin such action against the tenant alone, to preserve its alleged rights and with the stipulation that the receivers may intervene and temporarily stay the action, during the period that they may be in possession."

It was added, however, that the landlord might apply to the court below as having present jurisdiction over the entire property—

"for a determination as to the landlord's right of entry (subject to the actual occupation of the receivers) and that issue, if raised, may be properly disposed of upon the answering affidavits after a full hearing."

This amounted to a refusal to allow an action of ejectment to be brought in the courts of the state of New York. An action in the New York courts against the tenant alone would fail as the receivers are in

actual possession of the property, and the New York Code of Civil Procedure (section 1502) provides that:

"Where the complaint demands judgment for the immediate possession of the property, if the property is actually occupied, the occupant thereof must be made defendant in the action."

But even if the receivers were not a necessary party the permission to proceed without them was valueless as the receivers had the right under the authority conferred to intervene and stay the action. And as to the permission to apply to the court below we observe that any determination of the question in that court was to be "subject to the actual occupation by the receivers." The action of the court evidently proceeded upon the theory that the right of the receivers in the premises is superior to the right of the tenant as well as superior to any right of re-entry the landlord may have for the tenant's default.

[1] This makes it necessary to inquire whether the order which the court made denying the request to be permitted to sue the receivers in ejectment is a final order from which an appeal may be taken. If we conclude that it is, we shall then be obliged to inquire whether error was committed in refusing to grant permission to sue. Chief Justice Taney, more than 60 years ago, pointed out in Forgay v. Conrad, 6 How. 201, 205, 12 L. Ed. 404 (1848), that practice in the chancery courts of the United States differed from the practice of the chancery courts in England, in that it was possible to take an appeal to the House of Lords from an interlocutory order of the Chancellor in some cases, while in the courts of the United States the right to appeal was by law limited to final decrees. The authorities concerning the distinction between interlocutory and final decrees were cited and reviewed in an opinion of the Supreme Court of the United States in Keystone v. Martin (1889) 132 U. S. 91, 93, 10 Sup. Ct. 32, 33 L. Ed. 275. The subject was again fully reviewed in McGourkey v. Toledo & Ohio C. R. Co., 146 U. S. 536, 13 Sup. Ct. 170, 36 L. Ed. 1079 (1892), and by Chief Justice White in La Bourgogne, 210 U. S. 95, 112, 28 Sup. Ct. 664, 52 L. Ed. 973 (1908). And see Matter of Farmers' Loan & Trust Company, 129 U. S. 206, 213, 214, 9 Sup. Ct. 265, 32 L. Ed. 656 (1889); Clark v. Roller, 199 U. S. 541, 546, 26 Sup. Ct. 141, 50 L. Ed. 300 (1905); Ex parte National Enameling Company, 201 U. S. 156, 26 Sup. Ct. 404, 50 L. Ed. 707 (1906); Foster's Fed. Practice, vol. 1, § 255.

The rule announced in these cases for determining whether, for purposes of appeal, a decree is final, is whether the decree disposes of the entire controversy between the parties. Under the decisions an adjudication is a final appealable order if it involves a determination of a substantial right against a party in such a manner as leaves him no adequate relief except by recourse to an appeal. In the suit at bar appellant claims a legal right to immediate possession of the premises, and asserts that he is entitled to have that right determined with all reasonable speed. So much of the order appealed from as denied appellant's application was undoubtedly a final order, inasmuch as it definitely and conclusively determined the proceeding which appellant had instituted. The effect of the order as we have pointed out is to leave appellant without relief until the receivership is terminated.

When that will be cannot be predicted. The receivership is a consent receivership and capable of indefinite duration.

In Gay v. Hudson River Electric Power Company, 184 Fed. 689, 106 C. C. A. 643 (1911), this court decided that it was error for the court below to deny a mortgagee the right to have the mortgaged property immediately sold, which right was given by the terms of the mortgage, merely because the property was in the custody of the court in receivership proceedings and such a sale might work an injury to other creditors. It was argued, too, in that case, that the denial of the motion for leave to sell the property did not result in a final order, because, after the receivership had terminated, the appellant would be free to take steps to protect its rights. It was also argued that the order was discretionary, and therefore not appealable, inasmuch as it was a proper exercise of discretion to deny the mortgage creditor relief when the mortgaged property was so bound up with the rest of the estate in court as to make it desirable to sell all the property of the insolvent as a unit, since such a sale would realize a larger fund for creditors. We held the order made by the court denying to the mortgagee the right to have the property immediately sold was an appealable order. "We have no doubt," we said, "that the order is appealable." So in the recent case of Central Trust Co. v. Chicago, Rock Island & Pacific R. Co., 218 Fed. 336, 134 C. C. A. 144, we held that an order denying the petitioner leave to intervene was a final and appealable order, because it was apparent that under the circumstances the denial of leave to intervene impaired the petitioner's substantial rights.

[2] A trustee in bankruptcy is bound by all forfeiture clauses, and the bankruptcy court gives effect to them. Remington on Bankruptcy (2d Ed., 1915) vol. 2, p. 985. Thus in Lindeke v. Associates Realty Co., 146 Fed. 630, 77 C. C. A. 56 (1906) the Circuit Court of Appeals in the Eighth Circuit, in a case in which a corporation tenant for a long term had failed to perform a covenant of the lease which required it to build an expensive building on the leased premises, held, after the corporation had been adjudged a bankrupt, that on petition of the lessor the court of bankruptcy properly decreed the enforcement of the forfeiture and directed the trustee to surrender possession of the property as the only effective remedy for the protection of the rights of the lessor.

A trustee in bankruptcy gets the title of the bankrupt, and a chancery receiver, as we pointed out in Durand & Co. v. Howard & Co., 216 Fed. 585, 591, 132 C. C. A. 589 (1914), takes no title, but simply the possession as an officer of the court. It does not, however follow that the receiver can retain possession as receiver of A.'s property when it appears that A.'s right in the property is gone and that B. is entitled thereto. There can be no reason why B. is not entitled to show that A. has lost his right to the possession of the property, and that he (B.) is entitled to enjoy it. In other words, a chancery receiver can have no better right to retain possession of a leasehold than a trustee in bankruptcy has. The landlord's right to enforce a forfeiture of the lease is not less when a chancery receiver is in possession than it is when a trustee in bankruptcy has possession.

In this case the alleged breach of the lease occurred more than seven weeks before the appointment of the receivers. The landlord's right to end the tenancy was therefore complete, if the allegations are supported by the facts, before the receivers came into possession of the property. The receivers have no greater rights in the property than the insolvent corporation itself possessed. The appointment of the receivers in no wise abrogated the contract. And if under the lease after breach the landlord is entitled upon giving proper notice to the immediate possession of the property as against the tenant he certainly must have the same right as against the receivers. Receivers are not appointed to keep persons out of their rights. The law does not tolerate so rank an injustice. In Eyton v. Denbigh, etc., R. Co., L. R. 6 Eq. 14, 16 (1868), the plaintiff had conveyed land to a railway company in consideration of a rent charge. The company passed into the hands of a receiver, and Lord Romilly, Master of the Rolls, in permitting the owner of the rent charge to distrain for arrears of rent, said:

"I am clearly of opinion that I must give the applicant leave to distrain. * * * *The receiver was not appointed for the purpose of keeping persons out of their rights*, and in making this order I express no opinion as to the legal rights of the applicant, but simply remove out of his way the difficulty of the officer of the court being in possession. It is exactly the same case as if a stranger to the suit was applying for leave to bring ejectment."

And in Park v. New York, L. E. & W. R. Co. (C. C.) 57 Fed. 799, 802 (1893), Judge Lacombe said:

"The right to insist upon the execution of this contract according to its terms * * * is in no way impaired by the fact that the court has taken possession of all the property * * * and has placed its officers, the receivers, as custodians and caretakers, not only to preserve the same, but also to maintain it as a going concern pending the final adjustment. Every piece of such property comes to the receivers' hands in the same condition in which it leaves the hands of the defendant. No lien or contract is disturbed or altered by the court's intervention; and, if the receivers continue to hold a particular piece of property which they found in the possession of the Erie road, and which that road could only continue to hold upon complying with certain conditions, they must, if they so hold it, in like manner conform to these conditions."

[3] Where a court of competent jurisdiction, whether federal or state, takes property into its possession through a receiver appointed by it, the property is thereby withdrawn from the jurisdiction of all other courts. As said by the Supreme Court of the United States in Murphy v. John Hofman Co., 211 U. S. 562, 569, 29 Sup. Ct. 154, 156, 53 L. Ed. 327 (1909):

"The court, having possession of the property, has an ancillary jurisdiction to hear and determine all questions respecting the title, possession, or control of the property. In the courts of the United States this ancillary jurisdiction may be exercised, though it is not authorized by any statute. The jurisdiction in such cases arises out of the possession of the property, and is exclusive of the jurisdiction of all other courts, although otherwise the controversy would be cognizable in them."

All other courts than the one which has the property in its possession are without power to render any judgment which invades or disturbs the possession of the property while it is in the custody of the court

which has seized it. And in Wabash Railroad Co. v. Adelbert College, 208 U. S. 38, 54, 28 Sup. Ct. 182, 52 L. Ed. 379 (1908), the Supreme Court declared that for the purpose of avoiding injustice which otherwise might result, a court during the continuance of its possession has, as incident thereto and as ancillary to the suit in which the possession was acquired, jurisdiction to hear and determine all questions respecting the title, the possession, or control of the property. The court added that in the courts of the United States this incidental and ancillary jurisdiction exists, although in the subordinate suit there is no jurisdiction arising out of diversity of citizenship or the nature of the controversy. The principles to which attention has just been called are of general application, and serve to prevent a conflict over the possession of property which would be unseemly and subversive of justice. They have been applied by the Supreme Court of the United States impartially, sometimes in favor of the jurisdiction of the courts of the states, and sometimes in favor of the jurisdiction of the courts of the United States.

So long, therefore, as the premises in controversy continue in the possession of the receivers appointed by the court below, the jurisdiction of that court as concerns the property is exclusive of the courts of the state of New York. Because of its possession of this property through its receivers the court below has ancillary jurisdiction to determine whether the landlord has a right to forfeit the lease, whether there has been a default which justifies the forfeiture, and, if so, authority to direct the receivers to surrender the property. The court, in the exercise of its supervisory control of the receivers, may order them to relinquish possession to the landlord, if its title is incontestably clear as against the receivers. 34 Cyc. 422; Palys v. Jewett, 32 N. J. Eq. 302.

But the landlord is not asking the District Court to pass upon these matters. On the contrary, it invokes permission of the court to bring the suit in a court of the state of New York. If the suit is to be brought in the state court, it must be with permission of the court whose officers the receivers are, and permission must be granted in the cause in which the receivers were appointed. The appellant's right must be worked out, either in the action in which the receivers were appointed, or in an independent action brought only upon leave of the court by which the appointments were made. See Porter v. Kingman, 126 Mass. 141. It was therefore within the discretion of the court below to decide whether it would determine for itself the right which the appellant asserts against the premises which the court has taken into its possession, or would allow the question to be litigated elsewhere. Porter v. Sabin, 149 U. S. 473, 479, 13 Sup. Ct. 1008, 37 L. Ed. 815 (1893); Durand & Co. v. Howard & Co., supra. The law is correctly stated in 34 Cyc. 419, as follows:

"It was not according to the course of the Court of Chancery to refuse liberty to try a right claimed against its receiver, unless it was perfectly clear that there was no foundation for the claim, and while it has been held that the court cannot properly refuse leave to bring an action at law upon a purely legal right, when the applicant comes in asking for a trial at law and by jury, it is otherwise when the petitioner voluntarily comes into court in the

receivership proceeding, asking that court to determine his rights; and generally it is considered to be a matter within the discretion of such court whether it will determine for itself all claims of or against the receiver, or will allow them to be litigated elsewhere, and the latter is usually done when the issues can be more conveniently tried in the place where the facts arise and the venue belongs."

[4] As we have pointed out in an earlier part of this opinion, the order made by the court below was in effect a refusal to allow the landlord to have his claim adjudicated. The terms of the order clearly indicate that the court below has no intention to allow the receivers to be disturbed in their possession of the property. We think this an abuse of the court's discretion. The landlord has a right, which the court cannot properly disregard, to have its claim to the possession of this property passed upon and determined, and, if found to be valid, it has a right to be restored to the immediate possession of the property. That right the court must recognize and protect, notwithstanding the existence of the receivers and the creditors.

[5] The receivers claim that there is no cause of forfeiture, as it was the duty of the appellant, rather than of the defendant, to make the structural changes which the fire department ordered to be made, and that, if the receivers are mistaken in this, the defendant nevertheless was not under obligations to comply with the orders as the appellant had not demanded that defendant comply, and had not given its written consent to the making of the required structural alterations. The landlord answers that where a lease is for a long term, and provides that the tenant shall make repairs of every description, it includes repairs structural in character, and that by demanding that the orders be complied with it consented thereto. The receivers also assert that the landlord waived his right to terminate the lease by accepting rent after defendant's default. The landlord states he received the rent without notice that the orders had not been complied with, although defendant had promised to comply, and that as soon as the receivers were appointed he made an investigation into the condition of the property, and discovered that order No. 15,688F had not been complied with in any respect and that order No. 15,689F had only been partially complied with; that thereupon he immediately refused to receive any further payments of rent and gave notice terminating the lease. The receivers also assert that the orders of the fire department were void, not having been properly addressed and served. But the landlord asserted it received the orders and at once forwarded them to its tenant, with a demand for compliance, and that the tenant received them and immediately promised to obey them; that the orders described the demised premises with the utmost clearness and definiteness, and unmistakably referred and applied to the premises occupied by the defendant under its lease; that all the parties had actual notice of the orders, acquiesced in them, and acted under them, and are estopped from challenging their regularity.

But this court is not concerned with the foregoing defenses. It is not for us here and now to determine whether upon the facts the landlord is or is not entitled to judgment of ouster and to be put into possession of the property. It is enough for the present purpose to know that ap-

pellant has stated a good prima facie cause of action, and that no sufficient reason exists for denying it the right to sue the receivers as well as the defendant in an action of ejectment.

The order appealed from is reversed. The petition for leave to commence and prosecute an action in the Supreme Court of the state of New York is granted, as prayed.

LOUISVILLE & CINCINNATI PACKET CO. v. UNITED COAL CO.

(Circuit Court of Appeals, Sixth Circuit. April 6, 1915.)

No. 2502.

1. COLLISION ⟸71—MOVING AND MOORED VESSELS—EXCESSIVE SPEED.

A steamer left her landing at Cincinnati in the evening and proceeded down the river at a speed of from 10 to 18 miles an hour. The night was generally clear, but dark. When a short distance above the Southern Railroad Bridge, estimated by witnesses at from 300 feet to 300 yards, she entered a bank of fog or smoke, which made it impossible to see the shore or bridge lights until within 200 feet of the bridge. On entering the bank the speed was reduced, but was again increased to full speed when it was seen that she was about to strike a pier. Instead of passing through the channel span, she passed to the south of the pier through the draw span, and at a distance below of from 175 to 450 feet came into collision with and sank the outer one of a fleet of coal barges moored near the Kentucky shore. She was going at full speed. The master and pilot knew the locality, that there was likely to be fog or smoke in the bend above the bridge, that it was usual for fleets of coal barges to moor where these were, and that they frequently extended farther into the river. *Held* that, under the rule that a vessel in motion must exonerate herself from fault for collision with a moored vessel by showing that it was not within her power to prevent it, the steamer had not sustained the burden of proof resting upon her, but that those in charge were negligent, under the known circumstances, in not moving at such moderate speed as to keep her well under control, and that she was liable for the collision.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 101; Dec. Dig. ⟸71.

Collision rules, speed of steamers in fog, see note to The Niagara, 28 C. C. A. 532.]

2. COLLISION ⟸129—SUIT FOR DAMAGES—DAMAGES RECOVERABLE.

The owner of a vessel sunk in collision in a navigable stream is entitled to recover the necessary expense of raising her, to determine whether she may be advantageously repaired, and also to prevent her becoming an obstruction to navigation.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 283; Dec. Dig. ⟸129.]

Appeal from the District Court of the United States for the Western Division of the Southern District of Ohio; John E. Sater, Judge.

Suit in admiralty by the United Coal Company against the Louisville & Cincinnati Packet Company, as owner of the steamer Lizzie Bay. Decree for libelant, and respondent appeals. Affirmed.

C. H. Stephens, of Cincinnati, Ohio, for appellant.

Robert Ramsey, of Cincinnati, Ohio, for appellee.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

PER CURIAM. [1] The facts involved in this appeal, including the trial judge's summaries of the testimony of most of the witnesses, appear in his opinion. Study of the record and the briefs satisfies us that the controlling facts and appropriate principles of law were fully considered and rightly applied. An extended opinion here would of necessity result in substantial repetition of the opinion under review, and would obviously serve no useful purpose. We may remark, however, that the appellant failed to discharge the burden resting upon it, as owner of the moving boat (the Lizzie Bay), to show the exercise of reasonable care to avoid collision with the moored barge in issue. One distinct fault was that the navigators of the Lizzie Bay commenced too late to bring her under control. Their admitted knowledge of facts like these: Lack of mooring facilities above the Southern Railroad Bridge, insufficient lights maintained on the bridge, tendency of fog and smoke to accumulate in that vicinity, in connection with the claimed difficulties attending the stopping or turning of river steamboats—clearly required these navigators to operate the boat at such moderate speed as to keep her well in hand until they passed the Southern Bridge. The absence of a schedule distinctly fixing times of arrival and departure respecting points reached by the boat plainly admitted of this course. We may add that the navigating officers of the Lizzie Bay, including her captain, were perfectly familiar with the mooring of barges at the point of collision; and, moreover, the evidence fairly shows that the barges so moored did not then extend as far from shore as usual. We therefore do not see how the appellee can rightfully be placed in fault. These are some of the considerations which lead us to approve and adopt the opinion of the trial judge, which follows. The decree must be affirmed, with costs.

Opinion of Trial Judge.

SATER, District Judge. The Lizzie Bay left the Cincinnati wharf December 8, 1905, about 6:30 p. m., for Madison, Ind. At that time and place the night was clear, but dark. The atmosphere was damp and heavy, and somewhat smoky, but not enough to interfere with navigation. The smoke had a tendency to settle down. There were from 30 to 40 feet of water in the river, with a current of 5 to 6 miles per hour.

As the boat proceeded down the river, to pass beneath the bridge of the Cincinnati, New Orleans & Texas Pacific Railroad Company, it worked somewhat toward the Kentucky side. The shores and the light and barges along them could be seen until the boat got a short distance above the Southern Bridge, when it entered a smoke and fog, not previously seen, so dense as to shut off all view of the lights and render the bridge invisible. At the channel span, through which the boat was designed to pass, was suspended a green light to indicate the center of such span, and on each of the supporting piers was a red or danger light; but these lights were all small. When the boat entered the fog it had traversed perhaps 2 or 3 miles, and was running at a speed variously estimated at from 10 to 18 miles per hour. The pilot says it was going at a full head of steam, and he estimates its speed at 18 miles per hour. Morris, the mate, puts it at from 10 to 12 miles. The shape of the Kentucky hills was discernible, and served as a guide to the boat on its downward course. According to Thomas, the pilot, when he encountered the fog, the boat was near the Kentucky shore, a third of the way out in the river from that shore. He could see the "black of the hill," even in the fog; but he could

not tell how close he was to the Kentucky shore, until he saw the pier. He says the boat was to the left of the pier when it entered the fog, after which he could not see any shore lights. The men on the boat, until they were about to collide with the pier, at no time saw the outline of the bridge or the lights on it. The point at which the smoke and fog was entered is variously estimated by the witnesses to be from 300 or 400 feet to 200 or 300 yards above the bridge. The pilot makes varying estimates. He testifies that the boat encountered the fog a few hundred yards above the bridge, that he could see the shore lights until the boat ran into the fog 200 yards above the bridge, that the point at which the fog was entered was perhaps within less than the last-named distance from the bridge, that such point, he supposes, was between 200 or 300 yards above the bridge, and that when he was about 150 yards above it he could see the lights on either shore about the time the fog came up. The captain says the boat struck the fog at 200 or 300 yards above the bridge. The Southern Bridge, even under favorable circumstances, on account of a bend in the river, is not visible from the upper bridge, under which the boat had passed, except in case of very high water, until within a distance variously estimated from 300 yards to a quarter or half a mile therefrom. The presence of the bridge was not known until it was only from 185 to 200 feet distant, and was first made known by the passing of a train. When the bridge was first seen, the boat was about to strike the second pier from the Kentucky shore. When the fog was entered, the fog whistle was blown and a stopping bell was rung to shut off steam and slow down the boat. On the discovery of the danger of colliding with the pier, the signal was given for a full head of steam to clear the pier. The boat did not pass under the channel span, but was forced to pass south of it on the Kentucky side of the pier under the draw span.

Below the bridge was a fleet of moored barges. One witness says they were 175 feet distant from the bridge, another at a distance of 300 feet, and still another at a distance of from 400 to 450 feet. The captain testifies that he saw the lights on the barges at the same time that he saw them on the pier; i. e., when the boat was from 185 to 200 feet distant above the bridge. As the boat passed south of the pier through the draw span, an effort was made, so parties on the boat testify, to head it into the river away from the barges to escape collision. One witness testifies, however, that it kept straight on its course. It was then running with a full head of steam. It struck the outer barge, loaded with coal, broke the end off of it, and sank it. The boat was also damaged.

The bridge and the lights on it were not seen at any time until after the boat had passed through the smoke and fog. Indeed, the captain says that he was not looking for the bridge, but was watching the lights on the shore to see if there were any boats around. After the stop signal was given. the boat, then having considerable headway on account of its previous speed, proceeded at a reduced rate until the full head of steam was put on to avoid the pier.

Robinson, who was on the coal fleet at the time of the collision, 500 to 600 feet from its head, saw the boat and hallooed as it struck the barge, which he says was from 400 to 450 feet below the bridge. From his location he could see the red lights on the pier and the green light on the channel span. There were lights on the upper and lower ends of the barges and on the outside of them about the middle. It is difficult for him, he says, to recall the conditions that night; but it was an ordinary night and with little smoke. He has seen smoke come down in the location of the barges, but he does not know whether there was smoke or fog above the bridge. Just before the collision he heard the ringing of backing or go-ahead bells, but does not recall hearing any one on the hurricane deck.

Cleveland, who was with the Pittsburgh Coal Company (which had a barge quite close to the bridge), and witnessed the collision, was standing near the pier. The boat, he says, did not change its course until it got to the fleet, and was coming rather swiftly and without slackening its speed. He could not say whether there was smoke, or mist, or fog, but did not notice any. The accident occurred below him about twice the length of his barge, which was at the bridge. He saw the boat first when it was a short distance above the bridge.

Schauble says the night was moderately dark. He noticed no mist, fog, or smoke, but cannot say what the fact was as to the same above the bridge. He was below it, and could see the lights on the bridge on its Ohio side. He could not see above the bridge on account of the bend in the river, and because the piers more or less obstructed his view. He was somewhat excited at the time over the loss of the barge, but still a credible witness. He cannot say whether the night was very dark, or whether there was a fog coming down, or whether the atmosphere was heavy or not, or whether or not the smoke had settled at the end of the bend above the bridge.

Love, a coal shoveler, saw the boat when it was between the pier and the barge, coming with a pretty good speed and without slackening. He noticed no fog or smoke, and could see the lights on the bridge and the Independent fleet. He does not know the condition as to smoke that night at the Southern Bridge, but says it sometimes settles down in the bend, making it hard to see. He is unable to state the condition of the weather, but does not remember seeing fog, or dust, or anything above the bridge.

Menges, who left his Ludlow landing about 6 o'clock, 200 yards below the collision, says that he thinks it was the worst night he ever saw on the river. He thinks a light at the landing could not have been seen 15 or 20 feet away. The weather was calm, without wind. The fog extended about three squares above the bridge.

Taking the testimony as a whole, it must be held that there was a bank of fog and smoke above the Southern Bridge, which earlier in the evening extended below it. The record suggests that the fog which Menges describes had lifted at and below the bridge after 6 o'clock, but that it still remained above, obscuring the bridge and its lights, at the time the Lizzie Bay entered it.

The barges of the coal fleet were 6 abreast. There had been times when there were as many as 10 or 11 thus lashed together. There was also a pump boat 18 feet wide sparred out from the shore 20 to 25 feet. The spar boat was 26 feet wide, and 15 to 25 feet from the shore. Schauble says the barges extended out about 200 to 225 feet from the shore. Robinson, the watchman in the fleet, says they were 150 feet distant from the channel. Moody testifies that the coal fleet extended into the river beyond the second pier the width of two barges, but the pilot does not state it so strongly, for he says the coal fleet monopolized the biggest part of the space between the shore and the bridge. The photographs introduced in evidence give uncertain information, because the respective points from which they were taken are not shown. The evidence does not show the distance the barges usually extended into the river, or that the distance that evening was unusual.

There was no green light suspended from the draw span (which is only about 100 feet wide) to guide navigators. Robinson testifies that the water under the span was sufficient for a boat, but that it was navigated in fact only by private parties, and that boats of the size of the Lizzie Bay could not have gone between the piers which support it.

Cleveland's evidence is that there was just room for the boat between the pier and the barges of the Pittsburgh Coal Company.

Thomas testifies that the draw span was fixed for many years so that it might be open for boats, but he does not say that such use of it had been recent, nor did he know its condition on the night in question. The draw span had been opened on many occasions, and he has many times known of boats going under it when it was closed. There is plenty of water there at a 10 or 15 foot stage, but not as much as the channel would call for; but in a 15-foot stage there would be about 7 feet of water. The captain testifies that he had often passed under the draw span, when there were no barges there, to avoid the current, and that there was good water there on the night of the accident.

Schauble has seen boats pass under the span, but they were mostly upstream boats. Later he added that he had no recollection of having seen any downstream boats pass there, but that with the river at a 35-foot stage there was good water between piers 1 and 2. He never noticed boats passing beneath the span when the stage of the water was as on the evening in question.

That the span might be used for the passage of boats is suggested from the nature of its construction. It was to some extent so used. The fact that

it is a draw span implies its contemplated use in high water rather than low water. The absence from it of a suspended green light, its width of only about 100 feet, the presence of lights to point out the channel span, and the slight use made of the draw span, render it clear that it was not ordinarily used in the course of navigation, and was not intended for use at the time of the accident.

The evidence shows that, when the bank of smoke and fog was entered, the boat was going at a high rate of speed, without certain knowledge on the part of its officers of its location or distance from the Kentucky shore. The pilot's uncertainty as to the distance of his boat and the fog bank from the bridge is noticeable and significant. Mere darkness would not have obscured the lights on the bridge. That they were not seen was in itself notice that something other than darkness concealed them, and his experience, as well as that of the captain, should have made known to them that, in that locality, the cause of the obscuration was smoke, or fog, or both. The testimony of Menges destroys the theory that the smoke and fog suddenly came upon the boat. It was the boat that suddenly came upon them. They were hanging and had been hanging in that vicinity for some time. Considering the force of the current, the speed of the boat, the character of the evening, and the conclusion which should have readily been drawn by experienced rivermen from their inability to see the lights on the Southern Bridge, and their want of knowledge as to their location, the pilot and captain were not practicing good seamanship.

In view of the fact that the bridge lights were discernible from 185 to 200 feet from the bridge, the bank of smoke and fog was a narrow one, whether the point of its entrance was the minimum, the maximum, or the average distance therefrom as named by the witnesses, and considering the speed of the boat as stated by the pilot, to wit, 18 miles per hour, or the minimum speed of 10 miles per hour, as given by another witness, the time in passing through the bank was necessarily brief. The momentum of the boat and the force of the current were such as to interfere with any great checking of its speed in the brief time in which it was in the fog. The presence of the piers made navigation dangerous, and in anticipation of such danger there was not, under the circumstances, an exercise of due care on the part of those in control.

Schauble testifies that the place of collision has been used as a coal harbor for 15 years. The barges were sometimes lashed together 8 or 10 abreast, and consequently extended on such occasions much farther into the river than on the evening in question. The pilot knew that for a great many years a coal fleet had been located close to the bridge and at the point where the barges were situated that night. The captain saw the identical fleet of barges at the mooring on the morning preceding the accident. Both the pilot and the captain should have known and remembered the location of the coal fleet, and used due care commensurate with the circumstances to avoid it. The character of the skill and knowledge required of the pilot is as set forth in Atlee v. Packet Co., 21 Wall. 389, 396, 397, 22 L. Ed. 619, and Davidson Steamship Co. v. United States, 205 U. S. 187, 27 Sup. Ct. 480, 51 L. Ed. 764. The boat, being in motion, was required to keep out of the way of the barges at anchor, if there was no fault in the location of the latter, unless it appears that the collision was the result of inevitable accident. The rule is that the vessel in motion must exonerate itself from blame by showing that it was not in its power to prevent the collision by adopting any practicable precautions. The Virginia Ehrman, 97 U. S. 309; The Lucille, 169 Fed. 719.

The libelant asks recovery as follows: For loss of the cargo of coal, $829.50; for repairs of boat, $985; for services of the steamer Helen White in raising the barge, $525; for pumping boat, in raising the barge, $152.50; for wharfage, $2; for lumber for temporary repairs for towing barge, $30; for towing the barge to Pittsburgh, $100; for 63 days' demurrage, $126; total, $2,759.

[2] The libelant is entitled to be reimbursed for the necessary expense of raising the barge, to determine whether it could be repaired advantageously or not, and because it was liable to become an obstruction to navigation. The Reno, 134 Fed. 555, 67 C. C. A. 479; The Chauncey M. Depew (D. C.) 59 Fed. 791; The Venus (D. C.) 17 Fed. 925. The barge originally cost $1,550. Where the final claim for damages exceeds the full value of the vessel at the time

of the loss, the claim should be carefully scrutinized, and the libelant held bound to show special circumstances to justify any such excess, and that good faith and reasonable prudence and good judgment have been exercised in making repairs. The Venus, supra. The libelant claims too much. No survey appears to have been made to ascertain the amount of repairs necessary to reinstate the barge to its previous condition, and no estimates of any kind were obtained until after it was removed to Pittsburgh. Apparently without any preliminary investigation to ascertain whether it was worth raising and repairing, or what it would cost to remove it and repair it, it was raised, removed, and repaired. The conclusion reached is that the items of $829.50 for the coal lost, $985 for repairs, $375 for the services of the steamer Helen White, $152.50 for the pumping boat, $2 for wharfage, $100 for towing, and $39 for lumber, with interest on them from the date such items of expense were respectively incurred, should be recovered by the libelant. In other words, $529.50 are allowed for the raising of the barge and removing it as an obstruction, and $1,124 for its repair. There is no evidence of the value of the barge at the time of the collision. There had necessarily been a depreciation from use. My purpose is to make the last-named amount such a sum as would fairly equal the value of the barge at the time of the collision.

The item of $375 is allowed in lieu of that of $525, on the evidence of Boyd that $5 an hour is charged by his company for work of a kindred character. The other claims, and the libelee's claims for damage, are disallowed.

DUEHAY et al. v. THOMPSON.

(Circuit Court of Appeals, Ninth Circuit. May 10, 1915.)

No. 2533.

1. PARDON ⟸4—PAROLES—STATUTORY PROVISIONS—"COMMUTATION."

Act Jan. 23, 1913, c. 9, 37 Stat. 650 (Comp. St. 1913, § 10535), provides that every convict imprisoned for a definite term, whose record shows that he has observed the rules of the institution and who has served one-third of the total of the term for which he was sentenced, may be released on parole. Act June 25, 1910, c. 387, 36 Stat. 819 (Comp. St. 1913, §§ 10535–10544), a part of the original act relative to paroles, provides that nothing therein shall impair the power of the President to grant a pardon or commutation. *Held* that, where the President commuted a prisoner's term of imprisonment from eight to four years, the prisoner was eligible for parole when he had served one-third of the commuted sentence of four years, as a "commutation" of sentence or punishment is a change from a higher to a lower punishment, or the substitution of a less for a greater punishment, and the commutation did not substitute a sentence by the President for the judgment of the court, but left the judgment of the court in force, though in a modified form.

[Ed. Note.—For other cases, see Pardon, Cent. Dig. §§ 4–6½; Dec. Dig. ⟸4.

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

2. PARDON ⟸13—"PAROLE."

A "parole" is tantamount to a commutation, since it substitutes a lesser punishment for that imposed by the sentence, and changes one punishment known to the law for another and different punishment, also known to the law.

[Ed. Note.—For other cases, see Pardon, Cent. Dig. § 27; Dec. Dig. ⟸13.

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

Ross, Circuit Judge, dissenting.

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

Mandamus by Fred H. Thompson against F. H. Duehay, Superintendent of Prisons of the Department of Justice, and others. The writ was granted (217 Fed. 484), and defendants bring error. Affirmed.

Clay Allen, U. S. Atty., of Seattle, Wash., and G. P. Fishburne, Asst. U. S. Atty., of Tacoma, Wash., for plaintiffs in error.

John J. Sullivan, of Seattle, Wash., and Fred H. Thompson, of Los Angeles, Cal., for defendant in error.

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

WOLVERTON, District Judge. [1] On December 20, 1911, the defendant in error was convicted, on two counts, of the charge of having received articles stolen from the United States mails, and sentenced to the penitentiary at McNeil Island, Wash., for a term of four years, and to pay a fine of $1,000, upon each count, the terms of service to run consecutively. On petition for clemency, the President, on August 5, 1913, commuted the sentence to make the service on the two four-year terms run concurrently, instead of consecutively, virtually and in reality reducing the term of service from eight years to four. One-third of defendant in error's four-year term, as commuted, being due to expire in August, 1914, he made application to the board of parole, sitting in May, 1914, for hearing applications for parole for the months of June, July, and August of that year. The board, deeming he was not then eligible for parole, because he had not served a total of one-third of his original sentence of eight years, refused his application. Whereupon defendant in error applied to the court below for a writ of mandamus requiring the board to entertain his petition, and, the writ having been granted by judgment and decree of the court, the board of parole prosecutes error to this court.

The statute provides:

"That every prisoner who has been or may hereafter be convicted of any offense against the United States and is confined in execution of the judgment of such conviction in any United States penitentiary or prison, for a definite term or terms of over one year, or for the term of his natural life, whose record of conduct shows that he has observed the rules of such institution, and who, if sentenced for a definite term, has served one-third of the total of such term or terms for which he was sentenced, or, if sentenced for the term of his natural life, has served not less than fifteen years, may be released on parole as hereinafter provided." Act June 23, 1913, c. 9, 37 Stat. 650, Fed. Stat. Ann. (Supp. 1914) p. 326 (Comp. St. 1913, § 10535).

The original act contains this further provision:

"That nothing herein contained shall be construed to impair the power of the President of the United States to grant a pardon or commutation in any case, or in any way impair or revoke such good time allowance as is or may hereafter be provided by act of Congress." Act June 25, 1910, c. 387, 36 Stat. 819, Fed. Stat. Ann. (Supp. 1912) p. 306 (Comp. St. 1913, §§ 10535–10544).

The single question presented for decision is whether the commutation of the sentence by the President reduces the judgment of the court,

as a judgment, that is, casts a new sentence respecting which the judgment attaches, so that the commuted sentence stands yet as the judgment of the court, or whether it supersedes or displaces the judgment of conviction in such a way that it no longer remains the sentence or judgment of the court, but becomes the commuted sentence of the President.

The mere statement of the proposition is its own solution. It is said that:

"Commutation of sentence or punishment is the change of a punishment to which a person has been condemned to a less severe one." 29 Cyc. 1561.

Other definitions are found in the authorities, but all are to the same purpose, of which we note the following:

"Change from a higher to a lower punishment." Ogletree v. Dozier, Sheriff, 59 Ga. 800, 802.

"Substitution of a less for a greater punishment, by authority of law." Lee, Sergeant, v. Murphy, 22 Grat. (Va.) 789, 12 Am. Rep. 563.

Substitution of a "less grade of punishment for that inflicted by the sentence pronounced upon conviction." State v. State Board of Corrections, 16 Utah, 478, 52 Pac. 1090.

[2] A parole is tantamount to a commutation, for, as said by the court in the case last cited, it—

"substitutes lesser punishment for that imposed by the sentence. It changes one punishment known to the law for another and different punishment, also known to the law. In other words, it substitutes a less grade of punishment for that inflicted by the sentence pronounced upon conviction."

It was this view of the significance of a parole, no doubt, that suggested to Congress the idea of adding the tenth section to the parole act of June 25, 1910 (36 Stat. 821), providing against any impairment of the authority of the President to grant pardons or commutations in any case.

The judgment of conviction must be the basis upon which all pardons and commutations can be grounded, for if there be no judgment and sentence, there can be no pardon or commutation. If there be a full pardon, the judgment is satisfied and ceases to have operation. If there be a commutation only, the judgment is only satisfied in part, and remains operative in part, and it requires the exercise of the function of the court in order that the commuted judgment may be executed. The President does not execute it, nor prescribe the process whereby it shall be satisfied. That is left to the judicial department of the Government, and is controlled and regulated by the laws respecting the enforcement of judgments of conviction in criminal cases. So it must be that the judgment remains, but in modified form—a modification imposed upon it by the executive power—and can partake in no sense of a sentence imposed by the President. The effect is the same as that of a parole imposed by a legally constituted board of parole; it impresses itself upon the judgment, but enforcement still remains with the court. Hence the judgment is still the judgment of the court until satisfied, through its warrant and commitment. In short, the executive has superimposed its mind upon the judgment of the court; but the sentence remains, nevertheless, the judgment of the court, and not

of the executive, and is subject to the regulations of law respecting its enforcement.

It follows, therefore, that the defendant in error was entitled to his application for parole when he had served one-third of his commuted sentence of four years. Such has been the rule adopted in applying the regulations of the good time law, which operates against the interest of the prisoner, because, the shorter the term he has to serve, the less will be his credit per month for good time service. If the rule is right there, it is only fair to the prisoner to apply it where it operates in his interest.

The case of Ex parte Harlan (C. C.) 180 Fed. 119, 127, would seem to support the view we here entertain, as there it was held that the commuted sentence in the penitentiary cannot be unlawful merely because the statutes do not authorize the courts, in fixing the punishment in the first instance, to inflict imprisonment in the penitentiary for so short a time.

The judgment of the District Court will be affirmed.

ROSS, Circuit Judge (dissenting). The act of Congress, entitled "An act to parole United States prisoners, and for other purposes," of June 25, 1910 (36 Stat. 819), declares in its tenth section:

"That nothing herein contained shall be construed to impair the power of the President of the United States to grant a pardon or commutation in any case, or in any way impair or revoke such good time allowance as is or may hereafter be provided by act of Congress."

The Paroling Act as amended provides:

"That every prisoner who has been or may hereafter be convicted of any offense against the United States and is confined in execution of the judgment of such conviction in any United States penitentiary or prison, for a definite term or terms of over one year, or for the term of his natural life, whose record of conduct shows that he has observed the rules of such institution, and who, if sentenced for a definite term, has served one-third of the total of such term or terms for which he was sentenced, or, if sentenced for the term of his natural life, has served not less than fifteen years, may be released on parole as hereinafter provided." 14 Supp. Fed. St. Ann. p. 326.

The defendant in error was convicted under two counts of an indictment against him upon each of which he was sentenced by the trial court to imprisonment for four years in McNeil Island penitentiary, the second term to commence upon the expiration of the first—in effect, for eight years. The President subsequently commuted the two sentences "to run concurrently"—in effect thereby reducing the eight years to four years imprisonment. And the question presented by the record in the present case is whether the defendant in error is legally entitled (the necessary conditions appearing) to parole after having served one-third of four years. The court below held that he is, but I am of the contrary opinion, as was the Department of Justice in its opinion given to the prison authorities.

As has been seen, the act of Congress did not undertake to impair or in any way affect the power of the President to grant the defendant in error a pardon or commutation of his sentence; indeed, could not do so, for that power is conferred by the Constitution. Article

2, § 2. But the pardoning power is one thing, and a judgment of conviction is another and an entirely distinct thing. The one exists by virtue of the Constitution; the other, by virtue of a statute. The act of Congress in question provides for the parole of prisoners whose record of conduct shows that they have observed the rules of the penal institution, and declares that, when such a prisoner has served one-third of the whole of the definite term or terms for which he was sentenced, he may be released on parole as provided. Sentenced by whom? Not by the President, for he has no power to impose any sentence; but by the court, in and by the judgment of conviction it was required by law to pronounce. The construction of the word "sentence" contended for by the defendant in error, and sustained by the court below, would, as said for the government, be to import by construction into the statute after the words "one-third of the total of such term or terms for which he was sentenced" the words "or to which his sentence had been commuted," or words of similar import. There is just as much authority for inserting by construction into the statute after the words "if sentenced for the term of his natural life" the words (or their equivalent) "or if a death sentence be commuted to a life sentence," in which latter event one sentenced by a court to death, whose sentence is subsequently commuted by the President to life imprisonment, would be entitled to parole, if he had observed the prison rules, after having served not less than 15 years.

The complete answer to all such suggestions is, in my opinion, that no court has any authority to import by construction into a statute any words that will change the plain meaning of its unambiguous language.

I think the judgment of the court below should be reversed.

EDWARDS et al. v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. May 17, 1915.)

No. 2568.

1. PUBLIC LANDS ⇐102—CANCELLATION OF ENTRY—TIME OF TAKING EFFECT.
The decision of the Commissioner of the General Land Office, sustaining a contest against a land entry and holding the same for cancellation, does not effect a cancellation unless the time allowed for appeal expires without an appeal having been taken. If an appeal is prosecuted, all further proceedings are suspended until it is determined, and if the decision is again in favor of the contestant the entry is then formally canceled, and the notice required by Act May 14, 1880, c. 89, § 2, 21 Stat. 141 (Comp. St. 1913, § 4537), is given the contestant, who has a preference right for 30 days thereafter to enter the land.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 294–297; Dec. Dig. ⇐102.

Cancellation of entries, certificates, receipts, warrants, or transfers prior to issuance of patents to public lands, see note to Northern Pac. Ry. Co. v. United States, 101 C. C. A. 120.]

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2. CRIMINAL LAW ⊜1172—REVIEW ON ERROR—HARMLESS ERROR—INSTRUCTIONS.

Where a single judgment is entered on a conviction on two counts of an indictment, and the sentence imposed is no greater than might have been imposed under the one on which conviction was proper, errors in instructions are immaterial, unless they affect both counts.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3128, 3154–3157, 3159–3163, 3169; Dec. Dig. ⊜1172.]

In Error to the District Court of the United States for the Southern Division of the Southern District of California; Olin Wellborn, Judge.

Criminal prosecution by the United States against William B. Edwards and Robert L. Culpepper. Judgment of conviction, and defendants bring error. Affirmed.

Henry M. Willis, of San Bernardino, Cal., and J. O. Phillips, of Blythe, Cal., for plaintiffs in error.

Albert Schoonover, U. S. Atty., and Robert O'Connor and Clyde R. Moody, Asst. U. S. Attys., both of Los Angeles, Cal., for the United States.

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

RUDKIN, District Judge. The indictment in this case, containing two counts, was returned under section 19 of the federal Penal Code of 1910 (Act March 4, 1909, c. 321, 35 Stat. 1092 [Comp. St. 1913, § 10183), which provides 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.

The second count of the indictment charges that on the 1st day of June, 1912, one Patrick H. Bodkin, a citizen of the United States, made entry of the northeast quarter of section 11, township 7 south, range 22 east, San Bernardino base and meridian, at the United States land office at Los Angeles under the homestead law of the United States, the same being public lands of the United States subject to homestead entry, and that the plaintiffs in error and others conspired to injure, oppress, threaten, and intimidate him in the free exercise and enjoyment of a right and privilege secured to him by the Constitution and laws of the United States, namely, the right and privilege to make effectual his homestead entry by entering into possession of the lands embraced therein, making settlement thereon, and improving and cultivating the same, and in other respects complying with the public land laws of the United States so as to earn and procure a patent.

It appears from the bill of exceptions that on the 17th day of July, 1902, and the 12th day of September, 1903, these and other lands were withdrawn from entry by order of the Land Department of the United States under the act of Congress of June 17, 1902, commonly known as the Reclamation Act. On the 10th day of January, 1910, the lands

were restored to settlement on the 18th day of April, 1910, and to entry on the 18th day of May, 1910. On the 18th day of May, 1910, the lands were again withdrawn from entry pending the settlement of a contest between the state of California and the federal government as to their character and disposition, and were not restored to entry until May 22, 1912. Prior to the withdrawals of July 17, 1902, and September 12, 1903, one William B. Edwards made homestead entry of the tract above described. After the withdrawals, and before the lands were restored to entry, Bodkin filed a contest against the Edwards entry, and a hearing was duly had before the local land office. The record was transmitted to the Commissioner of the General Land Office, and under date of June 25, 1909, the Commissioner of the General Land Office held the Edwards entry for cancellation, and notice of this decision was given Bodkin prior to January 1, 1910. Edwards thereafter prosecuted an appeal from the decision of the Commissioner of the General Land Office to the Secretary of the Interior, and on the 19th day of April, 1910, the Secretary of the Interior affirmed the decision of the Commissioner of the General Land Office, directed a cancellation of the Edwards entry, and awarded Bodkin a preference right of entry. When Bodkin was notified of this decision, if at all, does not appear. On the 18th day of April, 1910, Edwards settled upon the land, and on the 18th day of May, 1910, made formal application to enter the same under the homestead law. On the latter date Bodkin made a like application, basing his claim on the preference right accorded him as a successful contestant. These several applications were suspended by the withdrawal of May 18, 1910, until June 1, 1912. On the latter date the Bodkin entry was allowed and the Edwards application canceled. On the foregoing facts the court instructed the jury as follows:

"The court further instructs you that the said Bodkin, by virtue of the allowance of June 1, 1912, at the United States land office, Los Angeles, California, of his application previously filed in said office, to wit, May 18, 1910, to enter as a homestead the land described in said second count, acquired the right, by the Constitution and laws of the United States, to make settlement and residence upon said land and cultivate the same and in other respects comply with the public land laws of the United States relating to homesteads, so as to earn and procure title to said lands."

This instruction was duly excepted to, as well as the refusal of the court to give an instruction embodying the opposite view of the law.

The first count of the indictment differs from the second only in the fact that the application of the successful contestant to make entry was not filed or presented to the local land office until several months after the cancellation of the prior entry, during which time the lands were withdrawn from settlement or entry. A verdict of guilty was returned as to both counts, and upon the two counts a single sentence or judgment was entered. From the judgment thus entered the defendants have sued out a writ of error, and the question presented for the consideration of this court is thus stated in the brief filed by the plaintiffs in error:

"The question raised, briefly stated, is: Is the action of local land officials in permitting and receiving the filing of a homestead application, based solely

upon a preference right of entry, theretofore awarded to the applicant by the Land Department at the successful termination of a contest of an entry upon lands, while withdrawn from all form of public entry under the Reclamation Act, and the allowance by the local land officials of such homestead entry upon such preference right, long after the 30-day notice required by law, but after the restoration of said lands to entry, within the jurisdiction of the land officials, and does such action confer such a right as is embraced within the terms of section 19 of the Penal Code of the United States?"

Section 2 of the act of Congress of May 14, 1880 (21 Stat. 140), provides that:

"In all cases where any person has contested, paid the land office fees, and procured the cancellation of any pre-emption, homestead, or timber culture entry, he shall be notified by the register of the land office of the district in which such land is situated of such cancellation, and shall be allowed thirty days from date of such notice to enter said lands."

Where the land is withdrawn from entry at the time of cancellation, the department has by certain regulations attempted to extend the time for exercising the preference right until 30 days after the land is restored to entry. The power of the department to thus extend the time for exercising the preference right beyond the 30 days allowed by the act of 1880 is the question sought to be presented here.

[1] The difficulty with this contention is that it finds no support in the record in so far as the second count of the indictment is concerned. Counsel seem to be laboring under a misapprehension as to when an entry is canceled, or the date from which the 30-day period for exercising the preference right is computed. The Edwards entry was held for cancellation by the decision of the Commissioner of the General Land Office on the 25th day of June, 1909, but that decision did not effect a cancellation of the entry. The parties are simply notified of such decisions and the aggrieved party of his right of appeal. If no appeal is prosecuted within the time prescribed by the rules of the department, the contest is closed, the entry formally canceled, and the register of the land office gives notice of cancellation to the successful contestant. If, on the other hand, an appeal is prosecuted, all further proceedings are suspended until the appeal is finally heard by the Secretary of the Interior. If the contestant is there successful, the entry is canceled, and the successful contestant notified as before. The date of the cancellation of the entry, or the date of the notice, if any, in this case, does not appear; but inasmuch as the case was not decided by the Secretary of the Interior until the 19th day of April, 1910, and the application to enter was made by the successful contestant on the 18th day of May following, it follows as a matter of course that the application to enter the land was in fact made within 30 days after notice of the cancellation of the entry.

[2] There was, therefore, no error in the instruction given, or in the refusal to give the instructions requested, as to the second count of the indictment, and, inasmuch as only one general judgment was entered on both counts, any error in the instructions as to the first count is immaterial. Dunbar v. United States, 156 U. S. 185, 15 Sup. Ct. 325, 39 L. Ed. 390. These same questions may arise in future litigation between the different claimants, and if they do the parties

should not be embarrassed by the decision of unnecessary questions at this time.

Finding no prejudicial error in the record, the judgment is affirmed.

FILLER v. JOSEPH SCHLITZ BREWING CO.

(Circuit Court of Appeals, Eighth Circuit. March 13, 1915. Rehearing Denied May 17, 1915.)

No. 4145.

1. TORTS ⟸26—ACTION FOR INTERFERING WITH PERFORMANCE OF CONTRACT—PETITION.

A petition which contained allegations that defendant induced and caused a third person to refuse to perform contracts made with plaintiff *held* to state a cause of action, and not subject to a general demurrer.

[Ed. Note.—For other cases, see Torts, Cent. Dig. § 33; Dec. Dig. ⟸26.]

2. PLEADING ⟸205—SUFFICIENCY OF PETITION—GENERAL DEMURRER.

Although a petition is based on a statute, and is insufficient to state a cause of action thereunder, it will not be held bad on a general demurrer, if it states facts constituting a cause of action at common law.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 491–493, 495, 496, 498–510; Dec. Dig. ⟸205.]

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

Action at law by Joseph Filler against the Joseph Schlitz Brewing Company. Judgment for defendant, and plaintiff brings error. Reversed.

David Goldsmith, of St. Louis, Mo. (M. N. Sale and Joseph Block, both of St. Louis, Mo., on the brief), for plaintiff in error.

John B. Edwards, of St. Louis, Mo., and Russell Jackson, of Milwaukee, Wis. (A. L. Abbott, of St. Louis, Mo., on the brief), for defendant in error.

Before SANBORN, ADAMS, and SMITH, Circuit Judges.

ADAMS, Circuit Judge. The amended petition in this case charged that the defendant the Joseph Schlitz Brewing Company entered into a pool, confederation, and understanding with a corporation known as the Missouri Poultry & Game Company and other persons unknown to plaintiff to fix the price of bottled beer, manufactured by defendant, in the city of St. Louis and to control and limit the trade in St. Louis and elsewhere of such beer, in violation of the provisions of sections 10298, 10299, 10300 and 10301 of the Revised Statutes of Missouri of 1909, known as the Anti-Trust Law.

Plaintiff set forth in his petition, in some detail, acts done by defendant and its confederates, all of which, it alleged, were done with the intention and for the purpose of lessening lawful trade and full and free competition in the sale of bottled beer in the state of Missouri, and alleged that he was thereby greatly injured in his business and

property, to his actual damage in the sum of $40,000. He then prayed for a judgment against the defendant in the sum of $120,000, three times the amount of his actual damages, as authorized by section 10305 of the Revised Statutes.

To this amended petition a general demurrer was filed, and for ground of demurrer defendant alleged that it failed to state facts sufficient to constitute a cause of action. This demurrer was sustained by the District Court, and, plaintiff declining to plead further, judgment was rendered in favor of the defendant. Due exceptions having been taken, plaintiff prosecutes this writ of error to secure a reversal of that judgment.

It is argued by defendant's counsel that the allegations of the petition were insufficient to constitute a cause of action under the Anti-Trust Law of Missouri because (a) they are statements of conclusions of law and not of fact; (b) because, if sufficient to show an unlawful pooling agreement between defendant and others, plaintiff, Filler, was by the express provisions of the pooling agreement exempt from its effect; (c) because the allegations, tested by the rule of reason, do not make a showing of any direct and necessary restriction upon competition. On the other hand, counsel for plaintiff argue that the petition did set forth a good cause of action under the Anti-Trust Law of Missouri. Neither party in argument or brief claimed that any other propositions of law were involved in the case. In other words, the entire contention was whether the amended petition stated facts sufficient to constitute a cause of action for triple damages, as provided by section 10305 of the Revised Statutes.

At the close of the oral argument the court asked counsel whether there were not other averments in the petition which might constitute a cause of action at common law, independent of the statute of Missouri, and whether the general demurrer to the petition should not have been overruled, even if the court held that the petition failed to state a cause of action under the statute. On this question, counsel took leave to file and have filed additional briefs and to this question our attention will first be given.

[1] A critical examination of the petition discloses that, in addition to the allegations charging the making of the pooling agreement and the injury to plaintiff's business and property directly resulting therefrom, the following allegations appear:

"That the defendant on the 29th day of May, 1910, and constantly and continuously since that date and up to the date of the institution of this suit, induced and caused said Missouri Company to refuse, and that in consequence solely thereof said Missouri Company did refuse to carry out, perform, execute, or comply with" two certain contracts alleged to have been made between said Missouri Company and the plaintiff on May 24, 1910, and May 29, 1910, respectively, whereby, in the first-mentioned contract said Missouri Company, with the knowledge of defendant, agreed to sell and deliver to plaintiff, and plaintiff agreed to purchase from said Missouri Company, on terms therein mentioned, 30,000 cases of bottled beer manufactured by the defendant. "That the defendant caused and induced said Missouri Company not to carry out, perform, execute, or comply with said contract, and not to ship or deliver any of said bottled beer thereunder to the plaintiff, and so caused and induced said Missouri Company to do, for the reasons hereinbefore set forth, and by reason thereof the said Missouri Company did refuse to perform, ex-

ecute, or comply with said contract, and to sell and deliver to the plaintiff any of the bottled beer thereby contracted for;" and whereby, in the second mentioned contract the Missouri Company with the knowledge of defendant "agreed to sell and deliver to plaintiff, and plaintiff agreed to purchase from said Missouri Company, on terms therein mentioned, 100,000 cases of bottled beer manufactured by the defendant and that the defendant caused and induced said Missouri Company not to carry out, perform, execute, or comply with said contract, and not to ship or deliver any of said bottled beer thereunder to the plaintiff, and so caused and induced said Missouri Company to do, for the reason hereinbefore set forth, and that by reason thereof the said Missouri Company did refuse to carry out, perform, execute or comply with said contract and to sell and deliver to the plaintiff any of the bottled beer thereby contracted for. * * * And plaintiff says that because of his refusal to enter into said alleged agreement, arrangement, combination or understanding" (referring to the pooling agreement alleged to have been made in violation of the anti-trust law of Missouri) "the said Missouri Company acting under instructions from the defendant, and in accordance with the agreement, arrangement or uderstanding had between the defendant company and said Missouri Company as aforesaid, refused to sell and deliver to the plaintiff the bottled beer which said Missouri Company had contracted to deliver."

We think, without now holding them to be technically sufficient, that these last-mentioned allegations state the substance of an action in the nature of the common-law action of trespass on the case for an unlawful interference by defendant with plaintiff's contractual rights, unassailable by a general demurrer, and notwithstanding the fact that the plaintiff has proceeded both in the court below and in this court upon the sole theory that the petition states a cause of action only for a violation of the anti-trust statute of Missouri, we cannot close our eyes, in passing on a general demurrer to the petition, alleging that it does not state facts sufficient to constitute a cause of action, to any of the substantial allegations of the petition.

[2] In Comings v. Hannibal & Central Missouri R. R. Co., 48 Mo. 512, 516, the Supreme Court said:

"While the petition is not good as a pleading framed on the statute, it nevertheless, in our opinion, sets forth a good cause of action at common law; and where such is the case the cause should be proceeded with."

In Kneale v. Price, 21 Mo. App. 295, 297, the St. Louis Court of Appeals, citing and following Comings v. Hannibal & Central Missouri R. R. Co., supra, said:

"While the petition is not good as a pleading framed on the statute, it nevertheless, in our opinion, sets forth a good cause of action at common law; and where such is the case the cause should be proceeded with. * * * If we treat the petition as embracing merely a common-law cause of action, it was not demurrable because it asked for double damages. The character of the petition is not always determined by the relief it prays for. The court may grant any relief consistent with the case and embraced within the issues."

See, to the same effect, Atlantic & Pacific R. R. Co. v. Freeman, 61 Mo. 80.

The judgment of the District Court is reversed, and the cause remanded to that court, with instructions to grant a new trial.

UNITED STATES v. WOODS.

WOODS v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. April 28, 1915.)

Nos. 4255, 4274.

1. INDIANS ⟸15—ALLOTMENT—RESTRICTIONS ON ALIENATION.
Allotments to the heirs of deceased members of the Creek Nation are not subject to the restrictions on alienation provided for by the Supplemental Creek Agreement of June 30, 1902 (32 Stat. 500, c. 1323).
[Ed. Note.—For other cases, see Indians, Cent. Dig. §§ 17, 29, 34, 37–44; Dec. Dig. ⟸15.]

2. EQUITY ⟸204—PLEADING—CROSS-BILL—NEW PARTIES.
In a suit by the government to cancel conveyances of land allotted to Indians, where the defendant made no suggestion of lack of proper parties for the determination of that controversy, a cross-bill alleging that other individuals were claiming some interest in the land and praying that they be joined as parties and required to litigate their rights was properly dismissed, since new parties cannot be introduced into a cause by a cross-bill as a general rule.
[Ed. Note.—For other cases, see Equity, Cent. Dig. § 467; Dec. Dig. ⟸204.]

3. EQUITY ⟸204—PLEADING—CROSS-BILL—RULE.
Equity rule 30 (198 Fed. xxvii, 115 C. C. A. xxvii), providing that the answer may, without cross-bill, set out any set-off or counterclaim against the plaintiff which might be the subject of an independent suit in equity against him, does not authorize the filing of a cross-bill in a suit by the government on behalf of the Creek Indians to cancel conveyances of allotted lands, which bill prayed that individuals claiming an interest in the lands adverse to defendant be joined as parties and required to litigate their claims.
[Ed. Note.—For other cases, see Equity, Cent. Dig. § 467; Dec. Dig. ⟸204.]

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

Suit by the United States against Helen F. Woods, in which the defendant filed a cross-bill asking that other persons be made parties to the suit and required to litigate their claims to the land in controversy. Decree dismissing the bill and the cross-bill, and plaintiff appeals from the dismissal of its bill, and defendant appeals from dismissal of her cross-bill. Decree affirmed on both appeals.

W. P. Z. German, Sp. Asst. U. S. Atty., of Muskogee, Okl. (D. H. Linebaugh, U. S. Atty., of Muskogee, Okl., on the brief), for the United States.

W. W. Noffsinger, of Muskogee, Okl. (Y. P. Broome, of Muskogee, Okl., on the brief), for defendant.

Before ADAMS and CARLAND, Circuit Judges, and AMIDON, District Judge.

ADAMS, Circuit Judge. The United States brought this suit on the authority of Act May 27, 1908, c. 199, 35 Stat. 312, as interpreted by the Supreme Court of the United States in the case of Heckman v. United

States, 224 U. S. 413, 443, 32 Sup. Ct. 424, 56 L. Ed. 820, to cancel three deeds made by one John C. Leeds, conveying to defendant Helen F. Woods three separate tracts of land, which he had acquired from the heirs of deceased full-blood Creek Indians, to whom homestead allotments of these tracts had been made. The charge in the bill of complaint was that they were made in violation of the restrictions upon alienation provided for by the Supplemental Creek Agreement of June 30, 1902 (32 Stat. 500, c. 1323).

The defendant filed her answer, denying that there were any restrictions against alienation by the heirs of deceased full-blood Creek Indians of allotments made to them in the right of these ancestors, and asserting her indefeasible title to the tracts of land so conveyed to her. At the same time she filed a cross-bill, alleging in substance that several persons, John A. Stiles, George D. Howison, the Guaranty State Bank, and Joe Deer, none of whom were made parties to the suit by the United States, were asserting some claim to the three tracts of land so conveyed to her, adverse to her right thereto, and praying that they be made parties to the suit, and be required to litigate their claims against her in this suit. The court below entered a decree dismissing the bill of the government against her and denying the prayer of her cross-bill to bring in the proposed new parties, and dismissing the cross-bill itself. From that part of the decree dismissing the bill the government prosecutes its appeal to this court, and from that part of the decree denying the defendant leave to bring in the new parties and dismissing her cross-bill she prosecutes an appeal.

[1] It has recently been decided by the Supreme Court that an allotment of land made to the heirs of a deceased member of the Creek Nation in satisfaction of the right of such deceased member is not subject to the restrictions upon alienation provided for by the Supplemental Creek Agreement. Skelton v. Dill, 235 U. S. 206, 35 Sup. Ct. 60, 59 L. Ed. ——, decided November 30, 1914, and Adkins v. Arnold, 235 U. S. 417, 35 Sup. Ct. 118, 59 L. Ed. —— decided December 14, 1914.

Those cases control the decision in this case, and require an affirmance of the decree below dismissing the bill.

And it is so ordered.

[2] Did the court err in denying the prayer of defendant's cross-bill? Neither of the three parties sought to be introduced into the case by the cross-bill were parties to the original bill. The government did not desire to litigate their claims, and did not make them defendants. The defendant suggested no defect of parties, and took no step to require the government to make additional parties. In other words, the parties to the suit did not deem them necessary parties to the controversy between them. The defendant, Helen F. Woods, conceiving that she had some cause of action against these parties, sought to litigate the same in the cross-bill in this case, rather than bring an independent action against them. We do not think a cross-bill can be availed of for this purpose.

The general rule is that new parties cannot be introduced into a cause by a cross-bill; that only parties to the original bill, plaintiffs or

defendants, can be made parties to a cross-bill. If the plaintiff desires to make new parties, he amends his bill and in that way introduces them. If the defendant requires the presence of parties other than those named in the original bill, he complains of a nonjoinder by answer, and plaintiff is then forced to amend or the bill may be dismissed. Such is the general rule in equity. Story's Equity Pleading (10th Ed.) § 389 et seq.; Shields v. Barrow, 17 How. 130, 15 L. Ed. 158; Bundl v. O'Day (C. C.) 125 Fed. 303, 319; Thruston v. Big Stone Gap Imp. Co. (C. C.) 86 Fed. 484; United States Gypsum Co. v. Hoxie (C. C.) 172 Fed. 504, and cases cited; Patton v. Marshall, 173 Fed. 350, 97 C. C. A. 610, 26 L. R. A. (N. S.) 127; Central Trust Co. v. Cincinnati, H. & D. Ry. Co. (C. C.) 169 Fed. 466.

[3] It is suggested that rule 30 (198 Fed. xxvii, 115 C. C. A. xxvii) of the new equity rules has some bearing on the question now before us. That rule reads thus:

"The answer must state in short and simple form any counterclaim arising out of the transaction which is the subject-matter of the suit, and may, without cross-bill, set out any set-off or counterclaim against the plaintiff which might be the subject of an independent suit in equity against him, and such set-off or counterclaim, so set up, shall have the same effect as a cross-suit, so as to enable the court to pronounce a final judgment in the same suit both on the original and cross-claims."

We discover nothing in the claim of the cross-complainant as set out in the proposed cross-bill in this case in the nature of a counterclaim. She has neither a set-off nor a counterclaim against the government and asserts no such claim. Neither do the averments of the cross-bill disclose any set-off or counterclaim against any of the Creek Indians in whose favor the government appears to be prosecuting this action. In our opinion, therefore, she is not helped by the provisions of rule thirty. We think the prayer of her cross-bill was properly denied, and the cross-bill itself was properly dismissed. The decree of the court below in so doing is affirmed.

FLOWER v. COMMERCIAL TRUST CO.†

In re JONES DRY GOODS CO.

(Circuit Court of Appeals, Eighth Circuit. April 27, 1915.)

No. 4206.

1. EVIDENCE ⊂⊃459—PAROL EVIDENCE TO VARY WRITING.

That a note evidencing a loan was signed in the names of the chief officers of a corporation rather than in the name of the corporation itself did not, under the parol evidence rule, prevent proof that the loan was actually made to the corporation, since while this was strong evidence tending to show what the contract was, it could not change the essential character of the contract as shown by all the proof.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1722, 1906–1910, 2109–2114; Dec. Dig. ⊂⊃459.]

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

† Rehearing denied July 24, 1915.

2. BANKRUPTCY ⇐340—PROOFS OF CLAIMS—VARIANCE BETWEEN CLAIM AND EVIDENCE.

Bankr. Act, July 1, 1898, c. 541, § 57, 30 Stat. 560 (Comp. St. 1913, § 9641) provides that proof of claims shall consist of a statement under oath setting forth the claim, the consideration therefor, whether any, and, if so, what securities are held, and what payments, if any, have been made. Forms 33 and 34 (89 Fed. xliii, xliv, 32 C. C. A. xliii, xliv) in bankruptcy require the proof of claims to contain a statement that the bankrupt is justly and truly indebted to the claimant in the sum therein stated, a statement of the consideration of the debt, and that no part of it has been paid except as therein stated. *Held*, that where the proof of claim set forth the amount of the debt and alleged the consideration to have been a loan by the claimant to the bankrupt, and the proof showed such to be the fact, it was immaterial whether the claim pleaded was one for money had and received, or whether the evidence failed to show such a claim.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 527; Dec. Dig. ⇐340.]

Appeal from the District Court of the United States for the Western District of Missouri; Arba S. Van Valbenburgh, Judge.

In the matter of the Jones Dry Goods Company, bankrupt. From a decree allowing the claim of the Commercial Trust Company, Henry C. Flower, trustee, appeals. Affirmed.

Justin D. Bowersock, of Kansas City, Mo. (Lester W. Hall, Inghram D. Hook, and Robert B. Fizzell, all of Kansas City, Mo., on the brief), for appellant.

W. H. H. Piatt, of Kansas City, Mo. (Thomas R. Marks and Brown Harris, both of Kansas City, Mo., on the brief), for appellee.

Before ADAMS and CARLAND, Circuit Judges, and AMIDON, District Judge.

ADAMS, Circuit Judge. The Commercial Trust Company filed with the referee in charge of the estate of Jones Dry Goods Company in bankruptcy a proof of claim against that estate for $15,000, stating as its consideration that it was for money loaned to the bankrupt and received and used by it for its own use and benefit. Objections having been made to its allowance, the referee heard proof and made an order disallowing it. Upon a petition for review the district court reversed that order of the referee, and made an order allowing the claim for the amount loaned, with accrued interest, aggregating $15,132.50. From that order the trustee appealed to this court. He assigned for error that the district court erred in allowing the claim because the evidence did not show that the claimant loaned the money to the bankrupt company and because the court permitted the use of parol evidence to vary the terms of a written contract which he claims fixed the rights of the parties, and elsewise as hereinafter stated.

The dry goods company was a corporation engaged in a general merchandise business in Kansas City, Mo. Two brothers, L. M. and J. L. Jones owned most of its capital stock, one being its president and treasurer and the other its vice president and secretary. L. M. Jones, the president, went to St. Louis, where the claimant

trust company was engaged in business, and there negotiated for the loan in question, and after returning to Kansas City, the transaction was closed by correspondence. L. M. and J. L. Jones signed their individual names to a note for $15,000, and forwarded it to the claimant inclosed in a letter written on a letterhead of the Jones Dry Goods Company and signed by L. M. Jones in his official capacity as president, as follows:

"May 11, 1909. Commercial Trust Co., St. Louis, Mo.—Dear Sirs: Mr. Walter S. Dickey called the writer on the telephone this morning and informed me you desired $15,000.00 of the paper of my brother and myself, something along the lines suggested in our correspondence and conversation some time ago. We therefore inclose herewith note for $15,000.00 dated May 11th, maturing September 10th, 1909, signed by L. M. Jones and J. L. Jones with collateral of 180 shares of 6% preferred stock of Jones Dry Goods Company. This paper is to be discounted at the rate of 6%.

"You may please place $6,000.00 of the proceeds of this paper to the credit of Jones Bros. Banking Company of this city. We inclose herewith signature cards of those entitled to check against the account of Jones Bros. Banking Company. The remainder of the proceeds you may please remit to us in St. Louis, New York or Kansas City Exchange.

"We have executed this paper in the way we understood from Mr. Dickey, would be satisfactory to your company. If there is any error anywhere, kindly let us know and we will correct it.

"Assuring you of our pleasure in doing this business with you, and believing our relations will be mutually pleasant and profitable, I am,

"Very truly yours, [Signed] L. M. Jones, Prest."

The Jones Bros. Banking Company referred to in the letter was a private bank owned by the dry goods company and operated for its convenience inside the store. The dry goods company also carried an account on its books known as the "L. M. and J. L. special account," not involving any of the personal debits and credits of the two brothers, but employed by the dry goods company whenever money was borrowed for the uses of the company which the company, for reasons satisfactory to itself, did not wish to appear on its books, in the notes payable account. Upon receiving that note the claimant, trust company, placed $6,000 to the credit of the Jones Bros. Banking Company, which amount by appropriate bookkeeping entry was forthwith turned over to the dry goods company, and mailed a cashier's check, payable to the order of Jones Dry Goods Company for the sum of $8,695, the remainder of the proceeds of the note after deducting the interest to accrue, to the Jones Dry Goods Company, Kansas City, Mo. Both these sums were subsequently used by the dry goods company in the prosecution of its regular business.

In addition to this letter and the facts just stated oral testimony of several witnesses was introduced concerning the negotiation for the loan as it actually occurred between the president of the dry goods company and the president of the claimant, trust company, at the time it was first negotiated between them in St. Louis. On the whole evidence Judge Van Valkenburgh, the learned District Judge who heard the case, made the allowance, stating in a memorandum made at the time, as follows:

"A reading of the record relating to that claim convinces that the loan was made to the Jones Dry Goods Company, and for its benefit, although the

note was made by L. M. and J. L. Jones. * * * Furthermore, beyond question the Dry Goods Company received the full benefit of the money in exact accordance with the understanding. Nine thousand dollars, less discount, was sent directly to the Jones Dry Goods Company, by cashier's check, and the remaining $6,000 was deposited * * * to the credit of the Jones Bros. Banking Company, whence it found its way into the dry goods company, and was used by it in due course of business."

The trial judge, by reason of his familiarity with local conditions and probably with the character of the individual witnesses, was peculiarly well fitted to pass on the question of fact here involved, and we might indulge a permissible presumption in favor of the correctness of his conclusion of fact, but as counsel for the trustee earnestly contend that there was no substantial testimony tending to show that the loan was actually made to the dry goods company, we have carefully examined and scrutinized all the oral testimony in the case, and, taking it, in connection with the letter and other important and uncontradicted facts to which we have already called attention, we conclude, without attempting to analyze the evidence in detail, that the trust company did not loan the money in question to L. M. and J. L. Jones, or either of them, but did loan it to the dry goods company, that the latter company received it and employed it in the prosecution of its legitimate business, and that the claim was properly allowed as a debt against the estate of the dry goods company *unless* the trust company's right to such allowance is defeated by one or the other of the following considerations to which counsel for the trustee invite our attention: They contend that the trust company's rights were fixed by the note as actually taken by it, signed by the president and secretary of the company, as individuals, that it evidenced no obligation of the dry goods company, but only one against the makers as individuals, and that the terms of that contract cannot be varied by parol evidence.

[1] The general rule that a written contract when complete in itself cannot be varied by parol evidence is not questioned, but we think the rule has no application to the facts in this case. It begs the fundamental question involved here: What was the contract as actually made between the parties? Was it for a loan of money to the dry goods company or was it for a loan of money to L. M. and J. L. Jones? We have already answered this question to the effect that the real contract was a loan to the corporation. Such being the case, the fact that for prudential or other business reasons the parties preferred that the note evidencing the loan should be signed in the names of the chief officers of the corporation rather than in the name of the corporation itself, while strong evidence tending to show what the real contract was, cannot, of itself, change the essential character of the contract, as shown by all the proof, taken together, to have been actually made by them. Signing the note in that way was an incident, attending the execution of the contract as actually made, and this was probably done to meet some emergency of business suggested by the necessity for keeping the "L. M. and J. L. special account." The contention, therefore, that oral proof of a loan to the corporation was improper because varying the terms of

a written contract cannot be sustained. This conclusion is supported by the doctrine announced in the case of Hanover Nat. Bank v. First Nat. Bank, 109 Fed. 421, 427, 48 C. C. A. 482.

[2] Much technical learning was displayed in brief and argument on the question whether the facts of the case sustained the proof of claim based on the common count for money had and received, as presented to the referee by the claimant. The contention on the part of the trustee was that the action for money had and received cannot be based upon an agreement of the parties, but rests upon what is commonly called a contract implied in law. It is argued that when one has received money belonging to another under circumstances which make it inequitable and unconscionable for the former to retain it, the law raises an implied promise on his part to return the money to the true owner, and that this kind of a promise only will support a count in assumpsit for money had and received. In other words, the contention is that only when one has no contractual rights against another for money unconscionably retained by the latter the law comes to the aid of the former in order to effect substantial justice.

We deem it unnecessary to dwell long upon the interesting inquiry suggested by this argument. The Bankruptcy Act, section 57, and forms of the Supreme Court Nos. 33 and 34 (89 Fed. xliii, xliv, 32 C. C. A. xliii, xliv), adopted pursuant to its provisions for the guidance of practioners, make procedure very simple and of easy comprehension. All that is required is to state that the bankrupt is indebted to the claimant in a certain amount of money, what the consideration of the debt was, and that no part of it has been paid. Referring again to the proof of claim as made by the trust company in this case, it appears that it complied with all the provisions of the law in making its claim. It set forth the amount of its debt and alleged the consideration to have been a loan by it to the Jones Dry Goods Company of the sum of $15,000. It unnecessarily further alleged that the money was received, accepted, and used by the company for its own use and benefit. In other words, the claimant set forth in this way the very facts of the case as we have found them to be. Whether this amounts to a count in assumpsit for money had and received or not is quite unimportant. It set forth facts sufficient to constitute a cause of action. It stated in plain language a cause of action for money loaned by the claimant to the bankrupt, and that was sufficient under whatever classification of actions it may properly fall. The cause of action so pleaded was sustained by the proof.

Other interesting questions were argued by counsel, to all of which we have given careful consideration, but we find nothing in them to change the conclusion already indicated. The result is that the decree below must be affirmed.

It is so ordered.

FLOWER v. CENTRAL NAT. BANK.†

In re JONES DRY GOODS CO.

(Circuit Court of Appeals, Eighth Circuit. May 3, 1915.)

No. 4207.

1. BANKRUPTCY ⊂⊃467—APPEAL—REVIEW—QUESTIONS OF FACT.
On appeal from a judgment allowing a claim against a bankrupt, the finding of the trial court that a loan, though evidenced by a note signed by the chief executive officers of the bankrupt corporation, was in fact made to the corporation, was presumptively correct.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 929; Dec. Dig. ⊂⊃467.
Appeal and review in bankruptcy cases, see note to In re Eggert, 43 C. C. A. 9.]

2. EVIDENCE ⊂⊃459—PAROL EVIDENCE TO VARY WRITING.
Though a loan was evidenced by a note signed by the chief executive officers of a corporation, and not by the corporation itself, no error was committed in permitting the introduction of oral testimony to show that the loan was in fact made to the corporation.
[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1722, 1906–1910, 2109–2114; Dec. Dig. ⊂⊃459.]

Appeal from the District Court of the United States for the Western District of Missouri; Arba S. Van Valkenburgh, Judge.

In the matter of the Jones Dry Goods Company, bankrupt. From a judgment allowing a claim of the Central National Bank, Henry C. Flower, trustee, appeals. Affirmed.

Justin D. Bowersock, of Kansas City, Mo. (Lester W. Hall, Ingram D. Hook, and Robert B. Fizzell, all of Kansas City, Mo., on the brief), for appellant.

W. C. Marshall, of St. Louis, Mo. (W. W. Henderson, of St. Louis, Mo., on the brief), for appellee.

Before ADAMS and CARLAND, Circuit Judges, and AMIDON, District Judge.

ADAMS, Circuit Judge. This was an appeal by the trustee of the estate of the Jones Dry Goods Company in bankruptcy from an order made by the District Court allowing a claim for $15,000 in favor of the Central National Bank against the estate of the bankrupt. The facts of the case as disclosed by the proof of debt filed with the referee and by the evidence adduced at the trial are substantially these: In April, 1910, L. M. Jones, president of the dry goods company, visited St. Louis, where the bank was engaged in business, and had an interview with Mr. Hilliard, the president of the bank, concerning loaning money to two corporations doing business in Kansas City, the Jones Dry Goods Company and the Jones Bros. Mercantile Company, of both of which L. M. Jones and his brother, J. L. Jones, were the chief executive officers, and they together owned a majority of the capital stock of both corporations. The bank had before that time loaned to these two

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

† Rehearing denied July 24, 1915.

corporations considerable money, but at the time in question they required more money. The bank was willing to loan them an additional sum of $25,000, but informed Mr. Jones, who was then seeking the additional loan, that the limit of credit of one of the corporations had already been reached, but that the bank would make the additional loan if it could be arranged in some satisfactory way. It was accordingly agreed that L. M. Jones, and his brother, J. L. Jones, should make their two individual notes for $12,500 each, and that $15,000 of the proceeds should go to the Jones Dry Goods Company and $10,000 should go to the Jones Bros. Mercantile Company. This arrangement was carried out. Two notes were executed accordingly, and the proceeds were delivered to the two Jones corporations in the proportions just indicated, and were afterwards used and employed by them in the regular course of their business. At the maturity of these notes they were renewed for some further period, and new notes of like character were given in lieu of them.

The sole question in this case is whether the claim for $15,000, based upon the loan as just described, is a provable debt against the bankrupt, notwithstanding the fact that the notes evidencing it were signed in the individual names of the chief officers of the company.

[1] The claimant bank contends that the loan was made to and for the benefit of the dry goods company and the mercantile company, and that the taking of the notes signed in the names of the two executive officers of these companies was a device resorted to for the purpose of avoiding the appearance of excessive loans, or for some other business convenience. The trustee contends that the loans were made to the individual signers of the notes, leaving it to them to make such disposition of the proceeds as they desired to make. The issue, therefore, is, To whom was the loan made? On this issue oral and written testimony was taken, and the trial judge reached the conclusion that the loans were in fact made to the two corporations, the dry goods company and the mercantile company, and that the taking of the notes in the way stated was an expedient resorted to for business reasons, and did not change the essential character of the transaction, and allowed the claim as made against the dry goods company. Not only is his conclusion on this issue of fact presumptively correct, but after a careful consideration of all the evidence we have reached the same result. In fact, we think the evidence taken as a whole admits of no other reasonable conclusion.

[2] The trustee contends that the trial court erred in permitting the use of oral testimony to vary the terms of the contract as evidenced by the notes, on the ground that these notes constituted the exclusive expression of the contract as made by the parties. He also contends that the trial court erred in holding that the claim of the bank was provable against the estate as a cause of action in assumpsit for money had and received. These contentions are the same as those made in the case of Flower, Trustee, v. Commercial Trust Company, 223 Fed. 318, just decided, and for the reasons expressed in the opinion in that case they present no obstacle for the allowance of this claim. The judgment of the trial court is therefore affirmed.

HOGIN v. CENTRAL NAT. BANK.†

In re JONES BROS. MERCANTILE CO.

(Circuit Court of Appeals, Eighth Circuit. May 5, 1915.)

No. 4208.

BANKRUPTCY ⊂⊃314—CLAIMS PROVABLE—LOANS.

Where a loan was in fact made to a bankrupt corporation, the claim was provable against it, though evidenced by the individual notes of the corporation's executive officers.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 469–473, 478, 483–487, 489, 490; Dec. Dig. ⊂⊃314.]

Appeal from the District Court of the United States for the Western District of Missouri; Arba S. Van Valkenburgh, Judge.

In the matter of the Jones Bros. Mercantile Company, bankrupt. From a judgment allowing a claim of the Central National Bank, Clarence L. Hogin, trustee, appeals. Affirmed.

James G. Smart and Albert R. Strother, both of Kansas City, Mo., for appellant.

W. C. Marshall, of St. Louis, Mo. (W. W. Henderson, of St. Louis, Mo., on the brief), for appellee.

Before ADAMS and CARLAND, Circuit Judges, and AMIDON, District Judge.

ADAMS, Circuit Judge. This was an appeal by the trustee of the estate of the Jones Bros. Mercantile Company in bankruptcy, from an order of the District Court allowing a claim of $10,000 in favor of the Central National Bank against the estate of the bankrupt. The facts of the case and the questions of law are the same as those involved in the case of Flower, Trustee, v. Central National Bank, 223 Fed. 323, just decided by this court, to which reference is made for a more comprehensive statement.

A loan of $25,000 was negotiated by L. M. Jones, the president of the Mercantile Company, and a high officer of the Jones Dry Goods Company, for the benefit of those two corporations. Two notes for the total sum of $25,000 were signed by L. M. Jones and his brother, J. L. Jones, who was also a high officer of both companies, and the proceeds of their discount were divided between the mercantile company and the dry goods company, as directed by L. M. Jones at the time he negotiated the loan, in the proportion of ten twenty-fifths, or $10,000 to the mercantile company and fifteen twenty-fifths to the dry goods company.

The issue of fact below was and here is whether the loan was made to the two companies in the proportion just stated or whether it was made to the individual signers of the notes, leaving it to them to make such ultimate disposition of the proceeds as they desired to make. The trial judge found that the loan was actually made to the two companies in the proportions stated, and that the taking of the individual notes of the executive officers was an expedient resorted to for busi-

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

† Rehearing denied July 24, 1915.

ness reasons, and allowed the claim of $10,000 against the estate of the mercantile company. We think this conclusion of fact was undoubtedly correct. The same questions of law were debated in this case as were relied on by the trustee in the two cases of Flower, Trustee, v. Commercial Trust Company, 223 Fed. 318, and Flower, Trustee, v. Central National Bank, 223 Fed. 323, just decided, and for the reasons expressed in the opinions in those cases we think there was no legal obstacle to the allowance of this claim against the estate of the bankrupt.

The judgment is affirmed.

KNASH et al. v. COMPAGNIE GÉNÉRALE TRANSATLANTIQUE.

(Circuit Court of Appeals, Fifth Circuit. April 5, 1915.)

No. 2625.

SHIPPING ⊜86—LIABILITY FOR INJURY TO STEVEDORE—UNSAFE WAY.

Allegations that an injury to a stevedore engaged in stowing cargo in the lower hold of a ship, which caused his death, was due to the unsafe condition of the perpendicular iron ladder by which he was required to enter and leave the hold, caused by the negligent piling of cotton so close to one side of the ladder as to project between the rungs, by reason of which deceased lost his foothold and fell, *held* not supported by the evidence, which showed that, while the cotton projected through the ladder, it could be safely used with reasonable care, and was safely used by 15 others employed with deceased.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 343, 353-360; Dec. Dig. ⊜86.]

Maxey, District Judge, dissenting.

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

Suit in admiralty by Mary Jane Knash and others against the Compagnie Générale Transatlantique, owner of the steamship Mexico. Decree for respondent, and libelants appeal. Affirmed.

The following is the opinion of the District Court, by Foster, District Judge:

In this case the libelants are, respectively, the mother and major sisters of one Joseph Knash, deceased, and they allege that Joseph Knash was engaged in storing staves in the lower hold of the steamship Mexico, owned by the claimants, Compagnie Générale Transatlantique, in No. 1 hatch; that this hatch is equipped with a perpendicular iron ladder for means of ingress and egress, and could also be reached by means of a companionway; that Knash, in going to his work at about 3 p. m. on March 1, 1911, was permitted to use the companionway; that when knocking off time came he attempted to leave by the companionway, but it was closed, and he attempted to climb the ladder; that cotton had been negligently stored against the ladder, so as to project between the rungs, and consequently he lost his foothold when half way up and fell to the lower hold, receiving injuries from which he subsequently died. The answer admits the ownership of the vessel, but denies that Knash was permitted to use, or did use, the companionway in going to his work, or that the ladder was dangerous as charged.

It is, of course, conceded that it was the duty of the ship to furnish the deceased with a safe place to work and a safe passageway to and from his work. The iron ladder complained of was the usual iron ladder to be found in holds of steamships. The companionway referred to by libelants is evidently a passageway through the forecastle down to the between-decks; but from there on down to the lower hold the iron ladder was the only passageway existing.

It is in evidence that two gangs of eight men each were working in the lower hold, and that they went to their work by means of the iron ladder from the deck of the ship, and when knocking off time came they returned safely the same way, all except Knash, who was the sixteenth man to come out of the hold. After he had fallen, a hatchway cover was placed in a sling and lowered down by the winch, and he was brought up on it; but three men who went down to assist him went down again by the same ladder from which he had fallen.

There is some evidence that a man had to be careful in using this ladder, but that the cotton was not piled so close against it as to prevent a secure handhold and a secure foothold. As against this there is the testimony of Anthony Ray, a longshoreman, who was working in the hold with the deceased. He is the only one who testifies that in going to his work he went through what he called the sailors' room, presumably the forecastle, and that when he attempted to go back the door to this room was closed. However, he then safely ascended the ladder from which the deceased subsequently fell.

There was no defect in the ladder of any kind, and the fact that 15 men used it with perfect safety is conclusive evidence to my mind that it was a reasonably safe means of ascending from the hold, and therefore that the ship has discharged its full duty in providing it.

The libel will be dismissed.

Athur McGuirk and Sturges Q. Adams, both of New Orleans, La., for libelants.

Edward Rightor and James Legendre, both of New Orleans, La., for claimant.

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

PER CURIAM. Upon consideration of the evidence in the transcript, we concur with the trial court in finding that there was not sufficient proof that the injury resulting in the death of Joseph Knash occurred as alleged, nor of such negligence on the part of the shipowners as to render them responsible, and therefore, and for the other reasons given by Judge Foster, the decree appealed from is affirmed.

MAXEY, District Judge, dissents.

OUTLOOK ENVELOPE CO. v. SAMUEL CUPPLES ENVELOPE CO.

(Circuit Court of Appeals, Second Circuit. March 9, 1915.)

No. 23.

1. PATENTS ⇐328—VALIDITY AND INFRINGEMENT—MACHINE FOR MAKING OUTLOOK ENVELOPES.

The Slater patent, No. 893,105, for a machine for making what are known as outlook or window envelopes, consisting essentially of mechanism which, during the period intervening between the operations of gumming an envelope blank and folding the flaps of such blank as performed on an envelope machine of the known type, automatically and mechan-

ically gums the edge of the window opening cut in the blank and accurately applies the transparent patch over the same. was not anticipated, and discloses patentable invention. The machine, by greatly increasing the speed of making such envelopes over the hand process previously employed, thereby cheapening the product, practically created a new industry, and the patent is of a primary character and entitled to a liberal construction. Claims 5 and 15 also *held* infringed.

2. WORDS AND PHRASES—"WINDOW ENVELOPE."
A "window envelope" is one which has on its face a patch of transparent paper forming a window through which an address written upon an inclosure can be seen.

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

This cause comes here on appeal from a decree entered on December 3, 1913, in the District Court of the United States for the Southern District of New York dismissing the bill of complaint in a suit brought by complainant against defendant for infringement of claims 5 and 15 of letters patent No. 893,105, granted July 14, 1908, to William D. Slater, on a machine for making what are known as outlook or window envelopes.

The Outlook Envelope Company is a corporation duly created and existing under the laws of the state of West Virginia and has its principal place of business in the city of Chicago, county of Cook, and state of Illinois.

The Samuel Cupples Envelope Company is a corporation duly created and existing under the laws of the state of Missouri and has its principal place of business in the city, county, and state of New York, borough of Manhattan.

William D. Slater, a citizen of the United States residing at Springfield, Mass., having made application for the patent in suit for an envelope machine, which application was filed in the Patent Office of the United States on July 6, 1903, assigned all his right, title, and interest in the invention and in all letters patent to be obtained thereon to the United States Envelope Company, a corporation organized and existing under the laws of the state of Maine. The instrument of assignment duly requested the Commissioner of Patents to issue all letters patent of said invention and application for patent to the United States Envelope Company. The assignment was duly recorded in the United States Patent Office. Thereafter, the patent having been issued to the United States Envelope Company, that corporation on March 13, 1909, sold and assigned the same to the Outlook Envelope Company, transferring to it the full and exclusive right, title, and interest in the invention and the letters patent to the full end of the term for which they were granted. The United States Envelope Company also sold and assigned to the complainant all claims to back damages, profits, or recoveries that it had against any person, firm, or corporation, who had infringed the patent while it held title thereto.

The bill of complaint charges the defendant with having made, used, and sold envelope machines which contained the invention covered and secured by complainant's patent, and asks for an injunction, an accounting, and damages.

F. P. Fish, Louis W. Southgate, and O. Ellery Edwards, Jr., all of New York City, for appellant.

Knight Bros., of New York City (Wm. Houston Kenyon and Harry E. Knight, both of New York City, of counsel), for appellee.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge (after stating the facts as above). The patent in suit, it is claimed, shows and describes the first automatic machine for making "Outlook" or "Window" envelopes.

[2] A window envelope is one which has on its face a patch of transparent paper forming a window through which an address written or printed upon an inclosure can be seen. The use of the window does away with the necessity of addressing the envelope and also all liability of an erroneous address being given to the envelope or one different from that given upon the inclosure, as the same address serves as the address of the inclosure and the address of the envelope.

It appears that in September, 1862, one J. S. Brown, of Washington, D. C., took out the first patent, No. 36,393, on widow envelopes. His invention consisted of two parts. One part consisted of separate, transferrable cards of address, which contained the name of the person or party addressed, and his place of business. The other part of his invention consisted in making the envelope sufficiently transparent to clearly show the cards of address through its face. This was to be accomplished either by rendering a portion of the envelope itself transparent and the remainder of the envelope opaque or by cutting out a piece of the envelope of the proper size and shape and covering the aperture with transparent paper or other equivalent transparent covering. His invention was not for a machine by which the envelope was to be made, but it was for a "method of directing letters, papers, and packages." It showed a clear conception of the advantages of the window envelope, and those advantages were fully set forth in the specification.

"The cost of manufacturing the improved envelopes," he said, "will scarcely, if any, exceed that of ordinary envelopes now in use. For while the additional cost of rendering the envelopes and wrappers transparent will be but little, a cheaper quality of paper may be employed, not requiring to be finished so highly as for receiving the pen. The cards of address also will cost only a mere trifle." His invention, however, apparently did not commend itself as it never got into general use and the patent itself long since expired.

In 1901 Americus F. Callahan, of Chicago, Ill., filed an application for a patent in which he alleged that he had invented a certain new and useful improvement in envelopes by a device adapted to securely inclose and seal the contents of the envelope while revealing so much of the inclosure as would enable the observer to ascertain the destination of the same. In his specification he stated his claim as follows:

"In combination with an envelope having a comparatively opaque face and a display-opening therein having transparent covering, of a folded communication sheet therein, said sheet being so folded, with regard to the position of the sendee's name and address upon the same side of the sheet with the communication, that only said name and address appear through the display-opening whereby the sendee's name and address as a part of the communication serves also as the envelope address."

A patent was granted him, No. 701,839, on June 10, 1902. This patent was held void in the First Circuit in the suit of Outlook Envelope Co. v. Sherman Envelope Co. (D. C.) 210 Fed. 630, affirmed in 216 Fed. 754, 132 C. C. A. 575 (1914). All that was accomplished by the Callahan patent was to provide a transparent cover for the open slot envelope when used in combination with a communication sheet addressed and folded in the manner stated in his claim. His patent was

held void for lack of invention, in view of the state of the art. Callahan brought his window envelope to the attention of the United States Envelope Company, and that company manufactured them by hand and put them on the market, and they were received with some favor. But the necessity of making them by hand made their cost relatively large and precluded their very general use. If the matter was to obtain commercial success it was necessary that a machine should be devised which should dispense with the hand labor involved in their production. The window envelopes made at that time by the United States Envelope Company were made in the following manner: The blanks were first cut and then the hole or opening was cut. Then the blanks were taken to a machine which gummed around the opening. Adjacent to this machine was a large table around which were seated eight girls. As the blanks came from the machine, they were taken by one of these girls and distributed to the other seven girls, each girl taking a blank and placing a patch upon the fresh gum, smoothing it down by hand. The blanks were then stored in piles and subsequently taken to an ordinary folding machine, which gummed the seal and back flaps. The blank was then folded in the ordinary manner. The gum, having been applied to the blanks and allowed to dry, made the blanks curl and crown up in the center, so that it was difficult for the folding machine to handle them. Because of this there was a very considerable waste, which was found to run from 10 per cent. to 20 per cent. The curling of the blanks made necessary the attention of "a fixer" to operate the folding machine. The cost of all this extra work involved in applying the patches amounted to 90 cents per 1,000, and was regarded as prohibitive of the envelopes ever coming into general use. While the envelopes were regarded by many as very desirable and as better than ordinary envelopes, they were not so much more desirable than envelopes of the ordinary kind as to make them salable in large numbers at the enhanced cost. Envelopes made by hand labor cannot successfully compete in the general market with those manufactured by machinery. For successful machines existed for the manufacture of the ordinary envelope, but no machine existed which was capable of producing a window envelope.

Mr. Slater was employed by the United States Envelope Company, and his attention was called to the difficulty which was experienced in the manufacture of the window envelopes. He conceived the idea of so organizing and adding to the mechanism of the ordinary envelope folding machine that the machine should not only gum around the edge of the window and apply the blanks automatically without interrupting the ordinary operation of the machine, but that it should accomplish this result at the high speed required for commercial production. His device provided a machine having additional gumming mechanism, correlated with the existing gummers, to apply the gum around the edge of the window, and also having a practical and efficient mechanism for handling and applying at high speed the small and extremely thin pieces of transparent paper with great accuracy at the right place over the gummed window edge.

A standard window envelope, as made on a Slater machine, has an opening with parallel sides and rounded ends cut in the face side, about

5 inches long and 1¼ inches wide, running parallel with the length of the envelope and near its lower edge. This opening is closed by a patch of thin transparent paper, known as glacene paper. The patch is about 3⅝ inches in length and is 1⅞ inches in width, giving an overlap of five-sixteenths of an inch. The width of the opening is large enough to disclose the address and the address only on the inclosure.

In devising a machine which would produce such an envelope, Mr. Slater solved the following problems: (1) That of gumming by mechanical means around the opening of a window envelope for the reception of a covering patch without interrupting the operation and required speed of an envelope making machine. (2) That of applying in an organized automatic machine a patch of light flimsy paper, more than five inches in length and nearly two inches in width, to cover the opening and its gummed margin with accuracy and speed. He thereby avoided the great inherent difficulty of the previously known hand method in that the curling and distortion of the freshly pasted blanks, which was fatal to the hand operation, was made impossible.

We are satisfied that the Slater machine practically created a new industry. The court below thought differently, but in this respect we think it was mistaken. Window envelopes were unable to compete successfully with ordinary envelopes so long as the former were made by hand and the latter by machinery. The capacity of a Slater machine is 40,000 envelopes a day of 10 hours. Prior to the invention of the Slater machine, and when the gumming machine and the girls were employed in their production, the output only amounted to about 10,000 a day. With the adoption of the Slater machine the use of window envelopes enormously increased. At the time the proofs were taken, complainant had 15 of the machines in operation, giving a daily output of 600,000 of window envelopes. The theory of defendant is that the use of such envelopes increased first, and therefore the new machinery was devised. The testimony, on the contrary, indicates to us that the use of these envelopes remained small until the handicap of the heavy cost of manufacture was removed by the invention of the Slater machine. Then there followed the enormous increase in the demand for envelopes of this character.

The specification of the patent in suit describes the generic nature of the invention as follows:

"My present invention relates to a machine for manufacturing what are known to the trade as 'outlook envelopes,' or envelopes having an opaque body with a transparent section or panel at that part of the envelope commonly occupied by the address. Envelopes of this character are designed to be used with inclosures having the address suitably placed thereon to register with the transparent section of the envelope and form the address of the envelope. Such envelopes are manufactured by pasting a patch of transparent paper over an opening formed in proper position in the envelope blank.

"The entire operation of applying the transparent patch to the body of the envelope has heretofore been done by hand, and it is the object of my present invention to provide mechanism for the application of the transparent patch to the body of the envelope by which the operation can be automatically and rapidly performed by mechanical means, and to arrange that the transparent patch shall be applied to the envelope blank during the period intervening between the operations of gumming an envelope blank and folding the flaps of said blank as performed upon an envelope machine of the known type.

"The mechanism embodying my present invention is designed to operate upon an envelope blank having an elongated piece cut from the body of the envelope at that part usually occupied by the address, and thereby forming an opening in the envelope, and my invention comprises means for applying adhesive material to the body of the envelope blank around the elongated opening; means for feeding the gummed envelope blank forward over a pressing table; means for registering the envelope blank on the pressing table; means for applying an elongated transparent patch to the body of the envelope blank slightly larger than the opening, so that the edge of the patch will overlap the gummed margin around the opening; means for applying pressure to the transparent patch to secure its firm adhesion to the body of the envelope blank; and means for removing the patched blank from the pressing table.

"The combination of instrumentalities for accomplishing the above-mentioned operations automatically and by mechanical means in the order named, the combination of the above instrumentalities with an envelope machine for manufacturing a completed envelope, and such arrangement of parts of an envelope machine as may be necessary to apply a patch to an envelope blank between the operation of gumming an envelope blank and folding the flaps of said blank, form the subject of my present invention."

In the specification Slater also declares:

"So far as I am aware, it is broadly new to apply a patch to the opening in an envelope blank by mechanical means, and to combine a patch applying mechanism with an envelope machine, so as to affix the patch to the envelope blank between the operations of gumming the blank and of folding the flaps of the envelope, and I do not wish to confine myself to the above specific construction and arrangement of the mechanism for applying a patch to an envelope blank and for pressing their overlapping surfaces together, as modifications in the various details of construction and arrangement may be made without departing from the scope of my present invention."

The claims in issue are 5 and 15, and they read as follows:

"(5) In the envelope machine, the combination with mechanism for gumming an envelope blank around an opening therein, mechanism for folding the blank and means for feeding the blank from the gumming to the folding mechanisms with an intervening dwell of the blank, of mechanisms for applying a patch to the blank covering the opening therein."

"(15) The combination with mechanism for gumming an envelope blank around an opening therein, mechanism for folding the flaps of said blank and means for feeding the blank from the gumming mechanism to the flap folding mechanism, of mechanism interposed between the gumming mechanism and flap folding mechanisms for applying a patch to the blank to cover the opening therein."

The court below thought it clear that Slater accomplished just one thing, namely:

"The applying of the patch between the operations of gumming the blank and the folding of the flaps of the envelope so that the blank has no opportunity to curl."

And claims 5 and 15 have been vigorously assailed by the defense upon the ground that no invention was involved in view of the prior art.

In his specification Mr. Slater declared that, so far as he was aware, it was broadly new to apply a patch to the opening in an envelope blank by mechanical means and to combine a patch applying mechanism with an envelope machine, so as to affix the patch to the envelope blank between the operations of gumming the blank and of folding the flaps of the envelope. But as his claims are assailed upon the ground

that, in view of the prior state of the art, what he did involved no invention, it is necessary to consider the subject of anticipation. In this connection the court below found it necessary to consider only two patents and an experimental machine. And to these we shall confine our attention.

The two patents to be considered are for machines for manufacturing what are known as "tearing envelopes." A tearing envelope was described by complainant's counsel as "one having a wire or string or strip of fabric incorporated therein at one edge between a flap and the body portion of the envelope so that the envelope can be slit along one edge by pulling on the wire, string, or strip."

The Tyrrel patent is No. 436,618 and was issued on September 16, 1890, to Alvin D. Tyrrel, of South Hadley Falls, in the state of Massachusetts. In his specification Tyrrel said:

"This invention for improvement in envelope machines particularly appertains to mechanism for affixing to the inner face of the seal-flap at or near and along the line of fold for said flap and at the junction thereof with the part of the blank forming the front of the envelope a strip of cord or tape. This strip of narrow tape or cord projects slightly beyond the sealing-flap at its one end, the purpose thereof being to afford means for conveniently opening the envelope after the same has been sealed by drawing on the said protruding end of the tape in a direction transversely of the line of fold of the seal-flap; the said tape constituting a severing device for that envelope to which it is attached as a part thereof."

The gumming mechanism of the Tyrrel patent is different from the gumming mechanism of the Slater patent. In the Tyrrel patent associated with the flap gummer is a narrow gummer so disposed as to extend over the blanks from end to end thereof at a portion at or near and along the folding-line for the blank. This puts a line of gum on the flap of the envelope entirely outside of the body portion of the envelope blank. The gummed blank is fed along so as to come under the reciprocating creasing plunger. The creasing or folding plunger is reciprocated to force the blank down through a rectangular opening in the frame, which operation creases the flaps of the blank at right angles to the body portion.

At the side of the plunger is arranged a tape-carrying box reciprocating, in which is a plunger. The operation of these parts is such that, when the envelope blank is in its position under the folder plunger, the box moves down to the blank, and the plunger is independently reciprocated to apply a tape or cord to the line of gum on the flap of the blank. Then, when the envelope blank is folded, the cord or strip is attached to the inside of the seal flap at the edge of the envelope. There is certainly nothing in this mechanism which can be used in place of or which corresponds in function to the mechanism which the Slater patent provides between the gumming and folding mechanism for applying a patch to the blank covering the opening in the envelope. The box or holder block in the Tyrrel patent is placed outside of the plunger and must be arranged at that place in order to bring the tape or cord at the crease-line of the envelope. This makes impossible any application of the tape or cord to the body portion of the envelope, which is defined by the outline of the plunger.

Moreover, the mechanism of the receptacle with its vertical kerf or

deep channel "preferably open from end to end of said tape holder block" is such that it would be of no use for supporting and attaching a thin, wide, flimsy patch over a window. To do this satisfactorily requires a greater accuracy than the Tyrrel mechanism admits of, capable though it is of holding cords and tapes accurately enough for application to the flap of an envelope at its crease-line. In the latter case no great accuracy is required, and in the other case the greatest accuracy is essential.

We are satisfied that the Tyrrel patent does not show either the organization or the elements of Slater's combinations of the claims in suit. The law of the organization of the Tyrrel machine is inconsistent with that of the Slater machine. We do not see how it would be possible to rebuild the machine of the Tyrrel patent so as to use it in manufacturing window envelopes without departing absolutely from its fundamental characteristics. That machine does not comprehend the idea of the Slater patent, the idea of an annular gummer, capable of laying an even band of gum around an opening in the blank for a window envelope, and it affords no device for holding and manipulating a patch for the window in the envelope. In the Tyrrel machine the only way the tapes or cords are held in place in the kerf is by the friction on the sides of the receptacle. But the friction this affords clearly would not suffice to hold thin, wide patches in place, and there is nothing corresponding to the supporting toes of either Slater's or the defendant's machine. And, as we have already noted, the Tyrrel machine is absolutely incapable of applying any material, either thin paper, tape, or cord, to the body portion of an envelope blank.

We pass on to the consideration of the Timmis patent.

Prior to the invention of Timmis, the tearing envelopes were made by the use of threads and wires in the envelopes by which the tearing was done. But there were certain objections to the use of wire or cords, and it occurred to Timmis to obviate them by substituting a strip of fabric. Attempts had been previously made to substitute a narrow tape, but the difficulties in feeding a narrow tape to the machine were found to be so great that the matter was abandoned. Timmis sought to overcome these by feeding the tearing material into the machine from a roll whose width was equal to the length of the strip. The amount of the feed from the roll of tearing fabric at each cycle of operation of the machine was equal to the width of the tearing strip.

The Timmis patent is No. 679,921 and was issued on August 6, 1901, to Walter S. Timmis, of the city of New York, borough of Brooklyn. In his specification Timmis said:

"My invention relates to machines for manufacturing envelopes, and more particularly to machines for completing the envelopes after blanks for the same have been cut into proper form and comprises, with other features, means for cutting from a roll of suitable fabric a strip of proper length and for attaching the same to the envelope-blank adjacent to one of the folding-lines thereof, whereby, when the blank is folded over along such folding-line, the inclosed strip, together with the portions of the blank covering the same, will form a bulky portion, which may be readily taken hold of and torn off for the purpose of opening the envelope without tearing the other portions of the same, all as hereinafter more particularly set forth. The use of a flat

strip I consider preferable to the use of a thread or cord on account of the great difficulty experienced in attaching the latter; it having been found impracticable to draw the thread or cord over and affix it in a sufficiently reliable and permanent manner to make it useful as an opener."

He also states:

"In carrying out my invention I use, in combination with the means hereinafter described, which constitute the invention, gumming, picking and folding devices of a general character, such as are well known in the art."

And again he states:

"In carrying out my invention I provide mechanism, as hereinafter more particularly described, for intercepting the blank in its travel from the picker to the folding device and for placing it underneath a mechanism which cuts a strip from a larger piece or sheet of fabric and immediately afterward pastes said strip along one of the folding lines of the envelope. The strip of gum for thus securing said strip has preferably been previously applied to the blank by the picker, but it may instead be applied to the strip itself immediately before cutting it off, as exemplified in some of the accompanying illustrations of my improved appliances. After this operation the blank is shifted to the folding apparatus, and the envelope is completed there in the usual manner."

The claims of the Timmis patent recite the successive steps of gumming the blank, cutting off the strip, applying the strip to the blank by pressure, and folding the blank. Mr. Timmis testified as to the working of his machine as follows:

"The operation of the machine as built was as follows: The blanks were piled at the front of the machine on the elevator table, as is usual in machines of this general character, the top blank of the pile being separated from the pile by means of the usual picker, the gumming device which placed gum on the blank both for the sealing flap and the back and side flaps, but in addition thereto there was another picker, which deposited a strip of gum on the blank for the purpose of receiving the strip of fabric. After the blank is stripped from the picker devices, it falls upon the conveyor, which conveys it to the central station, at which point it is adjusted in correct position by means of the adjustable stops, previously referred to. While the blank was being conveyed to the central station, the feeding rollers of the strip attachment operated upon the fabric and fed forward a portion of the fabric through the upper and lower guide previously referred to. After the blank has reached the central station, the upper part of the guide is forced down by means of spring seated pressure on top of the fabric, and thereby clamped to the lower part of the guide, after which both the upper and lower part of the guide move down together, carrying the fabric within one-sixteenth of an inch of the blank. The knife and plunger follow the guide, cut off the strip, and attach it to the blank, the guide raises, after which the plunger raises. The strip, now being attached to the blank in proper position, is conveyed to the folding box, the plunger descends, and the various flaps of the envelope are folded over and dropped into the delivery chain in the usual manner. The slack provider, previously referred to, consisted of a horizontal bar mounted on the plate, which carries the lower guide. The fabric being made to pass under this horizontal bar and over another horizontal bar placed close to the first-named bar but in a higher plane. The fabric being held taut by the clamps and feeding rollers at the one end and the roll of fabric being free to rotate upon its own axis, the action of the first-named horizontal bar upon the downward movement of that bar was such that the roll was rotated a sufficient amount to provide a slack in that part of the fabric between the feeding rolls and the roll of the fabric, so that on the return of the upper and lower guides, and upon the separation of these guides, the feeding rolls were free to feed a portion of the fabric between these guides without having to pull the roll of fabric or overcome its inertia. The guides and the plunger

knife were both operated by means of cams; there being one cam for each. Both the plunger and knife combination and the guides were connected to the cam mechanism by means of a lever fulcrumed between the cam shaft and the plunger and guide mechanism. This fulcrum was common to the two mechanisms and was mounted upon a plate, which plate was arranged to move up and down so that, when the fulcrum was in the upper position, neither the plunger knife nor the guide would come down to the presser table, but, when the fulcrum was in the lower position, both the plunger and guide were set in operative position. This moving of the fulcrum was performed by means of a toggle arrangement and connected to the front of the machine by means of a rod, upon which there was also mounted a device for throwing out of operative connection the feeding pawl which turned the feed rolls. The whole purpose of this fulcrum moving device and throw-out feed mechanism being for the purpose of convenience in the operation of the machine, so that every function of making the envelope outside of the strip-attaching mechanism could be tested out before the strip-attaching mechanism was put in operation."

A machine under this patent was constructed in the latter part of the year 1901, although the strip-attaching mechanism was organized somewhat differently from that stated in the patent. The machine was not a commercial success, although several thousand envelopes were made on it. A corporation organized to exploit it found it impossible to interest capital in the enterprise, and the machine was put in storage.

Now it must be said of the Timmis patent, as we said of the Tyrrel patent, that it does not relate to a machine for making window envelopes, and that the machine of this patent is as incapable of making window envelopes as the Slater machine is incapable of making tearing envelopes. The machines turn out different products.

Timmis applies a strip of gum along and near one edge of the envelope. Slater on the other hand applies a band of gum around an outlook opening in the face of the envelope. The strip-applying mechanism of Timmis is so organized that it cuts off a very narrow strip of a stout textile material and applies that along one edge of the envelope. But the Slater machine applies a broad transparent patch of thin, fragile paper over the outlook in the body of the envelope.

We shall not consider the mechanism of the Timmis patent in detail. Its mechanism is so far removed from the mechanism of the Slater machine as to make it unnecessary to do more than state in a general way certain conclusions which we have reached concerning it: (1) There is nothing in it which comprehends the idea of an annular gummer or of the idea of using such a gummer to lay an absolutely even band of gum around an opening in the blank for a window envelope. (2) The feed rolls which snap the edge of a piece of fabric under the reciprocating knife and plunger cannot manipulate or handle a patch for a window envelope. (3) The tearing fabric in all the modifications shown in the patent is applied to one of the flaps of an envelope and not to the body portion. (4) There is no device for holding and controlling a patch of paper and applying it accurately to the surface of an envelope blank.

It would be impossible in the Timmis patent, as we stated it to be in the Tyrrel patent, to so reconstruct the machine by reportioning the parts as to fit it to make window envelopes. We do not think that

a skilled mechanic could take either the Tyrrel or the Timmis machine and, without the aid of the disclosure made by Slater, construct out of either of them a machine which would successfully make window envelopes.

In 1910 Mr. Timmis, having before him the Slater patent, secured possession of the Timmis machine of 1901, took it from storage, and constructed what in this record is called "the Timmis Demonstrative Model." The purpose of this was to show that the Timmis machine could be organized to make window envelopes. The newly constructed machine, for numerous changes were made in it, no less than eight new parts being added, was constructed for the purposes of this case. And counsel for the defendant claim that this reconstructed machine can make a window envelope. In reply to the assertion that the Timmis machine cannot make a window envelope, the defendant's counsel say:

"This is true if by a window envelope is meant only the particular embodiment of window envelope shown in the Slater patent."

And he asks:

"Assuming, while not admitting, that the Slater machine makes window envelopes through which an address can be viewed, and the Timmis machine makes envelopes in which the window, if one were cut, would be too small to permit the inspection of the address, can it be said that the machine itself is necessarily a different mechanism from the machine which makes the other?"

Now we have already stated our opinion concerning the machine made in 1901 under the Timmis patent, and we do not find occasion to modify that opinion by virtue of the changes in the mechanism introduced in the reconstructed machine of 1910. We do not regard that machine as of serious probative force. And we call attention to the statement made by Mr. Justice Blatchford writing the opinion of the Supreme Court of the United States in Consolidated Safety Valve Co. v. Crosby Steam Gauge & Valve Co., 113 U S. 157, 170, 171, 5 Sup. Ct. 513, 521 (28 L. Ed. 939) (1885):

"In regard to all of the above patents, adduced against Richardson's patent of 1866, it may be generally said that they never were, in their day, and before the date of that patent, or of Richardson's patent, known or recognized as producing any such result as his apparatus of that patent produces, as above defined. Likenesses in them, in physical structure, to the apparatus of Richardson, in important particulars, may be pointed out, but it is only as the anatomy of a corpse resembles that of the living being. The prior structures never effected the kind of result attained by Richardson's apparatus, because they lacked the thing which gave success. They did not have the retarding stricture which gave the lifting opportunity to the huddled steam, combined with the quick falling of the valve after relief had come. Taught by Richardson, and by the use of his apparatus, it is not difficult for skilled mechanics to take the prior structures and so arrange and use them as to produce more or less of the beneficial results first made known by Richardson; but prior to 1866, though these old patents and their descriptions were accessible, no valve was made producing any such results."

We do not discover in the prior art, as that art is disclosed in the record before us, anything which invalidates the patent in suit.

The defendant introduced upon the market in 1904 a type of envelope which is termed the "Self-addressed." This envelope was in

substance the Callahan envelope of patent No. 701,839. At the time this envelope was introduced upon the market, and for some time thereafter, the transparent patch was applied by hand. Defendant interested its shop superintendent, one Thomas W. Kienast, in an endeavor to construct a machine to apply the patch. Kienast got up a paper cutting and patch applying device and attached it to the original Timmis machine of 1901, and which had been in storage since 1904. Removing the Timmis cutting and applying attachment of 1901, he attached his device in the same location between the gummer and the folder where the Timmis cutting and applying device had been attached. The improvements made by Kienast were solely in the matter of cutting and applying the patch, and no new construction or principle of operation in the matter of gumming or of feeding or of folding the blank was involved. He applied for a patent on these improvements limiting his claims to the mechanism for cutting and applying the patch, including the receiving table for supporting the blank in the period of dwell. His application was held up for a year and four months, but on April 7, 1908, a patent, No. 884,335 was issued to him. In his specification Kienast stated that his invention related to "an improvement in machines for making envelopes having incorporated therein a transparent paper strip through which writing upon an inclosure placed within the envelope may be viewed, thereby making the envelope one commonly termed a 'self-addressed envelope,'" he continued:

"The present invention pertains to mechanism whereby the transparent paper web is fed, cut into strips of the desired size, and applied to the envelope blanks that are provided with eight openings at the points to which the transparent paper strips are to be applied."

But the fact that defendant is acting under a patent cannot excuse it, if in fact it is infringing.

The court below thought that a narrow scope should be given to the claims of the patent in suit. In this it was in error. Slater being the first person who succeeded in producing an automatic machine for making window envelopes, he was entitled under the law to a liberal construction of the terms of his patent. If he had been a mere improver upon a prior machine by which the same general result was accomplished, the court would have been right in giving a narrow construction to his claims. But such is not the case. And the principle of the patent law is well established in this country, and indeed in England as well, that a liberal construction is to be given to a patent of the class to which the one in suit belongs.

In Hobbs v. Beach, 180 U. S. 383, 21 Sup. Ct. 409, 45 L. Ed. 586 (1901) the Supreme Court sustained a patent to one Beach on the first automatic machine for attaching stay-strips to the corners of paper or straw board boxes. Before Beach's machine was invented it had been customary to apply the stay-strips over the joints at the corners of the boxes by pasting them down by hand. His machine applied paste to a strip of material, fed the strip over the corner of the box, cut it, and then applied the cut and gummed strip to the outside corner of the box by a die having a right-angled recess to fit that corner. The machine was based upon ideas that were familiar in a

number of the arts. The novelty did not reside in any particular thing or in any particular mechanism. The novelty existed in the fact that there was a new mechanical result. It was sought in that case to invalidate the patent by reference to a prior machine for applying the address slips to folded newspapers in which the address slip was automatically gummed, fed to the attaching devices, and cut off and attached by plungers having flat faces. The principal difference in mechanical construction between the Beach machine and the prior machines for applying the address slips was in the shape of the attaching dies, which in the box machine was so shaped as to fit the corners of the box, and which in the other machines were flat so as to apply the flat strip to the folded newspaper. The Supreme Court held that it involved invention to see that a machine used for applying the address slips to folded newspapers was adaptable to the work of the Beach device and to make such changes as were necessary to adapt that device to its new function. The invention, the court declared, consisted "rather in the idea that such change could be made than in making the necessary mechanical alterations." The Beach patent originally came before Judge Coxe in the Circuit Court for the Northern District of New York, and he sustained it upon the ground upon which it was ultimately sustained by the Supreme Court. Beach v. American Box Machine Co. (C. C.) 63 Fed. 597 (1894). This court affirmed it (Inman Mfg. Co. v. Beach, 71 Fed. 420, 18 C. C. A. 165 [1895]), and the patent was also sustained by the Circuit Court of Appeals in the First Circuit (Beach v. Hobbs, 92 Fed. 146, 34 C. C. A. 248 [1899]).

In Morley Machine Co. v. Lancaster, 129 U. S. 263, 273, 9 Sup. Ct. 299, 302, 32 L. Ed. 715 (1889), the Supreme Court, speaking by Mr. Justice Blatchford, stated the law as follows:

"Where an invention is one of a primary character, and the mechanical functions performed by the machine are, as a whole, entirely new, all subsequent machines which employ substantially the same means to accomplish the same result are infringements, although the subsequent machine may contain improvements in the separate mechanisms which go to make up the machine."

The same court had announced the same principle in McCormick v. Talcott, 20 How. 402, 405, 15 L. Ed. 930 (1857), where, speaking through Mr. Justice Grier, it said:

"If he be the original inventor of the device or machine called the divider, he will have a right to treat as infringers all who make dividers operating on the same principle, and performing the same functions by analogous means or equivalent combinations, even though the infringing machine may be an improvement of the original, and patentable as such. But if the invention claimed be itself but an improvement on a known machine by a mere change of form or combination of parts, the patentee cannot treat another as an infringer who has improved the original machine by use of a different form or combination performing the same functions. The inventor of the first improvement cannot invoke the doctrine of equivalents to suppress all other improvements which are not mere colorable invasions of the first."

In Morley Sewing Machine Co. v. Lancaster, supra, the Supreme Court sustained the validity of a patent for automatically sewing shank buttons to shoes and fabrics. The machine consisted of three groups of mechanisms: (1) A mechanism for holding the buttons in mass

and delivering them separately, in proper position, over the fabric, so that they could be attached to it by the sewing and stitching mechanism. (2) A stitching mechanism. (3) A mechanism for feeding the fabric along so as to space the stitches and consequently the buttons when sewed on.

Morley in his patent had combined these mechanisms for the first time in the art into an automatic button sewing machine, and the court held that, having done this, he was entitled to a liberal construction of his patent. The substance of the defense in that case was that there were certain specific differences between the button-feeding mechanisms of the Morley machine and of the Lancaster machine which was alleged to infringe, and also that there were certain specific differences between their sewing mechanisms; and hence no infringement. The Supreme Court held that, notwithstanding the existence of these specific differences between the mechanisms of the two machines, the Lancaster machine infringed the Morley patent.

The rule laid down in the Lancaster Case is applicable to the patent in suit. That there were specific differences between the patent in suit and defendant's machine is true. Those differences the court below stated as follows:

"In the Kienast machine the transparent patch is produced by the machine from a continuous web of transparent paper instead of being produced outside of the machine, and a patch is formed for each individual blank, as the blank arrives in position to have the patch applied to it. This individual patch is lowered without pressure and entirely free and separate from the remainder of the patch material until it comes into contact with the gummed surface around the window opening of the envelope blank, whereupon the mechanism which lowered it rises and leaves it, without the previous application of sudden impact or pressure upon the blank."

The court below thought that, while these differences might be slight, they were sufficient to deny a decree on the ground of infringement, "in view of the narrow scope which must be given to the claims of complainant." But, as we have pointed out, the patent in suit is not to be given a narrow but a liberal construction, and "the slight differences" referred to amount to an infringement of the patent, the invention being of a primary character, as the defendant's machine employs substantially the same means to accomplish the same results that the complainant's machine accomplishes. The defendant's machine has each and every element that is found in the complainant's machine, and they are combined in the same way and produce the same result. It is immaterial that in the two machines the patches are fed to the same attaching mechanism in a somewhat different but equivalent manner.

The testimony shows that the defendant's machine has essentially the mechanism of the complainant's machine. It embodies instrumentalities for automatically applying adhesive material around the window opening; for feeding the gummed blank forward over the pressing table; for registering the blank on the pressing table; for applying a transparent patch to the blank to cover the window opening and overlap the gummed margin around the opening; for applying pressure to the transparent patch to secure its firm adhesion to

the envelope blank; and for removing the envelope blank with the patch attached thereto from the pressing table.

The combination described in claim 5 of the patent in suit is embodied in defendant's machine in that it combines the following elements: Mechanism for gumming around an opening in the blank; mechanism for folding the blank; mechanism for feeding the blank from the gumming to the folding mechanism with an intervening period of dwell; and mechanism between the gumming and folding mechanisms for applying a patch over an opening in the envelope blank.

The combination described in claim 15 of the patent in suit is embodied in defendant's machine in that it combines mechanism for gumming an envelope blank around an opening therein and mechanism for folding the flaps of the blank; means for feeding the blank from the gumming mechanism to the flap folding mechanism; and mechanism interposed between the gumming mechanism and the flap folding mechanism for applying a patch to the blank to cover the opening therein.

It is immaterial that in the two machines the patches are fed to the same attaching mechanism in a somewhat different manner. In complainant's machine the patches are fed downwardly from a pile of patches and in defendant's machine they are fed and cut from a continuous strip. But, so far as the patch attaching mechanism is concerned, the essential thing is that the patch should be fed to a patch holder at a point directly over the window of an envelope blank. This is done in both machines. After the patch has been fed into the holder in each machine, the attaching mechanism applies the patch in the same way. The attaching box in each machine is lowered so that the patch rests upon the gummed edge of the window hole. It may be true that in the complainant's machine a stronger pressure is used in the lowering of the plunger onto the gummed blank, and that a lighter pressure suffices in defendant's machine. But both machines, in our opinion, use some degree of pressure, and it cannot be said that plaintiff's machine requires pressure upon the blank and defendant's machine does not. However that may be, it cannot be decisive of the question involved.

Defendant claims that his machine is an improvement on the machine of the patent in suit in that more patches can be contained in a roll of transparent paper than can be put into the magazine patch holder of the Slater machine, and that the stoppages, each taking a few seconds, for the renewal of the patches, are less in number in his machine than in the machine of the complainant. We are not concerned to inquire particularly whether this be as claimed. It may be true, although the complainant insists that the theoretical loss of time in putting patches in bunches into the patch receptacle of the Slater machine "is infinitesimal and negligible." But, conceding that in the particular mentioned the Kienast machine has improved upon the Slater machine, the fact remains that the improvement cannot save the defendant from the charge of infringement.

Patent No. 893,105, issued by the United States Patent Office to William D. Slater, being valid and infringed by defendant, the

decree of the court below is reversed, and a decree for injunction and accounting is to be entered in pursuance of the prayers of the bill of complaint.

ADRIAN WIRE FENCE CO. v. UNITED FENCE CO.

(Circuit Court of Appeals, Sixth Circuit. May 4, 1915.)

No. 2530.

1. PATENTS ⟸328—VALIDITY—TIES FOR WIRE CONSTRUCTION AND DIES FOR MAKING THEM.

Claim 1 of the Williams patent, No. 533,403, for an improvement in ties for wire structures, such as wire fences, and the Tiffany patent, No. 755,187, for an improvement in dies for forming such ties, *held* void for lack of patentable invention, in view of prior patents.

2. PATENTS ⟸26—VALIDITY—COMBINATIONS—"INVENTION."

Where the elements of a combination and the result attained by it were old, and the change in the means of attaining such result showed nothing more than mechanical skill, there was no "invention."

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 27–30; Dec. Dig. ⟸26.

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

Patentability of combinations of old elements as dependent on results attained, see note to National Tube Co. v. Aiken, 91 C. C. A. 123.]

Appeal from the District Court of the United States for the Eastern District of Michigan; Arthur J. Tuttle, Judge.

Suit by the Adrian Wire Fence Company against the United Fence Company. From a decree for defendant, plaintiff appeals. Affirmed.

Edward Rector, of Chicago, Ill., for appellant.

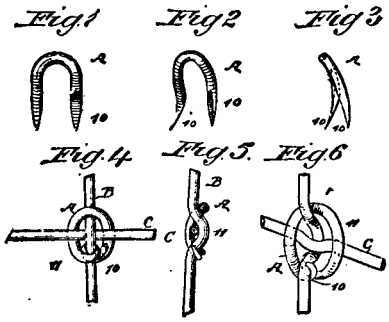
Walter H. Chamberlin, of Chicago, Ill., for appellee.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

WARRINGTON, Circuit Judge. This was a suit to enjoin alleged infringements of three patents and to recover the usual profits and damages. One of the patents was issued January 29, 1895, to Eugene L. Williams and John S. Williams jointly, and numbered 533,403; later, through mesne assignments, the patent was transferred to the plaintiff; and the invention claimed is for an improvement in "ties for wire structures." The second patent was issued March 22, 1904, to George Sylvester Tiffany, assignor, by mesne assignments, to the plaintiff, and numbered 755,187; the invention is in terms claimed to be an improvement in "dies." The third is alleged to have been issued to George S. Tiffany, assignor to the plaintiff, and numbered 774,210; and counsel for plaintiff dismissed the bill as to this patent, calling it the "Tiffany tie patent." The answer is in effect a denial of invention in or infringement of either of the two patents first mentioned. The court found that the first patent was not infringed, without pass-

ing upon its validity, and held that the second patent is invalid. Plaintiff appeals.

[1] 1. *The Williams Patent.* The prominent feature of this device is a wire tie designed to fasten the intersections of cross-wires. According to the claim in issue, one of the wires is bowed to receive the other at the intersecting points; while the specification and drawings show both wires are so bowed at these points. The use of the tie is not limited to any specified wire structure, but is extended generally to "wire structures." The infringement charged in the instant suit, however, concerns wire fencing; and the evidence, for the most part, relates to structures of that kind. The fences, as constructed under authority of plaintiff, consist of horizontal or strand wires and vertical stay wires, and both are oppositely bowed at the intersections and there fastened with this form of tie. The tie is made of a staple. The loop (or bend) of the staple engages the vertical wire horizontally at the upper end of its bow, with the legs passing over and engaging the strand wire at both ends of its bow, and the points turning to and bending in opposite directions partially around the vertical wire at the lower end of its bow. The tie so made is circular in form, having two bearings on one side of the vertical wire and two on the opposite side of the strand wire. The combination described in the specification and illustrated by drawings, is covered by two claims; both claims are in issue under the pleadings, but in the evidence and arguments only the first one is, and it is set out in the margin.[1] The staples used in making the ties and their relation to the cross-wires will be better understood by the drawings:



The defense of previous invention is set up in the answer; and in view of the patents there referred to, it is urged that want of patentable novelty in the Williams patent plainly appears. It is therefore necessary to look into the prior art. Cross-wires with crimps or bows at their intersections appear in a number of patents earlier than the one in suit. For instance, Figs. 2 and 3 of Caldwell's patent upon wire fences (October 25, 1887, No. 372,060), show cross-wires with intersecting bows, which are the same as those of Figs. 4, 5 and 6 of the patent in suit; this is not apparent in Figs. 4 and 5, but the specification states that the bows of these wires are the same as those in Fig. 6. Both Leggett and Staples, the one in his patent spring bed bottom (August 19, 1890, No. 434,794), and the other in his patent spring support for upholstery (September 20, 1892, No. 482,908), show

1 "The combination in a wire structure, of the crossed wires, one of which is bowed to receive the other, with a tie consisting in a staple engaging with its bend the said bowed wire with its legs crossing the other wire and its points bent around the bowed wire from opposite sides, substantially as described."

cross-wires with intersecting bows. Jones, in his patent on wire fences (November 1, 1887, No. 372,625), displays cross-wires with the strands bowed at the intersections; and Mitchell, in his patent on such fences (April 16, 1889, No. 401,450), illustrates his device by uprights which are bent to fit the strand wires at the points of crossing; while Hayden, in his patent on a wire-fastening device for metallic fence posts (April 20, 1886, No. 340,311), discloses bows in strand wires at his post fastenings.

It hardly need be said that the staples used by Williams differ in no material respect from the ordinary and well known commercial staple. It is true, as the specification states, "the members of the staple are carried out of alignment with each other" (Fig. 2), so that when viewed in side elevation the contour of an inverted V appears (Fig. 3); yet it is urged that one of the advantages of the tie is that the commercial staple may be conveniently used in making it.

Caldwell used a "clasp or staple" to fasten the vertical and horizontal wires at their intersecting points. It is stated in his specification:

"The method of uniting the longitudinal and vertical wires at their intersections [is] by means of a clasp or staple bent around the crimped portion of each wire."

The clasp or staple was used by placing its bend diagonally across the bow of the strand wire and turning its ends in opposite directions around the vertical wire at the extremities of its bow. Thus, virtually the same kind of instruments (staples) were designed in the Caldwell patent and in the Williams patent, to fasten the intersections of the same sort of bowed wires, vertical and horizontal.

The Depew patent upon wire fencing (April 11, 1893, No. 495,029) described a "clip that is normally provided with a re-entrant looped bend and elongated parallel legs" (practically a staple partially adapted for ultimate use), as "a connecting clamp or tie" at the intersections of the cross-wires (Fig. 3). The bend of the clip was placed about the vertical wire immediately above the strand, with the curves of the legs engaging the strand and the ends projecting on both sides of the vertical wire where they were twisted together. And Mitchell used a wire clamp to effect his tie. This clamp was a staple, with the ends of its legs bent into hooks. The bend of the clamp engaged the iron upright, resting on the shoulder at the upper extremity of the bow, and the hooks held the strand wire (Fig. 3). This is called by one of the experts a "suspension" tie, but its form would not seem to prevent clasping the cross-wires firmly.

In Biggs' patent upon pliers for building wire fences (January 2, 1894, No. 511,991), a staple is shown (Fig. 3), with its legs turned about midway of their length at right angles and in parallel lines. The bend of the staple was placed about the vertical wire, resting on the strand, and its projecting ends were turned around the strand (Fig. 2).

[2] In the light of the earlier patents, and all of them have not been mentioned, we are of opinion that the Williams device is lacking in patentable invention. The elements of the combination and the result attained by it were old; and upon comparison of the means of at

tainment here with the old methods, we find no change indicating anything more than mechanical skill. The most that can be said of the means now in issue is that the staple is disposed about the intersection of the cross-wires in a manner differing in some respects from that shown by the earlier patents. It is remarkable that the basic contrivance used for making these various ties, and all for the same object, should have been the staple. True, a number of the earlier patents show the staple partially changed into the final form desired (though without destroying its identity as a staple), while Williams displays the staple in its primary as well as its changed form; and still in the Williams tie the teaching of the prior art is none the less apparent. In view, then, of the purpose common to all these patents, it cannot signify how the patentees placed the staples about the cross-wires at their junctions, whether, for example, in the manner shown by Caldwell or Depew, or by Williams; for such differences could only vary the application of the tying device or possibly add to the efficiency of the intersection. It results that the combination in issue was at best simply an extension of the original idea, a change in form, an improvement in degree; in short, an old production wrought in an old way—since it was without material change in means. This is not invention. It is but another instance calling for the application of the principle reannounced by Mr. Justice Shiras in Market Street Railway Co. v. Rowley, 155 U. S. 621, 629, 15 Sup. Ct. 224, 228 (39 L. Ed. 284).

"The case is obviously within the principle, so often declared, that a mere carrying forward of the original thought, a change only in form, proportions, or degree, doing the same thing in the same way, by substantially the same means, with better results, is not such an invention as will sustain a patent. Roberts v. Ryer, 91 U. S. 150 [23 L. Ed. 267]; Belden Manufacturing Co. v. Challenge Corn Planter Co., 152 U. S. 100 [14 Sup. Ct. 492, 38 L. Ed. 370]."

See Smith v. Nichols, 21 Wall. 112, 118, 22 L. Ed. 566; Burt v. Evory, 133 U. S. 349, 358, 10 Sup. Ct. 394, 33 L. Ed. 647; Grant v. Walter, 148 U. S. 547, 553, 13 Sup. Ct. 699, 37 L. Ed. 552; Galvin v. City of Grand Rapids, 115 Fed. 511, 517, 53 C. C. A. 165 (C. C. A. 6th Cir.); Soehner v. Favorite Stove & Range Co., 84 Fed. 182, 187, 28 C. C. A. 317 (C. C. A. 6th Cir.); Torrey v. Hancock, 184 Fed. 61, 70, 107 C. C. A. 79 (C. C. A. 8th Cir.); and see Lane v. Welds, 99 Fed. 286, 290, 291, 39 C. C. A. 528 (C. C. A. 6th Cir.); Brown Hoisting & Conveying Mach. Co. v. King Bridge Co., 107 Fed. 498, 504, 46 C. C. A. 432 (C. C. A. 6th Cir.).

2. *The Tiffany Patent.* It is stated in the specification:

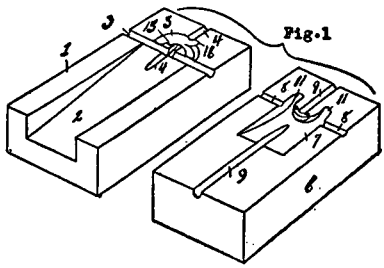
"This invention relates to dies into which may be driven a staple and which will form said staple in the shape of a knot or tie upon crossed wires passing through the dies to unite said crossed wires, as in the making of wire fencing."

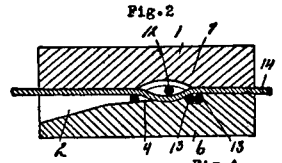
The specification further states:

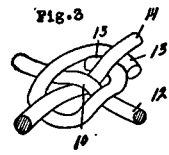
"The object of the invention is to provide simple and efficient means for forming the tie into a peculiar shape upon the crossed wires within the dies. * * *"

Doubtless the tie so provided for is the one as to which the bill was dismissed; it corresponds in the main with the Williams tie. The two ties are, however, differently applied to the cross-wires. According

to the Tiffany patent, and the testimony of plaintiff's expert, the loop and the ends of the staple engage the strand wire, while in the Williams tie, as we have seen, these parts of the staple engage the vertical wire. Still it is fairly to be inferred from the evidence and arguments, though it is not distinctly stated, that the Williams tie can be produced upon the Tiffany dies; yet, as counsel suggest, the patentable quality of the dies is to be tested regardless of the Williams tie. The dies will be more readily understood through inspection of the drawings, in connection with the claims and interpolations therein of the reference numerals of the drawings, as one of the experts has shown. The drawings are as follows:







The claims, with the interpolations mentioned, appear in the margin.[2] Here again the defenses made include the one of previous inven-

[2] "1. Dies having transverse registering channels [*3, 8* and *4, 9*] for the reception of the cross-wires [*12, 14*], one of said dies [*1*] having an inclined way [*2*] and a semicircular recess [*5*], the other of said dies [*6*] having a central concavity [*7*] with curved branches [*11*] leading from opposite sides thereof, which curved branches register with the opposite terminals of said semicircular recess [*5*].

"2. The combination of the dies, one die [*1*] having an inclined way [*2*] and a transverse channel [*3*] below the plane of the highest point of said way, a semicircular recess [*5*] whose terminals abut upon said channel [*3*], the other of said dies [*6*] having a central concavity [*7*] crossed by a transverse channel [*8*], said central concavity having curved branches [*11*] which register with the terminals of the semicircular recess [*5*] in the first-mentioned die, and a registering channel in the face of each die at right angles to the first-mentioned channel [the channel *4* in the case of die *1* and the channel *9* in the case of die *6*].

"3. In a device for the purpose set forth, the combination of the opposed dies having registering channels [*3, 8* and *4, 9*] in their inner faces which cross at right angles, one of said dies [*6*] having concave branches [*11*] which cross one of the channels [*8*] below the plane of the bottom thereof, the other of said dies [*1*] having a semicircular recess [*5*] which registers with the terminals of said branches [*11*] to direct the ends [*13*] of the tying-staple past each other and under one of the crossed wires [*14*].

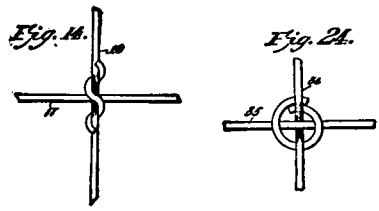
"4. The combination of the opposed dies having registering cross-channels [*3, 8* and *4, 9*] in the meeting faces thereof, a semicircular recess [*5*] in one of said dies [*1*] crossed by one of said channels [*4*] and depressed below the plane of the bottom thereof, the opposite die [*6*] having a depression [*7*] and concaved branches [*11*] crossing one of the channels [*8*] therein, said concaved branches being adapted to lead the ends [*13*] of the staple into the opposite terminal of said semicircular recess in the opposing die to direct said ends [*13*] past each other and cause them to lie concentric in the same plane."

tion, and several earlier patents describing dies kindred to those now in issue are referred to. Defendant's counsel insist, moreover, that dies are made simply to reproduce a previously designed object and cannot involve invention for that reason. The contention in effect is that the shaping of depressions, such as channels, recesses, or the like in the faces of dies, is predetermined, and so calls for imitation, and not invention. In view of the prior art, this is a broader proposition than we are required to consider. Williams intended his tie to be made through the medium of a suitable die, though apparently he did not regard the die as a device also calling for the exercise of the faculty of invention. His specification states that the vertical and strand wires are to be tied together as shown in Figs. 5 and 6, and proceeds:

"The staple is then manipulated through the medium of a suitable die in a manner to carry its ends in direction of one another, so that they will curve over the vertical wire * * * at a point below the horizontal wire." [8]

Any consideration of the claims and drawings of the Tiffany patent will show that whatever improvement was made by Tiffany is to be found in the peculiar shaping of the channels and recesses of the opposed faces of the dies. When the staple is forced between the dies, it will obviously follow the lines of least resistance, and so be bent around the intersection of the two cross-wires there held, and converted into a tie like that of Fig. 3 of the drawings.

Nearly four years before the date of the Tiffany patent, the Lamb Wire Fence Company, assignee of Lamb and Hoxie, was granted a patent (April 3, 1900, No. 646,497) disclosing two die constructions, both of which are in principle similar to the die construction in issue and one of which produces a tie like that of Tiffany. The Lamb and Hoxie ties are shown in Figs. 14 and 24:



The faces of both sets of dies show transverse registering channels for the cross-wires. The first set is provided with spirally located and registering grooves deeper than the transverse channels and crossing them diagonally; also with registering recesses for the admission of a plunger with a shoulder and continuing reduced width for receiving and driving a straight tie wire. The plunger forces the tie wire between the dies in the plane of the cross-wires and into the spiral grooves about the intersection of the cross-wires, producing the result seen in Fig. 14. The only difference that need be mentioned between the first set and the second set of these dies concerns the tie-forming grooves of the dies; the second set being provided with arcs or circular grooves,

[8] Attention may here be directed to the device subsequently designed by John S. Williams and patented, called "wire crimping and fastening pliers," which is used for making the Williams tie in the field during fence construction. The patent bears date February 2, 1897, and the device has recesses and curves for holding the cross-wires and forming the staple into a tie about the intersection analogous to those of the Tiffany dies.

instead of the spiral grooves of the first set, and the plunger forces the tie wire in the same plane as it does in the other but through the circular grooves and about the cross-wires with the result shown in Fig. 24. It need not be said that, when the sections of these two sets of dies are placed face to face, the respective tie-forming grooves are so shaped as to constitute continuous channels for the guidance of the tie wires and the formation of the knots or ties desired. It is true that a straight tie wire is employed in both sets of these dies, while a staple (a U-shaped wire) is used in the Tiffany dies. The Lamb and Hoxie tie wire is driven into the grooves provided for its reception and guidance, with only one end forward, and the Tiffany staple is driven into its grooves with both ends forward. Can it be that this difference introduced by Tiffany amounts to invention? The answer will not be found in a consideration of the *form* of his tie; for that was old and is not part of his claims. It must be found, as already stated, in what was done through the introduction of channels, grooves and recesses, into the faces of the dies; and since the methods adopted and the results achieved are practically the same in both devices, it is hard to see why Tiffany did more than to introduce a mechanical equivalent.

But, in addition to the teaching of the Lamb and Hoxie patent, Tiffany was previously advised of the fact that dies might be made for the introduction of a staple and its formation into a tie. Hoxie had accomplished this in 1901 (letters patent No. 678,955). The face of one section of his dies contains transverse channels for the reception of the cross-wires, and also recesses for forming a tie similar to the letter S. The other die member is provided with a slot through which the tie wire (the staple) is driven at right angles to the meeting faces of the dies and into the tie-forming recesses of the other die. And as early as 1899 Lamb provided a die for joining intersecting wires (letters patent No. 628,986) by carrying cross-wires through transverse channels in the faces of the dies and driving two staples through slots into the tie-forming recesses and so converting them into a double spiral tie about the intersection. Plungers were used for driving the staples, and like the plunger of the Hoxie patent, were worked transversely to the faces of the dies. Lamb's dies and his method of operation are so plainly described in his specification, that we reproduce a portion in the margin.[4]

It is contended that the Hoxie patent and the Lamb patent should be disregarded because the staples were driven into the dies at right

[4] "The improvement consists in coacting dies having feed slots for the staple-like fasteners, arranged diagonally across the lines of the wire-receiving channels, the latter being provided in the working faces of the dies to have the deep wire channel of one die cross the corresponding channel of the other die at right angles in order to properly position the wires in relation to each other and to the feed slots for the staple-like fasteners and each die having semi-spiral grooves which extend in the general direction of the deep wire-receiving channel thereof, whereby the locking fasteners may be fed simultaneously through the diagonal slots of both dies to be positioned thereby in oppositely inclined directions across the joint between the crossed wires, and the semi-spiral groove of one die operates on the closing of the dies to twist the ends of the staple-like fastener fed by the other die around the wire which is contained in the said die that effects the twisting of the staple fastener."

angles to the plane of the cross-wires, and that it is essential to the Tiffany dies that they should be separated from each other in the plane of the cross-wires to which the tie is to be applied by the dies. This ignores the fact that the purpose in all these dies was to fasten the cross-wires at their intersection; it ignores the fact that grooves and recesses were worked into the faces of the dies, with differences alone in shape and depth according to the form of the desired tie; and so would differentiate the dies simply by the direction the staple was given in its approach to the tie-forming grooves and recesses. It is common knowledge that dies in one form or other are old devices, and that their differences are worked out through changes made in their faces rather than in their operation. The means of introducing the material intended to be given shape and form by the use of dies, would seem to be of little importance. Tiffany does not describe the means to be employed for driving the staple into his dies, and so leaves this feature open to the inference that efficient means were well known. Indeed, when substance and not simply form is considered, there is such practical resemblance in methods of construction and operation between the essential features of the earlier dies and those of the dies in question as to show only mechanical equivalency in the latter; and it is vain to say that the variations, some of them exceedingly slight, in the forms of the ties produced, indicate the presence in the dies themselves of anything beyond the skill of the die mechanic. Thus the elements of the Tiffany combination, like those of the Williams combination, and the result attained by the one, as well as the other, were in every material sense old; and when the Tiffany device is subjected to the tests of the prior art in die construction and uses, it becomes plain that the Tiffany patent in point of validity must be controlled by the principles of law we have applied to the Williams patent.

Furthermore, in view of the state of the prior art touching the feasibility of bending and uniting pieces of wire into particular forms by driving them through pre-designed opposing channels and recesses wrought in the faces of an upper and a lower die, the Tiffany patent cannot escape application of the principles declared in Peters v. Active Mfg. Co., 130 U. S. 626, 628, 629, 9 Sup. Ct. 389, 32 L. Ed. 738. See also, Mahon v. M'Guire Mfg. Co. (C. C.) 51 Fed. 681, 683, per Judge Blodgett; Dayton Loop & Crupper Co. v. Ruhl (C. C.) 55 Fed. 649, 651, per Judge Taft. There is at least strong analogy between the use of dies for welding and forming pieces of iron into particular shape (as, for instance, in Peters v. Active Mfg. Co.), and for forcing pieces of wire into special relations and forms such as are described in the earlier art here disclosed. Nor can the decisions just cited be avoided upon the theory that the Tiffany dies "are in the nature of machines, or active mechanical devices, which co-operate" to form the wire into the tie produced by them; or upon the idea that the tie is applied and combined with the cross-wires of the fence structure. The bows of the cross-wires were shown as distinctly by the Hoxie patent of 1901 as they were by the Tiffany patent of 1904, and enough has already been said of the other co-operating features of the earlier dies. The argument in this behalf of the learned counsel seems to proceed upon

the basis that Tiffany produced something new instead of something old, and (in the sense of invention rather than mechanical skill) by some new instead of an old way. It might well be conceded that if the Tiffany dies were new in these respects they would possess patentable qualities; but we think upon the facts the hypothesis is not sustainable. It follows that the presumption of validity attending the grant of the patent, which is so much relied on here, is not availing.

We conclude that the first claim, the only one really in issue, of the Williams patent, and all the claims of the Tiffany patent, are void. The decree must therefore be affirmed, with costs.

TOLEDO METAL WHEEL CO. v. FOYER BROS. & CO.

(Circuit Court of Appeals, Sixth Circuit. April 6, 1915.)

No. 2564.

1. APPEAL AND ERROR ⊜356—TIME FOR PERFECTING APPEAL—DELAY WITHOUT FAULT OF PARTY.

Where an appeal was allowed and the amount of the appeal bond fixed by a Circuit Judge within the prescribed time, but approval of the bond and issuance of citation were referred to one of the District Judges, the appeal will not be dismissed because, by reason of the temporary absence of both District Judges from the district, approval of the bond and issuance of citation were delayed until after the expiration of 30 days.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1926, 1927; Dec. Dig. ⊜356.]

2. PATENTS ⊜112—SUIT FOR INFRINGEMENT—PATENT AS EVIDENCE.

The grant of a patent is prima facie evidence that the patentee is the first inventor of the device described and of its novelty.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 162–165; Dec. Dig. ⊜112.]

3. PATENTS ⊜226—SUIT FOR INFRINGEMENT—EVIDENCE—DATE OF SALE.

Sales of infringing articles as acts of infringement are to be regarded as having been made when the contract of sale was made, irrespective of the time of delivery.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 357; Dec. Dig. ⊜226.]

4. PATENTS ⊜311—SUIT FOR INFRINGEMENT—PLEADING.

A petition of intervention, filed in an infringement suit for the purpose of showing a change in the ownership of the patent and consequently of the party in interest as complainant since the commencement of the suit, is to all intents an original bill in the nature of a supplemental bill, and where it adopts the original bill, which alleged infringement to the date of its filing, and that defendant "still continues to infringe," the petition should be treated as operating to extend the time of the alleged infringement at least to the date when it was filed, especially where it was so treated without objection on the hearing.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 541, 542; Dec. Dig. ⊜311.]

5. PATENTS ⊜312—SUIT FOR INFRINGEMENT—SUFFICIENCY OF EVIDENCE.

Evidence considered, and *held* sufficient to make a prima facie case of infringement, where no evidence was offered by defendant.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 544–549; Dec. Dig. ⊜312.]

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6. ATTORNEY AND CLIENT ⊂=24—LIABILITY OF ATTORNEY FOR COSTS—VEXATIOUSLY INCREASING COSTS.

Under Rev. St. § 982 (Comp. St. 1913, § 1623), which provides that if any attorney appears to have multiplied the proceedings in a cause so as to increase costs unreasonably and vexatiously, he shall be required, by order of the court, to satisfy any excess of costs so created, as well as by the common law, a court has power on motion to order costs taxed against an attorney, where it appears that he is unreasonably and vexatiously prolonging the taking of depositions by excessive cross-examination or unwarrantably obstructing the examination of his client by instructing him not to answer proper questions.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 32–36; Dec. Dig. ⊂=24.]

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

Suit in equity by Foyer Bros. & Co. against the Toledo Metal Wheel Company. Decree for complainant, and defendant appeals. Affirmed.

J. S. Dodge, Jr., of Chicago, Ill., for appellant.

Almon Hall, of Toledo, Ohio, for appellee.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

WARRINGTON, Circuit Judge. [1] This was a suit to enjoin alleged infringement of a patent, and issue was joined through answer and replication. The appellee (plaintiff) offered evidence to support the allegations of the bill, and thereupon the appellant (defendant) moved to dismiss the cause on the ground that plaintiff's proofs did not make a prima facie case. The motion was denied, and defendant, declining to introduce proofs in defense, prayed final hearing. Decree was entered finding infringement and granting the usual injunction, reference, and accounting, and the decree contained other features, which will be considered later.[1] The controlling question arising upon the appeal is, whether plaintiff's evidence establishes a prima facie case.

The patent in suit was granted September 7, 1909, numbered 933,079, to Otto Kurz, assignor to Melvin J. Foyer, for certain improvements in folding perambulators. The perambulators are collapsible

[1] Appellee has moved to quash the citation and dismiss the appeal, because the appeal bond was not perfected and the citation issued within 30 days of the rendition of the decree. The appeal was allowed and the amount of the appeal bond fixed, within the prescribed time, by a Circuit Judge of the Sixth Circuit; but approval of the bond and issue of the citation were referred to one of the District Judges of the Northern District of Ohio. Such approval and issue were delayed until after expiration of 30 days, but by reason alone of the temporary absence of both District Judges. The acts of approval and issue occurred upon the return of one of the District Judges. Since the delay mentioned was caused by no fault of appellant, we think the appeal was rightly perfected; and the motion to dismiss should be denied. Peugh v. Davis, 110 U. S. 227, 228, 4 Sup. Ct. 17, 28 L. Ed. 127; J. D. Randall Co. v. Foglesong Mach. Co., 200 Fed. 741, 742, 743, 119 C. C. A. 185 (C. C. A. 6th Cir.).

vehicles adapted to the convenient transportation of children. The collapsible feature is designed for folding the vehicle into small compass so that it may be easily carried, transported, or stored. October 30, 1909, Foyer filed his bill, January 3, 1910, the defendant answered, and on the 27th of that month the replication was filed. The issues presented were not unusual. The infringement charged was that:

"After the issuing of the letters patent * * * and before the commencement of this suit," defendant "did, without the license * * * of your orator, and in violation of his rights and in infringement of the aforesaid letters patent, and particularly claims 2, 3, 4, 5, 6, 7, 8, and 12 thereof, * * * make, construct use and vend to others to be used vehicles made according to * * * said invention and that it still continues so to do, and that it is threatening to make the aforesaid vehicles in large quantities and to supply the market therewith, and to sell the same."

November 13, 1909, and before any of the evidence was adduced, a corporation was organized under the laws of Ohio, in the name of the Foyer Bros. & Co.; and on the 29th of that month Foyer assigned the patent to this corporation, and the assignment was recorded in the Patent Office April 8, 1910. July 5, 1910, the company filed an intervening petition in the cause, setting up its incorporation and alleging that it was engaged in the business of manufacturing and selling perambulators, "commonly called 'gocarts' or 'baby carriages,'" reciting the facts before indicated, and adopting as part of the petition the allegations of the bill previously filed by Melvin J. Foyer, as stated; it prayed to be permitted to prosecute the cause; that defendant be required to appear and answer though not under oath; that petitioner be granted the same relief prayed by Foyer, "and for such other and further equitable relief as your petitioner may be entitled to in the premises." Defendant appeared and answered, and issue was joined.

The taking of evidence was begun February 21, 1911. The plaintiff offered certified copies of the articles of incorporation of the Foyer Bros. & Co., of the letters patent, and of Foyer's assignment of the patent (which is in due form) to the corporation, as such assignment appears of record in the Patent Office. Foyer testified that he signed the original of this instrument, and that he is president and general manager of the company. Concededly, as early as September 21, 1909, defendant received a letter from Foyer's counsel, stating, among other things, that Foyer had learned that defendant was "making and selling folding perambulators which infringe the patent of September 7, 1909, No. 933,079," and notifying defendant "to cease this infringement." Defendant's president had stamped the letter as "Answered," but he did not find the answer. An important catalogue was introduced through a witness, Mr. Silverman, who testified:

"Q. Have you in your possession and can you produce a catalogue of gocarts of the Toledo Metal Wheel Company for the year 1909? A. I have; here is one."

His firm (the Kobacker Furniture Company of Toledo) was a dealer in gocarts manufactured by defendant. This catalogue bears

on the outside of the first sheet of its cover, near the top, the following: "The 'Favorite' Automatic Collapsible Gocarts," near the bottom, "The Toledo Metal Wheel Co., Toledo, Ohio," and the second sheet of the cover contains on the inside, "The 'Favorite' Line of Gocarts, Children's Carriages, etc., for 1909." On page 3, pictures of a gocart, both in open and folded forms, called alike "No. 'B'" and "Special 'B,'" appear; and on page 4, pictures, in similar forms, of "No. 'C'" are found. The catalogue also contains a stamped statement over the printed signature of defendant, with its address:

"Your dealer can supply you with any of our line. If not, we will sell you. A full line of all kinds shown at our office."

A full-sized sample of each of these particular types of perambulator was offered in evidence and produced in court. There is stenciled on the bottom of one, "Spec. B," on the other, "C," and on each is fastened an oval metal plate, which is stamped on the upper portion thus, "The Toledo Metal Wheel Co.," on the lower portion, "Toledo, Ohio," and between these, "Favorite."

Plaintiff called a mechanical expert, Alexander S. Stuart, who described the patented device in detail, and with respect to each of the claims in suit. Having his attention called to "a folding perambulator or collapsible gocart, upon the back of which is fastened a metal plate having stamped thereon the following: 'The Toledo Metal Wheel Co., Toledo, Ohio, The Favorite'"—and being asked whether that device was described in the specification of the patent and in the several claims in suit, he summed up quite an extended answer, thus:

"In said Favorite perambulator I find each and all of the elements included in and called for by each of the said claims of the patent numbered 2, 3, 4, 5, 6, 7, 8, and 12, and each of said elements as embodied in the Favorite perambulator has the characteristics of and functions similar to the corresponding elements called for and embodied in the said claims."

And in the course of his cross-examination he further stated:

"Your question implies a knowledge of a prior art which discloses the invention of the patent in suit. I know of no such prior art."

Although the witness was subjected to long and severe cross-examination, we do not see that his conclusions or the reasons given in their support, in his direct testimony, were materially affected.

Still it is contended that the foregoing is not enough to connect defendant with either the manufacture or sale of any of the perambulators described in the catalogue or with the effect of the testimony of the expert, and especially as respects the time intervening between the issue of the patent in suit and the filing of the original bill in 1909—a period of 53 days. Additional evidence, however, appears in the record. Plaintiff called Mr. Southard, the president and general manager of the defendant, as a witness to testify by deposition, whose course on the witness stand is sufficiently shown below:

"Q. Does the defendant company issue to the trade catalogues of the goods manufactured by it? A. Upon instruction of counsel, I decline to answer. Q. Did the Toledo Metal Wheel Company ever make any carts like the 'Complainant's Exhibit, Defendant's Cart?' A. In what particular? Q. Like it? A. We have made carts similar in appearance." Again: "Q. I show you

'Complainant's Exhibit, Defendant's Cart No. 2.' State, if you know, who made the cart. A. I do not know. Q. What is your best judgment about it? A. Upon advice of counsel I refuse to answer."

Several questions were put to the witness for the purpose of eliciting answers touching defendant's manufacture of carts of this kind, one of which upon advice of counsel the witness refused to answer, and the others he answered thus:

"A. The Toledo Metal Wheel Company have not manufactured any gocarts with bails as described, eliminating the mechanical detail, since September 21, 1909. Q. Has the Toledo Metal Wheel Company since September 21, 1909, sold any folding gocarts having the feature referred to in my last question? (Witness declined to answer). Q. Did the Toledo Metal Wheel Company ever manufacture any collapsible gocarts with a front releasing bail, and, if so, when did it cease to manufacture such carts? A. They did not manufacture any collapsible gocarts with a front releasing bail after September 7, 1909. Q. Did you sell any such carts after September 7, 1909?" (Witness declined to answer.)

The witness' attention being directed to the metal plate fastened to the exhibit "Defendant's Cart No. 2," which is stamped "The Toledo Metal Wheel Company, Toledo, Ohio, Favorite," he testified:

"Q. Is this stamp in all respects such a stanp as has been used by the Toledo Metal Wheel Company? A. It is very similar. Q. If it differs in any respect, point out the difference. A. I won't be able to do that without one of the Toledo Metal Wheel Company's so-called stamps for comparison. Q. I show you the same stamp on the back of the seat back of the 'Complainant's Exhibit, Defendant's Cart.' Can you say that either one of these stamps is, in your opinion, not genuine? A. They are not the same stamps. There is a very material difference in them. It is my opinion that one of them is not genuine. Q. Which one? A. I can't say which. Q. Why do you think so?" (Under instruction of his counsel, question not answered).

It will be noted that the witness in effect admitted that one of the metal plates was genuine. Moreover, Mr. Silverman, to whom reference has been made, distinctly identified two of the exhibits in evidence (full-sized perambulators) which bear unmistakable evidence that they correspond with two of the carts displayed in the catalogue he produced as stated; and metal plates are attached to these exhibits (perambulators), containing words the same as those to which Southard's attention was called and concerning which he testified. Silverman continuing, said:

"Q. I show you a folding gocart, marked herein for identification 'Complainant's Exhibit, Defendant's Cart No. 2.' Please state whether or not your firm has ever bought and sold carts like this exhibit. A. We have. Q. How is the cart 'Complainant's Exhibit, Defendant's Cart No. 2,' known to the trade, if you know? A. By the numbers 'B Special.' Q. Do you find on this cart any mark identifying it as a number B Special? if so, please point it out. A. On the bottom [witness points to the letters "B-Spec"]. Q. When did you purchase carts like 'Complainant's Exhibit, Defendant's Cart No. 2,' and which you have designated as number 'B Special?' And from whom? * * * A. I purchased them from Mr. Crosby of the Toledo Metal Wheel Company some time in November, 1909, and they were delivered in December, 1909. * * *"

As to the number so purchased he said:

"A. On December 1, 1909, 36; December 9, 1909, 31; December 13, 1909, 11; December 16, 1909, 25"—103 in all.

His attention was called later to the other perambulator (type "C"):

"Q. How is the cart 'Complainant's Exhibit, Defendant's Cart,' known to the trade? A. By the number C. Q. Upon the bottom or under side of 'Complainant's Exhibit, Defendant's Cart,' is stamped or stenciled in white a large letter 'C.' Do you know what this means? and, if so, please tell us. A. Yes; it is the lot number of the cart."

The witness stated that his firm purchased of defendant one of these carts December 16, 1909, and produced invoices showing all the purchases. Mr. Stewart, manager of the Globe Furniture Store of Toledo, testified that in March, 1910, his company purchased of defendant more than 50 of its "B Special" carts, and that they were delivered during March, April, and July following; such sales being further proved by invoices. Allen Shaw was in defendant's employ as an inspector of its collapsible gocarts for a period of about three months in the spring of 1910. His attention being called to "Complainant's Exhibit Defendant's Cart No. 2," he testified that such carts were known in the factory of defendant as "B Special," and that he inspected them; that he marked them thus, "'B Special' on the bottom of the seat"; that they were then "packed and shipped"; that defendant manufactured these carts "before and after" he began work at the factory; that he inspected "about 200" gocarts; and that Mr. Southard visited the room in which witness worked "three to four times a week."

The case made, upon a reasonable interpretation of the entire evidence, with the inferences to be justifiably drawn therefrom, may, as respects the question here involved, be summed up as follows:

[2] (a) The grant of the letters patent is prima facie evidence that the patentee is the first inventor of the device in issue and of its novelty. Cantrell v. Wallick, 117 U. S. 689, 695, 6 Sup. Ct. 970, 29 L. Ed. 1017; Reiter v. Jones & Laughlin (C. C.) 35 Fed. 421, 423, per Mr. Justice Bradley; Beer v. Walbridge, 100 Fed. 465, 466, 40 C. C. A. 496 (C. C. A. 2d Cir.); Streator Cathedral Glass Co. v. Wire Glass Co., 97 Fed. 951, 952, 38 C. C. A. 573 (C. C. A. 7th Cir.); Cleveland Foundry Co. v. Kauffman, 135 Fed. 360, 361, 68 C. C. A. 658 (C. C. A. 3d Cir.); Western Electric Co. v. Millheim Electric Tel. Co. (C. C.) 88 Fed. 505, 507, per Buffington, Circuit Judge, then District Judge; McMichael & Wildman Manufacturing Co. v. Stafford (C. C.) 105 Fed. 380, 382; Shaver v. Skinner Manufacturing Co. (C. C.) 30 Fed. 68–70, per Shiras, District Judge; T. B. Wood's Sons Co. v. Valley Iron Works (C. C.) 191 Fed. 196, 200.

(b) The catalogue shown was the catalogue of defendant for 1909, and it contained, among other things, a distinct offer to sell any of the entire line of defendant's perambulators.

(c) The perambulators displayed in this catalogue, which are marked "B Special" and "C," correspond with the full-sized perambulators produced in evidence.

(d) These vehicles infringe the patent in suit.

[3] (e) More than 100 of these types of perambulator were sold by defendant in November, 1909, and delivered in December of that year; more than 50 were sold in March, 1910, and delivered in that

month and in April and July following; and as acts of infringement such sales are to be regarded as having been effected in November and March. Schiebel Toy & Novelty Co. v. Clark, 217 Fed. 760, 773, 133 C. C. A. 490 (C. C. A. 6th Cir.).

[4] We need not pass upon the question whether the evidence and the inferences to which it reasonably gives rise warrant a conclusion that defendant infringed between the date of the patent in suit and the filing of Foyer's original bill. We think the intervening petition should be treated as having operated to extend the period of alleged infringement at least to the date of its filing, July 5, 1910. Evidently the parties so treated it; for evidence was introduced to cover that period, and we do not find objection made to the evidence on the ground that it related to a time subsequent to commencement of the original suit. The object of the intervention was plainly to introduce a fact which had occurred after the original suit was begun. It was to show a change of ownership of the patent in suit and a consequent change of the real plaintiff in interest; and the pleading is, to all intents and purposes, an original bill, in the nature of a supplemental bill. Ecaubert v. Appleton, 67 Fed. 917, 924, 15 C. C. A. 73 (C. C. A. 2d Cir.); 1 Hopkins' Pat. p. 520, § 388, and citations. It is true that the pleading incorporated the original bill by adoption. The bill, however, alleges that the defendant infringed the invention—

"after the issuing of the letters patent * * * and before the commencement of this suit, * * * and that it [defendant] still continues so to do, and that it is threatening to make the aforesaid vehicles in large quantities and to supply the market therewith, and to sell the same."

The extent of infringement charged was a practical appropriation of the invention. The theory of such an infringement, as well as its execution, would necessarily involve preparation and expenditure in mechanism and manufacture on the part of defendant. Presumably such a scheme, if resorted to at all, would become part of the business of defendant, and so in its nature would be continuing. The injurious effects of the infringement manifestly would not change because of a change in ownership of the patent. It is therefore hard to believe that the new owner would intentionally have limited the period of infringement to a time less than that disclosed by the facts; and, since the adoption included that portion of the bill which in charging infringement alleged that defendant "still continues so to do," the supplemental bill fairly shows that the intent was to extend the period. If the present claim had been called to the attention of the court below, either before or after decree, an amendment might well have been allowed as a precautionary measure to conform the pleadings strictly to the proofs (The Tremolo Patent, 90 U. S. [23 Wall.] 522, 527, 23 L. Ed. 97; Richmond v. Irons, 121 U. S. 27, 46, 7 Sup. Ct. 788, 30 L. Ed. 864; Hardin v Boyd, 113 U. S. 756, 764, 5 Sup. Ct. 771, 28 L. Ed. 1141), but (although plaintiff's pleadings were open to criticism) there is nothing in the equity rules or practice requiring such a degree of exactness as an amendment of the character mentioned would signify (O'Rourke Engineering Const. Co. v. McMullen, 160 Fed. 933, 942, 88 C. C. A. 115 [C. C. A. 2d Cir.]).

Moreover, any rule that would exclude the evidence showing infringement up to the date of intervention would, in principle, be inconsistent with the long-settled practice to show acts of infringement occurring after commencement of the suit, when taking accounts of profits. In taking such accounts the master is not limited even to the date of the decree, but may extend the account to the time of the hearing before him, if the infringement still continues. Any other rule would result in a multiplicity of suits and unnecessary loss of time and expense. Rubber Company v. Goodyear, 76 U S (9 Wall.) 788, 800, 19 L. Ed. 566; Untermeyer v Freund, 58 Fed. 205, 212, 7 C. C. A. 183 (C. C. A. 2d Cir.); Maimen v. Union Special Mach. Co., 165 Fed. 440, 441, 442, 91 C. C. A. 384 (C. C. A. 3d Cir.). It results that the evidence before pointed out was admissible.

[5] It cannot be necessary further to consider the evidence. True, the prayer of the original bill did not contain the ordinary waiver of defendant's oath to its answer, but the prayer of the intervening petition did; and it is vain to say, as counsel do, that since both answers are verified, the adoption of the bill operated to impose upon the corporate plaintiff the burden of proving the allegations of the pleadings by two witnesses. Still, if counsel's theory were accepted, the evidence is sufficient to establish a prima facie case. In all material respects the rule invoked as to two witnesses is distinctly met; and the inferences deducible from the affirmative evidence, as well as the circumstances disclosed, are to be added. Vigel v. Hopp, 104 U. S. 441, 26 L. Ed. 765; Schultze v. Holtz (C. C.) 82 Fed. 448. Thus plaintiff's right to relief becomes reasonably plain. And this is not answered by the suggestion that an infringement is a tort. This is of course true; but a resort to terminology cannot change the nature or the effect of the evidence required to prove the fact of infringement, any more than it could with respect to any other fact constituting a tort. The argument made in support of the defense is throughout necessarily technical, and it is forcefully presented. In the light of the evidence, however, the contentions made would seem to indicate that there was no other course open to defendant. As Judge Lacombe said in Badische Anilin & Soda Fabrik v. A. Klipstein & Co. (C. C.) 125 Fed. 543, 559, when commenting on the failure of defendants to offer evidence touching an important feature of the case:

"The circumstance that defendants have chosen instead to devote their energies, at great cost of time and labor, to elaborate and refined criticisms of complainant's proof, is persuasive to the conclusion that it was the only thing they could do."

[6] It remains briefly to consider the portion of the decree which imposed upon the counsel who appeared for defendant in the court below a portion of the costs, and ordered him to appear before the court at a time stated to show cause why he should not be punished for contempt. The acts so condemned occurred in the taking of depositions. The costs ($75.24) were imposed for excessive cross-examinations of two of the witnesses, and obstructing the direct examination of another; and the order to show cause was "for improperly and un-

reasonably directing the witness, Frank E. Southard, to refuse to answer the several questions properly put to him."

The court's attention was called to these matters by motion of plaintiff which was filed more than six months before entry of the decree, and presumably, made in pursuance of section 982 of the Revised Statutes (U. S. Rev. Stat. p. 184) which provides:

"If any attorney, * * * admitted to conduct causes in any court of the United States, * * * appears to have multiplied the proceedings in any cause before such court, so as to increase costs unreasonably and vexatiously, he shall be required, by order of the court, to satisfy any excess of costs so increased."

The decree recites that the motion was heard upon argument of counsel, and in substance finds, as to two of the witnesses, that counsel multiplied the proceedings in the cause and so increased plaintiff's costs and expenses unreasonably and vexatiously, and, as to the remaining witness, that counsel unwarrantably instructed the witness not to answer proper questions, and so, in large measure, rendered plaintiff's attempt to take the deposition "futile and ineffective," and that his conduct in this behalf was "obnoxious to the orderly, reasonable, and proper conduct of an examination." Counsel was given individually an exception to each of these orders, error was assigned directly upon the orders, and argument thereon has been made here. Objection is not taken to the fact that the orders were made in the pending suit, instead of an independent summary proceeding, and the orders are in character final. Examination of the depositions convinces this court that the course pursued by counsel would, but for the orders, have resulted in increasing plaintiff's costs unreasonably and vexatiously. The orders were manifestly made to shield appellant against excessive costs, and they should be sustained (Bogart v. Electrical Supply Co. [C. C.] 27 Fed. 722. See, also, Motion Picture Patents Co. v. Steiner, 201 Fed. 63, 64, 119 C. C. A. 401 [C. C. A. 2d Cir.]); and the power of a court to protect a litigant against costs so created by his counsel would exist independently of the statute, inasmuch as the rule at common law is broad enough to redress such a matter through summary proceedings (Bowling Green Savings Bank v. Todd, 52 N. Y. 489, 493, per Judge Peckham, later Mr. Justice Peckham of the Supreme Court; In the Matter of H., an Attorney, 87 N. Y. 521, 525, 526; Matter of Dakin, 4 Hill (N. Y.) 42; Jeffries' Adm'r v. Lawrie [C. C.] 27 Fed. 198, by Circuit Judge, subsequently Mr. Justice Brewer; In the Matter of Aitkin, 4 B. & Ald. 47, 49, per Chief Justice Abbott).

We cannot consider the order to show cause, for obviously it is in no sense a final order. There are no other assignments requiring notice in the opinion. The decree is affirmed in all respects, save the order requiring counsel to appear and show cause; and the appellant will pay all the costs, except the portions in terms imposed upon its counsel.

BROTHERS v. LIDGERWOOD MFG. CO.

(Circuit Court of Appeals, Second Circuit. March 9, 1915.)

No. 161.

1. PATENTS ⟸276—QUESTIONS OF LAW AND FACT—CONSTRUCTION OF PATENTS.

When the validity of a patent is to be determined, and its claim construed by reference to prior patents about the dates and authenticity of which there is no controversy, the trial judge will usually construe such patents as he would other documents, and by doing so he does not invade the province of the jury.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 240, 432–434; Dec. Dig. ⟸276.]

2. APPEAL AND ERROR ⟸927—REVIEW—APPEAL FROM JUDGMENT ON DIRECTED VERDICT.

On appeal in a patent infringement suit from a judgment on a directed verdict for defendant, where there was a conflict in the evidence as to an alleged prior use and the operation of the alleged infringing structure, complainant's version of the facts will be accepted as correct.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2912, 2917, 3748, 3758, 4024; Dec. Dig. ⟸927.]

3. PATENTS ⟸328—VALIDITY AND INFRINGEMENT—CABLE CRANE WITH GRAVITY ANCHOR.

The Brothers patent, No. 551,614, for a cable crane with a gravity anchor, consisting of a tilting anchorage tower, from which a counter weight is suspended, to take up the slack of the cable, *held* valid, but not infringed by certain cable ways as constructed by defendant for the United States government.

4. PATENTS ⟸178—CONSTRUCTION—PIONEER INVENTIONS.

Where an invention is broadly new, and is a pioneer in its field, the patent therefor is entitled to a broad construction, and the claims to a liberal application of the doctrine of equivalents.

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

5. PATENTS ⟸178—CONSTRUCTION—EQUIVALENTS.

The Brothers patent, No. 551,614, for a cable crane with a gravity anchor, consisting of a tilting anchorage tower with a counterweight suspended therefrom to take up the slack of the cable, claimed a combination including a gravity anchor at one end of the cable, consisting of an inclined "sheers" with the cable attached thereto and a weight hung permanently from the sheers upon the opposite side to the cable. *Held*, that a post or some similar structure, producing substantially the same result in substantially the same way as the sheers, was within the range of reasonable equivalency.

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

6. PATENTS ⟸328—CONSTRUCTION—"HUNG PERMANENTLY"—"GRAVITY ANCHOR."

The words "hung permanently" should be given a reasonable construction, and should not be so construed as to prevent a structure in which the counterweight, when all the slack in the cable is taken up, rests on the ground, instead of swinging free, constituting an infringement; the anchor not hereby ceasing to be a "gravity anchor," as gravity still gives it power to hold the load on the cable.

7. PATENTS ⟸266—INFRINGEMENT—PERSONS LIABLE.
Where certain cableways constructed by defendant for the United States government, and thereafter operated by the government, did not, as constructed by defendant, infringe complainant's patent, defendant was not responsible, as a direct or contributory infringer, for changes subsequently made by the government.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 410; Dec. Dig. ⟸266.]

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

This cause comes here upon writ of error to review a judgment of the District Court, Southern District of New York in favor of defendant in error, who was defendant below. The action was at law for alleged infringement of letters patent No. 551,614 granted December 17, 1895, to plaintiff, for a cable crane with gravity anchor.

W. F. Brothers, in pro. per.

Livingston Gifford, Leavitt J. Hunt, George W. Betts, Jr., and Charles S. Jones, all of New York City, for defendant in error.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

LACOMBE, Circuit Judge. At the close of the trial the court directed a verdict for the defendant. After it had been announced that this disposition would be made of the case, the court at the request of the complainant charged the jury and told them to bring in a verdict, apparently on the theory that if it were for defendant it would end the case, but if it were for the complainant it would be set aside and verdict directed as had been indicated. The jury disagreed; thereupon verdict was directed. These superfluous proceedings are of no importance. If the condition of the cause was such when the testimony closed that verdict should have been directed for defendant without passing on any disputed question of fact, the judgment should be affirmed; otherwise it should be reversed.

[1, 2] It is well settled that when the validity of a patent is to be determined and its claim construed by reference to prior patents, about the dates and authenticity of which there is no controversy, the trial judge will usually construe those documents as he would other documents; his doing so does not invade the province of the jury. There may be exceptional cases, but this is not one of them. The first questions, therefore, for this court to determine, are whether, in view of the prior art patents, the one in suit is valid, and what is the scope of its claims. Besides the prior patents, there was an alleged prior use at the Chicago drainage canal, but as to what that was there was conflicting testimony; therefore it must be assumed that complainant's account of it is correct, and we cannot consider it either as impairing the validity of the patent or as in any way affecting the construction of its claims.

On the question of infringement there seems to be no question as to what the structure was which defendant erected on the line of Panama Canal; as to the operation of that structure there is a conflict of

testimony, and we must here assume the complainant's version of such operation to be correct.

[3] The patent is for an improvement in cable cranes with gravity anchors. The following drawings will make the description more intelligible:

Fig. 3.

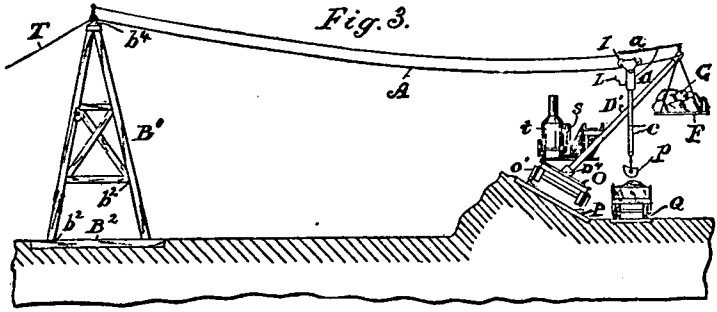
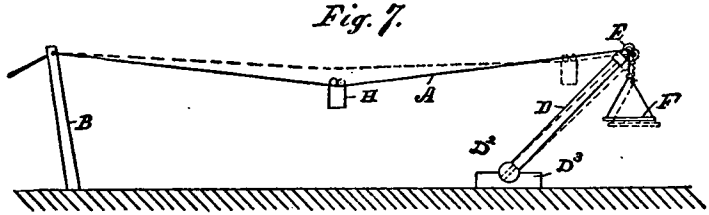


Fig. 7.



The object of the invention, as stated in the specifications, is to facilitate the erection and operation of a suspension cable, and consists in—

"combining a tension weight upon the end of the cable with an inclined sheers or post adapted to transform the vertical tension of the weight into a horizontal tension upon the cable. * * * By inclining the sheer poles and weighting their upper ends the tension of the cable is converted into a thrust at the lower ends of the sheers; but I have termed the device a 'gravity anchor,' as it depends for its efficiency entirely upon the operation of gravity."

In the drawings *A* is the cable, *D* the inclined sheer poles or post, *H* the load in the carrier which travels on the cable, and *F* the weight upon the end of the cable. The sheers are set at an angle of preferably 45 degrees to the cable.

"With the sheer posts set at this angle, the weight of the poles, if permitted to yield, exerts a very material tension upon the cable independently of the tension weight, and the latter may be proportioned to produce the additional tension required to strain the cable in the required degree. * * * It is well known that the tension at the ends of a suspending cable is much greater with a given load at the middle of the cable than when the load is close to either abutment, and my improved anchorage varies the angle of the cable in proportion to the load, if the sheer poles be so made as to support the load and also yield under variations of the tension."

Referring to Fig. 7 the patentee says:

"Fig. 7 illustrates in diagrammatic form the changes of angle in the cable, the parts being indicated in solid lines with the load in the middle of the cable, and in dotted lines with the load close to the sheer poles. In the lat-

ter position the slack of the cable is partially taken up by the tension-weight and the sheer poles are bent outwardly from the fixed abutment, thus holding the cable at a smaller angle with its abutment than would be the case if the sheer poles were rigidly fixed and the slack of the cable were unchanged during the shifting of the load. I have found that with the use of the flexible sheer poles and the tension weight *G*, the angle of the cable to the horizontal line at the cap *E* is substantially the same for all positions of the load, as is indicated by the parallelism of the full lines and dotted lines adjacent to the cap *E*."

The specification further states:

"The operation of the tension device in automatically taking up the slack of a suspended cable, when the load approaches the supports, enables me to move the load much closer to the supports, with the same degree of power, than has heretofore been possible. Where the cable supports are rigidly fixed, the inclination of the cable adjacent to the support is materially increased when the load approaches such support, and the power required to propel the carrier up such inclined portion toward the support is four or five times greater than is necessary to move the load over other portions of the cable.

"By the use of my automatic tension device the angle of the cable is kept nearly the same throughout the movement of the load toward the supports, and the angle adjacent to the support, when the load is at such point, is no greater than when the load is in the middle of the cable. * * * By transporting the load close to the supports at both ends of the cable I am enabled to utilize the entire length of the cable with a moderate exertion of power, which has not heretofore been possible."

The claims relied on are these:

"1. The combination, with a suspended cable, a carrier to support a load movably upon the cable and means for propelling the carrier thereon, of a stationary support or anchor at one end of the cable and a gravity anchor at the opposite end of the cable, consisting of an inclined sheers with the cable attached thereto, and a weight hung permanently from the sheers upon the opposite side to the cable, as and for the purpose set forth."

"2. The combination, with a suspended cable, a carrier to support a load movably upon the cable and means for propelling the carrier thereon, of a fixed anchor at one end of the cable, and a gravity anchor at the opposite end of the cable, consisting of inclined sheer poles braced toward one another and united at the top, and a weight hung permanently from the sheers upon the opposite side to the cable, as and for the purpose set forth."

"3. The combination, with a suspended cable a carrier to support a load movably upon the cable and means for propelling the carrier thereon, of a fixed anchor at one end of the cable, and inclined sheer poles held movably at the base so as to yield with variations of load upon the cable, with the cable attached to the top of said sheers, and a weight hung permanently from the sheers upon the opposite side to the cable, as and for the purpose set forth."

No claim, other than the first, which is the broadest one, need be considered. The description above quoted is so full and clear that Brothers' improvement is readily understood. He provided an anchorage tower—whether sheers, post, or other structure is immaterial—which would tilt when the cable crane was in operation. When the load (carrier) was in the center of the cable, the latter would pull strongest at the top of the tower; to that strain the tower would yield, towards the load. As the load drew nearer the tower, the pull of the cable would relax, and the counterweight would gradually take up the slack tilting the tower away from the load. Load and counterweight are so proportioned that, during operation, there is this constant tilting

back and forth. The advantages secured thereby are clearly pointed out.

Turning now to the patents of the prior art—and they are many—it is evident that this arrangement is broadly new; no cable crane shown in them works that way. The patentee testified that his method was revolutionary; that other engineers laughed at him when he suggested it. Before his suggestions both tower anchorages were constructed so that they would remain rigid. This rigidity was secured sometimes by one means, sometimes by another, sometimes by a combination of means. Bases were made broad, or were firmly imbedded in the ground, or the towers were anchored by chains or rods to dead-eyes set off at an angle, or the bases were clamped down, or counterpoise weights were so affixed to the towers that no load weight under which the crane was operated could lift them. The top of the tower to which the cable ran could tilt neither inwards nor outwards. Defendant's expert, referring to some of the patents (Pluchet, Sassiat) speaks of the tower *yielding* to the strain of the cable, but a reading of these patents shows that this is merely the usual easy assumption of the expert; each patent indicates as plainly as language can that the tower is to be so secured that, in operation, it will remain rigid, except, of course, for the minute elasticity of the wood, or steel, or other materials with which it is constructed. It may be that the art sought to avoid tilting because it feared it, dreading lest a tilt might prove but the initial step to a collapse. But whatever may have been the purpose of their builders, the structures of the prior art as disclosed in its patents were so built that they would not tilt in operation. Of course, with all of them it is quite conceivable that an overload might be applied to the middle of the cable, so great that (if the cable would stand the strain) it might tear out dead-eyes, or break connecting chains or rods, or straighten out holding clamps, or lift the counterpoise weights. But this would involve an abuse, not a use, of the structure; Brothers was the first to devise a structure whose use involved constant tilting back and forth.

Manifestly his patent is valid.

[4] Moreover, since the invention is broadly new, is a pioneer in the field of tilting anchorages for cable cranes, the patent is entitled to a broad construction, and the claims to a liberal application of the doctrine of equivalents.

[5, 6] One element of the claims is a "gravity anchor," which the claim itself defines as consisting of "an inclined sheers with the cable attached thereto, and a weight hung permanently from the sheers upon the opposite side to the cable." Certainly the patentee should not be confined to "sheers"; a post, which he suggests in the specification, or some similar structure which will produce substantially the same results in substantially the same way, is within the range of reasonable equivalency. The weight shown in the drawings and description consists of a mass of stones or sand bags piled up in a bucket which is swung by chains from the top of the sheers. The claim is certainly not avoided by the simple expedient of substituting a mass of concrete for the stones and sand and rigid rods for the chains. As shown in

drawings and description, the weight always swings free at some distance above the ground. It is therefore contended that the phrase "hung permanently" so restricts the claim that the structure complained of—even if it be conceded, which it is not, that the tower tilts—does not infringe because the weight is sometimes in contact with the ground. The words "hung permanently" must be given a reasonable construction in view of what the patent discloses, viz., an "anchor," whose holding power is due to the action of gravity, and which is raised or lowered as it yields to a greater strain, or overcomes a lesser one. When it is thus yielding, it is, of course, off the ground; it is also off the ground when it is taking in the slack of the cable, as the strain of the load grows less. There comes a time, however, when the strain of the load has reached its lowest limit, when there will be no more slack to take up. If at that moment it reaches the ground, it does not cease to be a gravity anchor; gravitation is giving it the power to hold, and it continues to hold at the lowest limit of opposed strain as effectually as if it were swinging five feet up in the air. We think it a strained construction which would hold that an anchor which acts in this way does not infringe because at the moment when all the slack is taken up it is not swinging free, although its weight is firmly holding, against load, all the slack thus taken up.

The infringement alleged is found in certain cableways, complete with towers, cables, rope for hoisting, conveying, dumping, etc., buckets, motors for hoisting, conveying, and accessories, which were installed by defendant for the United States government on the line of the Panama Canal. The work was done under a contract which is in evidence and which minutely specifies the details of the entire structure and its appurtenances. It was completed in July, 1909, and after official tests was accepted by the government in August, 1909. Thereafter it was operated by the government for about two years; defendant's operation consisted merely of what was needed as a demonstration to satisfy the government that the contract had been properly carried out. The following sketch sufficiently indicates the structure installed.

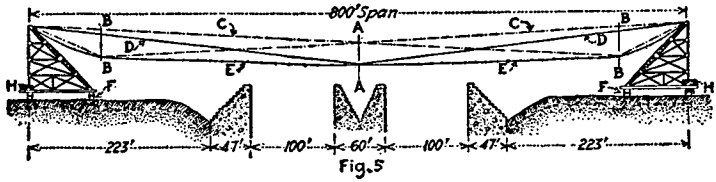


Fig. 5

Each tower rests on a trackway along which it can be moved; the portion indicated by the heavy line inclined at an angle of about 45 degrees is contended to be equivalent of the sheers, the "weight" indicated at *H* is a mass of concrete rigidly connected with the top of the tower. It is the contention of plaintiff that in operation the load (in the carrier) when in the center of the cable produced such a tension on the cable that the top of the tower was pulled over inwards and the weight lifted, and that as the load moved towards the abutment the

weight settled down again, taking up the slack. In other words that the tower became a tilting one, with a gravity anchor, substantially like the one shown and claimed in the patent. On this branch of the case there was conflicting testimony, but, inasmuch as defendant did not operate the cableway, testimony as to what the user did with the structure defendant built will not necessarily affect the latter, unless it can be shown that it contributed to an infringing use. If plaintiff's patent be a valid one, with claims covering broadly a tilting tower in which a gravity anchor alternately yields and overcomes load—as we think it is—and it be further shown that the user of the Panama structure so used it as to infringe the patent, a suit could be maintained against such user if a private party. Since it is the government, relief could be obtained only in such way as the statutes may provide; but it must be assumed that the owner of a meritorious invention which the government has appropriated without his consent will be in some way compensated, if he can prove his case by satisfactory proof.

[7] This suit, however, is brought only against the builder of the Panama structures, and we are concerned only with the structure as it was built. There seems to be no dispute that it was built in conformity with the provisions of the contract. Those provisions indicate that neither head nor tail tower was constructed so as to operate as does the tower of the patent; they more nearly approached the towers of the prior art. Like some of those towers, each tower was made rigid, not by dead-eyes, or clamps, but solely by the weight of its counterpoise, the concrete block *H*. Defendant was advised by the specifications for the contract what would be the limit of the load on the cable which it was to provide for. Careful calculations made therefrom indicated what weight there should be in the concrete mass to enable it to hold the tower rigid against any pull of the cable induced by any and every position. The weight of the concrete counterpoise in each tower was so much in excess of whatever it might be called to meet in operation that absolute rigidity of the tower was assured. Moreover the structure installed was complete in all its parts; it included all the necessary motors and in the proper motor there was an automatic cut-off which would stop the motor should it be attempted to put an overload on the cable. Not only is there no evidence that defendant ever tilted these towers in operation, but on the contrary it appears that the structure it installed could not be operated so as to put enough load on the cable to tilt the towers, because the control panel of the motors would throw out the current. There was nothing to indicate to defendant that the government intended to make changes in the structure, or to operate it otherwise than as planned. The statements in the specifications as to carrying capacity and provision for automatic cut-outs indicated the contrary. For the subsequent action of the government in eliminating or altering the cut-outs and in greatly increasing the specified carrier load, trying to counterweight it by some additional concrete—assuming that the proof shows, as plaintiff contends, that the government did so—defendant is not responsible, either as a direct or as a contributory infringer.

The judgment is affirmed.

In re ROSS.

(District Court, E. D. Pennsylvania. May 20, 1915.)

No. 12749.

ALIENS ⊂=68—NATURALIZATION—ADMISSION WITHOUT PROOF OF DECLARATION OF INTENTION—CONSTRUCTION OF STATUTE.

Naturalization Act June 29, 1906, c. 3592, § 4 (2), 34 Stat. 597, as amended by Act June 25, 1910, c. 401, § 3, 36 Stat. 830 (Comp. St. 1913, § 4352), provides that a person belonging to the class of persons who, under existing laws, may become citizens, who has resided constantly in the United States during a period of five years next preceding May 1, 1910, and has in good faith exercised the right of citizenship under the mistaken belief that he had the right to so act, may upon making a showing of such facts satisfactory to the court, "and [if] the court in its judgment believes that such person has been for a period of more than five years entitled upon proper proceedings to be naturalized," receive from said court a final certificate of naturalization, without proof of a former declaration of intention. *Held*, that the five years referred to in the latter part of the proviso is five years before the hearing, and that the court is not required to find that the applicant might have been admitted five years before May 1, 1910.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 138–145; Dec. Dig. ⊂=68.]

On petition of Simon Peter Ross for admission to citizenship. Petition granted, and certificate issued.

Jerome C. Shear, of Philadelphia, Pa., Chief Naturalization Examiner, for the United States.

Simon Peter Ross, of Philadelphia, Pa., pro se.

DICKINSON, District Judge. The petition failed to show the applicant to have made the declaration of his intention to become a citizen required by law. The absence of such declaration is the only ground of opposition to his admission.

His petition is based upon the proposition that the act of June 25, 1910, exempts him from the requirement of a preliminary declaration. It is conceded that if he is within its provisions he should be admitted to citizenship. The only reason alleged for rejecting the application is based upon the construction given to the act that it applies only to those who might have been admitted to citizenship before May 1, 1905. This applicant could not have been admitted before September 1, 1908.

We are referred to In re Urdang (D. C.) 212 Fed. 557, in support of this construction of the act. It does in principle support the objection. It is furthermore desirable that the naturalization acts should be given the same meaning throughout the United States. Until, however, a court is controlled by an authoritatively binding ruling, it cannot deprive a petitioner of that which the court finds to be his right. In the first instance, citizenship is not a right, but a high privilege only. When, however, the privilege is conferred by law, an applicant acquires a right to whatever privileges the law confers. His charter is still the law as made, and the "ita lex scripta" principle applies.

It is always, nevertheless, helpful to come to an understanding of the purpose and spirit of the law in order to interpret its letter.

The naturalization law required a preliminary declaration of intention by the applicant. The purpose of this is manifest. "The exercise of the rights and duties of citizenship" by one who thinks himself in good faith a citizen meets in spirit the purpose of this provision. No one could say, however, that it could be accepted without statutory authority as a substitute for the requirement of the law. It is, moreover, within the knowledge of all who have had any personal touch with the machinery of elections, that the more rigorous and exacting application of the rules of evidence to proof of the right to the elective franchise, which registration and other like laws have made necessary, has resulted in a denial of the right of citizenship to many who had long exercised that right and to whom it doubtless belonged, although the evidence of the fact had been lost or never held by them. The act of June 25, 1910, was intended to relieve some of this class. Only applicants who possess the following qualifications are entitled to the benefit of the act:

1. They must be of the class of persons who under existing laws may become citizens.

2. They must have resided in the United States continuously from May 1, 1905, to May 1, 1910, being five years next preceding May 1, 1910.

3. They must in good faith have exercised the right of citizenship under the mistaken belief that they had the right to so act.

4. They must make "a showing of these facts satisfactory to the court," etc., "and (if) the court in its judgment believes that (any) such person has been for a period of more than five years entitled upon proper proceedings to be naturalized," etc., they shall receive certificates, etc., and may receive them without proof of the filing of a declaration of intention, etc.

This would seem to mean that the other things done may be accepted in lieu of a declaration of intention. It is admitted that this applicant meets every one of these conditions enumerated as 1, 2, 3, and 4. Why, then, may a certificate not issue to him?

The answer we are asked to accept as sufficient is because the law requires the judge to find that the applicant might have been admitted on May 1, 1905. In other words, the five years referred to in the latter part of the act is not five years before the hearing, but five years before May 1, 1910. We cannot accept this interpretation. If correct, the qualification we have called (2) must be ordinarily a residence of "*ten* years next preceding May 1, 1910," instead of *five* years, as the act prescribes. We cannot see that the word "and" at the beginning of this clause of the act can have the effect of changing "five" to "ten" in the earlier clause. The present applicant might have been naturalized on September 1, 1908. In consequence, he "has been for a period of more than five years entitled upon proper proceedings to be naturalized." He has complied in all respects (other than a declaration of intention) with the requirements of the naturalization laws, and it seems to us that admission to citizenship under the provisions of the act of June 25, 1910, is his right.

He may therefore be admitted upon taking the required oaths.

In re HENRY SIEGEL CO.

(District Court, D. Massachusetts. November 27, 1914.)

No. 20297.

BANKRUPTCY ⊂=330—PROOF OF CLAIMS—BILL OF PARTICULARS—POWER OF REFEREE.

Bankr. Act (Act July 1, 1898, c. 541, 30 Stat. 562 [Comp. St. 1913, § 9647]) § 63b, provides that unliquidated claims against the bankrupt may be liquidated in such manner as the court shall direct, and may thereafter be proved and allowed. Section 2, subsec. 15 (section 9586), provides that courts of bankruptcy are thereby invested with jurisdiction to make such orders, issue such process, and enter such judgments, in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of that act. *Held*, that a referee had power to require creditors to file a bill of particulars as to a certain item of their claim, whether their claim was a liquidated or an unliquidated claim, and, having such power, the matter was within his judicial discretion.

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

In the matter of the Henry Siegel Company, bankrupt. On petition for review of an order of the referee requiring claimants to file a bill of particulars. Order affirmed.

See, also, 216 Fed. 943; 223 Fed. 369.

George R. Nutter, of Boston, Mass., for trustee.

Albert S. Woodman and Tyler, Corneau & Eames, all of Boston, Mass., for creditors.

MORTON, District Judge. These creditors, having filed a proof of claim, were ordered by Mr. Referee Olmstead, upon motion of the trustees, to file a bill of particulars as to a certain item thereof. The only question presented by the certificate is whether the referee had power to make such an order.

The creditors now contend that their claim is for an unliquidated amount, and that their proof of claim is to be regarded as the first step in an endeavor to establish their claim and to liquidate the amount of it. This is a different position from that taken by them before the referee, where the claim seems to have been treated by all parties as already liquidated.

If the proof be regarded as relating to an unliquidated claim, which the creditors now say is the case, it was clearly within the referee's power, under section 63b, to order full specifications of the crucial item therein, as one step in the proceedings for the liquidation of the amount alleged to be due. If the claim be regarded as for a liquidated amount, I am still of opinion that, under section 2, subsection 15, and the other sections and order referred to by him, as well as under his general control as a judicial officer of the proceedings before him, the referee had the power to make the order in question.

If the referee had such power, the matter lay within his judicial discretion. No facts are stated in the certificate from which I can say

that such discretion was erroneously exercised, and no request is made by the petitioners for review that the certificate be sent back to the referee for a statement of the facts on which his discretionary power was exercised. It is hard to imagine a case in which an order of this character would be held to be an abuse of judicial discretion. Upon the facts informally stated by counsel at the hearing on this petition for review, it seems to me that the referee was probably right. There is certainly no such likelihood that an injustice has been done as to require the court of its own motion to send back the certificate for a fuller statement of the case.

The order of the referee is affirmed.

In re HENRY SIEGEL CO.

(District Court, D. Massachusetts. April 24, 1915.)

No. 20297.

1. EVIDENCE ⟸43—JUDICIAL NOTICE—JUDICIAL RECORDS.

On a petition to reclaim goods from a trustee in bankruptcy, judicial notice will be taken of the papers on record in the bankruptcy case.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 62–65; Dec. Dig. ⟸43.]

2. BANKRUPTCY ⟸140—OWNERSHIP OF PROPERTY—PURCHASE WITHOUT INTENT TO PAY.

When a corporation ordered goods, it was hopelessly insolvent, and there was no evidence that those in control of the corporation were not aware of its condition. Seven days after the order, and two days after the last delivery, receivers were appointed, and it was subsequently adjudicated a bankrupt. *Held*, that as the corporation's managers must have known that the corporation could not pay for the goods except by giving the seller a preference, at the expense of other creditors, and as their knowledge was imputable to the bankrupt, the purchase was the legal equivalent of a purchase with an intent not to pay, and was fraudulent, and the seller might rescind and reclaim the goods from the trustee in bankruptcy.

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

In the matter of the Henry Siegel Company, bankrupt. On petition to reclaim property from the trustee. Referee's order dismissing the petition reversed, and petition allowed.

See, also, 223 Fed. 368.

Robert A. B. Cook, of Boston, Mass., for creditor.

Charles F. Weed, of Boston, Mass., for trustee in bankruptcy.

MORTON, District Judge. [1] This is a petition to reclaim from the trustees in bankruptcy of the Henry Siegel Company certain goods (or the proceeds thereof) upon the ground that when the goods were ordered and delivered the buyer was bankrupt, did not intend to pay for them, and procured them fraudulently from the petitioners. The case was submitted to the referee upon a statement of agreed facts, and

further evidence consisting of certified copies of proceedings in the District Court of the United States for the Southern District of New York against various corporations and persons, including Siegel and Vogel individually. In addition thereto, the court takes judicial notice of the papers on record in the bankruptcy case.

[2] The bankrupt, a Massachusetts corporation, operated a large department store in Boston. During December, 1913, it "was insolvent both at common law and within the meaning of the Bankruptcy Act" (Act July 1, 1898, c. 541, 30 Stat. 544). Agreed facts. In other words, at that time its property at a fair valuation amounted to less than its indebtedness. The goods here in question were ordered by the bankrupt from the petitioners on the 22d of December. They were delivered to it on the 23d, 24th, and 27th of December, 1913. On the 29th of that month, i. e., seven days after the order and two days after the last delivery, receivers were appointed for it; and it was subsequently adjudicated bankrupt.

The learned referee was of the opinion that an intent not to pay for the goods had not been made out. While such an intent must be, of course, established, it is not necessary that there should be direct evidence of it; it may be, and usually is, inferred from the facts. When these goods were purchased the buyer was deeply and hopelessly insolvent. Presumably the men in control of it were aware of its condition; there is no evidence to the contrary. They must have known, and their knowledge is imputable to the bankrupt, that it could not pay for these goods except at the expense of its other creditors, and by giving what would have been a preference; in other words, that it could not pay in an honest and regular way. Purchase under those conditions was, I think, the legal equivalent of purchase with an intent not to pay, and was fraudulent. The facts are meager, but they seem to me as strong for the claimants as those on which, in Watson v. Silsbee, 166 Mass. 57; 43 N. E. 1117, it was held to be a question of fact for the jury whether the purchaser bought without an intention to pay. See, too, In re Spann (D. C.) 183 Fed. 819; In re Gillespie v. Piles, 24 Am. Bankr. R. 502, 178 Fed. 886, 102 C. C. A. 120, 44 L. R. A. (N. S.) 1. The intent not to pay inferable from the financial condition of the buyer, might perhaps have been rebutted by evidence that its managers honestly expected to be able to continue, and bought the goods in an effort to do so. Nothing of that sort, however, appeared.

I accordingly find that at the time when the goods were purchased and delivered there could have been no reasonable expectation on the part of the buyer's managers that it would be able properly to pay for them, and consequently no honest intention to pay for them at all; and that the purchase was therefore a fraudulent one, which the sellers were entitled to rescind. It follows that the order of the referee dismissing the petition must be reversed, and the petition allowed.

So ordered.

PUGET SOUND TRACTION, LIGHT & POWER CO. v. REYNOLDS et al.

(District Court, W. D. Washington, N. D. April 28, 1915.)

No. 60.

1. CONSTITUTIONAL LAW ⇐121—IMPAIRING OBLIGATION OF "CONTRACT."
A city ordinance may constitute a "contract," within the constitutional provision against impairing the obligation of contracts.
[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 285, 304–311, 342–348; Dec. Dig. ⇐121.
For other definitions, see Words and Phrases, First and Second Series, Contract.]

2. MUNICIPAL CORPORATIONS ⇐593—FRANCHISES—SURRENDER OF POLICE POWER.
A municipal corporation cannot barter away the police power of the state, by unalterably fixing rates and fares during the life of a street railway franchise, unless specifically and expressly authorized so to do by the Legislature.
[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 904; Dec. Dig. ⇐593.]

3. STREET RAILROADS ⇐70—REGULATION BY PUBLIC SERVICE COMMISSION—STATUTORY PROVISIONS.
Public Service Commission Act Wash. March 18, 1911 (Laws 1911, p. 546) § 9, requires all charges by common carriers and all regulations to be just and reasonable, and requires all carriers to furnish adequate service, facilities, etc. Section 53 provides that, when the Public Service Commission shall find that the rates or fares of any carrier, or its regulations affecting such rates, are unreasonable, etc., it shall determine the reasonable rates or regulations to be observed, and fix them by order. An order of such Commission required a street car company to run through cars between certain points on certain lines, and to furnish sufficient cars to provide seats for substantially all passengers on certain lines. *Held*, that ample authority for the order was found in the statute.
[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 147½–149; Dec. Dig. ⇐70.]

4. STREET RAILROADS ⇐70—REGULATION BY PUBLIC SERVICE COMMISSION—VALIDITY OF ORDERS.
A street railway company may be required to furnish adequate facilities to the public, even though it suffers some incidental loss in complying therewith, as a public service corporation may always be required to perform its charter duties to the public.
[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 147½–149; Dec. Dig. ⇐70.]

5. CARRIERS ⇐12—REGULATION BY PUBLIC SERVICE COMMISSION—PRESUMPTIONS.
Where an order of a state Public Service Commission regulating rates to be charged by a street car company was made within the jurisdiction of such Commission, the rates are presumed reasonable and just until the contrary is made to appear.
[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 7–11, 15–20; Dec. Dig. ⇐12.]

6. CARRIERS ⇐12—REGULATION BY PUBLIC SERVICE COMMISSION—VALIDITY OF ORDERS.
An order of a Public Service Commission, prescribing rates and fares to be charged on certain lines about 16 miles long by a street car company operating about 200 miles of railway, was not confiscatory, and de-

prived the company of no property rights, though it compelled the operation of such lines at a loss, if the entire system was operated at a profit.

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

7. CARRIERS ⟸18—STREET RAILROADS ⟸65½, New, vol. 16 Key-No. Series—REGULATION BY PUBLIC SERVICE COMMISSION—VALIDITY OF ORDERS.

Where an order of a state Public Service Commission regulating the rates and facilities of a street car company was neither confiscatory nor unreasonable, its enforcement could not be interfered with, though, as claimed, made in a spirit of retaliation because of the company's refusal to renew a certain traffic agreement.

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

8. STREET RAILROADS ⟸70—REGULATION BY PUBLIC SERVICE COMMISSION—VALIDITY OF ORDERS—"EMERGENCY"—"EXTRAORDINARY"—"EMERGENCY CROWD"—"EXTRAORDINARY AND UNUSUAL OCCASIONS."

A street car company operated two railway lines about 8 miles long, which ran for a considerable distance through territory where there were few passengers, so that a majority of the passengers were carried 5 or 6 miles; such lines not paying expenses. For about two hours in the morning and in the evening of each day the cars were so crowded that from 30 to 40 per cent. of the passengers were compelled to stand for 5 or 6 miles, and on Sundays and summer afternoons the cars were crowded with persons going to the parks and beaches. The Public Service Commission ordered the company to furnish sufficient cars to provide seats for "the usual patronage"; the order providing that it need not provide seats for emergency crowds, nor on extraordinary occasions. *Held* that, as an "emergency" is an unforeseen occurrence or combination of circumstances calling for immediate action or remedy, or a pressing necessity, or an exigency, while "extraordinary" means beyond or out of the common order or method in use, uncommon, or rare, the order was unreasonable, as the crowds passing over the lines at the times mentioned were not "emergency crowds," nor were the occasions extraordinary or unusual, but to require the company to furnish seats at such times would be to require the impossible.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 147½–149; Dec. Dig. ⟸70.

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

9. STREET RAILROADS ⟸70—REGULATION BY PUBLIC SERVICE COMMISSION—VALIDITY OF ORDERS.

A definite and specific order for an increase in facilities to relieve the congestion during certain hours of the day would be reasonable.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 147½–149; Dec. Dig. ⟸70.]

In Equity. Suit by the Puget Sound Traction, Light & Power Company against Charles A. Reynolds and others, constituting the Public Service Commission, and W. V. Tanner, Attorney General, of the State of Washington, to enjoin the enforcement of an order of such Commission. Injunction granted as against a part of the order.

James B. Howe and Hugh A. Tait, both of Seattle, Wash., for plaintiff.

W. V. Tanner and Scott Z. Henderson, both of Olympia, Wash., for defendants.

Before GILBERT, Circuit Judge, and RUDKIN and NETERER, District Judges.

RUDKIN, District Judge. This suit was instituted by the plaintiff to restrain the defendants from enforcing an order of the Public Service Commission of the state of Washington. The plaintiff is a citizen of the state of Massachusetts, and the defendants are the Public Service Commissioners and the Attorney General of the state of Washington, and citizens of that state. The jurisdiction of this court is invoked on the ground of diversity of citizenship, and on the further ground that the order complained of impairs the obligation of certain contracts, and deprives the plaintiff of its property without due process of law, and denies to it the equal protection of the laws, in violation of the Constitution of the United States. The order is as follows:

"It is therefore ordered:

"(1) That the defendant company continue the operation of through service on the Ballard Beach line.

"(2) That the Alki Point and Fauntleroy Park lines be operated through the city of Seattle on First or Second avenue, as far north at least as Virginia street.

"(3) That the defendant company furnish sufficient cars to provide seats for substantially all persons using the Alki Point and Fauntleroy Park lines.

"It is understood that a substantial compliance shall be considered a sufficient compliance with this order directing the furnishing of seats for passengers on the Alki Point and Fauntleroy Park lines, the company not being required to provide for emergency crowds that might apply for seats, but shall provide seats at all times for the usual patronage of said lines, and shall so operate said lines at all times with sufficient cars to provide seats for all patrons, except on extraordinary and unusual occasions."

A brief statement of the case, as presented at the hearing of the application for an interlocutory injunction, is necessary to a proper understanding of the requirements of this order and the objections urged against it:

The plaintiff owns and operates a street railway system in the city of Seattle, and is the assignee of numerous franchises for street railways heretofore granted to its predecessors in interest by the city of Seattle, the city of West Seattle, the city of Ballard, and King county. The Ballard Beach line, referred to in the order, is operated under Ordinance No. 1020 of the city of Ballard, entitled:

"An ordinance granting to the Seattle Electric Company, its successors and assigns, a franchise to construct, maintain and operate street railway extensions connecting with its present street railway system, and extending over certain parts of Railroad avenue and Fourth avenue, Crawford street and other streets, avenues and places in the city of Ballard."

For some time prior to the promulgation of the order in question the cars operated on the Ballard Beach line ran beyond the franchise limit and into the business district of the city of Seattle; but immediately before the promulgation of the order this service was discontinued, and passengers were required to transfer to other lines at the end of the franchise limit of the Ballard Beach line in order to reach the downtown districts. The effect of the order was, therefore, to require

the plaintiff company to reinstate the through service on the Ballard Beach line.

The Alki Point line and the Fauntleroy Park line, each about eight miles in length, are operated under franchises heretofore granted to the predecessors in interest of the plaintiff by the city of Seattle. The northerly limit of these franchises is at or south of Yesler Way. For a period of two or three years prior to the date of the order in question the cars operating on these two lines ran north of Yesler Way on First or Second avenue to Virginia street, a distance of approximately a mile. Shortly prior to the promulgation of the order this through service was discontinued, and passengers going north of Yesler Way were required to transfer to other cars at that point, and a like transfer was required at the same point by passengers going in the opposite direction. The effect of the order was, therefore, to compel the company to reinstate the through service over these two lines north of Yesler Way on First or Second avenue as far as Virginia street. The uncontradicted testimony further shows that the two latter lines ran for a considerable distance over the tide flats, receiving and discharging but few passengers en route, so that a majority of the passengers are carried a distance of five or six miles before leaving the cars or reaching their destination. For this reason, among others, these two lines have never paid operating expenses, and perhaps never will, because the average haul is so long that the more cars operated and the more passengers carried the greater will be the loss to the company. It further appears, without substantial contradiction, that for about two hours in the morning and two hours in the evening of each day the cars on these two lines are so crowded that from 30 to 40 per cent. of the passengers are compelled to stand up for a period of 30 minutes or more while the cars are traveling a distance of five or six miles.

The franchise ordinances of the city of Ballard and the city of Seattle under which the three lines in question are operated provide, in substance, that the grantee, its successors and assigns, shall have the right at any and all times to make reasonable rules and regulations for the management and operation of the railway lines therein provided for, not inconsistent with the laws of the state or the charter and ordinances of the city; that the grantee shall have the right to charge a passenger fare of not exceeding five cents for one continuous passage for each passenger; that the grantee shall keep on sale at its main office and power station in the city of Seattle commutation tickets for $1 each, entitling the purchaser to 25 rides, but such tickets shall not be transferable, nor entitle the owner to a transfer, and the company is authorized to make reasonable rules and regulations to enforce the prohibition against transfers.

[1, 2] The first contention on the part of the plaintiff is that the order compels it to carry passengers on the Alki Point and Fauntleroy lines beyond the franchise limits of these lines, and in effect compels it to grant transfers on commutation tickets, in violation of the contract contained in the franchise ordinances. The order itself is silent as to rates or fares, but for the purposes of this case we will assume that it has the effect claimed for it. We are unable to yield assent,

however, to the proposition that these franchise ordinances create inviolable contracts between the municipality and the company protected by the contract clause of the federal Constitution. That a city ordinance may constitute a contract within the meaning of the Constitution is well settled; but it is equally well settled that a municipal corporation cannot barter away the police power of the state by unalterably fixing rates and fares during the life of a franchise, unless specifically and expressly authorized so to do by the supreme legislative authority in the state. Discussing this question in Home Telephone Co. v. Los Angeles, 211 U. S. 265, 272, 29 Sup. Ct. 50, 51 [53 L. Ed. 176], the court said:

"Did the city council have the power to enter into a contract fixing unalterably, during the term of the franchise, charges for telephone service, and disabling itself from exercising the charter power of regulation? If so, was such a contract in fact made? The first of these two questions calls for earlier consideration, for it is needless to consider whether a contract in fact was made until it is determined whether the authority to make the contract was vested in the city. The surrender, by contract, of a power of government, though in certain well-defined cases it may be made by legislative authority, is a very grave act, and the surrender itself, as well as the authority to make it, must be closely scrutinized. No other body than the supreme Legislature (in this case, the Legislature of the state) has the authority to make such a surrender, unless the authority is clearly delegated to it by the supreme Legislature. The general powers of a municipality, or of any other political subdivision of the state, are not sufficient. Specific authority for that purpose is required. This proposition is sustained by all the decisions of this court, which will be referred to hereafter, and we need not delay further upon this point."

Again:

"The facts in this case which seem to us material upon the questions of the authority of the city to contract for rates to be maintained during the term of the franchise are as follows: The charter gave to the council the power 'by ordinance * * * to regulate telephone service and the use of telephones within the city, * * * and to fix and determine the charges for telephones and telephone service and connections.' This is an ample authority to exercise the governmental power of regulating charges, but it is no authority to enter into a contract to abandon the governmental power itself. It speaks in words appropriate to describe the authority to exercise the governmental power, but entirely unfitted to describe the authority to contract. It authorizes command, but not agreement. Doubtless an agreement as to rates might be authorized by the Legislature to be made by ordinance. But the ordinance here described was not an ordinance to agree upon the charges, but an ordinance 'to fix and determine the charges.' It authorizes the exercise of the governmental power, and nothing else. We find no other provision in the charter which by any possibility can be held to authorize a contract upon this important and vital subject."

To the same effect, see Portland Ry. Light & Power Co. v. City of Portland (D. C.) 201 Fed. 119.

[3] The powers of the city of Seattle are no more specific or comprehensive in this regard than the powers conferred on the cities of Los Angeles and Portland in the cases cited, and little can be added to what has been said by Mr. Justice Moody and Judge Bean in these cases.

Section 9 of the Public Service Commission Act of March 18, 1911 (Laws 1911; page 546), provides that:

"All charges made for any service rendered or to be rendered in the transportation of persons or property, or in connection therewith, by any common

carrier, or by any two or more common carriers, shall be just, fair, reasonable and sufficient.

"Every common carrier shall construct, furnish, maintain and provide safe, adequate and sufficient service facilities, trackage, sidings, railroad connections, industrial and commercial spurs and equipment to enable it to promptly, expeditiously, safely and properly receive, transport and deliver all persons or property offered to or received by it for transportation, and to promote the safety, health, comfort and convenience of its patrons, employés and the public.

"All rules and regulations issued by any common carrier affecting or pertaining to the transportation of persons or property shall be just and reasonable."

Section 53 of the same act provides that:

"Whenever the Commission shall find, after a hearing had upon its own motion or upon complaint, as herein provided, that the rates, fares or charges demanded, exacted, charged or collected by any common carrier for the transportation of persons or property within the state or in connection therewith, or that the regulations or practices of such common carrier affecting such rates are unjust, unreasonable, unjustly discriminatory, or unduly preferential, or in any wise in violation of the provisions of law, or that such rates, fares or charges are insufficient to yield a reasonable compensation for the service rendered, the commission shall determine the just, reasonable or sufficient rates, fares or charges, regulations or practices to be thereafter observed and enforced and shall fix the same by order as hereinafter provided.

"Whenever the Commission shall find, after such hearing, that the rules, regulations, practices, equipment, appliances, facilities or service of any such common carrier in respect to the transportation of persons or property are unjust, unreasonable, unsafe, improper, inadequate or insufficient, the Commission shall determine the just, reasonable, safe, adequate, sufficient and proper rules, regulations, practices, equipment, appliances, facilities or service to be observed, furnished, constructed or enforced and be used in the transportation of persons and property by such common carrier, and fix the same by its order or rule as hereinafter provided."

Ample authority for the order of the Commission is found in these sections, and the franchise ordinances of the city of Seattle do not stand in the way of its exercise.

[4] The next contention of the plaintiff is that the order deprives it of its property without due process of law, and denies to it the equal protection of the laws. In this connection the order has a double aspect. First, it requires the street railway company to furnish adequate facilities to the public; and, second, it prescribes rates or fares for transportation. In the former aspect the order may be valid, even though the company suffers some incidental loss in complying therewith, because a public service corporation may always be required to perform its charter duties to the public. See Mo. Pac. Co. v. Kansas, 216 U. S. 262, 30 Sup. Ct. 330, 54 L. Ed. 472, and cases there cited.

[5, 6] In its second aspect it may be conceded that the order is invalid if it amounts to a confiscation of the plaintiff's property, or denies to it a reasonable return on its invested capital; but the order was made within the acknowledged jurisdiction of the commission, and the rates established are presumed to be reasonable and just under all the authorities, state and federal, until the contrary is made to appear. Does the record in this case overcome or destroy this presumption? We think not. The company owns and operates about 200 miles of street railway in the city of Seattle, and the proof submitted is con-

fined to two of these lines only, aggregating about 16 miles in length. Conceding as we do that the order compels the company to operate these two lines at a loss, yet the entire system may be operated at a profit, and, if so, there is no confiscation of property or deprivation of property rights. In St. L. & San Francisco Railway Company v. Gill, 156 U. S. 649, 15 Sup. Ct. 484, 39 L. Ed. 567, the Legislature of the state of Arkansas had prescribed a maximum rate of three cents per mile for each passenger carried by the railroads of that state, and imposed a penalty of $300 for each overcharge, payable to the passenger from whom the overcharge was exacted. In an action to recover this penalty the railway company defended on the ground that that portion of the railroad over which the plaintiff was carried was highly expensive to construct and maintain, and that the cost of transporting passengers over the same and the maintenance thereof exceeded the maximum rate fixed by law. Proof was offered tending to show:

That "the actual cost of carrying each passenger over that portion of defendant's railway in plaintiff's petition mentioned, and over all its railway therein referred to, did and does now exceed the sum of three cents per mile for each and every passenger so carried," and that "three cents per mile for the service rendered by defendant in carrying passengers, at the times in plaintiff's petition mentioned, over the line of railroad therein mentioned, was not reasonable compensation, and that no less than five cents per mile would be a reasonable sum."

In disposing of this defense and offer of proof the court said:

"It therefore appears that the allegations made and the evidence offered did not cover the company's railroad as an entirety even in the state of Arkansas, but were made in reference to that portion of the road originally belonging to the St. Louis, Arkansas & Texas Railway, and extending from the northern boundary of Arkansas to Fayetteville in said state. In this state of facts we agree with the views of the Supreme Court of Arkansas, as disclosed in the opinion contained in the record, and which were to the effect that the correct test was as to the effect of the act on the defendant's entire line, and not upon that part which was formerly a part of one of the consolidating roads; that the company cannot claim the right to earn a net profit from every mile, section, or other part into which the road might be divided, nor attack as unjust a regulation which fixed a rate at which some such part would be unremunerative; that it would be practically impossible to ascertain in what proportion the several parts should share with others in the expenses and receipts in which they participated; and, finally, that to the extent that the question of injustice is to be determined by the effects of the act upon the earnings of the company, the earnings of the entire line must be estimated as against all its legitimate expenses under the operation of the act within the limits of the state of Arkansas."

This language is peculiarly applicable to a street railway system. The passenger who travels five blocks ordinarily pays the same fare as the passenger who travels five miles. The one pays more than the service is worth, while the other pays less; but the long haul and the short haul are supposed to equalize each other in the end. And any attempt to fix street car fares so that each car or each line will bring a reasonable return to the owner would destroy all uniformity in rates and practically abrogate the power of regulation.

There is nothing in the recent case of Northern Pacific Railway Company v. North Dakota, 236 U. S. 585, 35 Sup. Ct. 429, 59 L. Ed.

——, decided March 8, 1915, in conflict with these views. In the latter case Mr. Justice Hughes, in delivering the opinion of the court, said:

"In St. Louis & San Francisco Railway Co. v. Gill, 156 U. S. 649 [15 Sup. Ct. 484, 39 L. Ed. 567], a statute fixing a maximum rate for passengers in the state of Arkansas was challenged, but the allegation and offer of proof that the rate would compel the carriage of passengers at a loss related only to a portion, or division, of the railroad, and not to the result of all the traffic to which the rate in question applied. The holding that this was insufficient was in entire accord with the above-stated principle—that the rate-making power may be exercised in a practical way, and that the Legislature is not bound to assure a net profit from 'every mile, section, or other part into which the road might be divided.' 156 U. S. 665 [15 Sup. Ct. 484, 39 L. Ed. 567]. A passenger rate may apply generally throughout the state, and the effect of the rate must be considered with respect to the whole business governed by the rate."

[7] The complaint charges that there has been no physical valuation of the properties of the company, and that the order was made by the Commission in a spirit of retaliation, because of the refusal of the company to renew some traffic agreement with the port of Seattle; but these facts, if true, do not show, or tend to show, that the order is either confiscatory or unreasonable. The court is concerned with results rather than with motives or methods, and on the record presented we are of opinion that the enforcement of the order should not be interfered with, in so far as it relates merely to the running of cars on the Ballard Beach, Alki Point, and Fauntleroy Park lines beyond the franchise limits of these lines.

[8, 9] We feel constrained to hold, however, that so much of the order as requires the furnishing of seats for all passengers on the Alki Point and Fauntleroy Park lines is unreasonable and void, in view of the severe penalties imposed by law for failure to comply therewith. The order requires the company to furnish seats for "substantially all persons using the Alki Point and Fauntleroy Park lines," and provides that "a substantial compliance" with the order shall be deemed a sufficient compliance; that the company shall furnish seats at all times for "the usual patronage of said lines," and excepts only "emergency crowds" and "extraordinary and unusual occasions." Webster defines "emergency" as "an unforeseen occurrence or combination of circumstances which calls for immediate action or remedy; pressing necessity; exigency." The same authority defines "extraordinary" as "beyond or out of the common order or method; not usual; uncommon; rare."

The crowds which pass over these two lines mornings and evenings, and the thousands that flock to the parks and beaches on Sundays and summer afternoons are neither emergency crowds, nor are the occasions extraordinary or unusual, and to require the company to furnish cars and seats for all who present themselves for transportation over these single-track railways, eight miles in length, is to require the impossible. We do not underestimate the difficulties which confront the commission in its efforts to compel the company to furnish adequate facilities, nor do we overstate the difficulties which confront the company in its efforts to furnish these facilities. The furnishing of seats for passengers on street railways is an unsolved problem, and

perhaps will remain so as long as a considerable part of the population is habitually attracted in the same direction at the same time in pursuit of business or pleasure. The matter is not wholly beyond regulation and control, however. If, as appears in this case, one-third of the passengers are without seats during certain hours of the day, an increase in facilities to that extent during these hours will, in a large measure, relieve the congestion. Such an order or regulation can be made definite and specific, and the company can reasonably comply therewith; but to compel it to furnish cars and seats at all times and on all ordinary occasions for all who may present themselves for transportation, as already stated, is an unreasonable requirement, and one to which no transportation company can conform. This conclusion finds ample support in the record, and is supported by facts and conditions within the common knowledge of all, of which a court may well take judicial notice.

To this extent the enforcement of the order will be enjoined, but in all other respects the application for an interlocutory injunction is denied.

In re CHALFEN.

(District Court, D. Massachusetts. March 27, 1915.)

No. 20990.

BANKRUPTCY ⊂=92—DISMISSAL OF INVOLUNTARY PETITION—"WANT OF PROSECUTION"—"CONSENT OF PARTIES."

Where counsel for petitioning creditors appear before the referee to whom the petition has been referred for hearing, the mere fact that they fail to produce any evidence in support of the allegations of the petition does not constitute "want of prosecution" or "consent of parties" to a dismissal, within the meaning of Bankr. Act July 1, 1898, c. 541, § 59g, 30 Stat. 561, as amended by Act June 25, 1910, c. 412, § 10, 36 Stat. 841 (Comp. St. 1913, § 9643), which requires notice to all other creditors before dismissal in such case; but where the circumstances warrant an inference that the failure to produce proof may be pursuant to an agreement between petitioners and the bankrupt, the referee should investigate the question before making his report.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 107, 108, 133–136; Dec. Dig. ⊂=92.]

In Bankruptcy. In the matter of Nathan Chalfen, alleged bankrupt. On motion by respondent to dismiss petition. Recommitted to referee for further report.

Stoneman, Gould & Stoneman, of Boston, Mass., for petitioning creditors.

William Charak, of Boston, Mass., for alleged bankrupt.

MORTON, District Judge. This involuntary petition in bankruptcy was, upon the petition and answer, referred to the referee to state the facts upon the question of adjudication. By his report it appears that the matter was set down for hearing before him; that at the time fixed, counsel for the petitioning creditors and for the respondent ap-

peared; that "no proof was offered by the petitioners to sustain the allegations of the petition and it was agreed that they were not sustained"; that "it was further agreed between counsel that, should the petition be dismissed, it should be without costs to the respondent." The referee finds that "the petitioners on hearing have failed to sustain the allegations of the petition," and he "accordingly recommends, all counsel of record assenting thereto, that the petition filed against said respondent be dismissed."

The respondent now moves that the report be confirmed and the petition dismissed. Nobody opposes the motion. The only question is whether, under the circumstances, an order of dismissal can be made without notice to creditors under section 59g. That section provides, in substance, that an involuntary petition shall not be dismissed "for want of prosecution or by consent of parties" until after notice to the creditors, and that the court shall, before entertaining an application for dismissal, require the bankrupt to file a list of his creditors, and cause notice to be sent to them, and delay action a reasonable time to allow them an opportunity to be heard. Where there has been a full hearing on the merits, at which the petitioners have introduced evidence, the provisions of the section in question do not apply. Under such circumstances, if the decision be adverse to the petitioners, the petition is dismissed without notice to creditors who are not parties to the proceedings. In re Everybody's Store, Inc., 207 Fed. 752, 125 C. C. A. 290 (C. C. A., 1st Circuit). Such notice is required only when the petition is dismissed by the petitioners, or for want of prosecution, or by consent of parties. Upon the facts stated in the referee's report, is "want of prosecution" or "consent of parties" to dismissal of the petition shown? "Want of prosecution" is a familiar ground upon which actions at law and suits in equity are dismissed. As there used, it ordinarily signifies a failure to follow up the case, so that by reason of staleness, or of omission to file proper pleadings, it has become subject to dismissal without a hearing on the merits. It seems to me that that is what this expression means in this connection. So construed, the facts in the referee's report do not show a want of prosecution. The petitioning creditors followed up the petition in all formal matters, and when it was set down for hearing duly attended before the referee. They did not offer any evidence; but I do not think that their failure to do so under the circumstances shown was a "want of prosecution" within the act.

The remaining point is whether an order of dismissal based on the referee's report would be "by consent of parties." It appears from the report that counsel for the petitioners agreed that the petition had not been sustained, that counsel for the respondent agreed that no costs should be imposed upon the petitioners if the petition was dismissed, and that counsel for the petitioners assented to the referee's recommendation of dismissal. Whether the recommendation of dismissal is based upon that assent, or upon the failure of proof, is perhaps not altogether clear. The real question, however, is whether what the petitioners did and failed to do before the referee was in pursuance of an agreement between them and the respondent which contemplated

that dismissal of the petition should be procured in that way. If, upon a mere failure of petitioners to produce evidence at a hearing, an order of dismissal may be entered up without notice to other creditors, an easy way will be open to evade the wholesome provisions of section 59g and to trade upon petitions in bankruptcy. See Remington on Bankruptcy (2d Ed.) p. 350. On the other hand, if, at the hearing, the petitioners' failure to produce evidence proceeds from no agreement or collusion with the respondent, the latter is entitled to a finding in his favor; and it does not seem that he ought in such a case to be required to notify his creditors in order to obtain the dismissal of the petition against him which he is of right entitled to. There would be neither want of prosecution nor consent to the dismissal by the petitioners. From such facts as are stated in the referee's report it might be inferred that the petitioners and respondent were acting under an agreement with each other looking to the dismissal of the petition. In such a situation, I think the referee should have investigated the question whether there was any such agreement or understanding between the parties, or any collusion between them, and whether the petitioners have received or will receive, directly or indirectly, any consideration whatever for the dismissal of the petition. As he does not appear to have done so, the matter is recommitted to him for that purpose.

THE GLADIATOR.

(District Court, D. Massachusetts. March 24, 1898.)

Nos. 319, 877.

1. ADMIRALTY ⊂⊃119—APPEAL—REVERSAL—INTEREST.
Where the Circuit Court of Appeals, on reversal of a decree in admiralty in favor of one vessel, directed the court below "to proceed on the theory that both vessels were in fault," rule 30 of the Circuit Court of Appeals rules (150 Fed. xxxv, 79 C. C. A. xxxv), relating to interest, does not deprive the District Court of discretion in the allowance of interest.
[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 776–790; Dec. Dig. ⊂⊃119.]

2. ADMIRALTY ⊂⊃122—COSTS—DIVIDED DAMAGES.
In an admiralty suit, where the damages are divided, it is the general rule, binding in all cases, unless the circumstances are exceptional, that the costs will also be divided.
[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 797–827; Dec. Dig. ⊂⊃122.]

3. TOWAGE ⊂⊃11—LOSS OF TOW—DEMURRAGE.
A tug, which was herself partly in fault for the loss of her tow, is not entitled to demurrage for the time lost in attempting to save the tow.
[Ed. Note.—For other cases, see Towage, Cent. Dig. §§ 11–23; Dec. Dig. ⊂⊃11.]

In Admiralty. Suit by Joshua F. Nickerson against the steam tug Gladiator. Decree for half damages for loss of tow.

Carver & Blodgett, of Boston, Mass., for libelant.

Carpenter & Mosher and Edward S. Dodge, of Boston, Mass., for claimant.

LOWELL, District Judge. This was a libel against the steam tug Gladiator for the loss of the schooner Nowell. The accident was alleged to have been caused by the negligence of the Gladiator in towing her.

The District Court found that the tug alone was in fault, and decreed to the libelant the value of the schooner, with interest from the date of filing the libel.

The claimants appealed to the Circuit Court of Appeals, which by its mandate has directed the District Court "to proceed on the theory that both vessels were in fault."

[1] Claimant's counsel contends that by rule 30 of the Circuit Court of Appeals (150 Fed. xxxv, 79 C. C. A. xxxv), as interpreted in The Haxby, 83 Fed. 720, 28 C. C. A. 38, the District Court is prevented from allowing the libelant interest upon the value of the schooner. Both the rule and the case cited appear to me to refer only to cases in which the amount of the damage has been fixed in the mandate. In this case the District Court is directed by the mandate to proceed on the theory that both vessels were in fault, but in other respects the decree seems to be left to its discretion. Of course the District Court is not in any way controlled by its former decree, which was made on the theory that the tug alone was in fault.

On the whole, I think that interest should be allowed, and I therefore award to the libelant half the value of the schooner as previously ascertained by this court, with interest on the same from the date of filing the libel. See Fabre v. Cunard Steamship Co., 53 Fed. 288, 293, 3 C. C. A. 534; Nashua & Lowell R. R. v. Boston & Lowell R. R., 61 Fed. 237, 9 C. C. A. 468.

[2] The libelant's counsel contends that his client should be awarded the costs of the District Court. While this matter seems to me to be left to my discretion by the mandate, yet I think that The Horace B. Parker, 76 Fed. 238, 22 C. C. A. 418, is intended to establish a general rule, binding in all cases where the damages are divided, unless the circumstances are distinctly exceptional. The costs of the District Court are therefore to be divided.

[3] The claimant's answer set out no counterclaim for damage suffered by the Gladiator in the accident. By an amended answer, filed after the case had come back to this court, he seeks to recover the value of a hawser and about a day's demurrage, said to have been caused by a deviation of the Gladiator in order to land the crew of the Nowell at Hyannis. The libelant's counsel assented to the filing of the amendment, and it may therefore be treated as forming part of the original answer. No objection was made to the allowance for the hawser, and half its value is allowed in set-off. As to the demurrage caused by the deviation, it is admitted that the accident occurred at about half past 6. The Gladiator then cast off two barges, which it was towing, and went to the assistance of the schooner. Until about half past 10, when the schooner sank, the tug was engaged in trying

to save her. One or both of the barges were then dragging, and so the Gladiator took one of them in tow, and proceeded some miles on its course to New York, until the barge could be left in safety near the Handkerchief Lightship. As the captain of the tug testified that he was not able to get up the anchor of the other barge until daylight, that barge could not have been taken in tow until after the tug had returned from the Handkerchief. At daylight he made the tug fast to the second barge and towed it up near the first barge. Having anchored, it there, he proceeded with the tug to Hyannis, landed the crew of the schooner, returned at once to the barges, and went on his way. He states the time taken in returning from Hyannis to the barges at three-quarters of an hour, so that his deviation to Hyannis could not have delayed him beyond two or three hours at the utmost. This delay is so small that I think I ought not to allow demurrage on account of it. Much the greater part of the delay was caused by the accident itself, and by casting off the barges, which was made necessary by the efforts of the Gladiator to save the schooner. No precedent has been shown to me for allowing to a vessel, herself at fault for an accident, any demurrage for the time lost by her in consequence of her attempt to save the injured vessel. To allow it would, I think, be an injurious practice. I therefore disallow the claim for demurrage.

The claim for the travel and attendance of Cahoon is disallowed, and I allow taxation of the travel of the claimant's witnesses who came from Philadelphia to attend the trial. Decree accordingly.

In re KELLEY.

(District Court, D. Massachusetts. May 8, 1915.)

No. 19811.

BANKRUPTCY ⊂⇒385—DEPOSIT ON OFFER IN COMPOSITION—RIGHT TO ACCUMULATED INTEREST.

Where money deposited by a bankrupt with the clerk pursuant to an offer in composition during litigation by minority creditors earned interest, on final confirmation of the composition the bankrupt is entitled to the return of such interest.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 595, 596; Dec. Dig. ⊂⇒385.]

In Bankruptcy. In the matter of Thomas A. Kelley, bankrupt. On distribution of fund deposited in composition.

Sisk Bros., of Lynn, Mass., for bankrupt.

Tyler, Corneau & Eames and Brandeis, Dunbar & Nutter, all of Boston, Mass., for creditors.

MORTON, District Judge. After Kelley's adjudication as a bankrupt on an involuntary petition, he made an offer in composition of 42½ per cent., and in pursuance thereof deposited with the clerk of this court $232,012.36. The offer was accepted by the requisite number and

amount of creditors. Objection was made by a minority of the creditors to the confirmation of the offer, upon the ground that Kelley had committed acts which would be a bar to his discharge. The matter was referred to the referee, who reported in favor of confirming the composition; and the District Court passed an order to that effect. The objecting creditors then took the case to the Circuit Court of Appeals, by which the order of the District Court was affirmed. These proceedings lasted for a considerable time, during which the money on deposit in the clerk's hands has earned $9,426 interest. The question is whether this interest belongs to the bankrupt or to his creditors. No decision upon the point has come to my attention.

The bankrupt was not responsible for the delay which has occurred. It is not contended that he is obligated to pay to the creditors interest on the amounts of their dividends. The contention of the creditors is, in effect, that the money in the clerk's hands constituted a fund for their benefit, and that they are therefore entitled to the interest on it. It is not uncommon for a bankrupt offering composition to deposit with the clerk something beyond the amount actually required. Such surplus is returned to the bankrupt at the conclusion of the proceedings. The same disposition is made of unclaimed dividends, as was decided in this district. In re Lane (D. C.) 125 Fed. 772. I am unable to see any sound distinction in this respect between a surplus originally deposited by the bankrupt, a surplus arising out of unclaimed dividends, and a surplus created by accumulated interest on the fund in the clerk's hands. The offer by the bankrupt was not to distribute a fixed and stated amount among his creditors, nor to pay 42½ per cent. plus interest from any given date; it was to pay 42½ per cent. flat. The amount deposited was computed on that basis. That offer became effective only upon final confirmation by the court, which by Act July 1, 1898, c. 541, § 70f, 30 Stat. 565 (Comp. St. 1913, § 9654), operated to revest in the bankrupt his property. Until such confirmation the creditors had no fixed right to the fund, which up to that point in the proceedings is, I think, to be regarded as a guaranty for the bankrupt's performance of his offer. Sections 12b, 12e (Comp. St. 1913, § 9596). The creditors, when they accepted the offer, took the chance that there might be delay from litigation or other causes in the completion of it, for which the bankrupt was not responsible.

It follows that the interest should be returned to the bankrupt as surplus deposit.

So ordered.

JAMES v. CLEMENT et al.

(Circuit Court of Appeals, Fifth Circuit. May 25, 1915.)

No. 2544.

1. GAMING ⟸49—WAGERING CONTRACTS—PURCHASES AND SALES OF COTTON FOR FUTURE DELIVERY—VALIDITY OF CONTRACTS.

Evidence considered, in an action by cotton brokers to recover advances by them in settlement of contracts made for defendant for the purchase and sale of cotton for future delivery on the New York Cotton Exchange, and *held* to show that it was understood by both parties that there was to be no actual delivery of cotton under such contracts, but that they were merely speculative or wagering contracts on the future price of cotton, intended to be settled by the receipt or payment of differences between the contract and market price; the evidence consisting of the undisputed testimony of defendant that he so stated to plaintiffs' agent, who procured the business, before any of the transactions took place, supported by the correspondence between the parties, which, fairly construed, was consistent only with such understanding, and the further fact that, although there was a series of such contracts, no actual delivery was called for or made under any of them.

[Ed. Note.—For other cases, see Gaming, Cent. Dig. §§ 100–102; Dec. Dig. ⟸49.]

2. GAMING ⟸12—WAGERING CONTRACTS—VALIDITY OF CONTRACT—DEALING IN FUTURES.

Where there was a mutual understanding between cotton brokers and a customer that purchases and sales of cotton futures on margin made for the customer were purely speculative and wagering contracts, they are not validated by the fact that they were executed in accordance with the rules of the New York Cotton Exchange and in the form prescribed by such rules, which called for an actual delivery of the cotton; it being also true that under the rules the contracts could be settled without delivery.

[Ed. Note.—For other cases, see Gaming, Cent. Dig. § 22; Dec. Dig. ⟸12.

Sales or purchases under agreements for settlement of differences between contract price and market price as wagering contracts, see note to Ware v. Pearson, 98 C. C. A. 368.]

In Error to the District Court of the United States for the Northern District of Georgia; Wm. T. Newman, Judge.

Action at law by Waldo P. Clement and another, as surviving partners of Haven & Clement, against D. W. James. Judgment for plaintiffs, and defendant brings error. Reversed.

See, also, 185 Fed. 692, 107 C. C. A. 640; 217 Fed. 51, 133 C. C. A. 170.

Alex W. Smith, of Atlanta, Ga., for plaintiff in error.

Hollins N. Randolph, Robert S. Parker, and Spencer R. Atkinson, all of Atlanta, Ga., and John R. Abney, of New York City, for defendants in error.

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

PARDEE, Circuit Judge. This case was formerly before this court (185 Fed. 692, 107 C. C. A. 640), and to clearly understand the pres-

ent aspect it is well to restate from our former opinion what was heretofore decided and to a certain extent became the law of the case, as follows:

"Pardee, Circuit Judge. In substance and effect this suit is one brought to recover specific sums of money paid out by the plaintiffs, Haven & Clement, as agents and brokers for the defendant, James, in purchasing and selling cotton futures; and the defense is that all the transactions for which plaintiffs paid out money were by intention and understanding of the parties, and in fact, gambling transactions; that is to say, only wagers depending upon the fluctuations of futures and the variations of the prices thereof upon the New York Cotton Exchange, with the understanding and intent of both parties that all such wagers should be lost or won according to such fluctuations in the price of futures in the New York Cotton Exchange, and, incidental to such defense, that all transactions in the New York Cotton Exchange for the purchase and sale of cotton for future delivery were under the technical rules of the Exchange providing for 'ringing out' and substituting contracts by the brokers without the knowledge of principals, and in the delays and technical notices and other formalities thrown in the way of any actual delivery, were, in fact, wagering transactions.

"As to this incidental defense, we notice that, under the evidence admitted on the trial of the case (all of which is found in the transcript), the particular transactions wherein Haven & Clement claimed that they purchased and sold cotton futures for the account of James for which they paid out moneys and now ask judgment were under the rules of the Exchange and otherwise so 'rung out,' substituted, arranged, and settled that the interests of no other or third parties are involved; and the validity of the transactions must stand or fall according to the actual agreements and intentions of the parties to this suit without reference to the character and manner of the business carried on in the New York Cotton Exchange, further than it is useful in throwing light upon the actual understanding and agreements between Haven & Clement on the one side and James on the other. * * *

"The bill of exceptions shows that prior to the charge of the court counsel for the defendant requested the court to give the jury the following instruction, to wit: 'I charge you that speculating or wagering contracts are void, and a broker or commission merchant cannot recover for advancement made on account of customer on account of such contracts. If there was no intention of buying or selling cotton, but the contract was only speculative in the present case, there can be no recovery'—and that the court declined to give the said request to the jury. Also, that counsel for the defendant requested the court to charge the jury as follows: 'I charge you further, gentlemen, that no rights can arise in favor of either party to a contract of agency where the agency was created for an illegal purpose. If the plaintiffs and defendant contracted one with the other and the purpose of the contract was to play the market in cotton futures, the agency was illegal, and neither party would have the right to sue the other for losses or profits growing out of such agency'—which also was refused.

"In each the trial judge certifies that 'the same is not covered by any portion of the charge to the jury.' These specially requested charges seem to be sound in law, and their application to the case in hand is beyond question. They certainly were not in unambiguous terms given to the jury, and it seems with the mass of evidence in the case, mainly devoted to the collateral, but not controlling, issue, involving the character of the rules and proceedings of the New York Cotton Exchange, these or similar distinct instructions bearing on the main issue in the case should have been given to the jury. * * *

"The bill of exceptions further shows that prior to the charge of the court counsel for the defendant requested the court in writing to charge the jury as follows: 'I charge you further, gentlemen, that, even if it should be true that the defendant promised to pay this claim, yet if the claim arose by reason of a wagering, illegal, or immoral contract, the promise of payment would not be binding.' The defense was that the transactions insisted upon by the plaintiffs as entitling them to recover were wagering and illegal. The plaintiffs adduced evidence tending to show a promise on the part of defendant

to pay the amount claimed. The instruction seems to be good in law, and, as it was applicable to the case, we are of opinion that it was prejudicial error to refuse it because, under the case as presented by the transcript, we cannot say that the evidence given of the defendant's promise to pay was not a controlling factor with the jury in reaching the verdict rendered. * * * The charge of the trial judge is before us because it is incorporated in the bill of exceptions duly allowed and signed.

"As heretofore pointed out in discussing the pleadings, and also in considering the nineteenth, twentieth, twenty-first, and twenty-third assignments of error, the controlling issue in the case was whether or not the amounts sued for by the plaintiffs below were for moneys advanced at the request and for the benefit of the defendant on wagering contracts. The transcript shows that there was evidence offered and admitted tending to show that they were illegal wagering contracts within the knowledge and intent of both parties, and also that there was a large mass of all kinds of evidence bearing upon the collateral issue in respect to the character of dealings upon the New York Cotton Exchange, and some bearing on other minor issues. Under these circumstances, and to the end that the jury might correctly apply the evidence, it was incumbent upon the trial judge to clearly and specifically instruct the jury on the law bearing on the main and controlling issue. The charge thereon was as follows: 'It is next claimed by the defendant that the evidence shows that Mr. James and the plaintiff's representative, Mr. Tate, had an express understanding that this arrangement made by Mr. James with the plaintiff firm was a mere wagering arrangement, and that both parties so understood it. If what he says about that—he told you about that on the stand—that there was to be no delivery of cotton, that is, it was simply taking—I do not remember the exact expression he used, a 'flier,' or something like that, but you will remember what he said, and that Mr. Tate so understood, that he told Mr. Tate that. And you heard what Mr. Tate said. He denied it. If there was an agreement made between Mr. Tate and Mr. James, and if Mr. Tate was to do the business as he described it, and if he had authority to make this sort of an agreement, of course, these contracts would fail and could not be enforced at all. If the arrangement Tate had with James was that it was to be a mere wagering contract, and no delivery contemplated at all, the contracts could not be sustained. That is for you to say. But my understanding of Mr. James was upon the line indicated by me heretofore that Mr. James wanted Mr. Tate to understand that: 'This thing I am to do with you has nothing to do with my business at Blakely. It is entirely separate and distinct.' Of course, he may have intended it differently, but that is the impression I got. If you understood it differently, and if you believe they had the understanding here claimed by the defendant and his counsel, it would render these contracts invalid.'

"It is contended that this is involved and argumentative, and does not sufficiently point out the importance of the issue presented although it is admitted that its real meaning is that, if the jury found that the arrangement between the parties was understood by both of them to be a mere 'wagering' contract, plaintiffs could not recover. Certain it is that the charge does not refer to section 3668 of the Code of 1895 of Georgia, which controls in suits in that state on wagering contracts, and declares such contracts to be against the policy of the law and not to be enforced, nor does it otherwise advise the jury as to what are wagering contracts and the public policy relating thereto. The charge deals with the issue as though there was no other evidence thereon than that found in the conversations between Tate, the plaintiff's agent, and the defendant, James, while the bill of exceptions shows the course of dealing between the parties which throws much light on the subject, and shows other pointed facts and circumstances directly bearing on the issue and tending to show mutuality in the understanding that no actual delivery of cotton was contemplated.

"Of necessity we have been compelled to read much of the evidence which includes many telegrams and letters passing between the parties, and we cannot resist the conclusion that from James' alleged notice to the agent Tate, and his telegrams and letters to the plaintiffs, and the course of dealings pursued by the parties and other matters shown, the jury might well

have found that James did not contemplate actual delivery of any cotton on the future contracts bought or sold for him by the plaintiffs, and only intended wagering or gambling on the fluctuations of prices of cotton futures, expecting to settle by the receipt or payment of differences, and that the plaintiffs were well advised thereof and well understood that in buying and selling for James' account no delivery was to be made or expected to be made, even if third parties should become interested in the future contracts entered into by them on James' account.

"Taking this view of the evidence, we are of opinion that the trial judge should have advised the jury in specific terms as to the public policy denying recovery on wagering contracts, defining the same, and also as to the right of recovery where parties willingly advance moneys to pay such contracts, and that on his failure to do so, coupled with his refusal of special charges hereinbefore considered, such reversible error supervened that a new trial should be granted."

On the second trial the evidence offered in the first as printed in the record was submitted to the jury, and in addition oral and documentary evidence was offered by the plaintiff tending to show that in the transactions on James' account the plaintiffs carefully followed the rules and regulations of the New York Cotton Exchange as to "ringing out" and substitution of future contracts, and that as matters developed notices by letter and telegram were given to James. All the books of Haven & Clement were submitted to the jury, and Sterrett Tate, the active agent of Haven & Clement, was again examined and cross-examined as to all the details of the case. And the defendant offered documentary evidence in relation to the same matters, and defendant James was again examined, cross-examined, and re-examined with regard to the whole merits of the case.

At the conclusion of the testimony, prior to the charge of the court to the jury, the defendant submitted to the court in writing a request to direct a verdict for the defendant, which request the court refused, and the defendant excepted, on the ground that the evidence demanded a verdict for the defendant. Thereupon, after argument of counsel, the court charged the jury as follows:

"Gentlemen of the jury: Under the law as laid down by the highest court of the land, the Supreme Court of the United States, and by the highest court of the state of New York, these contracts made in the New York Cotton Exchange are valid and binding when they are put in writing by slips of the character introduced in evidence here. It has been distinctly held, and is the law, that these slips are sufficient memoranda in writing to bind the parties and make a contract between the parties to these slips. The question has been made, under what we call the statute of frauds, that they would have to be in writing, and the courts hold that these slips are sufficient writing to make a valid contract. These contracts for the future delivery of cotton are sustained upon the ground that, under the laws of New York Cotton Exchange, the actual spot cotton can be required to be delivered, and therefore these contracts are sustained to be valid sales of a commodity if the commodity is demanded by the purchaser.

"The plaintiff claims that he was directed by the defendant, Mr. James, to make these contracts for the purchase and sale of cotton, as has been stated in the evidence. The evidence is before you on that subject. I do not understand it to be denied at all that Mr. James did order the purchases and sales as made, but that is for you to say under the evidence. And whether or not the plaintiff complied with these orders and directions of the defendant, James, for making the purchases and sales, that you must gather from the evidence also. It is incumbent upon the plaintiff to show you all of this, to

show it to your reasonable satisfaction by a preponderance of the evidence in the case.

"The defendant, as I understand it, contends, in the first place, that this was a wagering contract purely; that there was no intention on his part to deliver any cotton, or to have any delivered to him; that he was simply gambling on futures. This is the substance of his claim, and of his counsel's, as I understand it. He also states that what is called 'ringing out' in the cotton contracts on the New York Cotton Exchange is of such a character that it should defeat the plaintiff's right to recover against him, even if he is otherwise entitled to recover. As to this first matter of 'ringing out' or 'ringing up' as it seems to be sometimes called, it has been before the Supreme Court of the United States, and the highest court of the state of New York, and is fully sustained as a legal method of transacting this business. The Supreme Court of the United States says this: 'The ring settlement is reached by a comparison of books among the clerks of the members buying and selling in the pit, and picking out a series of transactions which begins and ends with dealings which can be set against each other by eliminating those between—as, if A. has sold to B. 5,000 bushels of May wheat, and B. has sold the same amount to C., and C. to D., and D. to A. Substituting D. for B. by novation, A.'s sale can be set against his purchase, on simply paying the difference in price.' That is to say, I understand this method of doing business to be treated by the courts, both the Supreme Court of the United States and the Supreme Court of New York, as an entirely legitimate method of transacting this part of the business. Unless you find something in what has been shown here in the evidence as to this ringing out or ringing up, it appears to me that it should have nothing to do with this transaction, and should not interfere with the plaintiffs' rights to recover, provided they are otherwise entitled to recover. Now, the claim has been made, if I understand the claim by the defendant in this case, that although, as I have just instructed you, this method of transmitting the business has been sustained by the courts, and this court should recognize it as legitimate, it is claimed by the defendant that what is called 'ringing out' extinguished these contracts that were made by Haven & Clement for Mr. James, that when the ringing out was made and the matter carried through, all these contracts that they had made for Mr. James were thereby extinguished. You have heard the testimony about that, and what was said about it by counsel on both sides. It is claimed on the part of the plaintiffs that this is not true, that the contracts provided that they shall remain in force until they were finally executed, notwithstanding this arrangement, that a contract to deliver on the part of a particular broker who sold to Haven & Clement, or their contract if they sold, existed and could be enforced under the rules of the Exchange, notwithstanding these contracts had, as they call it, been rung out. That is a matter for you to determine under the evidence. I instruct you, under the law as I understand it to be fully established by the courts of the United States and of the state where this occurred, that it is a legitimate way of doing business, whether or not it was followed legitimately in this particular case, or whether or not, as contended to you by counsel for the defendant, it was done in such a way as to extinguish any claim Mr. James might have had, or his brokers on his part, for what was due him. Of course, that is not legitimate. It has been assumed that the matter is so arranged—for example, one of the courts, in referring to it, likens it somewhat to a clearing house of the banks in cities where the banks have a clearing house arrangement, by which they settle their differences without having to give each one a separate check to square things up.

"Now another defense in this case on the part of the defendant is that this was a wagering contract pure and simple; that is, a gambling transaction, without any intention whatever, on the part of the defendant, to deliver cotton when sold or to receive cotton when bought, and that the plaintiffs understood this to be his intention. If the jury find that James did not contemplate the delivery of any cotton on the future contracts bought and sold for him by the plaintiffs, and only intended to wager or gamble on the fluctuations in the price of cotton futures, expecting to settle by the receipt or payment of differences, and that the plaintiffs were advised

thereof and well understood that in buying and selling for James' account no delivery was to be made or accepted by him, even if third parties should become interested in the future contracts entered into by them on James' account; then this arrangement would be one in which recovery could not be had for money advanced in this connection and to carry out these purchases and sales.

"Under the statute of Georgia (Code of 1910, § 4253) 'a contract which is against the policy of the law cannot be enforced. Such are contracts tending to corrupt legislation or the judiciary, contracts in general in restraint of trade, contracts to evade or oppose the revenue laws of another country, wagering contracts, contracts of maintenance or champerty.' 'Wagering contracts' you understand, betting contracts, and if this in the present case was one where there was no actual purchase or sale intended, it is simply a bet on the rise or fall of cotton. If the plaintiff has established its case so far as it is required to do so in the manner I have already indicated to you, that is to say, that they had orders from James to buy cotton on the New York Cotton Exchange and that James' orders were carried out, and that it was necessary for the plaintiff, in executing the same and carrying out the same, to pay out money for his account, and that this was all done properly and by the usual method recognized by the New York Cotton Exchange, then the burden would be shifted to the defendant to show his defense, as I have just indicated; that is, to show to your reasonable satisfaction that he did not intend, and that the plaintiff knew that he did not intend, to deliver any cotton or to receive any cotton on account of and as a result of these transactions of selling and buying, and that it was a wagering contract pure and simple. A wagering contract in this case would be one, of course, such as I have just described, where it was simply betting on the rise or fall of the market, and not a legitimate transaction under the law and under the rules of the New York Cotton Exchange.

"The defendant also claims, as I understand it, that when these contracts were closed out, on December 3d, they had allowed him to go beyond his margins. As I understand the defense, he claims he had an understanding with Mr. Tate that he must never allow him to go beyond his margins which he had put up with them, and I presume—but that is a matter for you gentlemen to determine; I do not know what the truth about that is, beyond the amount of credit they had given him. You remember they both agreed, Mr. James and Mr. Tate, that he agreed to give him a line of credit from $2,500 to $5,000. How far that is embraced in this matter of going beyond his margins I am unable to say. That will be a matter for you to determine under the evidence, whether he was not to go beyond the amount of money James had sent and this amount of credit, or whether he was not to go beyond the money actually sent. They were to notify him, and, if he did not increase his margins, they were to close him out, and that by allowing him to go beyond this he was injured. Of course, if they failed to carry out his instructions so far as they reasonably could, and to the extent that he was injured by such failure and by going contrary to his instructions, they ought not to recover against him. What that will be, and that is material in the case, it will be for you to say, and to what extent he was injured by their failure to close out more promptly and before his margin was exhausted. This will be for you to determine from the evidence. Mr. Tate testified, as I understand it, to the contrary, except that he agreed with Mr. James that they were to allow him a line of credit of from $2,500 to $5,000.

"Now, gentlemen, I have some requests to charge which I want to refer to here, and the most of them have been covered, at least the most of those I give have been covered; by the plaintiff to instruct you that, 'if you believe from the testimony that the defendant employed the plaintiffs to buy and sell cotton on the New York Cotton Exchange, in obedience to its by-laws, rules, and regulations, that employment implied an undertaking to indemnify them in respect to the execution of their agency, and also implied a promise to reimburse them for such expenditures as were necessary in the performance of the agency properly performed.' I so instruct you, that is right.

"Second. 'That a contract for the future delivery of a commodity is presumed to be valid, and the burden is upon the party attacking the contract

to show its invalidity, and in order to render such a contract invalid there must appear to your satisfaction an intention on the part of both parties to wager. The test of invalidity is mutuality of illegal intent.' That is, it must be shown to your satisfaction that both parties agreed that it was to constitute an illegal contract. That is, in this case, that there should be no delivery of cotton at all, but that it was simply a wager on the rise and fall of cotton. The other defenses, of course, are not embraced in that, but that applies to its being a gambling contract.

"It is shown that certain telegrams going between the parties, relating to the transaction of the business covered by these contracts, 'were expressed in cypher and were composed of cypher words selected from Shepperson's Code of 1881, and I charge you that by the use of that code the defendant in this case commits himself to abide by his contracts if executed and entered into in all respects in accordance with the rules and regulations of the New York Cotton Exchange of force at the time of the execution of such contracts.' And, of course, that would also be the case with them, provided they carried out his instructions in accordance with such instructions and acted in accordance with such instructions, and acted in accordance with the rules of the exchange, according to this book of cypher used, they too agree to be bound by it. I have already instructed you that these slip contracts are sufficient to make a valid contract.

"The other instructions I have combine the idea that although the customer did not intend himself (Mr. James in this case) to deliver or receive cotton—deliver cotton sold or receive cotton bought, if he intended his broker to do that for him in New York, it would be the same thing as if he did it himself. That is true, of course.

"Now I have some requests from the defendant, and I instruct you accordingly: 'If the plaintiff is entitled to recover, he can do so only by proof of a claim or claims set up in his pleadings.' He is not entitled, of course, to anything not set out in his pleadings. 'And that is so, even though you might believe that such theory is supported by the evidence adduced on the trial of the case.' That is to say, that the rule of law is that he makes his case by his pleadings, and he must stand on that, and must make out a case according to his declaration.

"I am also requested to charge you that he must recover in accordance with the items set forth in his declaration. That is more general, and does not point out in what respect. Of course, that is correct law, that he must recover in accordance with the case he makes out and sets up.

"I have already instructed you, what I am requested to here, 'that speculating or wagering contracts are void, and a broker or commission merchant cannot recover for advancement made a customer on account of such contracts.' If there was no intention of buying or selling cotton, as I have instructed you, if it was simply a gambling matter, the plaintiff cannot recover.

"I am also requested to instruct you that they could not recover, as I understand the request, for any commissions (in this case $820 commissions, I believe), if the contract itself was invalid. That is, even if service is rendered, no commission could be recovered on any alleged contract that was of a wagering, illegal or immoral character.

"I am also requested to charge you that the promise of the defendant to pay this claim, if it was a gambling claim, would not be valid. That is true.

"I am requested to instruct you, again, as I have already done two or three times, that if no purchases or sales of cotton were contemplated by either party, or intended to be made, the plaintiff would not be entitled to recover; and it appears to be a fact here, I will state to you, but you have heard the evidence, that no actual cotton was delivered between the parties.

"I have another request to the same effect about this being a wagering contract, that if both parties knew, and these men understood about it, but the question here is— Mr. James says he did not intend to deliver any cotton, and did not intend to buy any cotton; but what the law requires is that that should be mutual, that both parties should agree to it. That I understand Mr. Tate to deny, but that is for you to determine what the truth about that is.

"I am requested to charge you that under the law of New York 'all wagers, bets or stakes made to depend upon any unknown or contingent event

whatever, shall be unlawful and all contracts for or on account of any money so wagered, bet or staked, shall be void.' Counsel says that is a statute of New York, and I have no doubt that it is, and I so instruct you.

"I charge you again that wagering contracts (I have already done that), no matter where made, cannot be enforced under the laws of Georgia. The question for you is whether this was a wagering contract or not.

"Now, gentlemen, we have had a long time over this case, and I have tried to charge you about it as quickly as I could. You will consider all of the evidence, give it fair consideration, and if you think the plaintiff is entitled to recover you will have to determine the amount. You will see what the amount is; you will have the papers out with you; the papers there will show you the amount actually paid out by them, and what amount they received from Mr. James, and what amount he made on the transactions, where he made something; and, of course, if they paid the money out then, they paid out the full amount, less what he sent them and less what they made for him, with their commissions added, which I understand would be the amount they are entitled to recover if entitled to recover at all. If you do not believe they are entitled to recover, say 'We, the jury, find for the defendant,' and if you find they are entitled to recover, say, 'We, the jury, find for the plaintiff' and fix the amount."

To this charge defendant's counsel made special and specific exceptions, all of which were duly allowed. Among these were the following, to wit:

" 'I charge you further, gentlemen of the jury, that every contract or agreement, whether or not in writing, whereby any person shall agree to buy or sell and deliver any cotton to any other person, when in fact it is not in good faith intended by the parties that an actual delivery of such cotton shall be made, is unlawful in the state of Georgia, whether made or to be performed wholly within this state, or partly within or partly without this state. I further charge you that the law of Georgia prohibits any and all contracts or agreements for the purchase or sale and delivery of any commodity or other thing of value on margins, commonly called "dealing in futures," when the intention or understanding of the parties is to receive or pay the difference between the agreed price and the market price at the time of settlement.'

"Defendant excepted to the refusal of the court to charge as thus requested, and insists that the language of said request correctly expresses the nature and character of plaintiffs' claim as sued on, and correctly defines the law applicable thereto, and was apt and pertinent under the pleadings and proof in the case.

"Fourteenth Exception.

"Prior to the charge of the court to the jury in said case, and prior to the argument of counsel, counsel for the defendant submitted to the court in writing, and thereby requested the court to give the jury, the following special instruction, to wit: 'I charge you that dealings, if wagering in character, are none the less so if made in or on the alleged New York Cotton Exchange. The forms they may take are immaterial and their natures are unchanged no matter what guise they may assume or in what shapes or transactions they may appear. If wagering in character the plaintiffs cannot recover thereon.'

"Defendant excepted to the refusal of the court to charge as thus requested, and insists that under the issues joined and proof submitted the language of said request was apt and pertinent and essential to proper consideration by the jury of defendant's pleas and defenses in the case.

"Fifteenth Exception.

"Prior to the charge of the court to the jury in said case, and prior to the argument of counsel, counsel for the defendant submitted to the court in writing, and thereby requested the court to give to the jury, the following special instruction, to wit: 'I charge you that, if you believe the alleged transactions were mutually wagering in character, it makes no difference in this

case that defendant may have taken his winnings, had he won. The law against wagering transactions is still to be enforced and is binding upon the jury, regardless of any such possibility. And I charge you to give such possibility no weight or consideration whatever.'"

The record shows further:

"After the jury had been first charged, and had retired to the jury room, and had considered their verdict, and had been out for a considerable length of time, the jury returned into the courtroom and the following proceedings were had:

"The Court: I am told that you want to be recharged upon some points of the case, gentlemen; can you tell me what it is?

"The Foreman: Your honor, it seems that some of them have not understood or have not heard—either did not hear or did not understand, but what particular part I could not say, the whole charge, if you could—

"A Juror: The illegality of the sale of the contract; if it was illegal, if the first party understands it that it is not to be delivered, and the second party in writing for the cotton, if he understood it wasn't to be delivered, would that make it illegal? That is the point.

"The Court: I do not know that I understand you. If the first party—

"A Juror: If he understood that no cotton was to be delivered by the first party?

"By the Court: If Mr. James understood?

"A Juror: Yes, sir.

"The Court: And the question is with reference to somebody else with whom they dealt—with whom Haven & Clement dealt?

"A Juror: Yes, sir.

"The Court: The party becoming liable in this ringing out business?

"A Juror: Yes, sir; I just wanted to know whether that would make it illegal for one of the parties not to feel responsible for the delivery of the cotton.

"The Foreman: As I understand it, would it be necessary for both parties to understand that the cotton was to be delivered or received, or just one, and the other party did not?

"The Court: What I instructed you about it is this: I can read it here."

The court then proceeded to recharge the jury as follows:

"It is absolutely necessary, in order that the contract should be invalid on the ground that it was a mere wagering agreement, that the knowledge or understanding that the cotton was not to be delivered should be mutual; both parties should know, if that is what the question is. So far as Haven & Clement and Mr. James are concerned, the plaintiff and defendant, it would be necessary— 'Another defense in this case on the part of the defendant is that this was a wagering contract pure and simple; that is, a gambling contract, without any intention whatever on the part of the defendant to deliver cotton when sold, or to receive cotton when he bought, and that the plaintiff understood this to be his intention. If the jury find that James did not contemplate the delivery of any cotton on the future contracts bought and sold for him by the plaintiffs, and only intended to wager or gamble on the fluctuations in the price of cotton futures, expecting to settle by the receipt or payment of differences, and that the plaintiffs were advised thereof (that is, Haven & Clement themselves, the plaintiffs, were advised thereof) and well understood that in buying and selling for James' account no delivery was to be made or accepted by him, even if third parties should become interested in the future contracts entered into by them on James' account, then this arrangement would be one in which recovery could not be had for money advanced in this connection and to carry out these purchases and sales.' That is to say, if you find that the plaintiffs have established their case—that is to say, they have shown that they had those orders from James to buy and sell cotton respectively, and that they proceeded to execute those orders in a proper way, faithfully and right, and if, as a result of that, they paid out for him on those accounts, as they claim here, this amount of money which is claim-

ed, the balance of which is claimed here, then they would make out their case so far as they are concerned, and it would be up to this defendant. Under the rules of the New York Cotton Exchange, as I have stated to you, or rather the practice in the New York Cotton Exchange and the rules of the exchange have been upheld by the Supreme Court of the state of New York, and by the highest court in the state, the Court of Appeals, and these contracts held to be valid contracts upon the ground, as I stated to you, that the delivery of cotton can be required under them and under the charter of the New York Cotton Exchange and under the laws as applicable thereto.

"Now, when it comes to this case, as I have stated to you in my charge, when the plaintiff makes out his case, the defendant sets up three different defenses. The first one is that it was a gambling contract, a wagering contract. It would have to be substantiated and established, not only that Mr. James himself did not intend to deliver or receive, whatever the case may be, but it would be necessary that both he and the plaintiffs in this case, the brokers, should understand that there was to be no delivery of cotton and no receipt of cotton under the transactions under the rules of the exchange, and it was simply a gambling contract and he was betting on conditions."

From an adverse verdict and judgment for the full amount of plaintiffs' claim, this present writ of error is prosecuted.

[1] From the view we take of this case it is not necessary to pass upon other assignments of error than the one claiming there was reversible error in refusing the motion in writing made at the conclusion of the testimony to instruct the jury to find a verdict for the defendant on the ground that the evidence demanded such verdict. It is noted above in our former opinion, on the evidence then presented in the record, we decided that "the jury might well have found that James did not contemplate actual delivery of any cotton on the future contracts bought or sold for him by the plaintiffs, and only intended wagering or gambling on the fluctuations of prices of cotton futures, expecting to settle by the receipt or payment of differences, and that the plaintiffs were well advised thereof, and well understood that in buying and selling for James' account no delivery was to be made or expected to be made," and that we reversed the case because in respect to wagering contracts the jury was not sufficiently and properly instructed; and it is rather apparent that if, on the first trial, the defendant had asked for an instructed verdict on the ground that the proof showed a wagering contract, it would have received our sanction.

Upon the second trial now under review the same evidence was offered as on the first trial, supplemented by the plaintiffs by details as to the exact correctness with which they followed the rules of the New York Cotton Exchange, and supplemented by the defendant with more details on the issues urged by him, but practically and substantially all the evidence as to the intentions of the parties and the earmarks showing such intentions as to the purchase and contemplated delivery of cotton on the one hand, or gambling in cotton futures on the other, was substantially as on the first trial. That the whole business of dealing in cotton futures between Haven & Clement on the one side and James on the other was in fact and in result a wagering business is practically undisputed. No one can read the evidence and reasonably reach a contrary conclusion. It is undisputed that James from the beginning so intended, and so informed Tate, the agent of Haven

& Clement who solicited and obtained the business for his principal. Tate was examined on both trials, and although examined at great length and detail, frequently taking refuge in a "bad memory on account of lapse of time," yet nowhere did he deny that James so informed him, but asserted strongly that he did not tell his principal. Haven, senior partner of the firm of Haven & Clement, was examined at length on the first trial, and his evidence so taken was admitted on the second trial, and nowhere does he deny his knowledge that the James' business was wagering or dealing in cotton futures; but he does testify, when asked in reference to the James correspondence, as follows:

"Q. Did not Mr. Tate do the letter writing and the telegraphing? A. Mr. Tate did the letter writing and he referred the letters to me and— Well, the clerks did the telegraphing. Mr. Tate had charge of the business for Haven & Clement. I didn't undertake to attend to the details of it at all. Therefore this was Mr. Tate's work, the carrying on of the correspondence. He wrote the letters and dictated the telegrams to these men, and he knew more about that than anybody.

The general rule is that "the knowledge of the agent is the knowledge of the principal," and there is nothing in this case to take it out of the rule. See Wright Blodgett Co. v. United States, 236 U. S. 397, 35 Sup. Ct. 339, 59 L. Ed. ——. To induce James to deal in cotton futures through the firm of Haven & Clement, Agent Tate offered James a line of credit up to $5,000, which Haven & Clement confirmed by letter as follows:

"August 17, 1904.

"D. W. James, Blakely, Ga.—Dear Sir: Soon after returning from his Southern trip, which occurred a few days ago, our Mr. Tate called our attention to an important omission in the letters we wrote you soon after he had conferred with you when in Blakely, viz.: That we had overlooked mentioning the arrangement which he made with you to give you a credit up to $5,000 on trades which you might make through our house in the cotton market. We now beg to confirm what Mr. Tate said to you on that subject, the understanding being that, when we have executed your orders in cotton, we are to call on you for margin as soon as $5,000 is necessary to protect the contracts we are carrying for you at the market or when accounts are closed. We trust that this will be satisfactory, and that we shall receive your commands when you are doing anything in cotton. We shall certainly give your account our best attention and remain,

"Yours very truly, [Signed] Haven & Clement."

Does the expression "trades in the cotton market" cover the purchase or sale of cotton when actual delivery is intended? And is it customary for brokers to give credit covering margins when actual delivery is contemplated? No witness has so testified. The letters and telegrams from Haven & Clement to James during the course of business in 1904 show that they understood and fully appreciated the fact, and they go far to indicate actual knowledge, that James was gambling in cotton futures, to wit:

August 6th:

"We would not be surprised if the price went a little higher, but we consider cotton a sale on any bulge of that character."

October 6th, confirming telegram:

"Lower prices seem inevitable and it is likely that this decline will go to an exaggeratedly low price."

October 12th:

"This market at present looks as though it would ease off by degrees barring no bad weather, but it does not look as though it will sell much below ten cents, and if it breaks to ten cents again we would advise that you buy more cotton, but buy January or beyond."

October 14th, after naming conditions in the market:

"We believe in purchase on every break; buy the far months."

November 2d:

"Sentiment as to cotton has greatly changed in the last few days, and it looks as though the market will be pushed up some higher; but during the congested condition of spots it is not likely there will be any great and extended advance, but reactions from time to time, making the market a good scalp."

November 16th:

"This has been one of the most rushed and quickly marketed crops on record, and of course a great deal of cotton has accumulated everywhere; but the end is now, or soon will be, in sight, and the big crop estimators will be a thing of the past. Therefore we think this market is a purchase on every easy spot. If the American mills ever start to buy, we will see a remarkable advance; also if the farmers hold, if they are able to do, they can shape prices for 2 cents per pound in advance."

And after James was closed out December 5th:

"The bear force is well organized and hammer prices on every rally. We are just in receipt of a telegram from Oklahoma stating that snow, sleet, and rain there will rot unopened bolls and they think market would be a sale at least for the present."

Concerning these letters counsel for plaintiff in error very forcibly says:

"Throughout all these letters, the phraseology, verbiage, vernacular—yea, the very atmosphere of every expression, each and all—belie the suggestion of any intention to deal in anything but speculative transactions, and no other conclusion can be reached by a mind seeking for the truth."

All the books of Haven & Clement showing the James transactions were in evidence, and their bookkeeper, Binning, in explaining the cotton future blotter, testified:

"I said we had a general blotter. That is a cotton blotter. Q. Spot cotton, you mean, or futures? A. Futures. As to how that book is arranged, on the top of the page is the date. As to that (what) follows that—if a man makes a loss of a certain amount of money, we charge him with it on that book. In addition to the lines across the page, there is a column for the number of bales which is traded in, a column for the option, the column for the money, and a column for whose account. And there is one column for his name. The next is the column for the bookkeeper's posting check mark, his initials. There is a column in front for the date. It is usually dated at the top, if we are busy; if we are not busy, it would be dated on the side. I made the entries in that book from the account sales. I would enter in that book the charges against all customers one right after another on one page, if they lost money. Q. Suppose they won? A. They were credited in that book. Q. On the same page; on the opposite page? A. The opposite page. Q. Then the

losses were on the left-hand side and the profits were on the right-hand side? A. The losses were on the left-hand side and the profits were on the right-hand side. I prefer to say profits, instead of won."

And the record teems with much other pointed evidence in line with Mr. Binning. In Williamson v. Majors, 169 Fed. 762, 95 C. C. A. 186, in deciding in a similar case as to knowledge necessarily derived from the way the cotton future business was handled by the parties, this court said:

"From what has been recited, it is clear that, in his buying and selling cotton futures, Williamson, who was in the real estate business, and not in the cotton business, had no intention to actually buy or sell cotton, but was merely speculating on the rise and fall of the cotton market, intending to settle by receiving or paying differences—in fact, gambling in cotton futures; and it seems clear that Bettis Majors knew all about it. Certainly, from a mere inspection of Williamson's orders, he ought to have known it. Under the evidence, to assume his ignorance of Williamson's gambling would be a reflection on his intelligence. Knowing the nature of Williamson's dealings in cotton futures, he facilitated, if not encouraged, him, furnished credit and money to carry on the same, and, finally, took the transactions off his hands by 'closing out' as to Williamson and 'taking them over' to himself."

As opposed to this view, it is contended: (1) That these transactions could not be gambling transactions, because by understanding and agreement they were to be purchases and sales of cotton futures that were to be conducted according to the rules and under the regulations of the New York Cotton Exchange, which exchange it is contended contemplates the actual delivery of cotton under any contract made according to its rules; (2) that there have been two verdicts by juries in favor of Haven & Clement.

[2] 1. In considering the first-mentioned contention, it is to be borne in mind that the real nature of the transactions in question is not to be determined by looking at only the forms and words made use of in the contracts entered into. What the parties really intended is shown by what they said and did before the dealing started and while it was going on. It is not open to reasonable question that the evidence above referred to strongly indicates that, though under James' orders contracts were made which called for the future receipt or delivery of cotton "subject to the by-laws and rules of the New York Cotton Exchange," Haven & Clement, equally with James, never had in contemplation any actual delivery of cotton as a result of any of the transactions between them, but that the understanding of both parties to those transactions was that they would be closed by the receipt or payment of the difference between the contract price and the market price at the closing-out time. No attempt has been made to reconcile the claim now urged in behalf of Haven & Clement, that they contemplated actual deliveries of cotton, with some of the facts disclosed by undisputed evidence, notably that furnished by letters written to James while the dealing was in progress, which contained such suggestions to him as the one to buy more cotton on breaks in the market, the one to sell on bulges in the market, and the one to the effect that stated conditions made "the market a good scalp." The uncontradicted testimony of a witness introduced by Haven & Clement makes it

plain that no member of the exchange could really expect deliveries of cotton to be made as the result of scalping operations, which confessedly are quick ventures in the market, entered upon with no expectation of receiving or delivering the thing contracted about, but intended to be closed by the payment or receipt of the differences in prices resulting from the market fluctuations.

The evidence which has been referred to even more convincingly points to the conclusion that Haven & Clement understood that no delivery of cotton was to be expected as a result of James' ventures, when that evidence is considered in connection with that which disclosed the disposition which Haven & Clement made of the contracts they entered into in executing James' initial orders. The balance claimed by Haven & Clement to be due to them from James arose out of what the former did in executing the latter's orders to buy cotton for future delivery and his subsequent orders to close out the transactions so entered upon. Haven & Clement executed those orders of James by entering into contracts with other members of the Cotton Exchange, who thereby obligated themselves to deliver, at the times indicated in James' orders, to Haven & Clement, "subject to the by-laws and rules, New York Cotton Exchange," the number of bales stated in James' orders. The result, so far, was that Haven & Clement, as brokers, held for James, their customer, the obligations of other members of the exchange to deliver cotton in the future to Haven & Clement, "subject to the by-laws and rules" of the Exchange. While the matter remained in this situation, Haven & Clement are to be regarded as brokers holding for their customer contracts enforceable by them in behalf of the customer. But Haven & Clement, before receiving any further order or instruction from James with reference to such contracts, reported to him as having been entered into for his account and risk, so dealt with the contracts as to terminate all right to enforce them against the other members of the Exchange who had incurred liability under them. Each of those contracts for the future delivery of cotton to Haven & Clement was without any order from James, canceled by being set off against other contracts by which Haven & Clement had similarly obligated themselves to other members of the Exchange; the differences between the prices respectively stated in the contracts so set off against each other being paid to the member of the Exchange whose contract obligated him to buy at the lower price. And the evidence on the subject was such as to leave no room for reasonable doubt that Haven & Clement so terminated the existence of the contracts as soon after they were entered into as the opportunity to do so was afforded. This disposition of the contracts left in existence no contract under which either Haven & Clement, as brokers for James, their undisclosed principal, or James himself, could expect a future delivery of cotton to James, or to Haven & Clement on his account, unless another enforceable obligation for the future delivery of cotton was substituted in the place of those which were extinguished.

It is urged in behalf of Haven & Clement that there was such a substitution; that they themselves, by force of by-laws and rules of the New York Cotton Exchange, subject to which the extinguished con-

tracts were made, were substituted as parties obligated to make deliveries to James of the cotton which had been contracted for on his account. This contention is based upon the presence in the by-laws and rules referred to of certain provisions which are applicable when a member of the exchange offsets and settles a contract which he had made on the order and for the account of a customer. One of these provisions is to the effect that when this is done:

"Thereupon the said member, or his firm, if he is trading in the name of a firm of which he is a member, shall be substituted in the place of the said party from whom such purchase or to whom such sale was originally made, and shall be deemed a party to the contract for all purposes."

Another provision is the following one:

"Any member who may find that he holds, for account of his correspondents, contracts, both of sale and purchase, in the same month which offset each other, shall be authorized to offset and settle such contracts and to substitute therefor his own name, and he shall be responsible to his principals for the strict fulfillment of such contracts, and shall be liable to them for all damage or loss they may sustain by reason of such substitution."

The nature of the substitution resulting from the operation of the provisions just quoted cannot be determined without according due effect to other by-laws and rules of the Exchange which are equally applicable. A by-law of the Exchange explicitly provides that no contract for the future delivery of cotton shall be enforced by the exchange, or by any committee or officer thereof, unless both parties thereto shall be members of the New York Cotton Exchange. It is plain from the rules which prescribe the steps required in making such deliveries of cotton or warehouse receipts therefor as the contracts made between members of the Exchange can be regarded as calling for cannot be taken except by and between members of the Exchange. No outsider can intrude himself, can be either the giver or the recipient of one of the transferable notices of delivery by the use of which alone there can be brought about such a delivery as is contemplated under a contract for the future delivery or receipt of cotton made between members of the Exchange and subject to its by-laws and rules. Nothing in the provisions for substitution indicates that the substituted member's resulting obligation to his customers is other or in any respect different from the elaborately conditioned and qualified obligation which another member was under until the contract he made was settled and canceled.

We have not been referred to, nor have we discovered, any provision which purports to have the effect of substituting Haven & Clement, as the result of their settling with another member of the Exchange who had contracted with them for the future delivery of cotton, to any obligation other than the one which that other member had been under. Plainly that other member's obligation was not enforceable, except in behalf of one who was a member of the Exchange. It seems equally plain that the obligation to which Haven & Clement were subjected by way of substitution could not, because of the fact that James was not a member of the Exchange, entitle him to the only kind of delivery of cotton or warehouse receipts for it which is in con-

templation when a contract for future delivery is entered into between members of the Exchange. It seems necessarily to follow that the by-laws and rules of the Exchange, in providing for a substitution and at the same time making any contract for the delivery of cotton which is governed by them unenforceable by one not a member of the Exchange, are to be understood as contemplating a substitution so narrowly limited and qualified that it cannot be regarded as conferring upon the customer any right to demand or expect the only kind of delivery which any one had contracted to make, or as giving rise to any liability of the substituted member other than to compensate his customer for such loss or damage as the latter may sustain in consequence of the cancellation of the contract which had been made on his order and at his risk. It cannot well be inferred that a broker would under such circumstances so cancel a contract he held for his customer unless the understanding between them was that no delivery of the commodity contracted for was to be made, and that the only anticipated outcome of the transaction was the payment or receipt of the difference between the contract and the market price.

The result of Haven & Clement's disposition of the contracts was as effectual a deprivation of James of the benefit of any contract under which a delivery of cotton to him or on his account could be enforced or reasonably expected as was disclosed by the evidence in the case of Higgins v. McCrea, 116 U. S. 671, 6 Sup. Ct. 557, 29 L. Ed. 764, which showed a similar cancellation of a contract by a broker, unaccompanied by any pretense of a substitution. The ruling made in the case of Board of Trade v. Christie Grain & Stock Company, 198 U. S. 236, 25 Sup. Ct. 637, 49 L. Ed. 1031, furnishes support for the contention that the contracts made by Haven & Clement on James' orders to buy cotton for future delivery are not proved to have been of a gambling nature by the circumstance, standing by itself, that those contracts were entered into with the expectation that they might or would be satisfied by set-off or ringing. But nothing said or decided in that case is opposed to the conclusion that such a cancellation by a broker, without any order from his customer and unaccompanied by any substitution in the place of the canceled contract of another enforceable contract for the delivery of the thing nominally dealt in, is pursuasive evidence of the broker's understanding that no actual delivery of such thing was really in contemplation.

We do not understand that the contention is made that the New York Cotton Exchange does not afford convenient facilities for carrying on gambling operations in cotton futures. The evidence in this case conclusively shows that a very small percentage of the immense number of contracts made on that exchange for the future delivery of cotton result in the actual delivery of any cotton. If such a venture is entered upon and prosecuted with the understanding between the principal and his broker, by whose agency the transaction is carried on, that no delivery or receipt, as the case may be, of cotton is expected to occur, but that the dealing is to be concluded by the payment or receipt of the difference between the contract price and the market price at the time of settlement, the trans-

action is a wagering or gambling one, and is rendered none the less such a one by the circumstances that it is carried on by means of contracts which on their face call for the actual delivery or receipt of cotton. Bibb v. Allen, 149 U. S. 481, 13 Sup. Ct. 950, 37 L. Ed. 819.

2. The jury in the first trial was not properly charged in respect to the law of Georgia with regard to wagering contracts, and a new trial was granted for that reason. The verdict rendered under such circumstances is not entitled to much consideration as a finding by the triers of the facts that the transaction in question was not in its nature a wagering or gambling one. It is true that on the trial which is now under review the judge charged the jury directly and specifically with regard to wagering, but through the ingenuity of counsel in pressing their respective theories of the case in requested and specific charges, the instructions on this subject were so mixed and confused with others laying special emphasis on the significance of the inquiry as to whether Haven & Clement's disposition of the contracts they entered into on James' initial orders did or did not conform to the by-laws and rules of the Exchange as to make it very probable that the jury was left under the impression that if they found from the evidence that there was such conformity—which the evidence plainly tended to prove—this would require the further conclusion that the transaction in question was not a gambling one. This is evidenced by the fact, as above fully set forth, that after deliberating a considerable time they came back into the courtroom and asked for further instructions as to the effect of third parties being interested in the contracts and as to the legality of the same. They were recharged specifically on the wagering defense, but the legality of the transactions was stressed as follows:

"That is to say, if you find that the plaintiffs have established their case, that is to say, they have shown that they had those orders from James to buy and sell cotton respectively, and that they proceeded to execute those orders in a proper way, faithfully and right, and if, as a result of that, they paid out for him on those accounts, as they claim here, this amount of money which is claimed, the balance of which is claimed here, then they would make out their case so far as they are concerned, and it would be up to this defendant. Under the rules of the New York Cotton Exchange, as I have stated to you, or rather the practice of the New York Cotton Exchange, and the rules of the Exchange have been upheld by the Supreme Court of the state of New York and by the highest court in the state, the Court of Appeals, and these contracts held to be valid contracts upon the ground, as I stated to you, that the delivery of cotton can be required under them, and under the charter of the New York Cotton Exchange, and under the laws as applicable thereto."

In view of the evidence in the case, the verdict seems to show that confusion still prevailed in their minds as to the law propositions by which they were required to be governed. However this may be, on the whole record, we conclude that the undisputed evidence was such as clearly and fully to show to every reasonable and impartial mind that Haven & Clement on the one side, and James on the other, had no intention or expectation that any cotton would actually be delivered, and that the whole business in controversy was only wagering on the

rise and fall of the prices of cotton futures in the New York Cotton Exchange market.

The judgment of the District Court is reversed, and the cause is remanded, with instructions to grant a new trial, and thereafter proceed in accordance with the views expressed in this opinion.

UNION S. S. CO. v. LATZ. SAME v. ABRAHAMSON. SAME v. GUALALA S. S. CO.

(Circuit Court of Appeals, Ninth Circuit. May 17, 1915.)

Nos. 2473, 2474, 2516.

COLLISION ⊂=39—STEAMSHIPS MEETING AT SEA—INATTENTIVE LOOKOUT.

A collision at sea in a calm night between the steamships Argyll and Gualala, meeting on slightly converging courses, *held* due solely to the fault of the Argyll, in that she did not keep an efficient lookout, and after sighting the Gualala failed to observe her course, but, assuming their courses to be parallel, changed her own course slightly to give more sea room, which brought her nearer the Gualala's course; also because she accepted the Gualala's signal to pass port to port, and attempted to carry out the agreement, when, owing to her course at the time and the nearness of the vessels, she should have given danger signals and reversed at once.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 39; Dec. Dig. ⊂=39.

Signals of meeting vessels, see note to The New York, 30 C. C. A. 630.]

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

Suits in admiralty by Konstant Latz and by Aslak Abrahamson against the American steamship Argyll, Union Steamship Company, claimant, and by the Gualala Steamship Company against the Union Steamship Company. Decrees for libelants, and claimant and respondent appeals. Affirmed.

The cause of the injuries sustained, of which complaint is made, was a collision between the steamships Argyll and Gualala. The former is a ship of 320 feet in length, and at the time was carrying a cargo of gasoline, distillate, and kerosene. The latter is about 120 feet in length, and was loaded with tan bark and railroad ties. The former was proceeding in a northwest course, while the latter was running in an opposite direction, upon the open sea, on a practically clear night. The water was smooth, with a slight westerly swell and a light breeze.

D. S. McAlpine, the Argyll's third officer, was on the bridge at the time of the collision, which occurred about 3:05 or 3:07 in the morning of October 15, 1912. He relates that the lookout called his attention to a green light, which he saw at the same instant, about a point and a half on his starboard bow. Shortly afterwards the Gualala blew one whistle and ported her helm, and then he saw the red light, which indicated that the vessel was crossing his bow. In the interval, the ships were coming into closer position. McAlpine answered with one whistle, and ported his helm to try to clear the Gualala, which was turning to the right crossing his bow, his purpose being to parallel the Gualala and pass her; but there was not space enough, and the collision occurred. When the Gualala showed her red light and blew one whistle, Mc-

Alpine says, "I immediately altered my helm hard aport, and at the same time rang the engine room telegraph full speed astern, and blew him three whistles to indicate I had done so." McAlpine further relates that the porting of his helm would swing the Argyll's bow to the right. The Gualala was about three ship's lengths of the Argyll away at the time the Gualala showed her red light and blew her whistle, and the Argyll was making eight knots per hour by the log. If, instead of porting her helm, the Argyll had continued straight ahead, McAlpine was of the opinion that there still would have been a collision, but that the Gualala would have struck the Argyll; that such would have been the case if the Argyll had reversed her engine without changing her course, and it is probable that the result would have been the same if the Argyll had starboarded her helm and gone either full speed ahead or full speed astern. McAlpine further relates that at no time did he starboard his helm, but that subsequent to the receipt of the one whistle from the Gualala the Argyll may have swung in her course to port half a point or a quarter of a point. The Argyll still had considerable headway at the time of the impact, and struck the Gualala "head and head." Had the ships, when first sighted, continued on their respective courses, McAlpine thinks they would have passed over 600 feet apart.

On cross-examination McAlpine further relates that he saw both the starboard and masthead lights of the Gualala when they were reported to him, and that the vessel was inside of a mile distant; that it was about a minute and a half or two minutes after that that the Gualala blew one whistle. When the Gualala blew one whistle, McAlpine answered with one whistle, indicating that he was going to port his helm, and did so, and went to starboard, and at the same time he saw the Gualala's red light, the Gualala having already changed her course. At that time the vessels were about two ship's lengths apart, and the ships came together in "about two minutes and a half or so"—possibly in that time. McAlpine testified before the United States inspectors that he first saw the Gualala about 1½ to 2 points off the Argyll's starboard bow, and that she was about three miles away, but on his further cross-examination he was of the opinion that the Gualala was about a mile and a half away. Replying to an interrogatory he says: "A mile and a half is what I said now." The whistles of the two vessels were exchanged when they were about 900 feet apart. As the vessels approached each other, the Gualala changed her course to starboard about one-half point, and at the time of the exchange of whistles the Gualala was about 2 points on the starboard of the Argyll. McAlpine then testified, as interrogated, as follows:

"Q. Do you remember this testimony before the inspectors, Mr. McAlpine: 'Q. Did you notice any difference—whether the red light came up, and the green light went out, or vice versa? A. His green light was to our green light. He was clear then, and would have gone two to three ship's lengths from our vessel. When I heard his one whistle, it called my attention to him; when I saw his red light, sir, she was three to four lengths away.' Do you remember that testimony? A. Yes, sir. Q. Then, it is a fact that the whistle on the Gualala called your attention to it, and you then looked and saw the red light. Is it not true that the whistle called your attention to it? A. Certainly he brought my attention to it. Q. You did not know when that red light was first visible from the Argyll? A. No, sir; not until I saw it come into view. Q. Not until you saw it come into view. You did not see it come into view; you heard the whistle, and then you looked up, and you saw the red light? A. Yes, sir. Q. You do not know when that red light was first observable from the Argyll? A. No, sir.

"The Court: That is so? A. Yes, sir. Q. As I understand, you do not know how long the red light may have been in view from the Argyll before he blew this whistle? A. Not accurately.

"Mr. Lillick: When did you change your course on the Argyll from the course upon which you were proceeding to the course one-half a point port with reference to these lights? A. I did not change it. Q. Your log, as I remember it—your log reads: '2:59. Lookout man reported green light on starboard bow two points; altered course one-half point to port; received one whistle from vessel.' Do you remember when your course was altered one-half a point to port? A. No, sir. Q. You do not? A. No, sir. Q. Do you

know whether your course was altered one-half a point to port? A. It was not altered. Q. It was not altered? A. No, sir. Q. Do you know who wrote this in the log book? A. Some of it is in my writing, and some of it is in some one else's. Q. Do you know whose writing the language is: 'Altered course one-half point to port; received one whistle from vessel.' Do you know whose handwriting that is? A. No, sir. * * * Q. What course were you steering before the lights of the Gualala came up? A. Northwest one-half west. Q. Northwest one-half west? A. Yes, sir. Q. What was the first change you made in the course? A. From that course hard aport. Q. That order of 'hard aport' was given after the passing signals? A. Yes, sir. Q. Any other change made in the course of the Argyll after the whistle was blown? A. No, sir; not until after the collision. * * * Well, as I said before, she was a point and a half on our bow; she would have been that distance off of us when she passed. Q. When you testified on direct examination that the Argyll never changed her course at all, except for perhaps a quarter or half a point, what did you mean by that? A. Well, it is customary when you see a vessel on the bow at that distance to say to the man at the wheel: 'Don't let her come any closer; keep off a little.' That is not considered as a change of course. Q. But you did change her course? A. Yes, sir; I spoke to the wheelman. I said, 'Do you see that fellow, Andrew?' He said, 'Yes.' I said, 'Don't let him come any closer.' Q. You do not know how far the course was changed? A. It was not changed any; she may have swung one-fourth or one-half a point; it is not a direct order to change the course."

On cross-examination by Mr. Wall, witness further testified:

"Q. And you never saw the red light and the green light of the Gualala at any time together prior to the collision, did you? A. No, sir. Q. All of the time prior to the collision the Gualala was on your starboard bow? A. She was never anywhere else until the collision. * * * Q. You say you saw the green light? A. Yes, sir. Q. And you never, prior to the collision, saw the two lights together? A. Yes, sir. Q. But you did afterwards see the red light? A. Yes, sir. Q. Will you tell the court why it was, when the Gualala turned so that you lost her green light and picked up her red light, why you did not see the two lights together? A. Just at that particular minute I was not looking at the Gualala. Q. At that crucial moment, when she changed from the green light to the red light, you were not looking at her; is that the fact? A. Not looking in that direction. Q. Then you were not keeping a lookout on her at the time when she turned so as to lose her green light and show her red light; is that the fact? A. I was not looking at her at that actual moment. Q. You were not looking at her? A. Yes, sir. Q. She was over on the starboard bow? A. Yes, sir. Q. And your two vessels coming together at the rate of 16 knots an hour? A. We were coming parallel. Q. You were not separating, were you? A. Yes, sir; we were separating. Q. How were you separating?

"The Court: One was going northwest, and the other southeast.

"Q. Did you at any time prior to the collision take any particular notice of the bearings or change in bearings of the Gualala's light? A. No, sir. Q. You did not? A. No, sir. Q. And you never at any time saw her masthead light and her two side lights at the same instant? A. No, sir."

The log book was offered in evidence, and an entry therein, which the witness says he thinks is in the chief mate's handwriting, reads as follows:

"2:59. Lookout man reported green light 2 Pts on Str. Bow; altered course ½ Pt to Port; rec'd one whistle from vessel. 3:05. Reversed engines full astern. 3:07. Collided with stmr. Gualala."

At the left of this entry appears the statement: "Answered with one blast; gave 3 blasts; helm hard to port."

Richard Dickson, the master of the Steamer Argyll, came on deck just after the signals were given, and saw the vessels come into collision. He says the angle of impact was probably 40 degrees; that the helm of the Argyll, to the best of his recollection, was hard aport; the Argyll responded slowly to her helm, being constructed with a keel; when going at 8 knots an hour she could be stopped in about 7 minutes, between 7 and 8 minutes; that when he came on the bridge he saw a red light and a bright light of the Gualala, and the Argyll was about three ship's lengths from the Gualala.

John Hansen was lookout on the Argyll at the time of the collision, stationed on the forecastle head. He relates that he first saw the masthead light of the Gualala between a point and a half and two points on the starboard bow. He next saw a green light in the same direction. He reported the Gualala's light on the starboard bow, and immediately after her green light. After reporting the Gualala's green light, the Gualala blew one whistle, which the Argyll answered with one whistle. Witness continued to see the green light of the Qualala for a little while, "a second" after the whistle was given. Thereafter he saw a red light and a green light and a masthead light, all three at the same time; saw the red light and green light together "just a few moments" after the one whistle. At the time of the collision, he says, the Gualala was coming about a point and a half or two points on the starboard bow of the Argyll, not quite parallel with the Argyll's course, but pretty near, and the vessels came together a second or so from a head-on collision; the Argyll gave three whistles a few seconds after giving the one. He continued to watch the light on the Argyll from the time he first saw it. On cross-examination witness says he made no report to the officer on the bridge when he saw the red and green lights together; that the boats came together about two or three minutes after seeing the first light, and when the light was seen they were, to his recollection, about three or four ship's lengths apart, which would be around 1,200 feet; that during the time he was watching the lights of the Gualala she seemed to change her bearing, after she blew her first whistle, to the Argyll's port, which decreased the distance between the vessels; that it seemed a couple of minutes that the boats came together after the whistle, and it was a mater of a few seconds after he saw the red light, "about half a minute or so."

Andrew Torbjorsen was at the wheel of the Argyll. He received orders from the third officer on the bridge, immediately after the one whistle, to put his helm hard aport, which were obeyed. The ship, he says, at the time of the collision was steering N. W. ¼ W. One whistle was given by the Argyll after the whistle from the Gualala, and then about a minute afterwards the Argyll blew three whistles. He saw the Gualala's red light just after the collision. On cross-examination he relates that he kept a straight course, and did not change the vessel's course at all until he put the helm hard aport; that from the time the first whistle was blown it was about a minute until the collision, and it was about two or three minutes from the time the lookout reported the lights to the time the whistle was blown. He never got any instructions from the officer on the bridge to keep away from, and not to go any closer to, the Gualala, and when he saw the red light of the Gualala, after the collision, it was on the starboard bow of the Argyll. The Argyll, he says, in answering her helm, starts slowly, and then moves "pretty quickly."

James Dickie was of the opinion, from a careful examination of the Gualala after the collision, that the two vessels came together very close to 30 degrees from a straight line, and, further, that the Gualala was crossing the course of the Argyll, and was at the time on the latter's starboard bow.

Such, in short, is the testimony of the claimant respecting the manner in which the collision came about.

On the other hand, Harry Deloss Gibbs, for libelant, who was second mate and on the bridge of the Gualala at the time of the collision, relates that the Gualala was making 7¾ or 8 knots an hour; that he first saw the Argyll's range light when she was about a mile and three-quarters or a mile and a half away, and about four minutes before the collision; that the lights were nearly in range, and were on the port bow of the Gualala, a point and a half or two points; that about three minutes before the collision he saw the Argyll's port side light; that he was watching the range lights in the meantime, and the vessel did not change her course up to the time he saw her port light, when he blew one blast of his whistle, which was answered immediately; the man at the wheel was ordered to put the helm to port, and the vessel paid off about 1½ points; that the Argyll's range lights appeared to be changing, and the helm was ordered hard aport; that the vessel looked as if she had changed her course, but appeared as if she were not porting her helm at the time, and looked as though she were coming to starboard. The next thing he saw was her green side light, which was about a minute and a half

after he saw her red light. He saw the Argyll's red light first, and her green light about a minute and a half later. When the Argyll's range lights were seen, he says, the Gualala was steering south-southeast, or southeast, compass course, deviation one degree westerly. When "I saw her port side light," says the witness, "I blowed one blast of the whistle, and told the man to put his helm to port. We was heading south-southeast then. I saw these range lights changing, and I told him to put his helm hard aport, and then I saw the green side lights; then I stopped and backed full speed." The Gualala was heading south-southwest, when the engines stopped and backed full speed astern. The Argyll answered with one whistle, but, he says, "there was no more whistles blown. * * * I don't think he [the Argyll] ever stopped and backed. I think he was going full speed all the time. * * * The way it looked to me, the Argyll put her helm hard astarboard when she answered this one whistle." He further relates that the Argyll commenced to swing to starboard; that shortly after the Gualala blew one blast, her range lights began to change, and that is the reason the Gualala's helm was ordered hard aport; that the Argyll changed her course just about the time the Gualala stopped and backed, which was just about the time the Argyll's green lights were seen; that at this time the vessels were about a quarter of a mile apart, and the Argyll did not, during any portion of the time after her range lights were first seen, up to the time of the impact, get over on the Gualala's starboard bow: this because the Gualala "was going on a port helm"; that the lookout reported the range lights of the Argyll, but made no further report; that the Gualala had not lost her headway at the time of the impact, and it appeared that the Argyll had never stopped, and that the two vessels met nearly head on.

On cross-examination he says that the course of the Gualala was southeast; that the range lights of the Argyll were seen about a point and a half across the Gualala's port bow, and the course of the Argyll, as indicated by the range lights, was nearly in a direct line for the Gualala; that the helm of the Gualala was ordered to port, and the vessel ported about 1½ points; that at that time the vessels were about a mile and a half apart, and it was about three minutes before the collision. Witness next saw the Argyll, the whole ship; saw the red light about a minute after he saw the range lights. When he saw the range lights, he blew one blast, and when the answer came he put his helm to port. At this time, the Argyll was about a mile distant, and when he saw the body of the Argyll she was about a quarter of a mile distant, or a little more. As interrogated, he testified:

"Q. After you blew your one whistle, you ported your helm, and she continued to swing on that port helm? A. Yes. Q. You say the Argyll answered with one whistle? A. One whistle. Q. What did you do next? A. Well, I saw the Argyll's range lights changing. Q. The range lights changing? A. Yes; and I told my man to put his helm to hard aport. Q. How were they changing? How could you tell the range lights were changing? A. Well, they appeared to me they were changing. Q. And it was by those range lights that you were judging that she was swinging? A. Yes. Q. Which way did you think she was swinging? A. Well, I thought she was swinging to—I thought she was swinging a little to starboard. Q. Then you at that time ordered your helm to hard aport? A. I still saw that range light, and I ordered him to put his helm hard aport. Q. From that time, from the swinging of the range lights, you thought the Argyll was swinging to starboard? A. I thought she was swinging a little to starboard; it appeared that way to me. Q. How long before the collision was it that you put your helm hard aport? A. It was about a minute and a half. Q. How long was that after you had first put your helm to port? A. It was about half a minute. Q. Her bow was then swinging to starboard under her port helm, with the engines working full speed ahead, going about 8 knots? A. Yes; her engines were going full speed ahead. Q. What was the next that you saw of the Argyll? A. The next thing I saw was a green light. Q. How soon was that after you put your helm hard aport? A. That was about 25 or 30 seconds. Q. How far distant was the Argyll from you at that time? A. About a quarter of a mile. Q. How did she bear from you? A. She was on our port bow. Q. How much? A. She was about two points on our port bow. Q. How soon

after you saw the Argyll's green light did you reverse full speed astern? A. Right away. Q. That was about 25 seconds before the collision, 25 or 30 seconds before the collision? A. No; it was about a minute before the collision. Q. You have just stated that you saw the green light about 25 or 30 seconds before the collision? A. No; I did not. Q. How did you come to reverse full speed astern a minute before the collision? A. Well, I knew there was going to be a collision, or I was nearly certain of it. * * * Q. When you reversed full speed astern, you had not at that time seen this green light? A. Yes; that is what made me reverse. Q. By seeing the green light? A. Yes. Q. How long was that, did you say, before the collision? A. About a minute. Q. About a minute? A. Yes. Q. How far distant did you say that you thought the Argyll was then? A. About a quarter of a mile away. Q. Your vessel continued to swing on this port helm all this time, did it not, going ahead at 8 knots up to the time you stopped her—she continued to veer off to starboard under this port helm up to the time you reversed? A. Yes. Q. And at the time of the collision the Gualala had not stopped in the water; she still had headway? A. She still had headway; yes. Q. So that she was still under the influence of her hard aport helm, forging ahead, was she not? A. Yes. Q. Now, how fast, in your judgment, was the Gualala going through the water at the time of the actual impact? A. About a mile an hour. Q. That is a knot an hour? A. A knot an hour."

Witness was also of the opinion that the Gualala had swung about six points when she started to reverse her engines. On further cross-examination by Mr. Wall, he explains that, when he spoke of the Argyll swinging to starboard, he meant that she was swinging on a starboard helm, but the bow was swinging to port; that, with the helm to port, the Gualala's bow, when backing, would swing to port. He further says: "I know for a fact we was heading south-southwest just a few seconds before the vessels ran together. I know that to be a fact, because I looked at the compass. Just at the time they struck I don't know, but just a few seconds before that I know the Gualala was laying in that position."

Fred Carlson relates that he was at the wheel of the Gualala, and that she was steering southeast; that he saw the Argyll's mast light when she was about a mile and a quarter away, about a point or a point and a quarter off the Gualala's port bow. When he heard the exchange of whistles he was ordered to port his wheel, and not more than half a minute after that he was ordered to "put her hard over," and it was about 3 or 3½ minutes after the whistle that the collision took place. From the time the wheel was hard over, he says, to the instant of collision was not more than a minute. It looked to him as if the Argyll were following the Gualala right along. "We could get no further apart from her; she was coming up on us right along. * * * We were four points off the course the time we struck." On cross-examination he had gotten the helm over before the order "hard aport" came, but the vessel had not steadied on her course at that time—was still swinging. The vessel was heading at the time of the collision south-southwest.

Ernest Comstedt, the lookout on the Gualala, testifies that he saw the masthead light of the Argyll about three miles away, and "just a little after" saw her red light. After having the masthead light, he reported to the second mate on the bridge, who replied, "All right." Further testifying, he says: "After I reported her light, we was blowing one whistle, and the Argyll was answering us right off, and I could see her red light when we swung, being swinging to starboard, and she was still coming closer to us, and somehow she couldn't swing clear; she was keeping on swinging with us, and I didn't know what way she was going; she was coming right after us, came right on for us, like." The vessels struck about three minutes after sounding the whistle. He did not notice the Argyll's green light at any time.

Edward J. McCutchen, Ira A. Campbell, and McCutchen, Olney & Willard, all of San Francisco, Cal., for appellant.

Ira S. Lillick and L. A. Redman, both of San Francisco, Cal., for appellee Gualala S. S. Co.

F. R. Wall, of San Francisco, Cal., for appellee Latz.

S. T. Hogevoll, of San Francisco, Cal., for appellee Abrahamson.

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

WOLVERTON, District Judge (after stating the facts as above). The sole problem for solution is to fix the fault, if possible, as it respects the vessels in collision. The testimony of the respective parties, touching the situation and the incidents leading up to the collision, is very conflicting and in many particulars flatly contradictory. The solution rests on where the truth lies, and this can only be determined by ascertaining where reliance shall be placed.

The Argyll claims that when the Gualala was first sighted the ships were passing green light to green light; the Argyll having the Gualala from 1½ to 2 points on her starboard bow. The Gualala, on the other hand, claims that the vessels were passing red light to red light; the Gualala having the Argyll from 1½ to 2 points on her port bow. If either were right, and the vessels had kept their courses, it is probable there would have been no collision. If both were right—a thing not possible—and the vessels had kept their courses as indicated by the testimony of each respectively, they would have come together in proximity to where they did actually meet, and at approximately the same angle, 30 degrees from a right line, assuming one had the other 1½ points on her starboard and the other 1½ points on her port bow. The inconsistency in statement being such that both parties cannot be right, the problem is to determine what did in fact happen.

If McAlpine, as he says, saw the green light of the Gualala, when a mile and a half distant, a point and a half on his starboard bow, and each vessel had kept its course, there could have been no collision. McAlpine says they would have cleared by 600 feet. There must have been a change made in the course of one vessel or the other to bring them together. McAlpine affirms that the Gualala changed her course to starboard, so as to cross the bow of the Argyll, and it is urged that the fault lies with the Gualala in so doing. Shortly after the red light of the Gualala was observed, McAlpine says, the Gualala blew one whistle and ported her helm, which changed her course to starboard, and it was then that he saw the Gualala's red light, which indicated to the Argyll that she was crossing the Argyll's bow. McAlpine further asserts that in the interval between the time the light was reported and the time the whistle was blown the vessels had come into closer relation, so much so that there was not time for the Argyll to do anything else than to answer with one whistle, which she did, and an attempt was made, by porting the Argyll's helm, to clear the Gualala port to port. It is very apparent according to McAlpine's view of the situation, that instead of the vessels keeping their course in the interval, and passing clear, as he thinks they would have done by 600 feet, they were approaching one another to a common point of contact, for at the time the whistles were exchanged they were in such close proximity that there was nothing else for the Argyll to do but to answer with one whistle and port her helm; this although, from the time the Gualala was observed, the Argyll had gradually changed her course one-half point to port, which was calculated to widen the clearance of the vessels as it first appeared to McAlpine.

It will be remembered that McAlpine, when he discovered the Gualala, directed the officer at the wheel of the Argyll not to let "that fellow" come any closer, and McAlpine and the ship's log concur that the Argyll changed her course to port one-half point. The officer at the wheel denies, and so does McAlpine at other periods in his testimony, that there was any change of course in that direction; but it is altogether probable that such a change in the Argyll's course was made. It is manifest, however, that the ships were running on their respective courses, which were bringing them into probable contact. This fact was apparently not discovered by McAlpine until it was too late to do anything else than to answer with one whistle, which was in effect an agreement with the Gualala to pass port to port, and the collision followed. Why it was that this approach of the vessels was not sooner discovered is not satisfactorily explained by McAlpine. He says that he did not observe the change in lights of the Gualala from green to red until the one whistle was given, and then he looked up and saw it. He did not know when the red light was first observed from the Argyll, nor how long it had been in view.

Hansen is not in accord with McAlpine, for he says that when the Gualala blew her whistle her green light was visible to the Argyll; that after sounding her whistle she seemed to change her course to the Argyll's port; that he continued to see her green light a while—"a second"—and then he saw her red light and green light together, and her masthead light; this "just a few moments" after the one whistle.

The rule seems to be that a ship changes her course after and not before she signals her intention as to which side of the approaching vessel she will pass, and this is what the Gualala did, according to the testimony of McAlpine, which confirms what the second mate on the Gualala says he did. The red light, therefore, must have been visible from the Argyll before the Gualala changed her course, and Hansen must have seen the change from green to red before the passing signal was given. This he did not report to McAlpine. But McAlpine, being on the bridge, should have observed the change for himself, and noted then and there the course the Gualala was steering.

According to Torbjorsen, who was at the wheel of the Argyll, one whistle was given by the Argyll after the whistle of the Gualala, and then about a minute afterwards the Argyll blew three whistles. So that some time must have elapsed between the one-whistle and the three-whistle signals of the Argyll. In this Torbjorsen is not in accord with McAlpine, who says the three-whistle signal was given almost instantly after the one whistle. The engines were reversed after the three-whistle signal was given.

According to Gibbs, the second mate on the Gualala, he saw the Argyll's range lights, which were nearly in range, when about a mile and a half or a mile and three-quarters away; the Argyll being on the Gualala's port bow a point and a half to two points. About a minute afterwards he saw her port side light. The Argyll did not change her course up to that time. Then he blew one whistle, which was answered immediately with one whistle. After giving the signal, the

man at the wheel was ordered to port the helm, and the vessel paid off a point and a half to starboard. The Argyll's range lights appeared to be changing, while he saw her red light, and the helm was ordered hard aport. He next saw the Argyll's starboard light, and then he stopped and backed full speed. He was of the impression that the Argyll never stopped and backed at all. To his vision, although the Argyll had exchanged the passing signals port to port, the Argyll appeared to be swinging to port. This he judged from the changing of her range lights, and it was this that caused him to put his helm hard over to port. When the Argyll's green light showed up, a collision appeared imminent, and then the order was given full speed astern.

Carlson, who was at the wheel of the Gualala, thinks the Argyll, when first sighted, was from a point to a point and a quarter off the Gualala's port bow; but it appeared to him that, while the Gualala was executing her maneuvers, with her helm to port, then hard aport, and after the signals were exchanged, the Argyll was following the Gualala right along. "We could get no further apart from her," he says; "she was coming up on us right along."

Comstedt, the watchman, who reported the Argyll's red light, relates that he could see her red light when she swung to starboard, but that she was still coming closer, and somehow she could not swing clear; she kept on swinging with the Gualala; "she was coming right after us."

To our minds, the cardinal and decisive point in the controversy consists in the fact, as to which both parties agree, that the passing signals were given whereby the vessels agreed to pass port to port. The Argyll evidently thought at the time it was safe to do so, and said in effect to the Gualala, "Make your maneuver accordingly," which it did. All agree that the Gualala's course was continually changing to starboard after the signals were given, up to the time of the collision, unless her backing checked it. Notwithstanding this maneuver on her part, of which the Argyll could not have been ignorant, the Argyll kept pressing her by coming in the same direction, and it was probably not until a minute had elapsed that the Argyll gave the signal indicating that she had stopped and thrown her engines full speed astern. If there was danger of collision by accepting the Gualala's offer to pass port to port, the Argyll should never have agreed to it, but should have at once protested by giving the danger signal, and taken immediate steps to prevent it. But the Argyll did not do this, and allowed some time to elapse at a critical moment before stopping and backing.

The Gualala's view of the situation is, to our minds, the true one. The Argyll was heading, when first sighted, almost in a direct course for the Gualala. As the Gualala continued to starboard, the Argyll changed to port, as she was directed to do, and probably swung further in that direction than the officer on the bridge was aware of. Notwithstanding this, he concluded it was safe to pass port to port with the Gualala until it was too late to prevent a collision. A more vigilant lookout on the Argyll would have discovered the converging course of the vessels, and prompt action would have prevented the dis-

aster. A critical analysis of the testimony convinces us that the Gualala did not suddenly cross the bow of the Argyll, but kept her course until signaling her intention to pass to port, and, on receiving the Argyll's signal consenting thereto, directed her course accordingly. Opinion respecting time and distance in such a contingency is more or less unreliable, and hence we base our findings upon what seems to be the more reasonable testimony, omitting a critical discussion of such evidence.

Nor is the opinion of experts as to the probable result from defined relative positions of the vessels at a given time of any value, unless the positions, the time of running, and distance of separation are correctly estimated and given—a thing hardly possible under the exigencies then present.

"Lookouts," says the Supreme Court, "are valueless unless they are properly stationed and vigilantly employed in the performance of their duty; and if they are not, and in consequence of their neglect the approaching vessel is not seen in season to prevent a collision, the fault is properly chargeable to the vessel, and will render her liable, unless the other vessel was guilty of violating the rules of navigation." The Colorado, 91 U. S. 692, 699, 23 L. Ed. 379.

The failure of officers whose duties are to keep a lookout to see what they ought to have seen, or to hear what they ought to have heard, where casualty results, is a grievous fault, for which the vessel will be rendered liable. The New York, 175 U. S. 187, 20 Sup. Ct. 67, 44 L. Ed. 126. Further, as to the duties of a lookout and the consequences attending a lack of strict attention to duty, see The Oregon, 158 U. S. 186, 15 Sup. Ct. 804, 39 L. Ed. 943; The Viola (D. C.) 59 Fed. 632.

It is strange and inexplicable that the Argyll did not discover very much sooner than it did that its course was converging upon that of the Gualala, not diverging from it, starboard to starboard, and at the same time that it should have assented to a signal to pass to port. There was a serious inattention to what ought to have been sooner observed, and if it had been sooner observed we cannot doubt that the collision would have been avoided. In the case of The Manitoba, 122 U. S. 97, 7 Sup. Ct. 1158, 30 L. Ed. 1095, the Manitoba was held at fault, under somewhat similar circumstances, for not slowing, and not reversing until too late to avoid a collision, although the Comet, the other vessel, ported and ran across her course—a fault (that is, of running across the converging vessel's course) not attributable to the Gualala in the present case, as we are convinced by the manifest weight of the testimony.

The Gualala is perhaps subject to criticism that she did not sooner stop and reverse, but the primary and causative fault lies with the Argyll, for which she is alone liable.

This being the only controverted question, the decrees in all the cases are affirmed.

WOO WAI et al. v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. May 3, 1915.)

No. 2507.

1. CRIMINAL LAW ⊜37—ENTRAPPING ONE TO COMMIT AN OFFENSE—EFFECT.
The fact that a detective or other person, suspecting that accused is about to commit a crime, prepares for his detection, as a result of which he is entrapped in the commission of the crime, is no excuse, where accused alone conceived the original criminal design.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 42; Dec. Dig. ⊜37.]

2. CONSPIRACY ⊜28—CRIMINAL RESPONSIBILITY—STATUTORY PROVISIONS.
Where it was the intention of United States officers, who induced defendants to attempt to bring Chinese persons across the Mexican border, that the law should not be violated, and that they would prevent the consummation of the offense which they lured defendants to undertake, by intercepting the Chinese so brought across the border and returning them to Mexico, defendants, though not aware of the fact, were not guilty of a conspiracy to commit a criminal act, punishable by Rev. St. U. S. § 5440, merely because they engaged in the act, which was not to result in an accomplished offense against the United States.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 40, 41; Dec. Dig. ⊜28.]

3. CRIMINAL LAW ⊜37—ACTS OF OFFICERS INDUCING CRIMINAL ACTS—EFFECT.
Where government officers induced defendants to commit a criminal act not contemplated by them, and the purpose of the government officers was not to secure the punishment of any of them, but to place one of them in a position where he might be compelled to disclose facts of which he was suspected of having knowledge not derived from unlawful acts of his own, but relating only to unlawful acts of others, a conviction of defendants was contrary to public policy.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 42; Dec. Dig. ⊜37.]

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

Woo Wai and others were convicted of conspiracy to bring into the United States Chinese persons, and they bring error. Reversed and remanded for new trial.

Denis & Loewenthal, of Los Angeles, Cal., and C. H. Sooy, David L. Levy, and J. C. Campbell, Weaver, Shelton & Levy, all of San Francisco, Cal., for plaintiffs in error.

Albert Schoonover, U. S. Atty., and Harry R. Archbald, Asst. U. S. Atty., both of Los Angeles, Cal., for the United States.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge. The plaintiffs in error were convicted under an indictment which charged them with conspiring to bring into the United States from Mexico certain Chinese persons who were not entitled to enter or remain in the United States. The defense on which the defendants relied upon the trial was that they had been lured by

government officers into the commission of a seeming violation of the laws of the United States, and that therefore they had committed no offense against those laws. Upon the efficacy of that defense the trial court charged the jury that, if they found the facts to be fully as testified by the defendants, those facts would constitute no legal or valid defense in law to the charge embraced in the indictment. That instruction is assigned as error.

The facts testified to by the defendants, and so referred to in the charge, together with the facts established by the prosecution, are the following: In October, 1908, Fernando Sanford, a confidential agent of the Immigration Commission then in charge of the investigation of offenses in violation of the immigration laws on the Pacific Coast, suspected that Woo Wai, a Chinese merchant who had resided for many years in San Francisco, possessed information in regard to previous unlawful importations of Chinese women into San Francisco, and the complicity therein of certain officers of the Immigration Commission. He conceived the scheme of obtaining a hold on Woo Wai, in order to make him tell what he knew, by luring him into the commission of an offense against the laws of the United States, by bringing Chinese across the Mexican border into California, for which he was thereafter to be indicted and convicted, all for the purpose of bringing pressure to bear upon him to make him "come through," or, as was testified by one of the immigration officers:

"He wanted to get this man, as it were, in the door, so that the man would have to give him the information."

To carry out this scheme, Sanford, at the expense of the United States, employed a detective. The detective, whose name was Roy, approached Woo Wai, and suggested to him that he knew a scheme by which they could make money. Without disclosing the nature of the scheme, Roy induced Woo Wai to accompany him to San Diego. Both the expenses of Woo Wai and Roy on that journey were paid out of the treasury of the United States. Roy introduced Woo Wai to the local inspectors of immigration at San Diego, Ralph L. Conklin and Harry H. Weddle. Sanford had informed these inspectors of the nature of the scheme. It is to be said in justice to the inspectors that they entered into the scheme with great reluctance. In their presence and in the presence of Woo Wai, Roy made the proposition that they permit Woo Wai to bring Chinese across the Mexican border, for which they should receive $50 a head. They assented, but Woo Wai said:

"This is in violation of the law. It could not be done."

The inspectors said:

"Oh, well, if we make no arrest, who can make arrest? And then we don't want to go to jail. You don't want to go to jail, and if you go to jail, we will go to jail."

After returning to San Francisco, Roy again urged Woo Wai to carry out the scheme and to engage some other Chinese to assist him in it, and Sanford wrote Conklin as follows:

"Dear Conklin: I have seen our friend since his return, and I think we will make matters all right yet. * * * I will stand the responsibility of your letting another man through, if necessary. Use him yourself for all he is worth."

Woo Wai, accompanied by his partner, Wong Chung, and Woo Mon Yin, again went to San Diego and had an interview with Conklin and Weddle, and again Woo Wai and his partner returned to San Francisco, for the reason, as Woo Wai testified, that he did not like to handle this kind of work. During the summer of 1909 Roy was again urging Woo Wai to go to San Diego and enter into the scheme which had been devised, and Conklin wrote him several letters for the same purpose. The inspectors explained to Woo Wai the means by which Chinese could be brought across the border, the routes which they should follow, and the methods by which they could avoid arrest. Conklin went so far as to go to San Francisco to interview Woo Wai. It was not until about April 1, 1910, that Woo Wai finally assented to enter into the scheme which had been so assiduously and persistently urged upon him. He engaged his codefendants, Wong Chung and Wong Yee, to assist him.

[1] The general rule in regard to entrapment is expressed in 12 Cyc. 160:

"The fact that a detective or other person suspected that the defendant was about to commit a crime, and prepared for his detection, as a result of which he was entrapped in its commission, is no excuse, if the defendant alone conceived the original criminal design."

In the case at bar there is no evidence that, prior to the time when the detective first approached Woo Wai, any of the defendants had ever been engaged in the unlawful importation of Chinese, or had ever committed or thought of committing any offense against the immigration laws. The purpose for which the detective was employed, and the object of the scheme of entrapment, was not to punish men who were suspected of crime; but the whole purpose was to place Woo Wai in a position where he might be compelled to disclose facts of which he was suspected to have knowledge, knowledge not shown to be derived from unlawful acts of his own, but which related only to the unlawful acts of other persons—certain officers of the Immigration Commission at San Francisco. The scheme could not be carried out at San Francisco, the place where Woo Wai resided. It must necessarily be staged at a place where Chinese could be brought across the border, so they took him to San Diego, more than 500 miles away, and there coaxed, persuaded, and urged him into the commission of the acts upon which the indictment was based, at the same time promising him the protection of the officers of the United States.

[2] There are two grounds on which we think the judgment should be reversed:

First. The facts as testified to by the defendants, and as supplemented by the evidence for the United States, fall short of showing that there was in fact a conspiracy to commit a criminal act within the meaning of section 5440. It was the intention of the officers who induced Woo Wai and his associates to attempt to bring Chinese across

the Mexican border that the law should not be violated. They intended to prevent the consummation of the offense which they lured the defendants to undertake. Their purpose was to intercept the Chinese so brought across the border, and return them to the country whence they came. Woo Wai and his associates, therefore, although they were not aware of that fact, were engaged in an act which was not to result in an accomplished offense against the laws of the United States. In State v. Douglass, 44 Kan. 618, 625, 26 Pac. 476, 478, the court said:

"Where a thing is not an offense at all, a party cannot be guilty of committing an offense by merely consenting thereto; and even where the thing is an offense, a party can be guilty of committing an offense by consenting thereto only where his consent is of that affirmative and expressed character which amounts to a counseling, aiding, or abetting in the commission of the offense."

If no violation of the law was to be accomplished by the act of the defendants, it follows that they could not be held for conspiracy to do that act. In Connor v. People, 18 Colo. 373, 33 Pac. 159, 25 L. R. A. 341, 36 Am. St. Rep. 295, the offense charged was a conspiracy to rob a train. The conspiracy was originated by a detective employed by the railroad company. He induced the defendant to participate in it. The court held, following the settled rule on that subject, that, since the railroad company assented to the robbery, there was no trespass and no larceny. In answer to the contention that it was not for larceny, but for conspiracy, that the defendant was indicted, the court held that, inasmuch as the act done would constitute no crime, there could be no prosecution for a conspiracy to commit the act, citing Johnson v. State, 3 Tex. App. 593.

[3] Second. We are of the opinion that it is against public policy to sustain a conviction obtained in the manner which is disclosed by the evidence in this case, taking the testimony of the defendants to be true, and that a sound public policy can be upheld only by denying the criminality of those who are thus induced to commit acts which infringe the letter of the criminal statutes. Some of the courts have gone far in sustaining convictions of crimes induced by detectives and by state officers. This is notably so of the decision in People v. Mills, 178 N. Y. 274, 70 N. E. 786, 67 L. R. A. 131. But it is to be said, by way of distinguishing such cases from the case at bar, that in all of those cases the criminal intention to commit the offense had its origin in the mind of the defendant. Thus in People v. Mills, it was the defendant who made the first suggestion looking toward the commission of the criminal act, and for the commission of that act the district attorney furnished him opportunity and lent him aid. In the case at bar, the suggestion of the criminal act came from the officers of the government. The whole scheme originated with them. In O'Brien v. State, 6 Tex. App. 665, the court said that a case is not within the spirit of the Criminal Code where an officer "originates the * * * intent, and apparently joins the defendant in the criminal act first suggested by the officer, merely to entrap the defendant." In Commonwealth v. Bickings, 12 Pa. Dist. R. 206, it was said:

"No state, therefore, can safely adopt a policy by which crime is to be artificially propagated. * * * This is virtually the case of a detective who, by promising to perpetrate a crime, lures an innocent man to aid and abet him, the object being, not the perpetration of the crime, but the luring of the abettor."

In Love v. People, 160 Ill. 501, 43 N. E. 710, 32 L. R. A. 139, the court said:

"It is safer law and sounder morals to hold that, where an owner arranges to have a crime committed against his property or himself, and knows that an attempt is to be made to encourage others to commit the act and others to be led into and encouraged in its commission by acting in concert with such owner, no crime is thus committed."

In Commonwealth v. Wasson, 42 Pa. Super. Ct. 38, it was said:

"In considering the question of public policy the clear distinction, founded on principle as well as authority, is to be observed between measures used to entrap a person into crime in order, by making him a criminal, to aid the instigator in the accomplishment of some corrupt private purpose of his own, and artifice used to detect persons suspected of being engaged in criminal practices, particularly if such criminal practices vitally affect the public welfare rather than individuals."

In Saunders v. People, 38 Mich. 218, Judge Marston said:

"Some courts have gone a great way in giving encouragement to detectives, in some very questionable methods adopted by them to discover the guilt of criminals; but they have not yet gone so far, and I trust never will, as to lend aid or encouragement to officers who may, under a mistaken sense of duty, encourage and assist parties to commit crime, in order that they may arrest and have them punished for so doing."

In People v. McCord, 76 Mich. 200, 42 N. W. 1106, Judge Campbell said:

"But our duty to public justice and decency requires us to dispose of the other views of the case. In some of its features it is one of the most disgraceful instances of criminal contrivance to induce a man to commit a crime in order to get him convicted that has ever been before us. If the prisoner's statement is believed, and the court in the latter part of the charge seems to have assumed it was probable, he was not the active agent in the crime, but guilty of aiding and abetting Flint, and therefore only guilty if Flint was guilty. It would be absurd to hold Flint guilty of burglary. He did what he was expected to do, and had no such intent as would hold him responsible. It may be true that a person does not lose the character of an injured party by merely waiting and watching for expected developments. Possibly—but we do not care to decide this—leaving temptation in the way without further inducement will not destroy the guilt in law of the person tempted, although it is a diabolical business, which, if not punishable, probably ought to be."

Many other courts have expressed similar views, even while, in some instances, upholding the conviction obtained by the methods which were criticized.

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

In re FRISCHKNECHT.

(Circuit Court of Appeals, Second Circuit. April 13, 1915.)

No. 207.

BANKRUPTCY ⟸387—CONFIRMATION OF COMPOSITION—REVESTING OF PROPERTY IN BANKRUPT.

Under Bankr. Act July 1, 1898, c. 541, § 70f, 30 Stat. 565 (Comp. St. 1913, § 9654), providing that "upon the confirmation of a composition offered by a bankrupt the title to his property shall thereupon revest in him," money in the hands of a third person, belonging to a bankrupt, arising out of a transaction prior to the bankruptcy and which had not been reduced to possession by the trustee, on confirmation of a composition at once revested in the bankrupt, free of any claim or right of the trustee, and became subject to attachment by a creditor whose debt was not provable or dischargeable in the bankruptcy proceedings.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 603–605, 607–616; Dec. Dig. ⟸387.]

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

This cause comes here from the United States District Court for the Southern District of New York, on petition to review an order dated December 22, 1914, denying a motion in bankruptcy proceedings to compel certain creditors of the bankrupt to release an attaching lien.

On February 16, 1914, a petition in involuntary bankruptcy was filed against John Frischknecht to have him adjudicated an involuntary bankrupt, and on May 4, 1914, he was duly adjudicated a bankrupt. Two days prior to the filing of the petition in bankruptcy Frischknecht had made an assignment for the benefit of creditors to Henry B. Singer, and as such assignee Singer received $87,463.55. Subsequently Singer was elected the trustee of the bankrupt. Prior to the filing of the involuntary petition in bankruptcy Frischknecht had assigned certain outstanding accounts to Knauth, Nachod & Kuhne, bankers, for advances thereon made, which accounts exceeded the amount of the advances made, and after repayment of the indebtedness to the banking firm there remained a credit in favor of Frischknecht or of his estate of about $1,340.

Charles Hirschhorn and Fred Hirschhorn are the owners of the premises in the city of New York which were leased by them to Frischknecht prior to the bankruptcy proceedings under two certain leases for a period of 10 years, expiring February 1, 1921, at an annual rental of $8,500; and on or about October 2, 1914, the Hirschhorns instituted an action in the state court in New York against Frischknecht for the sum of $5,077.03 for rent due under the leases for the months of March, April, May, June, July, August, September, and October. Frischknecht had paid the rent for the premises prior to March.

John Frischknecht is a nonresident of the country, it being alleged that he resides in St. Gall, Switzerland, and pursuant to the provisions of the New York Code of Civil Procedure, a warrant of attachment in the action was procured on that ground.

On May 9, 1914, the bankrupt made an offer to his creditors in composition in bankruptcy of 60 cents on the dollar, to be paid in cash to the creditors, which was signed and accepted by a majority in number and amount of the claims filed. The cash amount required to pay the creditors under the composition, and required to be deposited in court pursuant to the Bankruptcy Act, was, as stated by the District Judge, $70,000. This did not include trustees' and attorneys' compensation and disbursements, but apparently included

the commissions of the referee. The attorneys all waived in writing the deposit in the composition proceeding of a sum sufficient to pay their fees.

The sum of $70,000 was deposited by the trustee in bankruptcy on September 1, 1914, in the Equitable Trust Company of New York. The expense of the administration of the bankruptcy proceedings were concededly not paid, and the only funds available for that purpose was the excess of $614.69 remaining of the deposit to meet the composition proceeding and the sum of $1,340, the moneys remaining in the hands of the bankers.

On September 14, 1914, an order was made by the referee in bankruptcy which provided: (1) That the attorneys for the petitioning creditors were entitled to the sum of $200 for their services and $40 for their disbursements, and the trustee was directed to pay the same. (2) That the attorneys for the trustee were entitled to an allowance for services of $2,250 and $85.32 for their disbursements, and the trustee was directed to pay the same. (3) That the attorneys for the bankrupt were entitled to an allowance for services of $1,500 and to the sum of $70.14 for disbursements, and these the trustee was likewise directed to pay.

The entry of this order was consented to by the trustee's attorneys and by the bankrupt's attorneys. Thereafter, and on October 5, 1914, the attorneys for the trustee made a motion for the payment out of the moneys deposited in the composition proceeding of the allowances made to the attorneys, etc., pursuant to the order of the referee made on September 14, 1914. That order recited the fact that it appeared that there were moneys at that time deposited in the composition available for the performance of the order. It is not denied that the order of October 5, 1914, has been complied with, and that whatever sums were filed were paid out of the moneys deposited in the composition proceeding.

On December 14, 1914, a motion was made that an order issue compelling the attaching creditors to release the attachment upon moneys and outstanding accounts of the bankrupt in the hands of Knauth, Nachod & Kuhne, and directing them to turn over to the trustee any and all moneys in their possession representing a surplus of the accounts assigned to them by the bankrupt prior to his bankruptcy, as well as any and all uncollected outstanding accounts which they at that time had in their possession by virtue of that assignment. The motion was denied in all respects in an order dated December 22, 1914. And it is this order which the trustee asks this court to vacate and set aside and to grant him the relief prayed for.

Myers & Goldsmith, of New York City (Emanuel J. Myers, of New York City, of counsel), for petitioner.

Rose & Paskus, of New York City (Benjamin G. Paskus and Jacob Scholer, both of New York City, of counsel), for respondents.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge (after stating the facts as above). The Bankruptcy Act provides two modes of procedure in the administration of a bankrupt's estate. One of these modes authorizes the bankrupt after his adjudication to make a composition with his creditors. The bankrupt, after he has been examined in open court or at a meeting of his creditors and after he has filed in court the schedule of his property and the list of the creditors required to be filed by bankrupts, may offer terms of "composition" to his creditors. This he does by tendering a certain amount to the creditors in lieu of that which they would ultimately receive upon the distribution of the assets of the estate in the other and more usual mode of administration. The composition which the bankrupt offers must be accepted in writing by a majority in number of all creditors whose claims have been allowed, which number must represent a majority in amount of such claims. It is without effect,

however, unless it is confirmed by the court, and unless the amount tendered and necessary to pay all debts which have priority and the cost of the proceedings has been deposited subject to the order of the judge and in such place as he designates. Section 12 of the Act. A composition thus made restores the estate to the bankrupt, frees him from all his debts provable and dischargable in bankruptcy. Remington on Bankruptcy, § 2346. And the act in section 70, subdivision "f," expressly declares that:

"Upon the confirmation of a composition offered by a bankrupt, the title to his property shall thereupon revest in him."

It appears in this case that after the bankrupt had filed the schedules of his liabilities and at the first meeting of the creditors duly and regularly held, and after he had been examined at such meeting, he submitted an offer of compromise which was signed by a majority in number and amount of claims filed. This offer of composition was on the basis of 60 per cent. on the dollar. An order to show cause was issued and served upon the creditors directing them to appear and show cause why the composition offered by the bankrupt should not be confirmed; and on October 1, 1914, it was duly confirmed in an order which recites that:

"The application for the confirmation of the composition having duly and regularly come on to be heard, and it appearing that said composition is for the best interests of the creditors, and that the bankrupt has not been guilty of any acts or failed to perform any of the duties which would be a bar to his discharge, and that the offer and its acceptance are in good faith and have not been made or procured by any means, averments or acts contrary to the acts of Congress referring to bankruptcy," etc.

Thereafter the trustee deposited with the Equitable Trust Company of New York the sum of $70,000 to cover a composition on the basis of 60 per cent. on the dollar. This sum was sufficient to cover all the items and amounts required under the bankruptcy law to be paid, as follows: (1) Creditors entitled to priority; (2) costs of the proceedings; (3) creditors whose claims had been scheduled, filed and approved; (4) creditors whose claims had been scheduled but which had not been filed. These various items, as appears from the schedules, were as follows:

Creditors entitled to priority	$ 2,395.00
Costs of the proceedings	464.70
Creditors whose claims had been scheduled and approved	63,172.82
Creditors whose claims had been scheduled but not filed	2,312.52
	$68,345.04

After the payment of the above items there was left in the hands of the trustee a balance of $1,654.96. But of this $259.44 would be required for a claim to be adjusted. To expedite and facilitate the composition proceeding by making the cash deposit of $70,000 required for that purpose, on August 18, 1914, the attorneys for the petitioning creditors, the attorneys for the bankrupt, and the trustee waived the deposits in the composition proceeding of a sum sufficient to pay their service fees and disbursements as attorneys for the creditors and bankrupt, as well as attorneys for the trustee.

The claim of the creditors Hirschhorn is for rent which accrued after the bankruptcy. The claim was one, therefore, not provable in bankruptcy; it being well settled that a landlord cannot maintain a claim against the estate of his tenant for any rent accruing under the lease after commencement of the proceedings in bankruptcy. As the composition only discharged the bankrupt from debts provable in bankruptcy, the claim of the Hirschhorns survived. As soon as the composition offered by the bankrupt was confirmed by the court the Hirschhorns began their suit against him in the New York court, alleging that he was indebted to them for rent in the sum of $5,077.03, and they attached the money in the possession of the bankers, Knauth, Nachod & Kuhne, which it is claimed is due from them to the bankrupt.

The attaching creditors assert that the right to money now in the possession of the bankers is because of the confirmation of the composition, and that by virtue of the language of Bankr. Act, § 70, subd. "f," the money had revested in the bankrupt and so became subject to the attachment. The trustee in bankruptcy, however, asserts that, while the right to the money in the hands of the bankers revested in the bankrupt, it did so subject to all judgments, decrees, and orders of the bankruptcy court, and all rights to and equities imposed upon and attaching to the bankrupt's estate and in force at the time of the order confirming the composition; that while the trustee did not have immediate manual or actual physical possession, and had not obtained or reduced to possession the funds in the banker's hands, those funds at the time of the confirmation of the composition were the property of the bankruptcy estate, and that the confirmation of the composition did not destroy or annul the adjudicative force of the order of September 14th, which granted to the attorneys certain allowances for their services; that at that time the trustee was by force of the Bankruptcy Act vested with the title to the balance of the fund in the hands of the bankers and to which they asserted no claim; that that money was in custodia legis and as such not subject to attachment.

The persons in whose interest the trustee seeks to have the attachment set aside are the persons who expressly waived in writing in the composition proceeding the deposit of any money to pay the expenses of administration. They are the attorneys for the bankrupt, the attorneys for the trustee, both as attorneys for the trustee and as attorneys for petitioning creditors, and the trustee himself. If counsel choose to waive payment of their fees in order to make the sum so small that deposit can be made under a composition, so that the composition can be put through, this court is strongly opposed to their thereafter resuscitating their claims and insisting that they should be paid out of the estate. The bed they made for themselves they should lie in. If the bankrupt benefited by their waiver, being thus enabled to effect a composition, we think he is the one who should pay them.

But, however that may be, we have no authority under the law to grant the petition of the trustee. We do not agree with him in thinking that the moneys or the accounts in the hands of these bankers, which they obtained from this bankrupt prior to his bankruptcy, were in custodia legis at the time of the attachment. When the court confirmed

the composition, the title to these moneys and accounts under the Bankruptcy Act at once revested in the bankrupt; and such moneys and accounts might have been forthwith handed over to the bankrupt by the bankers without asking the permission of the trustee, or the bankrupt without the consent of the trustee could have maintained an action against the bankers to recover the same. We cannot import into the act what Congress left out of it. The language of the act is that upon confirmation of a composition the title of the bankrupt to his property shall "thereupon revest in him."

The funds which have been attached, and which the trustee is seeking to reach, have never been in the actual custody of the trustee, and formed no part of the sum deposited in the composition proceeding, and the trustee has no right now to reduce them into his possession. The confirmation of the composition operated to supersede the proceedings in bankruptcy, and the Bankruptcy Act operated automatically to revest the bankrupt with the title to his property.

Judgment affirmed.

UNITED COPPER SECURITIES CO. et al. v. AMALGAMATED COPPER CO. et al.

(Circuit Court of Appeals, Second Circuit. April 13, 1915.)

No. 219.

CORPORATIONS ⟸204—STOCKHOLDERS—RIGHT TO SUE IN NAME OF CORPORATION.

A stockholder cannot maintain an action at law in the name of the corporation to recover money damages or specific property, on the refusal of the corporation to bring the action.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 783–790; Dec. Dig. ⟸204.]

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

F. E. M. Bullowa, of New York City, for plaintiffs in error.

Louis Marshall and Shearman & Sterling, all of New York City (John A. Garver, of New York City, of counsel), for defendants in error.

Before COXE, WARD, and ROGERS, Circuit Judges.

WARD, Circuit Judge. This is an action at law by two stockholders of the United Copper Company, on behalf of themselves and all other stockholders of that company, averring that they had asked the defendant the United Copper Company to bring the suit and it had refused to do so, to recover treble damages under section 7 of the Sherman Act of July 2, 1890 (26 Stat. 210, c. 647), from certain of the individual and corporate defendants on the ground of conspiracy to create a monopoly in the interstate commerce and trade in copper produced in the state of Montana. The complaint alleges that certain of the defendants obtained the control of a large number of copper

mines in that state, theretofore competing with each other, and operated them as a trust by means of the defendant the Amalgamated Copper Company; that there were at the same time a number of other copper companies in Montana controlled by one F. A. Heinze and his brothers, which in the year 1902 were put under the control of the defendant the United Copper Company, from and after which date the defendant the Amalgamated Copper Company and others of the defendants combined to destroy its business and so get absolute control of the interstate commerce and trade in the copper industry of Montana. By a series of illegal acts, not necessary to specify, it was further alleged that the conspirators did procure the sale to them of all but one of the copper mines controlled by the defendant the United Copper Company at a price less than one-third of their value, leaving only a few insignificant independent companies mining and dealing in copper in Montana, and have destroyed the credit and standing of the United Copper Company and greatly reduced the profits of its business.

Demurrers were filed by the defendants on the ground that the complaint did not state facts sufficient to constitute a cause of action, and that the plaintiffs' remedy, if any, was in equity. Judge Lacombe, upon motion to dismiss the complaint on the pleadings under section 547 of the Code of Civil Procedure of the state of New York, sustained the demurrers and dismissed the complaint, whereupon the plaintiffs sued out this writ of error.

It is quite clear, and, indeed, the plaintiffs concede it to be so, that the cause of action set up belongs to the United Copper Company, defendant. The cause of action is one conferred by section 7 of the Sherman Act in tort for treble damages. We have held that it cannot be maintained at all in equity. Fleitman v. United Gas Co., 211 Fed. 103, 128 C. C. A. 31. The sole question therefore is: Can a stockholder maintain it in right of the corporation at law? The case of Metcalf v. American School Furniture Co. (C. C.) 108 Fed. 909, affirmed 113 Fed. 1020, 51 C. C. A. 599, greatly relied upon by the plaintiffs, does not apply because in it the complainant sought to recover treble damages for herself individually, together with equitable relief for the corporation. The bill for that reason was dismissed as multifarious. It must be admitted that in Sheridan v. Electric Light Co., 38 Hun (N. Y.) 396, a stockholder sued at law upon a cause of action belonging to the corporation which had refused to do so. Curiously enough, Daniels, J., sustained the action on the ground that a stockholder had such a right in equity:

"For where the officers of a corporation charged with that duty refuse to prosecute an action in a proper case, or the corporation itself is under the control of the officers whose misconduct is to be made the subject of the action, the stockholders 'have a standing in a court of equity to sue in their own names, making the corporation a party defendant.' Brinckerhoff v. Bostwick, 88 N. Y. 52, 56; Young v. Drake, 8 Hun, 61; Hawes v. Oakland, 104 U. S. 450 [26 L. Ed. 827]."

We are not persuaded by Morrill v. Little Falls Co., 46 Minn. 260, 48 N. W. 1124, which does sustain the plaintiffs' contention. We think that a stockholder's right to assert a cause of action belonging

to the corporation depends upon allegations that the corporation is acting fraudulently, in breach of trust, or ultra vires. For this reason he must go into equity. On the other hand, there appears to us to be no ground for holding that stockholders may bring actions at law in the name of the corporation to recover money damages or specific property whenever the corporation refuses to do so. Ames v. American Telegraph & Telephone Co. (C. C.) 166 Fed. 820. Such a practice would be likely to create great confusion and tend unnecessarily to take away from the corporation the management of its own affairs.

The judgment is affirmed.

WILLIAMS v. POTTER et al.

(Circuit Court of Appeals, Second Circuit. April 13, 1915.)

No. 180.

1. PILOTS ⇐5—LICENSES—REVIEW OF ACTION OF INSPECTORS.

The courts are without jurisdiction, on appeal or writ of error, to review the findings of the steamboat inspectors on an application for a pilot license, and the most they can do is to see that the inspectors act within their jurisdiction, and that the constitutional and statutory rights of citizens are not impaired.

[Ed. Note.—For other cases, see Pilots, Cent. Dig. §§ 5, 6; Dec. Dig. ⇐5.]

2. PILOTS ⇐5—RULES OF BOARD OF SUPERVISING INSPECTORS—VALIDITY.

Rule 7, § 46, of the Rules of the Board of Supervising Inspectors, providing that an applicant for pilot license whose application has been refused shall not be re-examined within a year after the first examination, is not in violation of any statutory provision, and is reasonable and valid.

[Ed. Note.—For other cases, see Pilots, Cent. Dig. §§ 5, 6; Dec. Dig. ⇐5.]

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

For opinion below, see 210 Fed. 318.

F. R. Williams, of Syracuse, N. Y., pro se.

John H. Gleason, of Albany, N. Y., and H. V. Borst, Asst. U. S. Atty., of Amsterdam, N. Y., for appellees.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

WARD, Circuit Judge. This is the last step in a long contest between the complainant and the United States inspectors of steam vessels. He originally applied to the inspectors of the district of Oswego, New York, for a pilot's license, who refused to examine him on the ground that he had not had three years' experience on deck, as required by rule 5, § 46, of the Rules of the Board of Supervising Inspectors. This decision was, on appeal, affirmed by the supervising inspector at Cleveland, and subsequently by the supervising inspector general at Washington. Thereupon the complainant

applied to the District Court of the United States for the Northern District of New York for an order compelling the inspectors to give him the examination which was denied. On appeal we affirmed this order, on the ground that the District Court had no jurisdiction in the premises. Williams v. Molther, 180 Fed. 709, 103 C. C. A. 491. Thereupon he filed a bill in the United States Circuit Court for the Northern District of New York, praying that the rule in question be declared invalid, the inspectors enjoined from enforcing it and from refusing to give him an examination, which dismissed the bill. 189 Fed. 700. We reversed the decree on the ground that the provision of the rule in question was in contradiction of section 4442, U. S. Rev. Stat. (Comp. St. 1913, § 8204), and therefore was not authorized under section 4405 (Comp. St. 1913, § 8159). Williams v. Molther, 198 Fed. 460, 117 C. C. A. 220. In accordance with this decree the local inspectors of the Oswego district did give the complainant an examination, and rejected his application which, on appeal to the supervising inspector at Cleveland, was affirmed. The latter, however, because the complainant said that he was excited when examined by the local inspectors, gave him an independent examination, with the same result. Thereupon the complainant applied to the inspectors for the Oswego district for a re-examination, who refused it on the ground that a year had not elapsed from his last examination, as required by rule 7, § 46, adopted by the board of supervising inspectors. Thereupon the complainant filed this bill, charging that the defendants had maliciously conspired to refuse him a license, notwithstanding his competency, and asking that he be declared qualified and a license be issued to him, that the whole body of rules adopted by the board of supervising inspectors be declared invalid, especially rule 5, § 46, and that treble damages be awarded to him.

[1, 2] The courts have no authority to review the findings of the steamboat inspectors by appeal or writ of error. The most they can do is to see that the inspectors act within their jurisdiction, and that the constitutional and statutory rights of citizens are not impaired. Judge Ray very properly held that the courts cannot substitute their judgment for that of the inspectors; that there was no evidence whatever of any conspiracy against the complainant; that rule 7 was entirely consistent with the provisions of title 52, U. S. Rev. Stat., and therefore within the powers of the board of supervising inspectors to adopt under section 4405.

The decree is affirmed.

HARMON v. UNITED STATES.

(Circuit Court of Appeals, First Circuit. May 26, 1915.)

No. 1122.

ALIENS ⟸69—CERTIFICATE—ISSUANCE.

Following the decision of the Circuit Court of Appeals in the Second Circuit, according to our usual practice, the decision of the Second Circuit in Yunghauss v. United States, 218 Fed. 168, 134 C. C. A. 67, is followed, and the decree of the District Court in this case of March 8, 1915, is affirmed.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 147–153; Dec. Dig. ⟸69.

Decisions of courts as authority in other co-ordinate courts, see note to F. B. Vandegrift & Co. v. United States, 97 C. C. A. 472.]

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

Application by Whitney Earle Harmon for naturalization. From a decree dismissing the petition, petitioner appeals. Affirmed.

John L. Warren, of Boston, Mass., for appellant.

Leo A. Rogers, of Boston, Mass. (George W. Anderson, U. S. Atty., of Boston, Mass., on the brief), for the United States.

Before PUTNAM, DODGE, and BINGHAM, Circuit Judges.

PUTNAM, Circuit Judge. This is an appeal from the decree of the District Court, and refers to the application of Harmon for a final certificate of naturalization. The decree of the District Court was as follows:

"March 8, 1915. Upon consideration of the petition of Whitney Earle Harmon, in open court, this 8th day of March, 1915, it appearing that the petition had not been filed until more than seven years had elapsed from September 27, 1906, the date of the taking effect of the Naturalization Act of June 29, 1906, the said petition is hereby dismissed."

The case involves the construction, with reference to the points stated in the rescript of the learned judge of the District Court, of section 4 of the Naturalization Act of June 29, 1906 (34 Stat. 596, c. 3592 [Comp. St. 1913, § 4352]). As fully explained in Re Yunghauss (D. C.) 210 Fed. 545, and in the same case in the Court of Appeals, Yunghauss v. United States, 218 Fed. 168, 134 C. C. A. 67, the latter decision being on October 8, 1914, the Second Circuit in these cases decided adversely to the position of the appellant here; and its decision, announced by Circuit Judges Coxe and Rogers, is said to have been concurred in by the District Court, and by three District Judges for the Southern District of New York, namely, Judges Mayer, Hough, and Learned Hand. It is further said in the opinion there that the result was reached in two earlier cases, while an opposing view was expressed also in two earlier cases. It is plain, therefore, that there is at least sufficient doubt to require us to follow the practice which we have heretofore established, by adopting the decisions of the Circuit

Courts of Appeals in other circuits; the Second Circuit being the only one in which the matter has been considered by the Circuit Courts of Appeals. Gill v. Austin, decided on November 21, 1907, 157 Fed. 234, 84 C. C. A. 677.

The decree of the District Court is affirmed, without costs.

NG JIN v. UNITED STATES.

NG WUN v. UNITED STATES.

(Circuit Court of Appeals, Third Circuit. May 20, 1915.)

Nos. 1924, 1925.

ALIENS ⊂=32—PROCEEDINGS FOR DEPORTATION OF CHINESE—SUFFICIENCY OF EVIDENCE.

Findings by a commissioner, affirmed by the District Court, that persons of the Chinese race, arrested for being unlawfully in the United States, had not established their legal right to remain by affirmative proof as required by statute, *held* sustained by the evidence.

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

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

Appeal from the District Court of the United States for the District of New Jersey; John Rellstab, Judge.

Proceedings for deportation of Ng Jin and of Ng Wun. From orders of deportation, affirmed by the District Court, defendants appeal. Affirmed.

Robert M. Moore, of New York City, for appellants.

Charles F. Lynch, of Paterson, N. J., for the United States.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

McPHERSON, Circuit Judge. In each of these cases the Chinaman was a manual laborer, and was found within the state of New Jersey without the certificate required by law. Each appellant, however, claimed to have been born in California, and in support of this averment offered oral testimony. Nearly all of it was given by other Chinese persons, and the commissioner held that the witnesses had not established the averment of birth. Accordingly he ordered the appellants to be deported, and the District Court affirmed the orders. On these appeals we have nothing before us except questions of fact.

Section 3 of Act May 5, 1892, c. 60, 27 Stat. 25 (Comp. St. 1913, § 4317), provides as follows:

"That any Chinese person or person of Chinese descent arrested under the provisions of this act or the acts hereby extended shall be adjudged to be unlawfully within the United States unless such person shall establish, by affirmative proof, to the satisfaction of such justice, judge, or commissioner, his lawful right to remain in the United States."

With this presumption against the appellants, the conclusion of the commissioner is not surprising, for the testimony that was laid before him (and is now before us) can only be described as confused and contradictory. We have considered it all with care, and are not satisfied that error has been committed.

In each case the order of deportation is affirmed.

LOMBARDO v. BOSTON & M. R. R.

(District Court, N. D. New York. May 17, 1915.)

1. REMOVAL OF CAUSES ⇐3—CAUSES REMOVABLE—ACTIONS UNDER EMPLOYERS' LIABILITY ACT.

Judicial Code (Act March 3, 1911, c. 231) § 28, 36 Stat. 1094 (Comp. St. 1913, § 1010), provides for the removal from state to federal courts of suits arising under the Constitution or laws of the United States, and further provides that no case arising under Act April 22, 1908, c. 149, 35 Stat. 65 (Comp. St. 1913, §§ 8657–8665), relating to the liability of common carriers by railroad to their employés, or any amendment thereto, shall be removed. *Held*, that the statute prohibits the removal of any action arising under the Employers' Liability Act, and does not merely prohibit their removal on the ground that they arise under laws of the United States.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 4, 5; Dec. Dig. ⇐3.]

2. REMOVAL OF CAUSES ⇐3—STATUTORY PROVISIONS—POWER OF CONGRESS.

Congress has a right to provide for the removal of one class of cases from a state to a federal court to the exclusion of other classes, even though suits arising under the excluded class may be surrounded by local prejudices and influences of such character and extent as to forbid the defendant a fair trial in the state court.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 4, 5, Dec. Dig. ⇐3.]

3. COMMERCE ⇐27—RAILROADS—ACTIONS FOR INJURIES TO EMPLOYÉS—STATUTORY PROVISIONS.

A railroad company was operating its road and using its track extending into different states, and was having repairs made on a track used for both interstate and intrastate commerce, and an employé, when injured, was assisting in repairing such track by shoveling dirt from between the ties of the track so used to carry interstate trains. *Held*, that both the company and the employé were engaged in interstate commerce, within the Employers' Liability Act.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 25; Dec. Dig. ⇐27.]

At Law. Action by Frank Lombardo against the Boston & Maine Railroad. On motion to remand the cause to the Supreme Court of the state of New York, county of Saratoga, from which court it was removed by the defendant. Motion granted.

Leary & Fullerton, of Saratoga Springs, N. Y., for the motion.
Jarvis P. O'Brien, of Troy, N. Y., opposed.

RAY, District Judge. This is an action to recover damages for personal injuries alleged to have been received by the plaintiff, Frank Lombardo, an employé of the defendant, on or about the 16th day of

November, 1914, at Mechanicville, in the state of New York, while he was engaged and working as a laborer in a track gang and engaged at the time in repairing defendant's tracks at Mechanicville in the yards of the West Virginia Pulp & Paper Company at said place. The sixth subdivision of the complaint reads as follows:

"That on or about November 16, 1914, at about 8 a. m., while plaintiff was employed as a laborer in the track gang which was repairing defendant's tracks in the yard of the West Virginia Pulp & Paper Company, and while plaintiff was engaged in the performance of his duties at the aforesaid time and place, shoveling dirt from between the ties under the rails of said tracks, said place where plaintiff was working being a short distance south of a place where a steel or iron joint which holds two rails together was being broken by means of a large sledgehammer and a chisel, and while he was engaged in his duties aforesaid and in close proximity to where said joint was being broken, without fault or negligence on his part, but solely by reason of defendant's negligence hereinafter set forth, said Frank Lombardo was struck on the right side of his head and near the right ear by a large piece of steel or other metal from said joint, rail, or hammer, and received the injuries herein complained of."

Subdivisions 7 to 11, inclusive, set out acts of negligence in not providing a safe place for plaintiff in which to work, in failing to provide plaintiff with safe and proper tools and appliances, in failing to properly inspect the conditions surrounding the work in which plaintiff was engaged, in failing to make suitable rules and regulations, and in requiring plaintiff to engage and work in a dangerous occupation and failing to inform and instruct him as to the dangers of the employment. Mechanicville is many miles from the state line, and on the face of the complaint it appears that all alleged acts of negligence operating to produce the injury complained of were committed in the state of New York, where the plaintiff was injured. The accident was not connected with the running or operation of any train or engine.

The plaintiff is a citizen and resident of the state of New York. The defendant is a corporation of the state of Massachusetts, and owns and operates a railroad running into the state of New York and to Mechanicville, on and over which it carries freight and passengers in both interstate and intrastate commerce. It owns and maintains these tracks which so carry cars in both intrastate and interstate commerce, but the tracks which plaintiff was engaged in repairing were wholly in the state of New York, and here the negligence, if any, operated, and here the accident happened and the injuries were received.

The complaint alleges that the plaintiff, at the time he received his injuries, was engaged in interstate commerce; but the facts stated and alleged show that he was not so engaged unless it be that the employé of a railroad company which does both interstate and intrastate commerce, and which owns tracks extending into two or more states, over which it runs trains, is engaged in interstate commerce when engaged in repairing such tracks of such railroad company at a given point far from the state line, which repairs have no special reference to interstate commerce or business. The plaintiff was engaged in making repairs on the tracks of the defendant company, but there is nothing in the record to show that such repairs were being made for

the special purpose of running interstate trains or trains carrying interstate commerce.

[1] Section 28 of the Judicial Code (Act of March 3, 1911) provides for the removal of causes from the state courts to the federal courts, and provides generally:

(1) That "*any suit* of a civil nature, at law or in equity, arising under the Constitution or laws of the United States, * * * of which the District Courts of the United States are given original jurisdiction by this title [The Judiciary], which may now be pending or which may hereafter be brought, in any state court, may be removed by the defendant or defendants therein to the District Court of the United States for the proper district;" and (2) "*any other suit* of a civil nature, at law or in equity, of which the District Courts of the United States are given jurisdiction by this title [The Judiciary], and which are now pending, or which may hereafter be brought, in any state court, may be removed into the District Court of the United States for the proper district by the defendant or defendants therein, being nonresidents of that state;" and (3) "where a suit is now pending, or may hereafter be brought, in any state court, in which there is a controversy between a citizen of the state in which the suit is brought and a citizen of another state, any defendant, being such citizen of another state, *may remove such suit* into the District Court of the United States for the proper district, at any time before the trial thereof, *when it should be made to appear to said District Court that from prejudice or local influence he will not be able to obtain justice* in such state court, or in any other state court to which the said defendant may, under the laws of the state, have the right, on account of such prejudice or local influence, to remove said cause," etc.

Then follows in the same section the following provision:

"Whenever any cause shall be removed from any state court into any District Court of the United States, and the District Court shall decide that the cause was improperly removed, and order the same to be remanded to the state court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the District Court so remanding such cause shall be allowed: Provided, that no case arising under an act entitled 'An act relating to the liability of common carriers by railroad to their employés in certain cases,' approved April twenty-second, nineteen hundred and eight, or any amendment thereto, and brought in any state court of competent jurisdiction *shall be removed to any court of the United States.*"

Construed as it plainly reads, this proviso absolutely prohibits the removal of every cause arising under the act referred to, even when within the three classes of cases referred to and made removable by the prior provisions of the section. Section 28. That is, such a case (one arising under the Employers' Liability Act) cannot be removed into the United States court, even when the necessary diversity of citizenship and amount in controversy exists, or when these facts exist and it also appears that from prejudice or local influence, or both, the defendant will not be able to obtain justice in the state court. In view of the alleged absurdity of such a provision and distinction, it has been and is urged that the provision, properly construed and applied, means that cases arising under the federal Employers' Liability Act shall not be removed from the state court to the United States District Court for trial for the sole reason that they arise under a law of the United States, diversity of citizenship and requisite amount in controversy not being found; but that when diversity of citizenship and requisite amount in controversy exist, or when from prejudice or local influ-

ence justice cannot be obtained in the state court, cases arising under the federal Employers' Liability Act may be removed to the United States District Court. The proviso is general, and comes in at the end of the section, and is not in terms restricted in its application to the clause relating to suits of a civil nature arising under the Constitution or laws of the United States, and does not read:

"That no case arising under an act entitled * * * [a law of the United States] shall *for that cause or reason* be removed to any court of the United States."

In Van Brimmer v. Texas, etc., R. Co., 190 Fed. 394 (C. C., E. Dist. of Texas), it was held that a case arising under this federal Employers' Liability Act may be removed to the federal court if diversity of citizenship and requisite amount in controversy exist, or if on account of prejudice or local influence the defendant cannot obtain justice in the state court. Other cases hold that it was the purpose of Congress to forbid the removal of any case arising under the federal Employers' Liability Act and take these cases absolutely and entirely from the operation of the removal statutes. It is urged that it was the purpose of Congress, plainly expressed, to prohibit the removal of all cases arising under the act referred to to the federal court for trial and thus limit federal jurisdiction and at the same time secure to the injured employé a trial in the court of his own selection.

[2] It is settled, I think, that Congress has the right to provide for the removal of one class of cases from the state to the federal court for trial to the exclusion of other classes, even though suits arising under such excluded classes might be surrounded by local prejudices and influences of such character and extent as to forbid the defendant a fair trial in the state court. By section 24 of the Judicial Code (Comp. St. 1913, § 1006) the District Courts of the United States are given original jurisdiction of all suits of a civil nature, at common law or in equity, where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000, and (1) arises under the Constitution or laws of the United States, or (2) is between citizens of different states. Hence the federal court is given jurisdiction, regardless of the residence and citizenship of the parties to the suit, of every case brought under the federal Employers' Liability Act where the damages alleged and claimed exceed $3,000, but such jurisdiction is not exclusive, and the plaintiff may bring his action in the state court, as Congress has so expressly provided.

Then arises the question: May a case brought under the act referred to in a state court be removed into the District Court of the United States? This right of removal, if it exists, must have been conferred by some act of Congress. This right of removal, if it exists at all, is conferred by section 28 of the Judicial Code, read and construed as a whole, and from which must be deduced the policy and intention of Congress. It seems to me that if Congress had intended to leave any case, arising under the act referred to, removable to the federal court, it would have expressed or indicated such intention in some way, and would not have used the broad and comprehensive language it did at the very end of the section providing for the removal of causes, and which

section, as stated, is the only authority for such removal. It is, of course, difficult and to me impossible to spell out, surmise, or guess any good reason for denying to a defendant common carrier engaged in interstate commerce the right to have a case arising under the federal Employers' Liability Act, when diversity of citizenship and requisite amount in controversy, or local prejudice of the extent named, exist, tried in the federal court; but Congress has so decreed in plain language, and I discover no ground or theory on which the courts can make over the statute referred to. To broadly except that class of cases from the operation of the removal statute was clearly within the power and discretion of Congress. It seems to me that, if words not found in the proviso of the removal statute are to be written into and read as a part of it, limiting and restricting the meaning of the words now found therein, it should be done by Congress, and not by judicial legislation.

In Ex parte Roe, 234 U. S. 70, 34 Sup. Ct. 722, 58 L. Ed. 1217, the District Judge had followed Van Brimmer v. Texas Pac. R. Co., supra, and refused to remand the case. It was sought by mandamus to compel a remand. This was denied, the court holding that, if the ruling was erroneous, the place to correct such error was on appeal from a final judgment in the case. The ruling in the Van Brimmer Case was referred to in stating the action of the court below, but the holding in that case was neither approved nor disapproved, and the court said:

"We are not here at liberty to consider the merits of the question involved in the District Court's ruling."

[3] It has been decided by the Supreme Court of the United States (Pedersen v. D., L. & W. R. Co., 229 U. S. 146, 33 Sup. Ct. 648, 57 L. Ed. 1125, Ann. Cas. 1914C, 153) that an employé of a railroad company which is engaged in both interstate and intrastate commerce, and uses its tracks and bridges for both kinds of commerce, is, when on foot and engaged in carrying bolts to be used in *repairing* such a bridge, engaged in interstate commerce. The court laid down the broad proposition (Justices Lamar, Holmes, and Lurton dissenting) that:

"One engaged in the work of maintaining tracks, bridges, engines, or cars in proper condition after they have become, and during their use as, instrumentalities of interstate commerce, is engaged in interstate commerce; and this, even if those instrumentalities are used in both interstate and intrastate commerce."

This, of course, settles the proposition that this plaintiff was engaged in interstate commerce when he received his injuries, as he was repairing a track used by defendant to carry both kinds of commerce The defendant was also engaged in interstate commerce, as it was operating its road and using its tracks and having repairs made at the time. See, also, St. Louis, San Francisco & Texas R. Co. v. Seale, 229 U. S. 156, 33 Sup. Ct. 651, 57 L. Ed. 1129, Ann. Cas. 1914C, 156, and North Carolina R. Co. v. Zachary, 232 U. S. 248, 34 Sup. Ct. 305, 58 L. Ed. 591, Ann. Cas. 1914C, 159.

In Illinois Central Railroad Co. v. Behrens, Administrator, 233 U. S. 473, 34 Sup. Ct. 646, 58 L. Ed. 1051, Ann. Cas. 1914C, 163, it

is held that the particular service in which the employé is engaged at the time he receives his injury must be a part of interstate commerce; that is, that the work he is doing for the railroad company must be work in carrying on interstate commerce. Pedersen v. D., L. & W. R. R. Co., 229 U. S. 146, 33 Sup. Ct. 648, 57 L. Ed. 1125, Ann. Cas. 1914C, 153. The case also holds that, not only must the railroad company be engaged at the time in interstate commerce, but that the employé, as stated, must be engaged in work which is a part of interstate commerce. It was therefore held that an employé of a carrier, who was engaged on the switch engine in moving several cars, all loaded with intrastate freight, from one point in a city to another point in the same city, was not engaged in interstate commerce, as the the company was not at the time engaged in moving interstate commerce, and the employé was not. It was also held that the employé was not engaged in interstate commerce, for the reason his duty would call him to the movement of interstate commerce on the termination of the movement of the cars loaded with intrastate freight.

Having this case in view, the Circuit Court of Appeals in the Fifth Circuit, in Illinois Central R. R. Co. v. Rogers, 221 Fed. 52, 136 C. C. A. 530, held that an allegation in the petition that the railroad company was engaged in interstate commerce at the time of the accident did not sufficiently show that the engine which struck and injured the employé was engaged in interstate commerce at the time of the accident, and hence that there was no sufficient allegation that the defendant itself was engaged in interstate commerce at the time the employé was injured. The injured employé, who was injured and killed by being struck by an engine of the defendant, was at the time engaged in cleaning stencils which were used by the railroad company to mark cars owned and used by it in interstate commerce. The court held that this employé was not engaged in interstate commerce.

If the employé of a railroad company, in carrying bolts to repair a bridge over which both interstate and intrastate trains run, is engaged in interstate commerce, for the reason he is repairing or aiding to repair an instrumentality of interstate commerce (see Pedersen Case), it is difficult for this court to understand how or why it is that an employé of a railroad company who is cleaning for use and to make fit for use an instrumentality used to designate a car which is owned by the company and used by it in interstate commerce is not engaged in interstate commerce. In effect he is repairing an instrumentality used in interstate commerce, and, as the case shows, that instrumentality upon which he was at work, to wit, the stencils, was used by the company in interstate commerce only.

However, in view of this decision of the Circuit Court of Appeals, and conceding it to be good law, this court is of the opinion that the Pedersen Case controls, and that a person engaged in repairing the tracks of a railroad company is engaged in interstate commerce, even though the repairs consist in shoveling the dirt from between the ties under the rails of the tracks used to carry interstate trains. A laborer so employed is as much engaged in interstate commerce as another employé would be when engaged in carrying bolts or spikes to fasten the

rails to the ties, and one who carries spikes to fasten the rails to the ties which carry the tracks is as much engaged in interstate commerce as the man carrying bolts to repair the bridge which supports the rails that carry the trains in interstate commerce.

If this court had the power to amend the proviso to the removal statute, it would speedily do so, and establish the rule declared in the Van Brimmer Case, as it is of the opinion that such ought to be the law. It is a harsh rule to deprive carriers engaged in interstate commerce of the privilege of removing their cases to the federal courts for trial, when sued by an employé, when the necessary diversity of citizenship exists and the requisite amount is in controversy.

Construing the proviso quoted as my judgment tells me it should be and must be construed, and following the great weight of authority as to the construction to be given it, this court feels constrained, notwithstanding the Van Brimmer Case and the Rogers Case, above cited, to grant the motion to remand.

In re MARTINEZ.

(District Court, N. D. New York. May 21, 1915.)

BANKRUPTCY ⊂=161—RIGHTS VESTING IN TRUSTEE—RIGHT TO ACCOUNTING FROM FORMER ASSIGNEE.

A voluntary bankrupt, a year before the filing of his petition, assigned the goods in his store to a trustee, who sold the same and paid the proceeds pro rata to the assignor's creditors, except the shares of two, who refused to accept them, and which were therefore returned to the assignor. *Held* that, while the assignment was neither valid as a general assignment under the laws of the estate nor enforceable, yet, having been fully executed by the assignee in good faith more than four months prior to the bankruptcy, he was not liable for any part of the money to the trustee in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 261–263; Dec. Dig. ⊂=161.]

In Bankruptcy. In the matter of Lawrence A. Martinez, bankrupt. On review of order of referee. Affirmed.

Review of an order of the referee on an accounting as to certain property assigned by said Martinez more than four months prior to the filing of the petition in bankruptcy to Leon C. Rhodes for the benefit of the creditors of said Martinez, and which assignment is in the form of an agreement between Martinez and said Rhodes, and contains certain stipulations and provisions not usual to an assignment for the benefit of creditors.

T. B. & L. M. Merchant, of Binghamton, N. Y., for trustee.
Leon C. Rhodes, of Binghamton, N. Y., pro se.

RAY, District Judge. On the 11th day of October, 1912, Lawrence A. Martinez was in business in the city of Binghamton, and had at his place of business, 66 Court street, a stock of jewelry, merchandise, fixtures, and appliances, and also bills receivable, and held a lease of

the store in which he was doing business. On the 11th day of October, 1912, said Lawrence A. Martinez entered into an agreement in duplicate with Leon C. Rhodes, as attorney, of the same place, which recited that Martinez was indebted to various persons, and desirous to assign, transfer, and set over to Rhodes, as trustee, his property in order to secure the creditors of the said Martinez. The agreement then provides that in consideration of $1 and the premises recited the said party of the first part, Martinez, "does hereby assign, transfer, set over, and deliver unto the party of the second part, as trustee, his successor and assigns, all of the assets of said party of the first part which are located and situated at the store of said party of the first part." Then follows a general description. Then follows a provision that the transfer is not to include the tools and work bench belonging to the party of the first part, "but is to include any and all other assets, merchandise, fixtures, and appliances belonging to said party of the first part and now located at or used in connection with his said store and business at No. 66 Court street, in said city of Binghamton," which was the place of business aforesaid.

The agreement then recited that Rhodes was to take possession of and sell and reduce to cash in his discretion the said property, and sell for cash or for cash and on credit and from the proceeds pay the expenses of the trust, including rent, clerk hire, legal expenses, and other expenses incident to the performance of his said duties as trustee, and distribute the balance remaining in his hands ratably among creditors according to the just amounts of their various claims in full settlement and discharge of the same. He was to pay over the surplus, if any remaining, to the party of the first part. For this purpose Martinez appointed Rhodes the said trustee to be his attorney, in his name and on his behalf to sue for and collect outstanding accounts, and to make, execute, and deliver necessary deeds of conveyances.

This agreement does not recite that Martinez had any other property, but by its terms it is confined in its operation to the specific property referred to. This agreement then provided that Rhodes should and would employ Martinez as his clerk and assistant at the store during the continuance of the business at the weekly compensation of $25, and Martinez on his part agreed to faithfully and efficiently perform his duties as such employé.

The agreement also provided that Rhodes would accept as his compensation for his services as trustee 5 per centum of the gross proceeds arising from the conduct of the business and the sale of the property. This agreement then provided that Rhodes, as trustee, should not be required to file an account in any court, but that he should report and make final written account to the creditors of said company, meaning Martinez, and that Rhodes should not be under any personal liability of any nature or kind because of error and mistake on his part in making payment to creditors in the conduct of the business or in the disposition thereof, provided he should exercise due diligence and discretion in the conduct and disposition of said business and in determining the correct amount of the claims of creditors. It was also agreed that Rhodes should not in any event be liable for any failure or default of any nature or kind because of his acts or of

the acts of Martinez, or because of the acts of the employés, agents, or servants of the said Rhodes in connection with the performance of the obligations of the trust.

The agreement then provided that the contract and agreement should not be considered as an assignment under the laws of the state of New York, but purely as a mutual and voluntary agreement for the protection and benefit of the creditors of the said company, and that the contract should not be considered as an act of bankruptcy. The agreement then provided that the same was to become of full force, virtue, and effect from and after the date when the same should be assented to and agreed to by all the creditors of Martinez, excepting such of said creditors not assenting thereto whose aggregate claims should amount to less than the sum of $500. The assent of creditors was to be evidenced by an instrument in writing attached to and forming a part of the agreement. Such a consent, not signed, was attached to the agreement, which was duly signed by both parties and acknowledged before a notary public. Martinez agreed to execute any further instruments or writings necessary to enable Rhodes to perform his contracts and agreements as specified.

It requires no citation of authority to demonstrate that as to creditors generally this agreement was void and in fraud of creditors as a general assignment under the statutes of the state of New York. All creditors, however, assented to its terms, except two. Rhodes acted under the agreement without the assent of these two creditors, and reduced the property to money and made an equal dividend of 44.3 per cent. and paid same to all except the two nonassenting creditors. These creditors were Charles W. Keeler, who had a valid claim of $900, and H. Fein & Co., who had a claim of $141.12. On the basis of an equal dividend after deducting expenses, etc., Keeler was entitled to $398.78, and H. Fein & Co. were entitled to a dividend of $62.52. The creditors who were paid their dividends have not filed claims against the bankrupt estate. H. Fein & Co. refused to accept their dividend made under this agreement, and Rhodes still holds same. Keeler refused to accept his dividend made under the agreement aforesaid, and after a time Rhodes paid the dividend made by him for the benefit of Keeler over to the assignor, Martinez. The agreement aforesaid was never recorded, and neither of the parties thereto treated same as a general assignment for the benefit of creditors. None of the proceedings required by statute in the case of a general assignment for the benefit of creditors were taken.

On the 17th day of September, 1913, Martinez filed a voluntary petition in bankruptcy, and he was adjudicated on the 18th day of September, 1913. This was more than four months after the making of the agreement aforesaid and the doing of the acts referred to. Rhodes returned the $398.78 to Martinez on the 17th day of April, 1913, which was more than four months prior to the filing of the petition in bankruptcy. The trustee in bankruptcy of Martinez claims that the title to the property mentioned vested in Rhodes as assignee and trustee for the benefit of creditors, and that Rhodes is accountable to him therefor as such to the extent at least of the money not paid out and expended

by him in the execution of the trust and in payment of necessary and legitimate expenses including commissions; that is, the trustee in bankruptcy contends that Rhodes is not protected by the payment of the $398.78 to the assignor, Martinez, but is accountable therefor, and must pay that amount to him, as well as the $62.52 which Rhodes now has and is ready and willing to turn over to the trustee in bankruptcy.

Rhodes contends that this was an agreement for the benefit of all creditors who saw fit to avail themselves of it, made between himself and Martinez more than four months prior to the bankruptcy, and that it was not a general assignment for the benefit of creditors, but a mere mutual agreement between himself and Martinez, and that while creditors might have enforced it, or have enforced their rights under it, if any, title to the property did not vest in him to the exclusion of Martinez, and that, when Keeler refused his dividend of $398.78 under the agreement between Rhodes and Martinez, he (Rhodes) had the right and that it was his duty to return same to Martinez. Rhodes also contends that if the agreement was valid and binding and enforceable by creditors, as it was made more than four months prior to the bankruptcy, if the title vested in Rhodes, he (Rhodes) now holds such money, if chargeable with it at all, for the benefit of Keeler, and that no one but Keeler can collect same from him. Rhodes contends that in no event is the trustee in bankruptcy entitled to the dividend made under the agreement for the benefit of Keeler.

No action or proceeding has been taken to have the agreement between Martinez and Rhodes declared fraudulent or void. The trustee in bankruptcy stands upon the proposition that such agreement was valid, and valid as and enforceable as a general assignment for the benefit of creditors. Some stress has been laid upon the proposition that Martinez and Rhodes agreed that the instrument referred to should not be considered or treated as a general assignment for the benefit of creditors. It goes without saying that the assignor and assignee in a general assignment for the benefit of creditors, one having all the attributes of a general assignment for the benefit of creditors and properly executed, could not destroy or weaken the same by an agreement between themselves, even if inserted in the instrument, that it should not be considered or treated or operate as a general assignment for the benefit of creditors. Should the assignor and assignee in a general assignment for the benefit of creditors, having all the attributes of such an instrument and being properly executed, insert therein an agreement that the assignee should not be accountable in any court, such provision would be void. The operation of the statutes of the state of New York in the case of a general assignment for the benefit of creditors cannot be varied or defeated by an agreement of the parties that such statute shall not apply.

This agreement was made more than four months prior to the filing of the petition in bankruptcy, and was fully executed as to all of the creditors of Martinez except two. These two did not assent thereto, and they were under no obligation to assent thereto. It does not appear that they ever have assented, or that they have claimed their dividend thereunder. In fact, Keeler has declined to take his dividend. Rhodes

had no power to compel Keeler to accept such dividend. The agreement itself expressly provided that it should become valid and enforceable and binding only on condition that it was accepted by all the creditors excepting those whose aggregate claims were less than $500. According to its terms it never became operative, as these two creditors, whose claims exceeded $500, declined to assent thereto. Keeler and H. Fein & Co. might have repudiated the whole transaction. They, or either of them, might have sued Martinez, obtained judgment, issued execution, and levied upon this property in the hands of Rhodes. If they could not have done this, they could have filed a petition in bankruptcy against Martinez in bankruptcy proceedings taken within four months after the making of the agreement in question, and such agreement would have been superseded by the bankruptcy, and the entire property would have been recoverable by the trustee in bankruptcy.

In Cohen v. American Surety Co., 192 N. Y. 227, 84 N. E. 947, it is held that:

"Where, within four months after the making of a general assignment for the benefit of creditors, the assignor, on the petition of certain of his creditors, is adjudged a bankrupt, and a trustee in bankruptcy is appointed, the adjudication in bankruptcy supersedes the general assignment, which becomes void as against the trustee in so far as it interferes with his administering the property assigned."

It was also held that the trustee in bankruptcy becomes vested with the title to the property in the hands of the assignee under the general assignment, and that it is the duty of the trustee in bankruptcy to take such property into his possession and collect from the assignee under the general assignment any money in his hands belonging to the estate of the bankrupt; that is, the title to property of the bankrupt remains in the bankrupt and passes to his trustee in bankruptcy as to an assignee under a general assignment made by the bankrupt within four months of his bankruptcy. The case cited holds that it is the duty of the assignee under a general assignment for the benefit of creditors to account to the trustee in bankruptcy for all moneys received by him, and that his failure so to do constitutes a violation of the bond required to be filed under the provisions of section 5 of the general assignment act as security for the faithful performance of his duties as such assignee. However, in this case this assignment, whether it was a general assignment for the benefit of creditors or a special assignment, was not made within four months of the bankruptcy.

This court is of the opinion that this agreement was not a general assignment for the benefit of the creditors of Martinez. It was an assignment for the benefit of creditors on the face of it. It was to become in full force and effective when all the creditors, except it might be a few whose claims did not aggregate $500, should assent thereto. It never became effective. However, the parties thereto acted under it, and Rhodes, acting with authority from Martinez, converted the property into money and applied the proceeds to the payment of such of the creditors of Martinez as would accept their ratable and proportionate shares thereof. These creditors, having assented and received the benefits, cannot complain. They do not complain. The transaction, so

far as they are concerned, was closed more than four months prior to the filing of the petition in bankruptcy by Martinez. There was no fraud in that transaction. It was an equal distribution of the property of Martinez among his creditors. There is no question of preference, as no one was preferred. All shared alike. The title to all the money paid over to creditors passed to the creditors. Keeler and H. Fein & Co. refused to recognize the transaction; that is, refused to assent to and accept benefits under the agreement, but they cannot now set aside what was done under that agreement except fraud be shown. No attempt has been made to prove fraud or fraudulent intent or purpose. Rhodes had no right to the money which Keeler refused to accept. He was under no contractual relation with Keeler. Keeler refused to avail himself of the agreement. Keeler refused the money. Rhodes had no title in himself, and Keeler repudiated the trusteeship which Martinez attempted to create in his favor.

What, then, should Rhodes do? Was it his duty to retain the money for further proceedings? He was not a trustee for Keeler and owed him no obligation. He returned the money under these circumstances to the owner thereof, leaving it open to Keeler to sue Martinez, obtain judgment and enforce same in due course. When he returned the money to Martinez, Rhodes ceased to be responsible therefor; at least, so far as Martinez and his trustee in bankruptcy is concerned, he ceased to be responsible. Martinez had had the money returned to him long before proceedings in bankruptcy were taken. Martinez had received it. The trustee in bankruptcy took title to the property which belonged to Martinez, or in which he had an interest, so far as that interest went at the date of the filing of the petition in bankruptcy. He took it in the same plight and condition and subject to the same equities it was in when the petition in bankruptcy was filed. Rhodes, more than four months before the filing of the petition in bankruptcy, had closed his trusteeship of that fund by returning it to Martinez, and Martinez, the owner of the fund, had voluntarily received it. The transaction was closed, without fraud, or intent to cheat or defraud any one, more than four months prior to the bankruptcy. I see no theory upon which it can be held that Rhodes is accountable to the trustee in bankruptcy for the $398.78 returned to Martinez by Rhodes more than four months prior to the bankruptcy, and which sum was retained and set aside by Rhodes, when acting under the agreement, for the benefit of Keeler, and which Keeler refused to accept. The assignment made by Martinez to Rhodes did not purport to operate upon all his property, and for that reason alone, I think, was not a general assignment for the benefit of creditors.

In Cohen v. American Surety Co., supra, the court said:

"The general assignment act of the state of New York, like the Bankruptcy Act, is designed to distribute all of the assets of a debtor among his creditors."

As this was not a general assignment for the benefit of creditors, and because of many provisions therein inserted in violation of the general assignment law, it must be treated as a special agreement and assignment, operative only in so far as the parties and creditors assented

thereto and accepted benefits thereunder. The trustee in bankruptcy occupies no better position than did Martinez at the time of the filing of the petition in bankruptcy. It is not claimed that the trustee in bankruptcy represents any creditor or creditors of Martinez who were excluded from benefits under the agreement referred to. He represents those creditors who refused to accept benefits under it, and the trustee in bankruptcy and these creditors find themselves at liberty to appropriate all of the property of Martinez, unhampered by any act of Martinez or of Rhodes committed within four months of the bankruptcy, and, in any event, all they can complain of is that more than four months prior to the bankruptcy Martinez applied, through Rhodes, his property in his business and store to the payment of his creditors pro rata, except that two refused to accept their pro rata share. The money belonging to Martinez that was set aside for one of them in the hands of Rhodes, and which the creditor refused to accept, was returned to Martinez, and it would be unjust to compel Rhodes to pay that amount again to his trustee in bankruptcy. At the time of the bankruptcy Rhodes did not hold it for Martinez, and he did not owe Martinez that sum of money.

The referee has ordered that Rhodes pay over to the trustee in bankruptcy the $62.52 set apart for H. Fein & Co. This Rhodes is willing to do.

There is no complaint that Rhodes has failed to account for all the money and property of Martinez that came into his hands. The correctness of his accounts is not questioned. There is no charge that he lost, or misappropriated, or misapplied any of the property, or any of the proceeds thereof. The claim is that the amount set apart as the dividend for the benefit of Keeler should not have been returned to Martinez, and that Rhodes is accountable therefor to the trustee in bankruptcy, on the ground that title had vested in Rhodes, as assignee under the general assignment for the benefit of creditors.

The order of the referee is affirmed.

HANE v. CROWN & KEYSTONE CO., Incorporated, et al.

(District Court, N. D. New York. May 18, 1915.)

1. BANKRUPTCY ⊂=279 — FRAUDULENT CONVEYANCES — PREFERENCES — RECOVERY OF PROPERTY.

As alleged in the complaint in an action by a trustee in bankruptcy, the bankrupt, with intent to hinder, defraud, and delay his creditors, while insolvent, and within four months before the adjudication, transferred property, without consideration, to a corporation organized by him, and subsequently he and the corporation executed a chattel mortgage to a mortgagee as trustee, both the trustee and the beneficiary knowing that the bankrupt and the corporation were insolvent. Under a judgment against the corporation, the sheriff levied on all property in the corporation's possession, irrespective of whether it was acquired before or after the incorporation of the company, or before or after the adjudication in bankruptcy, and the trustee procured an injunction pendente lite preventing a sale thereof. *Held* that, if the facts alleged by the trustee were

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

true, the trustee could recover the property transferred to the corporation, and could set aside the mortgage and hold the property, or recover it if taken under the mortgage.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 419–424; Dec. Dig. ⊂⊃279.]

2. BANKRUPTCY ⊂⊃279 — FRAUDULENT CONVEYANCES — PREFERENCES — RECOVERY OF PROPERTY.

If property acquired by the corporation after the transfer was purchased with the proceeds of property so transferred, it could also be recovered.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 419–424; Dec. Dig. ⊂⊃279.]

3. BANKRUPTCY ⊂⊃301—FRAUDULENT CONVEYANCES—INJUNCTION—BILL OF PARTICULARS.

To enable the court to pass upon a motion to vacate the injunction, the trustee would be required to furnish a bill of particulars separating as far as possible the property transferred to the corporation by the bankrupt from that subsequently purchased by it.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 464; Dec. Dig. ⊂⊃301.]

4. BANKRUPTCY ⊂⊃301—FRAUDULENT CONVEYANCES—INJUNCTION—VACATING.

The sheriff and the judgment creditor, on a motion to vacate such injunction, should present to the court facts enabling it to determine what property was transferred by the bankrupt to the corporation and what was after-acquired property.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 464; Dec. Dig. ⊂⊃301.]

5. BANKRUPTCY ⊂⊃302—FRAUDULENT CONVEYANCES—COMPLAINT.

If the trustee claimed any of the property acquired by the corporation after the transfer as the proceeds of property fraudulently transferred, the complaint should be amended to show that fact.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 456, 457; Dec. Dig. ⊂⊃302.]

In Equity. Suit by Charles B. Hane, as trustee in bankruptcy of Charles R. Hertzberg, a bankrupt, against the Crown & Keystone Company and others. On motion to vacate an injunction pendente lite and for a bill of particulars, etc. Bill of particulars ordered, and motion to vacate injunction denied.

Wm. J. Gardinier, of Herkimer, N. Y., for complainant.
Fred D. McIntosh, of Little Falls, N. Y., for defendant Stitt.

RAY, District Judge. For several years prior to September 4, 1913, the bankrupt, Charles R. Hertzberg, had been engaged in the wholesale and retail liquor business at Little Falls, N. Y., under the name and style of Crown & Keystone Distributing Company. On that date, or at about that date, and at a time when the said Charles R. Hertzberg was owing more than $50,000, and was apparently insolvent, an alleged corporation was formed under the laws of the state of New York and under the name of Crown & Keystone Company, Incorporated. The capital stock was fixed at $10,000, consisting of 100 shares, of the par value of $100 each, and of which 80 shares were forthwith issued to the said Hertzberg, and one share each to two other persons. The other shares were not issued, and none of the shares were paid for. These three persons, holding the stock as stated, elected Hertzberg presi-

dent and treasurer of this new corporation, as well as the active manager of the business, and the business was conducted as theretofore with this change of name. Hertzberg made a bill of sale to this Crown & Keystone Company, Incorporated, of which he was president and treasurer and manager, which bore date September 5, 1913, but the bill of complaint alleges that there was no consideration for such transfer, and that this company was formed and this transfer made with intent thereby to hinder, delay, and defraud the creditors of Hertzberg, and at a time when he was insolvent, and such insolvency was known to the incorporators of this new company.

About September 30, 1913, Hertzberg individually, and this new company, by Hertzberg as its president, gave a chattel mortgage to George W. Norris, as trustee for some undisclosed party, which covered the fixtures, furniture, and tools pertaining to the business, and which had been owned by Hertzberg. The bill of complaint alleges that there was no sufficient or valid consideration for the chattel mortgage, and that this was given when Hertzberg and the Crown & Keystone Company, Incorporated, were insolvent, which fact was well known to the mortgagee and the beneficiary or beneficiaries thereunder, and that the same was null and void, and was done to give an illegal preference, etc.

Within four months after these transfers, and on the 23d day of December, 1913, Hertzberg was duly adjudicated a bankrupt, and the object of the bill of complaint is to set aside these transfers, including the chattel mortgage, and have the property transferred to this Crown & Keystone Company, Incorporated, declared void, and the property declared the property of the bankrupt, with title in the trustee in bankruptcy. The bill of complaint further charges that on the 13th day of October, 1914, and 10 months, about, after Hertzberg was adjudicated a bankrupt, the defendant Cook & Bernheimer Company obtained a judgment in the Supreme Court of the state of New York against the Crown & Keystone Company, Incorporated, and issued an execution thereon, and delivered same to the sheriff, Stitt, who proceeded to levy upon all the stock of goods and merchandise in the place of business of said Crown & Keystone Company, Incorporated, irrespective of whether such property was acquired before or after such alleged incorporation of the Crown & Keystone Company, Incorporated, or whether acquired before or after adjudication in bankruptcy of the said Hertzberg, and that commingled with the property so levied upon was property belonging to the estate in bankruptcy of said Hertzberg. This allegation, of course, is intended to include the property claimed to have been mortgaged as a preference and illegally and in fraud of creditors transferred to the new company.

[1] I have not mentioned in detail the allegations of the complaint, but have stated same in a general way. There is no allegation in the complaint that the Crown & Keystone Company, Incorporated, was a fraud or a sham company, and that it was actually run and owned by Hertzberg as a continuation of his business, and as to property purchased by Hertzberg or the Crown & Keystone Company, Incorporated, after the bankruptcy, same would be after-acquired property,

and belong to Hertzberg, even if such fact existed. Under the allegations of the complaint, the plaintiff can recover, if the facts alleged be true, the property transferred to the Crown & Keystone Company, Incorporated, and can set aside the mortgage and hold the property, or recover it if taken under the mortgage.

[2-5] Inasmuch as the sheriff, under the execution referred to issued in favor of Cook & Bernheimer Company, has levied upon all of the property, the injunction was properly granted; but there should be a separation, if possible, of the property now in the possession of the Crown & Keystone Company, Incorporated, transferred to it by Hertzberg, from that purchased thereafter, if any there be, by the Crown & Keystone Company, Incorporated. When such separation is made, this court will be able to intelligently vacate the injunction as to property actually owned by the Crown & Keystone Company, Incorporated, and in which the bankrupt estate has no interest. If such after-acquired property has been purchased with and is the proceeds of the property transferred by Hertzberg in fraud of creditors to the Crown & Keystone Company, Incorporated, then, of course, such goods could be followed. However, at this time the injunction should not be vacated as to any of the property, and there should be a separation by the bill of particulars, so far as the trustee in bankruptcy is able to make same, and the defendant Cook & Bernheimer Company and the sheriff should present to the court some fact or facts which would enable it to determine what property was transferred by Hertzberg to this new corporation and what is after-acquired property, if any. If the complainant claims any of this after-acquired property as the proceeds of property fraudulently transferred by Hertzberg to such new company, the complaint should be amended so as to show that fact.

This matter has now been running with motions and counter motions for nearly a year, and it is time that a definite bill of complaint was made, and the matter brought before the court for determination. In view of all the facts and circumstances which have been disclosed on these motions, and in view of the conditions and conflicts as to the facts, it would be wise for the parties to frame their pleadings and go to trial, either before the court itself or a referee, and have the facts determined and some proper adjudication made. This is a suggestion. All the court can now do is to provide for a bill of particulars, which will enable the court so far as possible to release property, if any there be, not properly embraced within the terms of the injunction.

An order will be made requiring a bill of particulars. The complainant may also amend, if advised that such amendment is necessary or proper.

THE ALBERGEN.

(District Court, S. D. Georgia. May 19, 1915.)

AMBASSADORS AND CONSULS ⊂=6—CONSULAR COURTS—JURISDICTION—WAGES OF SEAMEN—TREATY.

Article 11 of the Consular Convention of August 1, 1879, between the United States and the Netherlands, giving to the consuls of the latter country exclusive cognizance of all disputes between captains, officers, and crews of Dutch ships, "including disputes concerning wages," is not in violation of the constitutional provision extending the jurisdiction of the national courts to all cases of admiralty and maritime jurisdiction, but is a valid and binding treaty provision, and under it a District Court is without jurisdiction of a suit against a Dutch ship to recover wages, even though the seaman is an American citizen.

[Ed. Note.—For other cases, see Ambassadors and Consuls, Cent. Dig. §§ 16–20; Dec. Dig. ⊂=6.]

In Admiralty. Suit by a seaman for wages against the Dutch steamship Albergen. Dismissed for want of jurisdiction.

Alex R. MacDonell, of Savannah, Ga., for libelant.

Fred T. Saussy, of Savannah, Ga., for claimant.

LAMBDIN, District Judge. This is a libel in rem against a foreign steamship of the Netherlands, brought to recover unpaid wages. The owners of the vessel intervened, and excepted to the jurisdiction of the court, on the ground that article 11 of the Consular Convention between the United States of America and the Netherlands, dated and proclaimed August 1, 1879, provided that the District Courts of the United States should have no jurisdiction of such matters; said article being in the following language:

"Consuls general, vice consuls genèral, consuls, vice consuls and consular agents shall have charge of the internal order on board of the merchant vessels of their nation, to the exclusion of all local authorities. They shall take cognizance of all disputes and determine all differences which may have arisen at sea, or which may arise in port, between the captains, officers and crews, including disputes concerning wages and the execution of contracts reciprocally entered into. The courts or other authorities of either country, shall on no account interfere in such disputes unless such differences on board ship be of a nature to disturb the public peace on shore or in port, or unless persons other than the officers and crew are parties thereto."

The consul of the Netherlands, resident in Savannah, also filed a protest to the jurisdiction of the court upon the same ground.

Libelant claims that he is an American citizen, and that the terms of the treaty quoted above are unconstitutional, and he relies upon the following decisions of the District Court of Washington: The Neck (D. C.) 138 Fed. 144; The Falls of Keltie (D. C.) 114 Fed. 357; The Troop (D. C.) 117 Fed. 557; Bolden v. Jensen (D. C.) 70 Fed. 505. The position of the District Court of Washington in such matters is stated in the third headnote of the case styled The Neck, supra, which is in the following language:

"A citizen of the United States cannot be deprived by treaty of his constitutional right to invoke the jurisdiction of the national courts of admiralty to

determine a cause within the admiralty and maritime jurisdiction to which he is a party, and which is cognizable within the United States."

In other words, the position of the libelant in this case is that by the express terms of paragraph 1 of section 2 of article 3 of the Constitution of the United States the judicial power of the District Courts of the United States extends "to all cases of admiralty and maritime jurisdiction," and that therefore the provision of the treaty with the Netherlands quoted above, withdrawing jurisdiction of the controversy involved in this case from the United States District Courts, is contrary to the Constitution of the United States, and therefore void.

The court recognizes the doctrine that claims of seamen for wages are entitled to the highest consideration, and that they occupy a favored position in admiralty law. However, the court is not prepared to hold that the above-quoted provision of the treaty with the Netherlands is unconstitutional. Treaties are regarded as being of the same dignity as acts of Congress, and it is fundamental that all doubts should be resolved in favor of the constitutionality of a law, and that no law should be declared to be unconstitutional unless its unconstitutionality is plainly manifest. The learned judge of the United States District Court of New Jersey, Judge Rellstab, discusses this very question in The Koenigin Luise (D. C.) 184 Fed. 170, on page 173, in which he says:

"By the Constitution of the United States the President has the power, by and with the advice and consent of the Senate, to make treaties. Article 2, § 2, par. 2, cl. 1. And such treaties and laws of the United States, when made in pursuance of such constitutional authority, as well as the Constitution, are declared to be the supreme law of the land. Article 6, par. 2. By the same instrument, the judicial power is vested in the United States courts, and extends to all such treaties and laws, and all cases of admiralty and maritime jurisdiction. Article 3, §§ 1 and 2. A treaty with a foreign nation is essentially of a political character, and under our Constitution is made by the executive branch of the government. It deals with international relations, and when confined to such subjects, and not inconsistent with the Constitution and the nature of our government, is of binding force until abrogated by executive or congressional action. It is a compact between independent and sovereign nations, and the dictates of morality and national honor, as well as the first principles of sound public policy, demand that its provisions be faithfully carried out. While it is the duty of the court in the exercise of the constitutionally granted judicial power to annul the provisions of a treaty that are clearly violative of the organic law, yet that result is never to be declared unless no other construction is permissible. The word 'all' in the clause 'all cases of admiralty and maritime jurisdiction,' found in the constitutional grant of judicial power to the United States courts, and in the Judiciary Act of 1789 (Act Sept. 24, 1789, c. 20, § 9, 1 Stat. 76), giving cognizance over such causes to the therein created courts, cannot be given that embracing meaning which would annul an article in a foreign treaty dealing with a subject peculiarly of international concern, because in the enforcement of it a judicial function is necessarily exercised. The manifest purpose of this inclusive term was to exclude from the states all jurisdiction over admiralty and maritime causes, and not to limit the subject-matter and scope of foreign treaties. The judicial power is necessarily limited, by the constitutional grant and the acts of Congress distributing it, to the courts. What is withdrawn by foreign treaties constitutionally entered into is as effective a limitation as if it had never been authorized by congressional legislation. To give full force and effect to the constitutional provision granting the Executive and Senate the power to make treaties, it is necessary to confine the meaning

of this word 'all,' and limit the judicial cognizance to such subjects and persons as the treaty-making and legislative departments of the government, acting within their constitutional powers, shall indicate."

The Supreme Court of the United States in The Belgenland, 114 U. S. 355, on page 364, 5 Sup. Ct. 860, on page 864 [29 L. Ed. 152], lays down the rule, as follows:

"Of course, if any treaty stipulations exist between the United States and the country to which a foreign ship belongs, with regard to the right of the consul of that country to adjudge controversies arising between the master and crew, or other matters occurring on the ship exclusively subject to the foreign law, such stipulations should be fairly and faithfully observed. The Elwin Kreplin, 9 Blatchford, 438, Fed. Cas. No. 4,426, reversing same case, 4 Ben. 413, Fed. Cas. No. 4,427. See same case on application for mandamus, Ex parte Newman, 14 Wall. 152, 20 L. Ed. 877. Many public engagements of this kind have been entered into between our government and foreign states. See Treaties and Conventions, Rev. Ed. 1873, Index, 1238."

Judge Smith, of the United States District Court of South Carolina, discusses the matter in a learned opinion in the case styled The Ester (D. C.) 190 Fed. 216, on page 221, in which he says:

"Where treaty stipulations exist, however, with regard to the right of the consul of a foreign country to adjudge controversies arising between the master and the crew, or other matters occurring on the ship exclusively subject to the foreign law, such stipulations are the law of the land, and must be fairly and faithfully observed. The Belgenland, 114 U. S. 355, 5 Sup. Ct. 860, 29 L. Ed. 152; Wildenhus' Case, 120 U. S. 17, 7 Sup. Ct. 385, 30 L. Ed. 565."

This position is also sustained by the following authorities: The Bound Brook (D. C.) 146 Fed. 160 (District Court of Massachusetts); The Burchard (D. C.) 42 Fed. 608 (District Court, Alabama); The Welhaven (D. C.) 55 Fed. 80 (District Court, Alabama); The Marie (D. C.) 49 Fed. 286 (District Court, Oregon); Ex parte Anderson (D. C.) 184 Fed. 114 (District Court, Maine).

It may be noted in passing that the law is clear that, when a seaman enters the crew of a merchant vessel of a foreign nation, he assumes a temporary allegiance to the flag borne by this vessel, and for the time being belongs to the nationality of his vessel. In re Ross, 140 U. S. 453, 11 Sup. Ct. 897, 35 L. Ed. 581.

The weight of authority, therefore, is against the libelant in this case. The court realizes the hardship of libelant's position, but he comes within the express terms of the above-quoted provision of the treaty between this country and the Netherlands, and, for the reasons above stated, this court is not prepared to hold that this treaty violates the Constitution of the United States.

The objection to the jurisdiction of the court is therefore sustained, and a decree will be entered in the case, dismissing the libel and dividing the costs between the parties.

DUNCAN v. ATLANTIC COAST LINE R. CO.

(District Court, S. D. Georgia. May 12, 1915.)

1. JUDGES ⇐47—DISQUALIFICATION TO ACT—CONSTRUCTION OF STATUTE—"HAS BEEN OF COUNSEL."

In Judicial Code (Act March 3, 1911, c. 231) § 20, 36 Stat. 1090 (Comp. St. 1913, § 987), which disqualifies a judge of a District Court to sit when he "is in any way concerned in interest in any suit pending therein or has been of counsel," the phrase "has been of counsel" has reference to the particular suit before the court.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 214–219, 222, 223; Dec. Dig. ⇐47.]

2. JUDGES ⇐47—DISQUALIFICATION TO ACT—FEDERAL JUDGES.

A federal judge, who was formerly local attorney for a railroad company in a certain county, his employment being restricted to that county, and who was afterward appointed District Judge, is not disqualified on account of such previous employment from presiding at the trial of a case against his former client, which originated and was brought in another county, and with which he had no connection.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 214–219, 222, 223; Dec. Dig. ⇐47.]

At Law. Action by Thomas B. Duncan against the Atlantic Coast Line Railroad Company. On question of disqualification of judge.

H. Mercer Jordan and David S. Atkinson, both of Savannah, Ga., for plaintiff.

P. W. Meldrim and Shelby Myrick, both of Savannah, Ga., for defendant.

LAMBDIN, District Judge. The question here presented is whether the presiding judge is disqualified from hearing the above-stated case on account of the fact that before his appointment as District Judge the law firm of which he was then a member was local counsel for defendant railroad company in Ware county, Ga.; the employment of said firm being restricted to the counties of Ware and Charlton. He had no connection with the case at bar, which was originally brought in the city court of Savannah and removed to this court, and knew nothing of said case until he reached it on the docket.

[1] At common law there existed no ground for the disqualification of a judge. Blackstone in his Commentaries stated that the law of England in his time was as follows:

"By the laws of England also, in the times of Bracton and Fleta, a judge might be refused, but now the law is otherwise, and it is held that judges and justices cannot be challenged. For the law will not suppose a possibility of bias or favor in a judge who is already sworn to administer impartial justice and whose authority greatly depends upon that presumption and idea." 3 Bl. Com. 361; Co. Litt. 294; 23 Cyc. 575.

It is by statute that a judge is declared to be disqualified in particular instances, and, as a general rule, the statutory grounds of disqualification are exclusive. Elliott v. Hipp, 134 Ga. 844, 848, 68 S. E. 736, 137 Am. St. Rep. 272, 20 Ann. Cas. 423; Luke v. Batts, 11 Ga. App. 783 (3), 76 S. E. 165; 17 Am. & Eng. Enc. Law, pp. 738,

740. In order to decide the question under consideration, it is therefore necessary to consider the statute of the United States governing such matters. This is to be found in section 20 of the Judicial Code of the United States, which is as follows:

"Whenever it appears that the judge of any District Court is any way concerned in interest in any suit pending therein, or has been of counsel or is a material witness for either party, or is so related to or connected with either party as to render it improper, in his opinion, for him to sit on the trial, it shall be his duty, on application by either party, to cause the fact to be entered on the records of the court; and also an order that an authenticated copy thereof shall be forthwith certified to the senior Circuit Judge for said circuit then present in the circuit, and thereupon such proceedings shall be had as are provided in section fourteen."

The presiding judge in this case is not "concerned in interest" in the pending suit, nor is he "a material witness" therein, nor is he "related to or connected with either party" at the present time, so as to render it improper for him to sit at the trial of the case.

But this section also prohibits a judge from presiding who "has been of counsel." The question involved here, therefore, is whether the expression last quoted means that a judge is disqualified who "has been of counsel" at any time for a party to the cause, or whether he is disqualified only when he "has been of counsel" in the case to be tried. The use of the expression in question in connection with the context shows conclusively that the words "has been of counsel" are restricted to the suit under consideration. The language of the section is that:

"Whenever it appears that the judge of any District Court is any way concerned in interest in any suit pending therein or has been of counsel, or is a material witness for either party," etc.

It is evident that the words "in any suit pending therein" are to be understood, at the end of the above excerpt from the section. As stated by the District Judge in the case of The Richmond (C. C.) 9 Fed. 863:

"The decisions, so far as I have been able to find, are unanimous that 'of counsel' means 'of counsel for a party in that cause and in that controversy,' and if either the cause or controversy is not identical the disqualification does not exist."

In the absence of statute, judges are not disqualified, even by reason of having been counsel in a cause. 23 Cyc. 586; Lloyd v. Smith, T. U. P. Charlt. (Ga.) 143.

The Code of Georgia of 1910, § 4642, which covers substantially the same grounds of disqualification as the federal statute, clears up the question, by stating specifically that the judge must have been of counsel in the pending case to be disqualified; the language of the section being as follows:

"No judge or justice of any court * * * can sit in any cause or proceeding in which he is pecuniarily interested, or related to either party within the fourth degree of consanguinity or affinity, nor in which he has been of counsel, nor in which he has presided in any inferior judicature when his ruling or decision is the subject of review, without the consent of all the parties in interest: Provided, that in all cases in which the presiding judge of the superior court may have been employed as counsel before his appoint-

ment as judge, he shall preside in such cases if the opposite party or counsel agree in writing that he may preside, unless the judge declines so to do."

The Supreme Court of Georgia has decided the question here presented squarely in the following language:

"The fact that a judge of the superior court had formerly been a director of a railroad company, and was so at the time that an attorney rendered professional services to the company, did not disqualify him from presiding at the trial of a suit for such services, if at that time he had ceased to be a director, owned no stock, and was not otherwise interested. It is present, not past, interest which disqualifies a judge." Johnson, Executrix, v. Marietta & North Georgia Railroad, 70 Ga. 712 (1).

The Supreme Court of the United States in the case of Carr v. Fife, 156 U. S. 494, 15 Sup. Ct. 427, 39 L. Ed. 508, also held as follows:

"The fact that a Circuit Judge, prior to his appointment, had been counsel for one of the parties in matters not connected with the case on trial, does not disqualify him from trying the cause."

See, also, the case of Conyers v. Ford, Receiver, 111 Ga. 754, 36 S. E. 974; In re Nevitt, 117 Fed. 448, 451, 54 C. C. A. 622; 23 Cyc. 585; The Richmond (C. C.) 9 Fed. 863; and Ex parte N. K. Fairbank (D. C.) 194 Fed. 978, 987.

[2] The presiding judge in this case does not come within the letter or the spirit of the prohibition of the statute. He is not concerned in the pending litigation; he has no interest in it, and has never been connected with it in any way; he never was counsel in the case for either party, and is not related to or connected with either party; he has never heard of the case before, and knows nothing about the facts or issues involved; and he feels that his mind is absolutely impartial between the parties to the cause, and that it is therefore neither illegal nor improper for him to preside at the trial of the case. He holds, therefore, that he is not disqualified.

PEEK v. BOSTON & M. R. R.

(District Court, N. D. New York. May 17, 1915.)

1. REMOVAL OF CAUSES ⟸3—SUITS REMOVABLE—ACTION UNDER EMPLOYERS' LIABILITY ACT.

Under Judicial Code (Act March 3, 1911, c. 231) § 28, 36 Stat. 1094 (Comp. St. 1913, § 1010), which expressly provides that no case arising under the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [Comp. St. 1913, §§ 8657–8665]), or any amendment thereto, brought in any state court of competent jurisdiction, shall be removed, such an action is not removable, notwithstanding the fact that diversity of citizenship exists and the requisite amount in controversy is involved.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 4, 5; Dec. Dig. ⟸3.]

2. COMMERCE ⟸8—ACTION FOR INJURY TO SERVANT—LAW GOVERNING.

If the complaint in an action by an employé against a railroad company states two causes of action, one under a state law and one under the federal Employers' Liability Act, but also shows that at the time of the

injury complained of both plaintiff and defendant were engaged in interstate commerce, the federal statute controls the liability and right of recovery.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 5; Dec. Dig. ⇐8.]

At Law. Action by Robert E. Peek against the Boston & Maine Railroad. On motion by plaintiff to remand to Supreme Court of New York, Saratoga County. Motion sustained.

Leary & Fullerton, of Saratoga Springs, N. Y., for the motion.
Jarvis P. O'Brien, of Troy, N. Y., opposed.

RAY, District Judge. The plaintiff is a resident and citizen of the state of New York. The defendant is a foreign corporation, organized and existing under the laws of the commonwealth of Massachusetts, but does business in the state of New York, into which state its tracks and railroad bed extend, and over which the defendant does business in interstate commerce by the transportation of freight and passengers. These tracks run from Mechanicville, Saratoga county, N. Y., through East Deerfield, Mass., to Boston, Mass. At the time the plaintiff received the injuries complained of he was employed by the defendant as a fireman on said railroad, and was engaged in the performance of his duties on a special freight train drawn by defendant's engine at East Deerfield, Mass., and which engine was at the time moving cars "through defendant's yards at East Deerfield, Mass., bound for Greenfield, Mass., and containing freight and cars bound for points in New York." This is the language of the complaint, and I think is an allegation that the engine, which was not bound for any point in New York, was moving a train of cars in defendant's yards at East Deerfield, which cars were bound for Greenfield, Mass., and contained freight bound for points in New York, and that some of the cars in the train, whether loaded or empty, were also bound for points in New York. Assuming this to be so, the plaintiff was acting as fireman on the engine which was at the time moving cars forward on defendant's tracks to points in New York and other cars containing freight bound for points in New York. Assuming this to be so, the plaintiff was at the time engaged in interstate commerce, and the defendant was also engaged in interstate commerce.

In other places the complaint alleges that both the plaintiff and defendant were at the time engaged in interstate commerce. In stating the acts of negligence complained of, the complaint contains a statement that there was in force and effect in the commonwealth of Massachusetts a statute known as the Workmen's Compensation Act, and the complaint sets out certain provisions of section 1 of that act. This is not set forth as a separate or distinct cause of action, and on the trial the plaintiff would not be allowed to recover under the provisions of that statute of the commonwealth of Massachusetts. This court is of the opinion that no attempt is made in the complaint to set forth a cause of action under the statutes of the state of Massachusetts. The cause of action, if any, is founded on common-law negligence, of which the

defendant was guilty while engaged in transporting freight in interstate commerce and moving cars in interstate commerce, and while the plaintiff was engaged in operating an engine moving the said cars, and who was therefore engaged in interstate commerce. One cause of action is stated, to wit, the negligence set forth.

[1] In Lombardo v. Boston & Maine Railroad, 223 Fed. 427, this court hands down its decision herewith that a case or cause of action arising under the federal Employers' Liability Act cannot be removed into the federal court for trial, notwithstanding the fact that diversity of citizenship and requisite amount in controversy exists, because of the proviso found in section 28 of the Judicial Code, removal section, and which proviso reads as follows:

"Provided, that no case arising under the act entitled 'An act relating to the liability of common carriers by railroad to their employés in certain cases, approved April 22, 1908, or any amendment thereto, and brought in any state court of competent jurisdiction, shall be removed into any court of the United States."

This court held this notwithstanding the decision in Van Brimmer v. Texas, etc., R. Co. (C. C.) 190 Fed. 394. In the Lombardo Case this court held, and here holds, that the language of the proviso is so explicit and sweeping that it would amount to judicial legislation to limit it to cases arising under the federal Employers' Liability Act where diversity of citizenship and requisite amount in controversy, $3,000, do not exist. This court is of the opinion that the cause of action stated in the complaint is one arising under the federal Employers' Liability Act and that the federal statute, section 28 of the Judicial Code, prohibits its removal to the federal court, and that the motion to remand must be granted.

[2] If this complaint contains two causes of action, one under the federal Employers' Liability Act and one under the state law, the federal Employers' Liability Act controls, as both plaintiff and defendant were engaged in interstate commerce, and, Congress having legislated on the subject, the federal statute is paramount. The federal statute controls the liability and right of recovery. See St. Louis, San Francisco, etc., R. Co. v. Seale, 229 U. S. 156, 33 Sup. Ct. 651, 57 L. Ed. 1129, Ann. Cas. 1914C, 156; Seaboard Air Line v. Horton, 233 U. S. 492, 34 Sup. Ct. 635, 58 L. Ed. 1062; Taylor, as Administrator, v. Taylor, 232 U. S. 363, 34 Sup. Ct. 350, 58 L. Ed. 638; North Carolina R. R. Co. v. Zachary, 232 U. S. 248, 34 Sup. Ct. 305, 58 L. Ed. 591, Ann. Cas. 1914C, 159; Michigan Central R. Co. v. Reeland, 227 U. S. 59, 33 Sup. Ct. 192, 57 L. Ed. 417, Ann. Cas. 1914C, 176. In Seaboard Air Line Railway v. Horton, 233 U. S. 492, 34 Sup. Ct. 635, 58 L. Ed. 1062, it is expressly held that:

"Since Congress, by the Employers' Liability Act of 1908, took control of the liability of carriers engaged in interstate transportation by rail to employés injured while engaged in interstate commerce, all state laws upon the subject have been superseded.

Other prior cases hold the same. There will be an order remanding the cause.

ARMSTRONG et al. v. WALTERS.

(District Court, E. D. Pennsylvania. May 17, 1915.)

No. 2670.

1. SALES ⟸418—BREACH BY SELLER—MEASURE OF DAMAGES.

Where a seller of brewers' grains to be delivered in installments notified the buyer that its plant had been destroyed by fire and that it would not be able to make the deliveries, the buyer could declare a breach as of that date and hold the seller liable for any difference between the then market price and the contract price, or it could declare successive breaches as the respective times of delivery arrived and in like manner recoup its loss; but it could not speculate upon the seller's misfortunes and measure the damage by the highest market price, whenever reached, unless the time of delivery was extended.

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

2. COURTS ⟸328—UNITED STATES COURTS—JURISDICTION—AMOUNT IN CONTROVERSY.

Where the amount in controversy, as shown by the statement of claim and the attempted proof, exceeded the jurisdictional amount, and there was no colorable expansion of the claim, a federal court had jurisdiction, though the verdict was for an amount below its jurisdiction.

[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 and reasons for a new trial and motion in arrest of judgment. Motions discharged.

For opinion on motion to dismiss for want of jurisdiction, see 219 Fed. 320.

Ward W. Pierson, of Philadelphia, Pa., for plaintiffs.

Johnson & Gilkyson, of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. The verdict in this case was for the plaintiffs, but for a sum which did not answer to their expectations. They have in consequence moved for a new trial. The defendant had originally moved to dismiss the action for want of jurisdiction. The jurisdictional fact is the amount in controversy between the parties. The verdict was for $480.15. The sum in which the jury found for the plaintiffs, without interest, in all probability does not exceed $325. The defendant now renews his demand to have the case dismissed in the form of a motion in arrest of judgment. We will dispose of the two motions in their order.

The reasons accompanying the motion for a new trial are eight in number. They involve, however, but one question. What that question is, how it arose in the course of the trial, and the disposition which was made of it by the trial judge, are best shown by a short outline statement of the facts.

In June, 1907, the plaintiffs were dealers in brewers' grains, having a place of business in Lafayette, N. J. The defendant was also a dealer in grains, and, in addition, had a plant within this district for the

drying of grains. He dealt in both wet and dry grains. In June, 1907, the parties entered into a contract, a summary of which is that the plaintiffs bought and the defendant agreed to deliver certain quantities of dried brewers' grains at certain times at stipulated prices. Deliveries were to be made during the months of July, August, and September following—five car loads each month. The contract, which had been made orally between the parties, was confirmed by a letter from the defendant to the plaintiffs under date of June 20, 1907. The defendant entered upon the performance of his contract, when unfortunately, early in August following, his plant was destroyed by fire, or at least damaged to such an extent as to put his drier out of business. He began at once to rebuild his plant, with the evident expectation originally that it would be completed in the fall. In point of fact it was not restored into working order until the following February. The plaintiffs were promptly notified on August 9, 1907, of the fire, and that as a consequence the defendant would not be able to make delivery of grains in compliance with his contract.

The parties also had dealings in wet grains. The defendant was again the seller, and the plaintiffs the buyers. These dealings were not interrupted or interfered with by the fire, which only affected the defendant's drying plant. In the course of these dealings in wet grains the plaintiffs became indebted to the defendant. Being in need of money to rebuild his plant, he was somewhat urgent in his demands for payment. The parties with respect to their contract, after June, 1907, had communication with each other only by letter. They never personally met, or at least never spoke to each other on the subject of the contract in suit. This is mentioned as part of the history of the transactions up to the suit, to emphasize the fact, which is a conceded fact in the case, that the evidence hereinafter referred to consists wholly of writings, and there is an entire and absolute absence of any oral testimony relating thereto.

The market for dried grains, according to the plaintiffs' claim, supported by evidence and testimony submitted at the trial, was steadily upward in price, at least to a time late in December or early in January, 1908. The question of market prices was one of the questions in controversy before the jury. With this feature, however, we are not now concerned.

The times of delivery called for by the contract, it will be remembered, were the months of July, August, and September. The plaintiffs did not supply themselves with grains until some time in the latter part of December, 1907, or the early part of January, 1908. The situation is therefore this: If the plaintiffs' damages are to be assessed as of the dates of delivery called for by the contract, the verdict of the jury is not complained of in the motion under discussion. If, however, the damages are to be assessed as of the dates when the plaintiffs supplied themselves with grains by purchases in the open market during the latter part of 1907 or the earlier part of 1908, then the plaintiffs have a well-grounded complaint. This is because the trial judge instructed the jury that the measure of damage was the difference between the market price of grains of a like kind and quality at the time

and place of delivery called for by the contract and the contract price of the grains. This called for the further instruction that the plaintiffs could not recover for damages measured by the high-water mark, which prices may have reached subsequently to the time of delivery. The plaintiffs complain of this feature of the charge as error, and its correctness is the question referred to as the one question now remaining in the cause.

The theory upon which the plaintiffs tried their case was that after the fire, but before the time of delivery of the last grains under the contract, the parties had conducted negotiations and had reached an agreement for the extension of the time of delivery until the defendant had reconstructed his drier, when he was to fulfill his contract by making deliveries in accordance therewith. These negotiations and this agreement, according to the plaintiffs' claim, were evidenced by a series of letters.

The plaintiffs asked the court to submit to the jury as a question of fact whether there had been such an extension, and to instruct the jury that, if the time of delivery had been extended, then the measure of damage should be determined in accordance with the prices prevailing at the time the defendant fell down upon this second or extended contract. Before the charge was delivered the trial judge made the inquiry of counsel whether all the evidence on that subject was in writing and consisted of the letters. The answer was in the affirmative. The court thereupon, in the absence of any testimony or evidence other than the writings, charged the jury that the letters did not evidence any such agreement of extension. The consequence is accepted that the jury were then relegated to the market price at the time of delivery called for by the contract, together with the contract price, as affording the proper measure of damages.

These letters began with a notification of the plaintiffs by the defendant on August 9th of the fact of the fire and his consequent inability to fulfill his contract, and because of this his refusal to do so. This letter does not appear in the stenographer's notes. The next letter was from the plaintiffs to the defendant, under date of August 21st. There is no copy of this letter of record, and it does not appear to have been offered in evidence. The next letter was from the defendant to plaintiffs, under date of August 22, 1907. This was followed by a letter to plaintiffs under date of November 2d. Following this was a letter from plaintiffs to defendant, dated December 12th, and this by letters from the defendant to the plaintiffs, dated December 14 and December 26, 1907.

[1] It is well, perhaps, to premise the consideration of these letters after that of August 9th with the observation that the plaintiffs, having been notified on that date that the defendant had fallen down on his contract, had the right to have declared a breach as of that date, to have supplied themselves elsewhere within a reasonable time thereafter, holding the defendant responsible for any difference between the then market price and the contract price. It was also within their rights to have declared successive breaches of the contract as the respective times of delivery arrived and in like manner have recouped their loss.

It was clearly not their right to speculate upon the misfortunes of the defendant and measure their damage by the top of the market whenever it was reached, unless the time of delivery had been extended by the parties.

This brings us to a consideration of the letters. Without taking the space to analyze this correspondence and to summarize the results, it is sufficient to observe that it is clear that up to December 12th there was no thought in the minds of the plaintiffs that there had been any agreement to extend the time of delivery. It is to be further observed that the market price had then reached nearly, if not quite, its highest point. The plaintiffs clearly had the right to insist, as they were then doing, upon the fulfillment of the contract and to hold the defendant to responsibility for its breach. Just as clearly, however, the money responsibility was to be determined by the market price at the times of delivery, and the plaintiffs could not have increased this measure otherwise than by an agreement to which the defendant was a party.

The defendant was likewise in the exercise of his rights in seeking to minimize the damage by offering to deliver as soon as his drier was in operation. The attitude of neither party affected their legal rights, further than to put each of them in a position to assert them. The measure of damages was one of their rights which could not be changed, except by agreement. There is nothing in the letters out of which such an agreement springs. There was evidently no thought in the mind of plaintiffs on December 12, 1907, of such an agreement having at that time been made. The subsequent letters made none. As the evidence would not have supported the finding of an agreement, it is of no moment now to inquire whether the question should have been submitted to the jury.

[2] The motion in arrest of judgment is disposed of by what was said on the motion to dismiss for want of jurisdiction. The amount of the verdict does not affect the question. It is determined by the amount in dispute—the sum in controversy. This exceeded $2,000, the then jurisdictional minimum, by the statement of claim and the proofs attempted at the trial. There was no colorable expansion of the claim. Had the statement set forth no more than was required to be set forth, jurisdiction would be conceded by the defendant. The position taken, however, is that the claim as set forth on its face shows to a legal certainty the damages recoverable to be less than the jurisdictional sum. There is that in the statement of claim which gives more than the strength of mere plausibility to defendant's argument, but the argument none the less falls short of possessing convincing power. The statement of claim sets forth a contract, its breach, and a claim of damages sufficient in amount to confer jurisdiction. The fact that the plaintiffs fell short in their proofs, or were overborne by the strength of the defense, still leaves the jurisdictional fact of "dispute" having been in the case. Indeed, it is still present. This suggests, as possibly intended to be included in the reasons for a new trial, the complaint that under the evidence the verdict inadequately measured the damages. In one sense the weight of the evidence might fairly be said to have called for a larger verdict. There was evidence,

however, in support of a less. The plaintiffs were presenting a stale claim. The action was saved from the grasp of the statute by a few days' margin. The testimony in support of plaintiffs' prices bore upon a time nearly eight years ago.

There was no reason the plaintiffs should be relieved from the burden of proving their case, including the damages sustained. The case was earnestly and well tried, and the verdict expressed the judgment of a jury who heard the cause with patience and intelligence.

The motion for a new trial, and that in arrest of judgment, are each discharged, and plaintiffs have leave to enter judgment on the verdict, with costs.

THE J. P. SCHUH.

(District Court, S. D. Alabama. January 30, 1915.)

No. 1469.

1. MASTER AND SERVANT ⟸8—CONTRACTS OF HIRING—TERM OF EMPLOYMENT.
A hiring at so much a day, unless there is a mutual understanding of the parties that the service is to extend for a certain fixed and definite time, is an indefinite hiring, determinable at the will of either party, and recovery may be had for the services actually rendered.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 8–10, 17; Dec. Dig. ⟸8.]

2. MASTER AND SERVANT ⟸73—SEAMEN ⟸2—CONTRACT OF HIRING OF DECK HANDS—LEAVING EMPLOYMENT—RIGHT TO WAGES—"SEAMAN."
Libelants were hired orally as deck hands on a steamer employed as a towboat to take a number of barges up the river from Mobile, load them with cross-ties, and tow them down. No term of service or wages were mentioned, but the rate per day at which they were to be paid was understood. Libelants cleaned and loaded the barges. On the return trip three of the four barges stranded on a sand bar, and libelants worked unsuccessfully a part of the night to get them afloat. Next morning they were ordered to carry the ties from one of the barges onto the steamer, which they refused to do. They were then told, if they would not do the work, to get off the boat, and did so. *Held*, that they were not "seamen," within the contemplation of the statutes of the United States relating to seamen, and that in any event their leaving the vessel under the circumstances and in view of their contracts was not a desertion, which forfeited their right to the wages earned.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 90–102; Dec. Dig. ⟸73; Seamen, Cent. Dig. §§ 1–3; Dec. Dig. ⟸2.

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

In Admiralty. Suit by Anderson Jackson and others against the steamer J. P. Schuh. Decree for libelants.

H. T. Pegues, of Mobile, Ala., for libelants.
Hanaw & Pillans, of Mobile, Ala., for claimant.

TOULMIN, District Judge. The material facts in this case are few and simple, and without serious conflict. There is a conflict in the evidence as to some minor questions involved in the case.

The evidence on the part of the libelants was in substance that they

were hired by Mr. Spottswood to go up the river with the steamer J. P. Schuh, and barges in tow, four in number, to get cross-ties. They were to load the barges with cross-ties, and return with the steamer and the barges, loaded with the cross-ties, to Mobile; the barges thus loaded being in tow of the steamer. It did not appear from their evidence that at the time of the hiring Mr. Spottswood said anything to the libelants about the length of the trip, or the probable time it would consume, the specific work they were to do, or the wages to be paid them. It, however, appeared from the evidence that these men, or at least some of them, had made some prior trip or trips of like character under Mr. Spottswood's employment, and of the kind of work to be done, and the rate of wages he paid for it, which was stated to be $1.16⅔ a day; that if they were employed for as much as a month it was $35.00 a month, and if their employment was for any time less than a month it was at that rate—that is to say, $1.16⅔ a day. The libelants made the trip up the river, to Gullet's Bluff. One of the four barges had a derrick, called a "derrick barge," with which they loaded the ties onto the barges. On the way up the river the men cleaned the barges by taking out mud and water, etc., getting them ready to receive the cargo of cross-ties; and they also wooded the steamer. All the barges were loaded; the steamer and tow came on down the river, and when they reached a point, said to be about two days' run from Mobile, three of the barges got aground on a sand bar. This was on Saturday, and the evidence of the libelants was that they worked from that time trying to get the barges off until 1 or 2 o'clock Saturday night, using the lines in the work. Their evidence further was that about daylight next morning they were called out; that they went out and cut and carried wood to the engine room; that Mr. Spottswood then told them to go to taking the cross-ties from the barge which was lying alongside the steamer, both of which were afloat in the river and to put them on the steamer, to be carried down the river and put out on the bank, to be later reloaded on the barge there, that, the barge load being lightened, it might avoid getting aground. The libelants refused to comply with this direction or request of Mr. Spottswood, claiming they were too tired from the previous day's and night's work to "tote" the cross-ties from the barge onto the steamer. They testified that they so stated to Mr. Spottswood. It appears that this was about 9 o'clock a. m. Sunday. After some further talk on the subject, and the libelants insisting on their inability and refusal to "tote" the cross-ties as directed, Mr. Spottswood told them, "If you are not going to do the work, get off!" Some of the libelants stated that Mr. Spottswood said to them, "If you can't tote the cross-ties, get off and take to the woods!" One of the libelants testified that, in connection with Mr. Spottswood's order or declaration to get off and "take to the woods" he used some profane language toward them.

Spottswood in his evidence denied that he used any such language as is attributed to him, and stated that he used no profane language in the matter, and that he did not use such language as "take to the woods." He stated that he did tell them, if they would not or could not do the work, to get off the boat. Spottswood's denial that he used such language as is attributed to him is satisfactory to the

court, and disposes of that issue between the parties, even if it was at all material to the merits of this case, which it is not, in my judgment. The material facts of the case are in substance without conflict. Spottswood testified that he hired the libelants in a bunch, and not singly. They were down at the wharf, and he wanted some men. One of his men already in his employ told him these men wanted to work, and wanted to go on the boat up the river. The libelants said nothing to him, and signed no paper. He said nothing to them, but "just took their names and put them on the book." He had no express contract with them, as to the work they had to do, the period or term of employment, or about their compensation. He said that was all understood, although nothing was said about it by him or them at the time of employment.

Spottswood was undoubtedly correct when he said it was all understood, as it appears from the evidence that these men, some of them, at least, had heretofore been on a like trip or trips, in the same employment and work, and at the same compensation, as admitted by both sides in this case. It also appeared that the libelants, on the trip in question, did similar work as on the prior trips they had made. It is reasonable to suppose that those of them who had not been on the prior trips had learned from their coworkers what the work to be done was, and what the compensation to be paid was. Indeed, there was no conflict in the evidence as to the work that was done by the libelants, and the rate of compensation per day therefor, whether they worked 15, 10, or 5 days. When the libelants were called on by Mr. Spottswood to unload cross-ties from the barge alongside of the steamer onto the steamer, they refused to do so, saying they could not "tote" the cross-ties from the barge onto the steamer. They testified that they said they were too tired; that they had worked all the preceding day, Saturday, and up to 1 or 2 o'clock in the night, and could not "tote" the cross-ties as directed. Spottswood stated that they had worked three or four hours the night before, but in his opinion not later than 10 o'clock. He further testified that, when he ordered libelants to go to work removing the cross-ties from the barge to the steamer, he did not hear them say they were "tired out," or too tired to "tote" the cross-ties; that they did not say so to him, or that, if they said anything of the kind, he did not so understand it. He further testified that he told them, "If you are not going to work, get off!" He also stated that the men had worked 15 days preceding this trouble.

[1] A hiring at so much a day, week, or month, no time being specified, is an indefinite hiring, and no presumption attaches that it was for a day even, but only at a fixed rate for whatever time the party may serve. Unless the understanding of the parties was mutual that the service was to extend for a certain fixed and definite period, it is an indefinite hiring, and is determinable at the will of either party; and a recovery may be had for the services actually rendered. Wood, Master and Servant, 272. In Russell et al. v. The Twilight (D. C.) 43 Fed. 320, it was held that:

"The master of the boat was justified in discharging deck hands on an Ohio river towboat, but that the deck hands had not incurred a forfeiture of their wages for past services rendered on the trip."

"A seaman is entitled to recover wages for the time served, although discharged because of fault on his part." The Sentinel (D. C.) 152 Fed. 564; The Bell of the Coast (D. C.) 56 Fed. 251.

[2] Aside from the rules of law announced in the authorities cited supra, the evidence as to the material facts of this case are, in my opinion, so free from conflict that the court cannot have any trouble in determining what they are. The counsel for the respondent contends that the libelants were "seamen," and should be treated as having the rights and duties incident to that relation. The libelants were employed as deck hands on the steamer, which was in the capacity and occupation of a towboat. They were designated as deck hands. The steamer was engaged in towing barges up the river empty, loading them up there with cross-ties, staves, etc., and returning with them to Mobile. The libelants were employed under an ordinary contract of hiring, without writing of specific terms of any kind. They performed the duties of deck hands, including the loading of the barges. In my opinion, the only sense in which these libelants could be deemed to be seamen is that, under the rule, a person who is employed or engaged to serve in any capacity on board a vessel is deemed to be a seaman. They certainly were not seamen in contemplation of the maritime law of Great Britain, or of the statutes of the United States providing for the contracts between vessels and their seamen, and prescribing the rights and duties incident to that relation, and which are very full, specific, and clear.

My opinion, further, is that the custom testified to by Captain Quill has no application to the case in hand. The conditions and terms of the contract made in view of the custom constituted said custom a part of the contract, and controlled the rights of the parties. No other custom was proven in this case. Moreover, Spottswood himself stated that he was not familiar with the method that obtained with the river packets in their contracts with their deck hands. A misfortune, called by Spottswood a "mishap," had overtaken him. He doubtless considered it an emergency. The libelants were there. He requested or ordered them to go aboard the barge, and to transfer the cross-ties from the barge to the steamer as directed. They insisted that they could not "tote" the cross-ties from the barge onto the steamer. After some further talk on the subject, the men still failing to comply with the order to go to work on the barge transferring the cross-ties, Spottswood told them, if they could not or would not do the work, to get off the boat. Shortly thereafter the men left the boat and never returned.

The learned counsel for respondent contends that they then became deserters, and thereby forfeited all wages earned for work done for the 15 days prior. He cites the case of The Galina (D. C.) 6 Fed. 927. There can hardly be any doubt that desertion entails a forfeiture of wages. But there may be a wide difference of opinion as to what facts make out a case of desertion. In my opinion the case of The Galina is not applicable to the facts in the case at bar. The meager facts set out in the head note of that case are so unlike the material facts in this case.

The case of Disbrow et al. v. The Walsh Bros. (D. C.) 36 Fed. 607, cited by counsel for respondent, was one where the libelants were hired for service on a barge, including loading and unloading, in transporting brick from Hackensack to New York at the rate of $35 per month. The barge was towed by a tug. On one of the trips the barge was discharging bricks at New York, when the libelants quit work on account of some dissatisfaction with the master. The men were not discharged by the master, and the judge stated that he could not find that they left with his assent. The court held that:

"They were legally required to remain and finish the unloading. The chief part of their work was loading and unloading the cargo. To quit work as they did was to subject the barge to liability of special expenses, or loss of two days' time."

The libelants had broken their contract before they had fully performed their part of it, and the respondent claimed a deduction of a small amount from their wages as his probable actual loss by their breach of the contract.

The Walsh Bros. Case and the case at bar differentiate in two important particulars.

First. The libelants in this case left the boat with the assent of the master, implied by his order or direction to get off the boat. It is true that the order was made in the alternative. The respondent gave the men a choice to do one or the other of two things which he required and directed them to do. The substance and effect of what he said to them was, "Go to work removing the cross-ties from the barge onto the boat, or get off the boat." Can it be seriously contended that the submission of this option to the men was not an implied assent that they might do either as they chose. They of course acted voluntarily in making their choice.

Secondly. The libelants in the Walsh Bros. Case had breached their contract expressly made in the hiring, including loading and unloading the brick. At the place of unloading, and while unloading at New York, the men quit work. While in the case before the court the contract of hiring requiring the men to load the barges at the place of loading up the river, would require them to unload them at the place of delivery, Mobile, but does not provide for unloading them at an intermediate place, onto the steamer having them in tow; nor can the contract by implication be extended to include a legal duty or requirement to do so when the necessity or supposed necessity therefor arose from a cause wholly unexpected, and not contemplated at the time the contract was made, and in the nature of things not implied in it. I do not consider that the libelants broke any contract they were under, or violated any legal duty required of them expressly or impliedly by their contract of hiring. They were directed to do work arising from a "mishap," or occurrence wholly unexpected, and not contemplated at the time the contract of hiring was made.

Whatever may be thought of an altruistic or moral obligation the men were under to help their employer, if they could, in the conditions then existing, and in his disappointment and supposed trouble under them, the court has no authority to punish the failure to per-

form such obligation, even if the judge was satisfied that they had an appreciation or recognition of such an obligation. The court would not be justified in punishing these men by a forfeiture of wages earned for services rendered prior and up to the day on which they left the boat.

From my view of the facts in this case and the law applicable thereto, my judgment is that the libelants are entitled to recover the amounts sued for respectively.

Let a decree be entered accordingly.

In re HELLAMS.

(District Court, S. D. Alabama. April 5, 1915.)

No. 1268.

1. CONTRACTS ⟹212—TIME OF PERFORMANCE—WHEN TIME IS NOT SPECIFIED—"REASONABLE TIME."

When a contract specifies no time of performance, a reasonable time is implied, and what constitutes a "reasonable time" depends 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.]

2. CONTRACTS ⟹214—CONTRACTS FOR BUILDING MATERIALS—TIME FOR PAYMENT.

Where a written contract to furnish certain materials to a contractor for a building for a gross sum did not specify when such sum should be paid, it did not become due and payable until full performance of the contract by delivery and acceptance of the last of the material.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 980–995; Dec. Dig. ⟹214.]

3. CONTRACTS ⟹171—"ENTIRE CONTRACT."

An "entire contract" is one the consideration of which is entire on both sides.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 754–757; Dec. Dig. ⟹171.

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

4. WORDS AND PHRASES—"DEBT."

A "debt" is a sum of money due by contract, express or implied, and it has accrued when it has ripened into a vested right, an available demand, or an existing cause of action.

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

Appeal from Order or Decree of Referee.

In the matter of J. E. Hellams, bankrupt. On review of order of referee disallowing claim of the T. J. Rossell Manufacturing Company to a mechanic's lien. Reversed.

Bestor & Young, of Mobile, Ala., for appellant.

Carl McMahon, of Mobile, Ala., for appellee.

TOULMIN, District Judge. The question in controversy certified by the referee for consideration and decision by the court is whether or not the claimant, the T. J. Rossell Manufacturing Company, complied with the requirements of the statutes of Alabama necessary to give it the lien claimed by it in this case. The claim is one for priority of payment for material furnished by claimant under a contract with the bankrupt to be used, and that was used, in the construction of a building by said bankrupt. The referee decided in favor of the trustee, who contested said claim, and disallowed the lien claimed, holding that the lien was not filed within four months after the debt accrued, as required by the state statute.

The important—indeed, the main—question to be determined in this case is: When did the debt, on which the lien is claimed for its prior payment, accrue? The claimant, T. J. Rossell Manufacturing Company, and J. E. Hellams (the bankrupt), who was the contractor and builder of a residence for F. M. Ladd, of Mobile, Ala., made a contract in words and figures as follows, to wit:

"Mobile, Ala., Aug. 16, 1912.

"Mr. J. E. Hellams, Mobile, Ala.—Dear Sir: We will furnish all mill work for the residence of Mr. F. M. Ladd, of Mobile, Alabama, as per plans and specifications, for the sum of twenty-seven hundred and eighteen ($2,718.00) dollars f. o. b. Mobile, Ala. This estimate includes all lattice for upper and lower rear galleries, also sash weight and cord, but does not include corner boards or ceiling; doors in foundation six frames for basement are to be omitted, but sash for same are to be furnished.

"Respectfully, T. J. Rossell Mfg. Co.
"Byrd Enochs, Pres.

"Accepted: J. E. Hellams."

[1] The contract specified no time for or within which the material contracted for was to be furnished. By the failure to specify a time, the performance of the contract within a reasonable time was implied, and what was a "reasonable time" depends upon the circumstances of the particular case. Allegheny Valley Brick Co. v. Raymond Co., 219 Fed. 477, 135 C. C. A. 189. When no time is specified for the performance of a contract, the law presumes that its performance was intended within a reasonable time. Henley v. Bush, 33 Ala. 636; Skinner v. Bedell's Adm'r, 32 Ala. 44; 1 Vol. Brick. Dig. p. 397.

[2, 3] Neither does the contract specify the time the amount agreed to be paid for the material to be furnished was to be paid. No specific time for such payment being fixed, and the contract being an entire contract, the sum to be paid as therein provided was not due and payable until a completion of the contract by the delivery by the claimant and acceptance by the contractor, Hellams, of said material. An entire contract is one the consideration of which is entire on both sides.

The entire fulfillment of the promise by Rossell Manufacturing Company to furnish the material mentioned in the contract as per plans and specifications was a condition precedent to the implied promise by J. E. Hellams to pay the sum of $2,718 named in the contract. Whenever there is a contract to pay a gross sum for a certain and definite consideration, the contract is entire. The contract between the parties being entire, it required the complete fulfillment of both sides—by Rossell Manufacturing Company furnishing all the material

required by the contract, and its acceptance by J. E. Hellams. When this was done, the contract was completed, and Rossell Manufacturing Company had the right to demand payment for the material delivered. 1 Brickell's Dig. 393; Kirkland v. Oates, 25 Ala. 465; Petty v. Gayle, 25 Ala. 472; Wolfe v. Parham, 18 Ala. 441; Wilfley v. New Standard Concentrator Co., 164 Fed. 421, 90 C. C. A. 543.

[4] The debt, in my opinion, then accrued. It came into existence as a right, and became vested. A debt is a sum of money due by contract, express or implied, and it has accrued when it has ripened into a vested right, an available demand, or an existing cause of action. This vested right, in my judgment, accrued to the claimant on August 16, 1913, being, as I understand from the evidence, the date on which the last material which was accepted by the contractor was put into the building for which it was furnished.

It appears from the evidence that some parts of the material furnished by the claimant were on two occasions condemned, and acceptance refused by the architect, as not being in compliance with the specifications. The condemned material was, however, put into the building temporarily until claimant could deliver material which would be in compliance with the specifications and acceptable to the architect. Subsequently material in accordance with the specifications was delivered on the job, accepted, and installed in the building in the place of the condemned material, which had been temporarily used. The accepted material, consisting of glass as being up to the specifications, was delivered under and in pursuance of the terms of the contract, to take the place of the condemned glass that was delivered prior to March 31, 1913, and there was no extra charge made by claimant therefor.

In the case of Great Western Manufacturing Company v. Burns & Company, 59 Mo. App. 391, the court said:

"The indebtedness accrued when it came into existence as a completed obligation owing by defendant to the plaintiff, for a debt to accrue is nothing more nor less than for it to exist in a complete form. * * * When the purchase of property, accompanied by delivery, occurs, the indebtedness accrues and becomes fixed when the delivery is made."

Rossell Manufacturing Company's failure to deliver some part of the material, not accepted by the purchaser, Hellams, as not in compliance with the specifications of the contract, was a matter of which only said purchaser could take advantage, and if the purchaser "elects to stand to the contract, he may do so." He may, if he elects to, overlook the seller's fault or failure, and the contract, as a matter of course, remains unimpaired." 59 Mo. App. 391, supra.

The evidence does not show that the said failure of claimant to furnish some parts of the material which was not acceptable to the contractor was intentional, and there is no evidence that Contractor Hellams claimed the contract with Rossell Manufacturing Company breached, or claimed any damage as arising from said alleged failure, or for the delay in delivering the material which was accepted by the architect and contractor as being in compliance with the specifications.

And the evidence shows that said material was delivered under and in pursuance of the terms of the contract.

When the last material was delivered and accepted, the contract was completed, and the indebtedness therein provided for accrued. Cutliff v. McAnally, 88 Ala. 507–509, 7 South. 331. All the material delivered and accepted was installed in the building and the contract completed on August 16, 1913, on which date the court finds the indebtedness of J. E. Hellams to claimant accrued, and the claimant's right to file the statement required by law to fix its lien as claimed arose.

And the court further finds that on November 1, 1913, claimant, in order to fix its lien, filed a statement in the probate court of Mobile county, containing the necessary allegations, and in form required by section 4758 of the Code of Alabama of 1907, and on November 13, 1913, claimant filed in the law and equity court of Mobile county, a court of competent jurisdiction, its original bill of complaint in equity against said owner, F. M. Ladd, and said bankrupt contractor, J. E. Hellams, claiming the sum of $1,596.04, and seeking a materialman's lien on said residence therefor, as required by law.

The order of the referee denying the petition for a rehearing is affirmed, and his decree disallowing the lien claimed by Rossell Manufacturing Company is reversed and remanded, with directions to the referee to allow the lien claimed on the balance due claimant. And it is so ordered.

KIMBALL v. ATLANTIC STATES LIFE INS. CO.

(District Court, S. D. Georgia, N. E. D. April 22, 1915.)

RECEIVERS ⊂=154—COMPENSATION OF ATTORNEYS—ALLOWANCE.

Counsel, bringing an action at law for a client against a corporation and an ancillary proceeding in equity in aid thereof, in which a receiver of the corporation is appointed, and obtaining a judgment for the client for a part of his demand, may not be paid their compensation from the fund in court, for the services rendered by them were not for the benefit of all the stockholders.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 279–282; Dec. Dig. ⊂=154.]

At Law and in Equity. Action by G. S. Kimball against the Atlantic States Life Insurance Company, with ancillary proceedings in equity, in which a receiver of the company was appointed, and judgment rendered for plaintiff. On application of McElreath & Akerman, attorneys of plaintiff, for compensation payable out of the fund in court. Denied.

Walter McElreath, of Atlanta, Ga., for applicants.

E. H. Callaway, of Augusta, Ga., for receiver.

SPEER, District Judge. In this case is presented the petition of Walter McElreath and Alexander Akerman for the allowance of coun-

sel fees in the case of G. S. Kimball against the Atlantic States Life Insurance Company. It was referred to the master, and by that officer the application was denied. Exceptions were filed to the master's report, and counsel were fully heard on yesterday.

The facts are that Kimball was the promotor of the Atlantic States Life Insurance Company. He finally brought suit against that company for liquidated damages in the amount of $5,000, and for other demands in the amount of $122,500. An ancillary proceeding in equity was filed in support of the common-law action, and by and with the consent of the counsel for the insurance company a receiver was appointed and the assets taken in charge. The suit was brought to trial in this court before Hon. Wm. B. Sheppard, judge presiding. Kimball prevailed on his claim, upon one count, for $1,500, but lost on his demand for $122,500. This was taken to the Circuit Court of Appeals and affirmed. The court was now in the possession of all the assets of the defendant company, and certain stockholders by intervention have asked the distribution of the funds. This has been partially done.

The claim of petitioners is based upon the assertion that they brought the fund into court. In a certain class of cases, where a proceeding in equity is brought for the benefit of all the stockholders of a corporation, where valuable services are rendered, and benefits result, such claims of counsel are allowed, and paid by the direction of the court. The trouble about the petitioners' application here is that their entire proceeding was adversary and inimical to the company. They did not seek to benefit or enhance its values, but to deplete them. They did so to the extent of $1,500. After effort to that end, they failed to do so to the extent of $122,500. Had they succeeded in their effort, the company would have lost at least $127,500, with all costs. True, they now intervene and join in the prayers of the stockholders for the distribution of the fund, and yet, but for their adversary action, inimical in every sense to the interest of the stockholders, the directors of the company might have effected that distribution without the expense of the receivership. To allow a fee of counsel to be paid from the fund in hand, under such circumstances, would, in the opinion of the court, be to establish a precedent which would encourage the bringing of unjustifiable proceedings; counsel acting under the consciousness that, although the proceeding itself was without merit, they would be sure of personal compensation from the property of others which they had perhaps unrighteously caused to be involved in litigation. That such a precedent would be dangerous seems undeniable.

Of course, no reflection is intended on counsel in this particular case, for they prevailed in part; but the report of the master is approved, and this application is denied.

PORTER v. F. M. DAVIES & CO.†

(Circuit Court of Appeals, Eighth Circuit. March 11, 1915.)

No. 4314.

1. APPEAL AND ERROR ⊂=5—MODE OF REVIEW—LAW ACTION TRIED TO COURT.
The judgment in an action at law in a federal court, although a jury is waived and the cause tried to the court, is reviewable only on writ of error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 8–21; Dec. Dig. ⊂=5.]

2. REMOVAL OF CAUSES ⊂=5—CAUSES REMOVABLE—ACTION BY STATE RECEIVER.
An independent action by a receiver of a state court against a nonresident defendant to recover money alleged to be due the receivership estate is not ancillary to the suit in which the receiver was appointed, and is removable where the requisites for removal exist.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 21, 22; Dec. Dig. ⊂=5.]

3. EVIDENCE ⊂=148—COMPETENCY—ASSUMPTION OF FACTS IN ISSUE.
In an action by the receiver for an elevator company against a corporation conducting a grain commission business in which the principal question at issue was whether certain speculative transactions conducted through defendant and on account of which it was given checks of the elevator company signed by its secretary were those of the company or of the secretary personally, testimony of an officer of defendant in answer to questions by its counsel based on the assumption that the transactions were those of the elevator company, *held* incompetent, and other testimony of the witness as to his understanding *held* immaterial and irrevelant and erroneously admitted over plaintiff's objections.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 438; Dec. Dig. ⊂=148.]

4. WITNESSES ⊂=142—COMPETENCY—PERSONS INTERESTED FOR OR AGAINST REPRESENTATIVES OF PERSONS DECEASED—ACTIONS IN WHICH TESTIMONY IS EXCLUDED.
In an action by the receiver for a corporation in which the principal question in issue was whether certain transactions were between the corporation and defendant or between its secretary individually and defendant, the fact that the secretary was dead at the time of trial did not render the testimony of an officer of the corporation as to the transactions incompetent under Code Civ. Proc. S. D. § 486, subd. 2, providing that in actions by or against executors or administrators neither party nor any person who has any interest adverse to the other party shall be allowed to testify against such party as to any transaction with the deceased; neither the witness nor the personal representative of the deceased secretary being a party, and the estate of the latter being in no way involved.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 580, 581; Dec. Dig. ⊂=142.]

5. EVIDENCE ⊂=471—OPINION EVIDENCE—CONCLUSION OF WITNESS.
Testimony of various witnesses *held* erroneously admitted on the ground that it stated merely the conclusions of the witnesses.

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

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

† For opinion on motion for rehearing, see 224 Fed. 451, — C. C. A. —.

In Error to the District Court of the United States for the District of South Dakota; James D. Elliott, Judge.

Action at law by Clement F. Porter, Jr., receiver of the Independent Elevator Company, against F. M. Davies & Co., a corporation. Judgment for defendant, and plaintiff brings error. Reversed.

Howard Babcock, of Sisseton, S. D., and Frank McNulty, of Aberdeen, S. D., for plaintiff in error.

H. V. Mercer, of Minneapolis, Minn., for defendant in error.

Before ADAMS and CARLAND, Circuit Judges, and AMIDON, District Judge.

CARLAND, Circuit Judge. Porter, as receiver of the elevator company, commenced this action in the circuit court for Grant county, S. D., against Davies & Co., to recover the sum of $29,300 which he alleged was the amount of money belonging to the elevator company which had been unlawfully paid to Davies & Co. between January 31, 1908, and October 22, 1909, by one A. J. Norby, secretary of the elevator company, acting individually for himself in payment of losses sustained by him in speculating on the future price of wheat at Minneapolis, Minn.; it being also alleged that Davies & Co. knew at the time it received the money that Norby was speculating on his own account, and that the money it received belonged to the elevator company. The action was removed to the federal court on the ground of diversity of citizenship; the receiver being a citizen of South Dakota, and Davies & Co., a corporation, organized under the laws of Minnesota. Davies & Co. answered in the federal court by denying the allegations of the complaint and alleging that whatever transactions it had with Norby were lawful; that Norby acted therein as the agent of the elevator company; and that the transactions in which the money was paid were in fact the business of the elevator company, which had full knowledge thereof and either authorized or ratified the same. A jury was waived, and the action tried to the court. At the close of all the evidence counsel for the receiver moved the court for findings and judgment in his favor. The court denied this motion and made a general finding in favor of Davies & Co. Judgment was subsequently entered in accordance with this finding. The receiver has brought the case here both by writ of error and appeal.

[1] The appeal must be dismissed as the action is at law. It was commenced as such and tried as such. No equitable relief is asked for. Counsel for the receiver refers us to Arthurs et al. v. Hart, 58 U. S. 6, 15 L. Ed. 30, as outlining the practice of this court on the present writ of error. Since the decision cited, section 700, R. S. U. S. (Comp. St. 1913, § 1668), has been enacted, and the decisions of the Supreme Court and of this court in relation thereto now govern the practice. The following cases decided in the Supreme Court and in this court fully explain the practice: 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. Dixon, 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; Coop-

er 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, Appx. 14 Sup. Ct. 1188, 25 L. Ed. 157; Insurance Company 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 Company 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 Company, 201 Fed. 893, 120 C. C. A. 191; Eastern Oil Co. v. Holcomb, 212 Fed. 126, 128 C. C. A. 642.

The finding of the trial court in the present case has the same effect as the verdict of a jury. Section 649, R. S. U. S. (Comp. St. 1913, § 1587). The request of counsel for the receiver at the close of the evidence for findings and judgment in his favor had the same effect as a request for an instructed verdict. The finding in favor of Davies & Co. must stand if there is any evidence to sustain it. After a careful consideration of the evidence, we are not prepared to say there is no evidence to support the finding, and therefore must hold that the assignment of error based upon the finding must fail. While no assignment of error is made raising the question of jurisdiction, counsel for the receiver insist that there is a lack of jurisdiction appearing upon the record. We think counsel have misapplied the authorities cited in the brief upon the question of jurisdiction.

[2] The claim is made that this suit is but ancillary to the suit in which the receiver was appointed now pending in the circuit court of Grant county, S. D.; that the state court has constructive possession at least of the money claimed to be due the elevator company from Davies & Co.; and that therefore the case was not removable to the federal court because such a proceeding would be an interference with the possession of the state court over property in its possession. The case of First National Bank v. Turnbull & Co., 16 Wall. 190, 21 L. Ed. 296, is cited in support of this contention. That was a case where certain cotton was levied upon under an execution issued upon a judgment of the state circuit court for the county of Alexandria, Va., in favor of the First National Bank at Alexandria and against Abijah Thomas. Certain persons, to wit, Alexander and John Turnbull, citizens of the state of Maryland, with Alexander Reach, a citizen of the state of New York, trading together as Turnbull & Co., asserted a claim as owners of the property thus levied on, and thereupon the sheriff, before proceeding further under his levy, demanded of the plaintiff in the execution an indemnifying bond, which demand was complied with. Turnbull & Co. then executed what may be called a forthcoming bond. The circuit court for Alexandria county under authority of the statute entered an order directing an issue to be tried by a jury, to determine the right to the property thus levied on. Before this issue was tried, Turnbull & Co. removed the case thus constituted to the Circuit Court for the United States for the District of Virginia. It was held by the Supreme Court that where a proceeding in a state court is merely incidental and auxiliary to an original action there—a graft upon it, and not an independent and separate litigation—it could not be

removed into the federal court. The other cases cited by counsel are along this line, and there can be no doubt as to the correctness of the rule established. The present suit, however, is an independent action brought by the receiver a citizen of South Dakota against Davies & Co., a corporation of Minnesota. The receiver is pursuing his remedy in this court the same as in the state court. The state court has never obtained possession of the property sought to be recovered, and, if the plaintiff in this action is successful, the receiver recovers the property in his character as receiver just the same as if the case was being prosecuted in the state court. The case was removable under the law and there is no merit in the contention.

[3] It only remains to consider the numerous assignments of error based upon the admission and exclusion of evidence during the trial of the case. In order to properly understand the errors assigned, it is necessary to take a brief view of the state of the case when the rulings which are alleged to be erroneous were made. It had appeared at the trial that between January 31, 1908, and November 1, 1910, one Norby, who was the secretary of the elevator company, had paid to Davies & Co. by checks, either on the Northwestern National Bank or the Scandinavian American National Bank, both of Minneapolis, signed "Independent Elevator Company, by A. J. Norby, Secretary," payable to Davies & Co., $29,800. Sometimes the words "by L. Baker" followed the words "A. J. Norby, Secretary." Miss Baker was the bookkeeper for Norby and the elevator company. The account of the transactions on the books of Davies & Co. appeared in the name of Norby. It was claimed by Davies & Co. that the account was so kept as a matter of convenience, as the license to trade on the floor of the Minneapolis Chamber of Commerce had been granted to Norby. The claim of Davies & Co. also was that the transactions were wholly between itself and the elevator company, while the receiver claimed that the transactions were those of Norby individually with which the elevator company had nothing to do. Norby was dead, and the receiver called as a witness at the trial Mr. R. J. Healy, who was the secretary of Davies & Co., and of course interested in the success of the defendant. He was asked by counsel for the receiver for Davies & Co. the following question:

"During this time did Mr. Norby ever raise any objection to this dealing on behalf of the company with your company?"

Counsel for plaintiff objected on the ground that it assumed and stated facts not shown by the evidence, that it was incompetent, irrelevant, and immaterial, and assumed that the Independent Elevator Company was dealing with the defendant. The objection was overruled and an exception taken. The answer was, "No, sir."

Counsel for Davies & Co. then asked the witness this question:

"Did Frank McNulty ever raise any objection to your company on any ground to keep you from trading with the Independent Elevator Company?"

The same objection was made to this question as the preceding one. The objection was overruled and an exception allowed. The answer was, "No, sir."

Counsel for Davies & Co. then asked the witness the following question:

"Did Mr. Porter ever make any such objection?"

To which question there was the same objection and the same ruling. The answer was, "No, sir."

Counsel for Davies & Co. then asked the witness the following question:

"For how long a period of time did this dealing continue during which F. M. Davies & Co. acted as commission merchants for the Independent Elevator Company on the Chamber floor from the time this dealing started?"

The same objections were made to this question and the same ruling was made as before. The answer was, "A few days over ten months."

Counsel for Davies & Co. then asked the witness the following question:

"And during the time these clearings were going on, did you understand that the Independent Elevator Company was acting as commission agent for concerns like the Armour Grain Company and such others as you have mentioned?"

This question was objected to as incompetent, irrelevant, and immaterial, assuming a state of facts not proven and called for a conclusion of the witness, which objection was overruled and an exception allowed. The answer was, "Yes, sir."

Counsel for Davies & Co. then asked the following question:

"Did you and the Independent Elevator Company, that is, Davies & Co. and the Independent Elevator Company, balance your account every time there was a payment made?"

This was objected to as assuming a state of facts not proven, namely, that the Independent Elevator Company had any transactions with the defendant. The objection was overruled and an exception allowed. The answer was, "No, sir."

Counsel for Davies & Co. then asked the following question:

"When the Independent Elevator Company made you the payments on account of these transactions, how were they made?"

This question was object to as assuming a state of facts not proven. The objection was overruled and an exception allowed. The answer was, "By check."

Considering the relation which Healy bore to the defendant and the way the evidence stood at the time these questions were asked, we think the admission of the testimony was error. The question of whether the transactions resulting in the payments of money to Davies & Co. were those of Norby individually, or those of the elevator company was one of the questions at issue to be decided by the court on all the facts proven, and therefore it was error to permit the witness Healy to be asked questions which assumed that the transaction was with the elevator company. Porter, Norby, and McNulty were stockholders of the elevator company. The understandng of Healy that the elevator company was acting as commission agent for concerns like Armour Grain Company was immaterial and irrelevant. Whether or

not it was the custom for all elevator companies buying grain to hedge that grain was immaterial and irrelevant under the issues.

[4] The elevator company was a South Dakota corporation, and its articles of incorporation stated that the purpose for which it was organized was as follows:

"The purpose for which this corporation is formed is conducting the business of buying and selling grains of all kinds, both at wholesale and retail; and all other acts necessary and desirable in connection with the wholesale and retail grain and lumber business."

Mr. Porter, the president of the corporation, was called as a witness by the plaintiff and asked the following question:

"You may state, Mr. Porter, whether or not, to your knowledge, the company was engaged in the grain commission and brokerage business at Minneapolis or elsewhere."

This question was objected to by counsel for defendant as irrelevant and immaterial and calling for a conclusion of the witness. The objection was sustained and an exception taken.

Counsel for the plaintiff then asked the witness:

"You may state if you ever had any talk or conversation with Norby at that time relative to your name appearing on the stationery."

In connection with this question, it may be said that there was testimony introduced by the defendant that Porter's name appeared upon the letter heads of Norby & Co. This question was objected to by counsel for the defendant for the reason that under the statute of South Dakota the witness as a director or officer of a corporation for whose benefit the action was being prosecuted was interested in the event of the action. The court sustained the objection on the ground that the witness was incompetent under the statute of South Dakota. The statute referred to reads as follows:

"No person offered as a witness in any action or special proceeding in any court or before any officer or person having authority to examine witnesses or hear evidence shall be excluded or excused by reason of such person's interest in the event of the action * * * or because such person is a party thereto.

"In civil actions or proceedings by or against executors, administrators, heirs at law or next of kin in which judgment may be rendered or order entered for or against them, neither party nor his assignor nor any person who has or ever had any interest in the subject of the action adverse to the other party, or to his testator or intestate shall be allowed to testify against such other party as to any transaction whatever with or statement by the testator or intestate, unless called to testify thereto by the opposite party." Code Civ. Proc. S. D. § 486, subd. 2.

The witness Porter was not a party to the action, and the action was not against the personal representative of a deceased person, but was a proceeding entirely between third parties in no way involving the deceased or his estate; that the witness was interested of course was no objection to his testifying. Section 858, R. S. U. S. as amended (Act June 29, 1906, c. 3608, 34 Stat. 618 [Comp. St. 1913, § 1464]), reads as follows:

"The competency of a witness to testify in any civil action, suit, or proceeding in the courts of the United States shall be determined by the laws of the state or territory in which the court is held."

Counsel for plaintiff then asked the witness Porter the following question:

"You may state, Mr. Porter, if you ever authorized or ordered your name or stated to any person that your name might be put on that stationery."

Counsel for defendant objected to the question unless limited to others than Mr. Norby and on the further ground that it called for a conclusion of the witness. The objection was sustained and an exception taken.

[5] A witness by the name of Gage was called by the defendant. He was asked by counsel for the defendant the following question:

"You know whether there was a general understanding on the Exchange floor as to whether the Independent Elevator Company was doing business there during this time?"

Counsel for plaintiff objected, as the question called for a conclusion. The objection was overruled and an exception taken.

Counsel for defendant then asked the witness Gage the following question:

"Having answered the other question in the affirmative, you may tell us what the understanding was—was it or was it not? I want to know whether there was an understanding among the traders that the Independent Elevator Company was transacting business there."

This question was objected to as calling for a conclusion of the witness. The objection was overruled and an exception taken. The answer was, "Why certainly."

Counsel for the defendant then asked the witness Gage the following question:

"And as careful dealers, of course, they would hedge the grain?"

This was objected to as a conclusion. Objection overruled and an exception allowed.

Counsel for the defendant asked the witness Winter the following question:

"As among grain men when they buy one of these contracts for future delivery, they regard themselves as bound by that for delivery and payment of the money just the same as if the warehouse receipt was presented to them in the case of a future?"

This was objected to as calling for a conclusion. The objection was overruled and an exception allowed. The answer was, "Yes."

Counsel then asked the witness Winter the following question:

"And these trades for future purchases and sales of wheat are recorded here on the Exchange with just the same intent as a contract would be for the purchase of a corner lot over there?"

This question was objected to as calling for a conclusion. Overruled. Answer, "Yes."

F. N. Davies, when on the stand, was asked by counsel for the defendant, referring to the account appearing on its books with Norby:

"Whose account did you understand that was?"

This question was objected to on the ground that it was incompetent and not admissible. Objection overruled. Answer, "The Independent Elevator Company."

We are of the opinion that the court erred in the foregoing rulings, and that it does not clearly appear that no prejudice resulted. Let the judgment be reversed, and a new trial ordered.

NATIONAL BANK OF COMMERCE IN ST. LOUIS v. ALLEN, Internal Revenue Collector.

(Circuit Court of Appeals, Eighth Circuit. March 25, 1915.)

No. 4260.

1. TAXATION ⟸11—SHARES OF STOCK IN NATIONAL BANKS.

A national banking corporation and its property are separate and distinct from its shares of stock, and while a tax levied upon the bank itself by a state would be invalid, a tax levied by a state on its shares of stock is valid, and the state may lawfully require the tax to be paid in the first instance by the corporation, with the right to reimbursement from the stockholders.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 27–29; Dec. Dig. ⟸11.]

2. INTERNAL REVENUE ⟸9—EXCISE TAX ON CORPORATIONS—NET INCOME—"TAXES IMPOSED BY AUTHORITY OF THE STATE."

A tax levied by a state on the shares of a national bank, and paid by the bank as required by the state statute, but which under the statute it has the right to recover back from the stockholder, is not a "tax imposed under the authority of the state" on the corporation or its property, within the meaning of Corporation Tax Law Aug. 5, 1909, c. 6, § 38 (2), 36 Stat. 112 (Comp. St. 1913, § 6301), such as the bank is thereby authorized to deduct from its gross income to ascertain its taxable net income; nor can it be deducted as an expense of the business.

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

3. INTERNAL REVENUE ⟸9—EXCISE TAX ON CORPORATIONS—CONSTRUCTION OF STATUTE—"EXCISE TAX."

The tax imposed by Corporation Tax Law, § 38 (Comp. St. 1913, § 6301), is not a tax upon income, but an "excise tax" upon the right to do business as a corporation, the amount of which is measured by income.

[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, Excise Tax.

Recovery of internal revenue taxes paid, see note to Merck v. Treat, 122 C. C. A. 305.]

4. INTERNAL REVENUE ⟸9—EXCISE TAX ON CORPORATIONS—"FALSE" RETURN—POWER OF COMMISSIONER TO AMEND.

Corporation Tax Law, § 38, by subdivision 3 (Comp. St. 1913, § 6302), requires corporations to make "true and accurate" returns. Subdivision 4 (section 6303), authorizes the Commissioner of Internal Revenue to amend any return believed to be inaccurate without any limit as to time, and subdivision 5 (section 6304) provides that in case of "false or fraudulent" returns he shall, on discovery of the fact within three years, make a return and assessment thereon. *Held* that, construing such provisions together, the word "false," as used in subdivision 5, is not to be construed as meaning intentionally or fraudulently false, but the same as "not true," or the equivalent of "incorrect," and that the

Commissioner has power in such case to amend a return at any time within three years.

[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, False.]

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

Action at law by the National Bank of Commerce in St. Louis against E. B. Allen, United States Collector of Internal Revenue for the First District of Missouri. Judgment for defendant, and plaintiff brings error. Affirmed.

For opinion below, see 211 Fed. 743.

A. C. Stewart, of St. Louis, Mo. (Stewart, Bryan & Williams, of St. Louis, Mo., on the brief), for plaintiff in error.

Homer Hall, Asst. U. S. Atty., of St. Louis, Mo. (Arthur L. Oliver, U. S. Atty., of Caruthersville, Mo., on the brief), for defendant in error.

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

CARLAND, Circuit Judge. This is an action by the bank against the collector to recover the sum of $5,304.57 paid under protest as taxes assessed pursuant to section 38, Act of Congress approved August 5, 1909 (36 Stat. 112–117 [Comp. St. 1913, §§ 6301–6307]), for the years 1909, 1910, and 1911. Judgment was rendered by the court below against the bank on the pleadings. The following facts appear therefrom:

The bank is a national bank, organized under the laws of the United States and doing business at St. Louis, Mo. It made returns of its gross and net income to the United States Commissioner of Internal Revenue, hereafter called the Commissioner, for the years 1909, 1910, and 1911. From its gross income for 1909 it deducted $193,230.98; for the year 1910, $187,042.99; for the year 1911, $150,204.31—which sums it had paid in the years in which deduction was made for taxes imposed by the state of Missouri by virtue of chapter 117, article 2, Revised Statutes of Missouri 1909. The Commissioner assessed against the bank on its return of net income for the year 1909, $9,848.57; for the year 1910, $7,824.61; for the year 1911, $6,257.76—which the bank duly paid. In April, 1912, the Commissioner upon evidence produced before him decided that the returns of net income made by the bank for the years 1909, 1910, and 1911 were incorrect, in that the bank was not entitled to deduct the taxes imposed by the state of Missouri for those years by virtue of chapter 117, article 2, Revised Statutes of Missouri 1909. The Commissioner thereupon amended the returns of the bank for the years mentioned by adding to the reported net income the several amounts deducted by the bank as above stated and assessed against it on said additional net income a special tax for

the year 1909, of $1,932.10; for 1910, $1,870.43; for 1911, $1,502.04. These are the amounts which the bank paid under protest and now seeks to recover.

There is no claim that the returns as made by the bank were intended to defraud. It is conceded that they were made in good faith under the belief that the bank had a right to deduct from its gross income the taxes referred to. The Corporation Excise Tax Law, so far as the present controversy is concerned provides as follows:

"Sec. 38. That every corporation, joint stock company or association, organized for profit and having a capital stock represented by shares * * * shall be subject to pay annually a special excise tax with respect to the carrying on or doing business by such corporation, joint stock company or association, * * * equivalent to one per centum upon the entire net income over and above five thousand dollars received by it from all sources during such year. * * *

"Second. Such net income shall be ascertained by deducting from the gross amount of the income of such corporation, joint stock company or association, * * * received within the year from all sources, (first) all the ordinary and necessary expenses actually paid within the year out of income in the maintenance and operation of its business and properties, including all charges such as rentals or franchise payments, required to be made as a condition to the continued use or possession of property; * * * (fourth) all sums paid by it within the year for taxes imposed under the authority of the United States or of any state or territory thereof."

Section 11357 of article 2, chapter 117, Revised Statutes of Missouri 1909, is entitled:

"Sec. 11357. Assessment of manufacturing and business companies and *stock* in other corporations."

The section then provides that persons owning shares of stock in banks incorporated under or by any law of the United States or of the state of Missouri shall not be required to deliver to the tax assessor a list thereof, but the president or other chief officer of such corporation shall under oath deliver to the assessor a list of all shares of stock held therein and the face value thereof, and such shares shall be valued and assessed as other property at their true value in money less the value of real estate, if any, represented by such shares of stock.

Section 11359, Revised Statutes of Missouri, provides that the taxes assessed on shares of stock listed as above, shall be paid by the corporation and the corporation may recover from the owners of such shares the amount so paid by it or deduct the same from the dividends accruing on such shares, and the amount so paid shall be a lien on such shares, respectively, and shall be paid before a transfer thereof can be made.

Section 11360 provides that, if the president or other chief officer of any such corporation fails to comply with the provisions of the law above mentioned, he shall forfeit to the state of Missouri the sum of $1,000 to be recovered by indictment in any court of competent jurisdiction.

Section 11463 provides for the seizure and sale of the shares in case the tax thereon is not paid. The legislation of the several states in regard to the taxation of shares in national banks is of like character, although it may differ in matter of detail. A general knowledge of the

power of the states to tax national banks is necessary in order to fully understand state legislation in relation thereto. The Supreme Court of the United States has uniformly held that the states cannot tax the property of national banks. As a result of this state of the law there was inserted in the National Bank Act of 1864 the following provisions:

"That the president and cashier of every such association shall cause to be kept at all times a full and correct list of the names and residences of all the shareholders in the association, and the number of shares held by each, in the office where its business is transacted; and such list shall be subject to the inspection of all the shareholders and creditors of the association, and the officers authorized to assess taxes under state authority, during business hours of each day," etc. Act June 3, 1864, c. 106, § 40, 13 Stat. 111 (Comp. St. 1913, § 9773).

"Provided, that nothing in this act shall be construed to prevent all the shares in any of the said associations, held by any person or body corporate, from being included in the valuation of the personal property of such person or corporation in the assessment of taxes imposed by or under state authority at the place where such bank is located, and not elsewhere, but not at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state: (2) Provided, further, that the tax so imposed under the laws of any state upon the shares of any of the associations authorized by this act shall not exceed the rate imposed upon the shares in any of the banks organized under authority of the state where such association is located: (3) Provided, also, that nothing in this act shall exempt the real estate of associations from either state, county, or municipal taxes to the same extent, according to its value, as other real estate is taxed." Section 41, 13 Stat. 112.

[1] Under this legislation of Congress the states have provided for the taxation of shares in national banks and also provided for the payment of the same by the bank. It is, therefore, now the law that a national banking corporation and its property is separate and distinct from its shares of stock, and that while the tax levied upon a national bank itself by a state would be invalid, a tax levied by a state upon the shares of stock in a national bank is valid. Van Allen v. Assessors, 70 U. S. (3 Wall.) 573, 18 L. Ed. 229; Home Savings Bank v. Des Moines, 205 U. S. 503, 27 Sup. Ct. 571, 51 L. Ed. 901; Hawley v. Malden, 232 U. S. 1, 34 Sup. Ct. 201, 58 L. Ed. 477; Clement National Bank v. Vermont, 231 U. S. 120, 34 Sup. Ct. 31, 58 L. Ed. 147.

The Supreme Court of Missouri has uniformly nullified every attempt to assess taxes by the state directly against the property of national banks, and has repeatedly pointed out that the tax could be levied only upon the shares of stock. Lionberger v. Rowse, 43 Mo. 67, affirmed 9 Wall. 468, 19 L. Ed. 721; First National Bank v. Meredith, 44 Mo. 500; City of Springfield v. First National Bank, 87 Mo. 441; State ex rel. v. Bank, 160 Mo. 640, 61 S. W. 676; State ex rel. v. Shryack, 179 Mo. 424, 78 S. W. 808; State ex rel. v. Bank, 180 Mo. 717, 79 S. W. 943. In State ex rel. v. Brinkop, 238 Mo. 298, 143 S. W. 144, the Supreme Court of the state of Missouri said:

"Under our statute, stock in a bank, federal or state, is assessed against the shareholder, but the tax is paid in the first instance by the bank, and the bank is reimbursed by the shareholder. That is merely a mode of convenience in collecting the tax, the effect is the same as if the shareholder paid it in the first instance."

In Bank v. Commonwealth, 9 Wall. 353, 19 L. Ed. 701, it is said:

"It is strongly urged that it is to be deemed a tax on the capital of the bank, because the law requires the officers of the bank to pay this tax on the shares of its stockholders. Whether the state has a right to do this we will presently consider, but the fact that it has attempted to do it does not prove that the tax is anything else than a tax on these shares. It has been the practice of many of the states for a long time to require of its corporations thus to pay the tax levied on their shareholders. It is the common, if not the only, mode of doing this in all the New England states, and in several of them the portion of this tax which should properly go as the shareholders' contribution to local or municipal taxation is thus collected by the state of the bank and paid over to the local municipal authorities. In the case of shareholders not residing in the state, it is the only mode in which the state can reach their shares for taxation. * * * The mode under consideration is the one which Congress itself has adopted in collecting its tax on dividends, and on the income arising from bonds of corporations. It is the only mode which, certainly and without loss, secures the payment of the tax on all the shares, resident or nonresident; and, as we have already stated, it is the mode which experience has justified, * * * convenient and proper in regard to the numerous wealthy corporations of those states."

In the later case of Merchants' Bank v. Pennsylvania, 167 U. S. 461, 17 Sup. Ct. 829, 42 L. Ed. 236, it is said:

"It is further insisted that the act is really one taxing the bank, and not taxing the shares of stock as the property of the stockholders; but this is obviously a misinterpretation of the statute. That simply makes the bank the agent to collect from the stockholders the tax imposed upon the shares. * * * That the state has the right to make the bank its agent to collect the tax from the individual stockholders was settled in National Bank v. Commonwealth, 9 Wall. 353 [19 L. Ed. 701]."

In the still later case of Home Savings Bank v. Des Moines, 205 U. S. 503, 27 Sup. Ct. 571, 51 L. Ed. 901, it was again said:

"It, however, is not an uncommon and is an entirely legitimate method of collecting taxes to require a corporation, as the agent of its shareholders, to pay in the first instance the taxes upon shares, as the property of their owners, and look to the shareholders for reimbursement."

[2, 3] On this state of the record the important questions to be considered are as follows:

First. Were the taxes paid to the state by the bank on the shares of its capital stock such taxes as the Corporation Excise Tax Law authorized it to deduct from its gross income?

Second. Was the Commissioner of Internal Revenue authorized by law in April, 1912, to make the additional assessment on the amounts so deducted by the bank?

It must be conceded that the taxes were imposed by the state of Missouri. Were they imposed upon the owners of the shares, the bank being a mere agent to pay the tax, or were they imposed upon the bank as a legal entity? It seems to be conceded in the record that the bank has not been repaid these taxes. If this be so, it must be because the bank has not chosen to reimburse itself. In construing the Excise Tax Law as to the matter under consideration, it will help us to arrive at its true meaning by considering the real purpose of the law. The law is not a tax upon income, but a tax upon the right to do business as a corporation; the amount of the tax being measured according to the income. Therefore, for the purpose of ascertaining the amount of the

tax which the corporation shall pay, it is necessary to arrive at its own net income for any particular year. The bank, therefore, would have no right to deduct from its gross income taxes imposed by the state upon a third party, but which the bank itself had paid. Congress was legislating with reference to all corporations, and not particularly as to national banks.

We think the word "imposed" as used in the Excise Law must be given the meaning which the standard dictionaries give it. The Century Dictionary gives some of the meanings of the word as follows: "To lay as a burden, levy, inflict, or enforce; as by authority, power, or influence; as to impose taxes or penalties." Webster defines it to mean: "To lay as a charge, burden, tax, duty; to levy." Giving to the word the meaning which its association demands, and taking also into consideration the fact that the state of Missouri could not impose a tax upon the bank as such, we are of the opinion that the taxes paid by the bank were not imposed upon it by the state of Missouri within the meaning of the law, and that, therefore, the bank had no authority to deduct the same from its gross income.

It is also contended by the bank that, if it was not entitled to deduct the amounts which it did from its gross income as taxes imposed upon it by the state, it had the right to deduct them as expenses paid within the year out of income in the maintenance and operation of its business. This contention has much less to support it than the other. It was not paid out of income for any of the purposes mentioned in the law, and the taxes cannot be considered expense, for the reason that the law specifically provides for taxes, which would have been entirely unnecessary if the expenses were to cover taxes.

[4] We now come to inquire whether conceding that the taxes paid by the bank could not be deducted from its gross income, the Commissioner had authority in April, 1912, when he discovered that the returns of the bank made in 1910, 1911, and 1912, were incorrect, to make a new assessment upon the amounts deducted. The solution of this question is not entirely free from difficulty. Subdivision third of section 38 provides that corporations shall on or before March 1st of each year make *true* and accurate returns under oath. Subdivision fourth provides that:

"Whenever evidence shall be produced before the Commissioner of Internal Revenue which in the opinion of the Commissioner justifies the belief that the return made by any corporation * * * is incorrect, * * * the Commissioner of Internal Revenue may require from the corporation * * * such further information * * * as he may deem expedient, * * * and for the purpose of ascertaining the correctness of such return * * * is hereby authorized * * * to examine any books and papers bearing upon the matters required to be included in the return of such corporation, * * * and upon the information so acquired the Commissioner of Internal Revenue may amend any return or make a return where none has been made."

It will be observed that this subdivision does not limit the time within which the Commissioner of Internal Revenue must act.

Subdivision fifth provides:

"All returns shall be retained by the Commissioner of Internal Revenue, who shall make assessments thereon; and in case of any return made with

false or fraudulent intent, he shall add one hundred per centum of such tax. * * * All assessments shall be made and the several corporations, joint stock company, or association * * * shall be notified of the amount for which they are respectively liable on or before the first day of June of each successive year, and said assessments shall be paid on or before the 30th day of June, except in cases of refusal or neglect to make such return, and in cases of false or fraudulent returns, in which cases the Commissioner of Internal Revenue shall, upon the discovery thereof, at any time within three years after said return is due, make a return upon information obtained as above provided for, and the assessment made by the Commissioner of Internal Revenue thereon shall be paid by such corporation, joint stock company or association, * * * immediately upon notification of the amount of such assessment."

Counsel for the bank contends that the language last above quoted limits the Commissioner of Internal Revenue, as to his power to make a new assessment, to cases of refusal or neglect to make a return, and to cases where the return is false or fraudulent, and further contends that the word "false," in the connection in which it is used, must be construed to mean intentionally false, or false with intent to defraud, and as the returns of the bank in this case were not made with intent to defraud and were not false in a fraudulent sense, the Commissioner of Internal Revenue had no authority to act. We do not think that the contention can be sustained when we view all the provisions of the Corporation Excise Tax Law. It is true that the Commissioner did not add 100 per centum of the tax levied as provided for a false or fraudulent return, and we may conclude from this that the Commissioner was of the opinion that the returns were not false or fraudulent in the sense that those words were used in the language of the law which authorizes the addition of the penalty.

The words "false" or "fraudulent" as pointed out by the Circuit Court of Appeals of the First Circuit in Eliot National Bank v. Gill, 218 Fed. 600, 134 C. C. A. 358, is used but four times in the Corporation Tax Law. The first instance is in the fifth subdivision above quoted at the commencement thereof, where the law provides for the addition of 100 per centum of the tax. The next instance is in the same subdivision, and is the language which we are now considering; the remaining two instances are in the eighth subdivision, which provides a penalty for the refusal or neglect to make a timely return, and also provides that one who shall make a false or fraudulent return shall be guilty of a misdemeanor and punished as therein provided. If the contention of counsel for the bank is correct, then the provisions of subdivision fourth, which allows the Commissioner, in case he finds a return to be incorrect merely, without reference to whether it is false or fraudulent, would be inoperative unless the correction was made before the tax was due for any particular year. We do not think any such result should be reached or that it necessarily follows from an examination of the law. We agree with the Court of Appeals of the First Circuit, in the case above mentioned, that there is no necessity of construing the word "false" where it is used with reference to the time in which the Commissioner shall act to mean fraudulently false or dishonest, and that the full purpose of the law and the rights of all parties may be preserved by construing the word broadly enough to

include a return which was made in good faith but incorrect. The bank was required under the law to make a true return. The return that it did make was incorrect, or in other words it was not true, but false; that is, false in the sense that it was not true. We think the word should be given this particular signification in connection with the language now being construed, and giving it such meaning the Commissioner had full authority to make a new assessment on the property omitted from the returns made by the bank.

The point is made that the Excise Law as we construe it would violate the principle of uniformity, in that to refuse to allow a banking corporation, in computing its net income, to deduct taxes paid to the state, when such deduction is allowed to a corporation doing a manufacturing, insurance, or other kind of business, would result in gross inequality against the bank. The trouble with this contention is that it assumes that the taxes paid were imposed upon the bank, which we decide is not the case. The District Court of Massachusetts in the case of Eliot National Bank v. Gill (D. C.) 210 Fed. 933, the Circuit Court of Appeals for the First Circuit, in affirming the judgment in the same case, 218 Fed. 600, 134 C. C. A. 358, and also the District Court of the Eastern District of Pennsylvania in the case of Northern Trust Company v. McCoach (D. C.) 215 Fed. 991, have reached the same conclusions as herein expressed.

The judgment of the court below should be affirmed. And it is so ordered.

NORTHWESTERN PORT HURON CO. v. BABCOCK.

(Circuit Court of Appeals, Eighth Circuit. March 8, 1915. Rehearing Denied May 17, 1915.)

No. 4276.

1. JUDGMENT ⇐956—CONSTRUCTION—EVIDENCE—OPINIONS OF COURT.

Under a state statute requiring the opinion of the Supreme Court to be filed as a part of the record, such an opinion may be introduced in evidence in a federal court and examined in order to properly interpret the judgment of the court.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1822–1825; Dec. Dig. ⇐956.]

2. JUDGMENT ⇐731—MATTERS CONCLUDED—ISSUES NOT ADJUDICATED.

In an action in a state court on promissory notes, defendant answered, expressly admitting the execution of the notes but pleading a counterclaim. Plaintiff moved to dismiss, which was denied. The only issue tried or submitted to the jury was on the counterclaim upon which judgment was rendered for defendant. On appeal plaintiff contended that the judgment should at least be set off against the amount due on the notes but was overruled; the court stating in its opinion that the notes were not in issue in the trial court. *Held*, that defendant's liability on the notes was not res judicata, since they were clearly not adjudicated on the merits, although plaintiff was entitled to judgment

thereon on the pleadings, nor was it plaintiff's fault that they were not so adjudicated.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1259, 1261; Dec. Dig. ⊂⊃731.]

3. COURTS ⊂⊃494—EQUITABLE RELIEF AGAINST STATE JUDGMENT.

A federal court of equity may allow an equitable set-off against a judgment of a state court, where the judgment plaintiff is not only a nonresident of the state but is insolvent.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1355–1371; Dec. Dig. ⊂⊃494.]

4. JUDGMENT ⊂⊃847—EQUITABLE RELIEF AGAINST—SUIT TO ESTABLISH SET-OFF—EFFECT OF ASSIGNMENT.

An attorney, although entitled under the law of the state to a lien for services on a judgment obtained in favor of his client, which lien is superior to a right of set-off against the judgment, if notice is previously filed, who, with notice of such claimed set-off, takes an assignment of the judgment in settlement of his claim, merges his lien, and cannot set up such assignment as a defense to a suit in equity by the judgment defendant to enforce his right of set-off.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1548–1555; Dec. Dig. ⊂⊃847.]

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

Suit in equity by the Northwestern Port Huron Company against Howard Babcock. Decree for defendant, and complainant appeals. Reversed.

A. J. Keith and L. M. Morris, both of Sioux Falls, S. D., for appellant.

L. W. Crofoot, of Aberdeen, S. D., for appellee.

Before ADAMS and CARLAND, Circuit Judges, and AMIDON, District Judge.

CARLAND, Circuit Judge. Appellant filed its bill in the court below to enjoin the collection of two judgments rendered against it and in favor of Olaf Iverson and Bjorn Iverson, respectively, on March 1, 1907, in the circuit court of the county of Roberts, S. D., and also to have the amount due on certain promissory notes described in the bill offset against the amount due on said judgments. Babcock was the only defendant served with process; the defendants Olaf Iverson and Bjorn Iverson not being found within the district of South Dakota. The defendant Babcock answered the bill and pleaded as a defense that the right of appellant to recover upon the notes set forth in the bill had been finally adjudicated against it on the merits by the judgment of the circuit court for the county of Roberts in favor of Olaf Iverson. He further pleaded that he was the owner of said judgments by assignment thereof from the Iversons; and that he took said judgments in settlement and satisfaction of two attorney's liens for services rendered in the action in which said judgments were obtained. No affirmative relief was asked in the answer. The cause came on for final hearing on the pleadings and proofs, and as a result

thereof the bill was dismissed on the merits for want of equity. The pleadings and proofs established the following facts:

On May 10, 1904, at Veblen, S. D., Olaf Iverson purchased from appellant the following farm machinery at the agreed price of $3,469.60:

1 Port Huron Traction Engine 30 Horse Power (traction rating)—Simple-Compound.
1 Straw Burning Attachment.
1 Jacket Force Feed Lubricator.
1 Loco Cab Mocking Bird Whistle Canopy Top.
1 Port Huron Rusher Separator, width of Cylinder 40 inches; of Separator 64 inches.
1 Stacker Farmers Friend (Kind).
1 Band Cutter and Feeder Parsons (Kind).
1 Elevator-Weigher-Wagon Loader-Bagger Perfection (Kind).
1 Drive Belt 150 feet long 8 inches wide 4 ply-canvas Rubber. Saw Mill: Mounted-Unmounted: Right-Left Hand (Kind).
1 Saw 18x36 (Canvas Cover).
Port Huron Cylinder Corn Sheller.
Port Huron Husker-Shredder (Adjustable) Sieve.
1 Ham Head Light.
1 Woods Tender complete.
1 Wood Tank 12½ bbl.
1 Tank Pump and Hose Free.

In payment of this sum he executed and delivered to appellant the following promissory notes:

Consisting of note due Oct. 1, 1904	$1,219 60
Note due Oct. 1, 1905	1,000 00
Note due Oct. 1, 1906	1,000 00
Note due Oct. 1, 1904	125 00
Note due Oct. 1, 1905	125 00
	$3,469 60

—with interest at 8 per cent.

Bjorn Iverson indorsed these notes before delivery. On or about February 11, 1905, appellant commenced an action against Olaf and Bjorn Iverson in the circuit court for the county of Roberts, S. D., to recover the amount due on the notes above mentioned, except the note for $1,219.60, due October 1, 1904, which the complaint in the action admitted had been paid by the application of the proceeds of a chattel mortgage foreclosure sale. The chattel mortgage having been given on the farm machinery by Olaf Iverson to secure the payment of the notes. Appellant, in the action so commenced, claimed the right to declare the remaining notes due by virtue of a certain provision of the chattel mortgage which gave the appellant the option to declare the whole amount of the notes due on the happening of certain contingencies. Bjorn Iverson answered the complaint, but, as the action as to him was subsequently dismissed, his answer may be disregarded. Olaf Iverson answered the complaint and specifically admitted the execution and delivery of the notes, alleged that they had been paid, and by way of counterclaim set forth facts tending to show that the chattel mortgage given to secure the notes had been foreclosed in a county where the mortgage had not been recorded, and that by reason of this fact the appellant was liable in conversion to Olaf Iverson for the value of the machinery.

Appellant denied generally the allegations of the counterclaim. The cause subsequently came on for trial in the circuit court for Roberts county, and the appellant at the opening of the case moved to dismiss the action. The motion was granted as to Bjorn Iverson and denied as to Olaf Iverson. Judgment was subsequently entered in favor of Bjorn Iverson against appellant for costs amounting to $57.60. The motion to dismiss the action as to Olaf Iverson was renewed by appellant at the close of all the evidence and again denied as before. The trial proceeded on the counterclaim and resulted in a verdict by the jury in favor of Olaf Iverson against appellant for $3,500, being the alleged value of the property claimed to have been converted by appellant. Judgment was subsequently entered on this verdict amounting to $3,512.60. The judgment of $57.60 was rendered March 6, 1907, and the judgment for $3,512.60, March 1, 1907. From the judgment in favor of Olaf Iverson, an appeal was prosecuted by appellant to the Supreme Court of South Dakota. For the purpose of that appeal a bill of exceptions was settled and allowed by the trial judge and became a part of the record. It appears from the bill of exceptions that the trial judge charged the jury as follows:

"Gentlemen of the Jury: Under the undisputed evidence in this case the court is of the opinion that Olaf Iverson is entitled to a verdict at your hands for the value of this threshing rig. The court will therefore direct the following verdict. There is only one question for you to decide in this case and that is to decide what was the value of this threshing rig at the time it was taken by the plaintiff in this case for foreclosure under this mortgage sale. While some evidence has been offered in regard to a sale being made of this machine, the court is of the opinion that said mortgage sale was a void mortgage sale and the plaintiff in this case has converted this threshing machine to its own use and benefit. You may swear a bailiff, Mr. Clerk, to take charge of this jury. There is a blank left in this verdict for filling in whatever amount you may find. After you have ascertained the value of the machine you may insert that in the form of verdict. You may retire."

On appeal the Supreme Court affirmed the judgment in favor of Olaf Iverson and denied a rehearing. The Supreme Court decided that the alleged conversion of the mortgaged property was properly pleaded as a counterclaim and that there was sufficient evidence of conversion. Then follows this language in the opinion of the court:

"It is further contended by the appellant that, if in fact there was sufficient evidence to establish the conversion of the mortgaged property, it does not appear that the defendant sustained any damages, and in any event he would be entitled to recover only the value of the property, less the amount of the mortgage debt. This contention is untenable, for the reason that it was disclosed by the record that the plaintiff had previous to the trial disposed of the notes, and that they were still unpaid and outstanding as against the defendants. The plaintiff offered no evidence in the action tending to prove the amount due upon the notes, and hence the controversy as to the notes and amount due thereon was practically out of the case, and the defendant Olaf Iverson, having introduced evidence showing the value of the mortgaged machinery at the time of its alleged conversion by the plaintiff, was entitled to recover the value of the same, and there was ample evidence to support the findings of the jury that the value of the mortgaged property at the time of the conversion was $3,500 found by them in favor of the defendant Olaf Iverson by their verdict."

After the affirmance of the judgment and denial of a rehearing, but before the remittitur was sent to the lower court, the appellant

petitioned the Supreme Court for a modification of the judgment below in favor of Iverson. The relief asked for was that the case be remanded to the circuit court, with directions to enter a judgment in favor of appellant for the balance due on the notes after deducting the amount of the judgment in favor of Olaf Iverson. In this petition for a modification a claim was made for the amount due on all the notes given by Olaf Iverson, including the first note due October 1, 1904. After a hearing of this petition, the Supreme Court denied the same without opinion. The filing of the petition for a modification was in effect an attempt to retry the case in an action at law on the facts in an appellate tribunal, and we attach no more importance to the decision thereon than we do to the judgment of affirmance and the denial of a rehearing. Whatever the Supreme Court did was as an appellate tribunal; it rendered no new judgment, but simply affirmed the judgment of the circuit court for Roberts county, which is the real judgment which adjudicated appellant's right to recover on the notes if such right was adjudicated at all.

The defendant Babcock was the attorney for the Iversons during all the litigation in the state courts and had actual knowledge of all the facts appearing therein. On April 24, 1907, less than a month after the rendition of the judgment in favor of Iverson, Babcock filed a notice with the clerk of the court where the judgment was docketed, claiming an attorney's lien under the laws of South Dakota for $1,800 for services rendered in the action. July 31, 1908, he filed in the same place a notice pursuant to law that he claimed an attorney's lien for services rendered therein in the sum of $3,500. November 23, 1908, Olaf Iverson, in settlement of the claim of Babcock for attorney's fees, assigned, transferred, and set over all his interest in and to the judgment in his favor against appellant to the defendant Babcock. February 11, 1909, Bjorn Iverson assigned the judgment in his favor against appellant to Babcock. No other consideration for these judgments was paid by Babcock than the value of his services as attorney for the Iversons in the action in which the judgments were rendered.

The pleadings and the evidence fully warrant the finding that the Iversons are nonresidents of the state of South Dakota and are insolvent as insolvency is defined by the law of that state (Civil Code 1903). By this law a person is deemed insolvent when he is unable to pay his debts as they become due in the ordinary course of business, which also is the definition of the common law. In Cunningham v. Norton, 125 U. S. 90, 8 Sup. Ct. 811, 31 L. Ed. 624, it was said:

"When a person is unable to pay his debts he is understood to be insolvent. It is difficult to give a more accurate definition of insolvency."

The definition of the bankruptcy law is not controlling here. The evidence in the present case is to the effect that appellant is owner and holder of all the notes given by the Iversons on May 10, 1904, and no part of the same has been paid, except $352.70 paid October 15, 1904, which sum paid one note for $125 and interest amounting to $2.70; the balance of $225 being applied on the note for $1,219.60. What became of the amount received on foreclosure of the chattel mortgage, if any, does not appear. It is probable that the defendant was of the opin-

ion that, if the liability of the Iversons on the notes had not been adjudicated in the suit in Roberts county, the amount due thereon became more or less immaterial.

It thus appears from the foregoing facts that, if appellant may not be granted the relief prayed for in this action, it will have lost, not only the purchase price of the farm machinery, but will also be obliged to pay the Iverson judgments now amounting to over $5,500. Such an unjust result ought not to be brought about, unless there be no escape therefrom under well-settled principles of law and equity. The defendant Babcock seeks to defeat the relief asked for by appellant by insisting that the right of appellant to recover anything on the notes given by Iverson was finally adjudicated against it by the proceedings in the circuit court and Supreme Court of the state of South Dakota, and in this behalf the well-established rule of law is invoked that, where the second suit is upon the same cause of action and between the same parties as the first, the judgment in the former is conclusive in the latter as to every question which was or might have been presented and determined in the former. The law is plain enough in cases of the kind mentioned, but the question for determination in this case, as well as all others of like character, where the plea of res judicata is interposed, is: Do the facts show that the question at issue was determined on its merits or might have been so determined in the former action? That we may not be misunderstood, it is proper to state that in any examination we may make of the proceedings in the Supreme and circuit courts of South Dakota, which resulted in the Olaf Iverson judgment, our single object will be to determine from such examination whether the right of the appellant to recover on the Iverson notes was adjudicated therein, or whether, under the circumstances in that case, the right of the appellant to recover on the notes might have been determined therein on the merits. Whatever the proceedings were in the state courts, they stand here unquestioned.

The first question presented for decision is: Was the right of appellant to recover on the notes decided on the merits in the former suit? This cannot be seriously claimed; neither the trial court nor the Supreme Court had any such idea and such was not the fact; and defendant Babcock has at all times known this. Appellant desired to get out of the circuit court for Roberts county and moved at the beginning of the trial and at its close to dismiss its action, but it was held for the purpose only of trying the issues arising on the counterclaim. The Supreme Court, on appeal from the judgment in reply to the suggestion of counsel for appellant that Iverson could not recover only the value of the property alleged to have been converted, less the mortgage debt, used the language hereinbefore quoted, showing clearly that the Supreme Court had no idea that the liability of the Iversons on the notes had in any wise been adjudicated in the court below.

[1] We have no doubt that we have the right to examine the opinion of the Supreme Court in a case of this kind in order to properly interpret its judgment. A duly certified copy of the opinion was introduced in evidence in the court below, and the Revised Codes of South Dakota 1903, c. 2, art. 3, par. 634, p. 117, also page 872, provide for the filing of

these opinions as public records. Stearns v. Lawrence, 83 Fed. 738, 28 C. C. A. 66.

[2] The trial judge had no idea that the right of recovery on the notes was in any way involved at the trial in the circuit court for Roberts county, as appears by his language hereinbefore quoted, taken from the bill of exceptions duly settled and allowed. We therefore think that it is plain from the face of the record that the right to recover on the notes was not in fact decided on the merits. We next come to inquire if, under the facts in this case, the appellant's right to recover on the notes must be held to have been adjudicated against it in the former suit for the reason that it might have been. We do not think that this is a case where the might-have-been rule can be applied. It must be borne in mind that although appellant in the former suit endeavored to get out of court it was far from being successful, and notwithstanding its desire to get out, it may insist upon whatever rights its forced position gave it. This being the case, it is proper to inquire as to what was the status of appellant with reference to its claim on the notes at and during the proceedings in the state court. This is certainly not a case where a party to a former action has negligently failed to set up a claim therein which he might have set up—far from it. Appellant went into the circuit court asserting in his complaint the execution and delivery of the notes by the Iversons and praying for judgment. Olaf Iverson specifically admitted the execution and delivery of the notes. Laying aside for the moment the counterclaim in which Olaf Iverson was plaintiff, the appellant, when the trial opened, was entitled to judgment on the pleadings for the amount due on the notes sued upon without offering any evidence whatever. What did appellant fail to do in the circuit court of the state to establish his right of recovery on the notes? The answer to this question will determine whether the liability of the Iversons on the notes might have been determined in the suit in the circuit court for Roberts county, and also as to whether the appellant was guilty of such negligence as will bar it from any relief in the present action. It could not control the charge of the court. It was in court with its claim established beyond a doubt, and, while it was held there so that Iverson could prove his claim against it, Iverson recovered a $3,500 verdict and appellant nothing. On its appeal from the judgment it urged that, in case the Iverson verdict must stand, it be allowed as a credit on the amount due on the notes. In its petition for a modification of the judgment, it asked the same thing, and now, when attempting to accomplish the same purpose in the present action, it is met with the defense that it may not do it here for the reason that it might have done it there. In view of the facts appearing of record, it is quite plain, we think, that it cannot be said that appellant might have litigated the liability of the Iversons on the notes in question in the circuit court for Roberts county, and for a much stronger reason it cannot be said that appellant was guilty of such negligence in presenting its claim in that litigation as would bar it from any relief in equity in the present action. We are therefore of the opinion that the plea of former adjudication has wholly failed, and that the

facts presented in the record entitle the appellant to resort to a court of equity for relief, if he be otherwise entitled thereto.

[3] It certainly would be inequitable to allow the defendant to enforce the judgment now amounting to more than $5,500 against the appellant, and we cannot see that the position in which appellant finds itself has been in any wise brought about through its own negligence or fault. The following cases we think establish beyond doubt that a court of equity, under the facts proven in this case, has the right to allow an equitable set-off against the judgment, although it be a judgment of a state court. Gaines v. Fuentes, 92 U. S. 10, 23 L. Ed. 524; Barrow v. Hunton, 99 U. S. 80, 82, 25 L. Ed. 407; Johnson v. Waters, 111 U. S. 640, 667, 4 Sup. Ct. 619, 28 L. Ed. 547; Arrowsmith v. Gleason, 129 U. S. 86, 101, 9 Sup. Ct. 237, 32 L. Ed. 630; Marshall v. Holmes, 141 U. S. 599, 12 Sup. Ct. 62, 35 L. Ed. 870; National Surety Co. v. State Bank of Humboldt, 120 Fed. 593, 56 C. C. A. 657, 61 L. R. A. 394 (8th Circuit).

By the clear weight of authority, the nonresidence of a judgment creditor is in itself sufficient ground to justify a court of equity to interpose and allow a set-off against the judgment. Especially would this be true if the judgment creditor be both insolvent and nonresident. North Chicago Rolling Mill Co. v. St. Louis Ore & Steel Co. et al., 152 U. S. 596, 14 Sup. Ct. 710, 38 L. Ed. 565, in which case it was said:

"In addition to insolvency, it is held by many well-considered decisions, including those of Illinois, that the nonresidence of the party against whom the set-off is asserted is good ground for equitable relief. Quick v. Lemon, 105 Ill. 578; Taylor v. Stowell, 4 Metc. (Ky.) 175; Forbes v. Cooper, 88 Ky. 285, 11 S. W. 24; Edminson v. Baxter, 4 Hayw. (Tenn.) 112 [9 Am. Dec. 751]; Davis v. Milburn, 3 Iowa, 163. It is not deemed necessary to review these cases and make quotations from them. They fully establish the principles for which they are cited."

In Loy v. Alston et al., 172 Fed. 90, 96 C. C. A. 578, it was said:

"If the court below should decline to grant relief in this suit, the complainant must pay the amount due upon the judgment against him, and then bring another action at law in North Carolina upon his Missouri judgment and collect the judgment he may recover in that action * * * by subsequent execution or other process issued in that state. This remedy is not as prompt, efficient, and adequate as the simple decree of this court that Alston shall credit on the judgment it has rendered in his favor the amount due to Loy on the judgment against Alston in the state court."

[4] Defendant sets up in his answer that the consideration for the assignment of the judgments from the Iversons to him was in consideration of legal services rendered in the actions in which the judgments were obtained. It is not pleaded, however, in the answer, that the defendant has an attorney's lien upon the Iverson judgments for reasonable attorney's fees rendered in the action in which the judgments were obtained, with a prayer that the amount of this lien be ascertained, and that it be held superior to the right of set-off asked by appellant. The straight claim is made that the defendant is owner of the judgments and of the whole thereof, and that the judgments were obtained from the Iversons in settlement of the liens for services filed by the defendant. It is argued in brief that the laws of South Dakota provide for an attorney's lien upon money due his client in the hands of an adverse

party from the time of giving notice to the adverse party or after judgment in a court of record; that such a notice may be given and the lien may be made effective against the judgment debtor by entering the same in the judgment docket opposite the entry of the judgment. Revised Political Code 1903, § 702. It seems also to be the law of South Dakota that this lien is superior to the right to set off mutual judgments, if the notice is given or filed before the institution of proceedings to set off the judgments, except as to mutual judgments rendered in the same action. Pirie v. Harkness, 3 S. D. 178, 52 N. W. 581; Hroch v. Aultman & T. Co., 3 S. D. 477, 54 N. W. 269; Sweeney v. Bailey, 7 S. D. 404, 64 N. W. 188; Lindsay v. Pettigrew, 8 S. D. 244, 66 N. W. 321.

We are not called upon in this case to determine what might have been done if defendant was here asserting an attorney's lien for a reasonable amount for the reason that the defendant has become the owner of the judgments and the liens no longer exist. The lesser interest has been merged in the greater. We certainly, as a court of equity, could not treat the whole amount due on these judgments as an attorney's lien and give it precedence over the right of the appellant to set off the amount due on the notes against the judgment. Upon the whole record we are of the opinion that the judgment below must be reversed and the case remanded, with instructions to the trial court to grant the relief prayed for in the bill.

And it is so ordered.

CHOY GUM v. BACKUS, Commissioner of Immigration.

(Circuit Court of Appeals, Ninth Circuit. May 10, 1915.)

No. 2475.

1. HABEAS CORPUS ⟸56—PETITION—SUFFICIENCY AS AGAINST DEMURRER.
   Where a petition for habeas corpus is tested by demurrer, the statements of fact therein must be taken as true, but statements of mere conclusions will not be taken as true.

   [Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 50; Dec. Dig. ⟸56.]

2. ALIENS ⟸18—IMMIGRATION—POWER TO REGULATE OR RESTRICT.
   Congress may exclude aliens, regulate their coming, provide for their deportation, and confer on the executive department or subordinate officials thereof the duty to enforce the law.

   [Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 70–72; Dec. Dig. ⟸18.]

3. CONSTITUTIONAL LAW ⟸318—DEPORTATION OF ALIEN—PROCEEDINGS—DUE PROCESS OF LAW.
   A proceeding to deport an alien is not a criminal prosecution, within the fifth and sixth amendments, and an alien may be deported without a hearing of a judicial character.

   [Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 949; Dec. Dig. ⟸318.]

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4. ALIENS ⟸32—DEPORTATION—TIME FOR PROCEEDINGS.
A Chinese prostitute may be deported, though proceedings against her were not begun within three years after her entry into the country.

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

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

5. ALIENS ⟸32—DEPORTATION—PROCEEDINGS—RULES—VALIDITY.
A rule governing proceedings to deport aliens, which accords to an alien a right to inspect the warrant of arrest and all evidence on which it was issued and to be apprised, at such stage of the hearing as the officer before whom it is being held may deem proper, that he may be represented by counsel, who shall be permitted to be present during the further conduct of the hearing, to inspect and make a copy of the minutes of the hearing so far as it has proceeded, and to offer evidence to meet any evidence previously or subsequently presented by the government, and which gives to the alien an opportunity to show cause why he should not be deported in view of new facts proved, is not so arbitrary as to deprive the alien of a fair though summary hearing, and is not beyond the power of the executive department, empowered to enforce the law, to enact.

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

6. ALIENS ⟸32—PROCEEDINGS TO DEPORT—VALIDITY.
Where an alien in deportation proceedings and her counsel were given an opportunity to inspect the warrant and the testimony taken preliminarily to its issuance and make a copy of the minutes of the hearing, the alien was sufficiently put into possession of all information necessary to enable her to prepare her defense and produce testimony essential to her cause, and she was not deprived of a fair and impartial hearing.

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

7. ALIENS ⟸32—PROCEEDINGS TO DEPORT—VALIDITY.
The practice of forwarding to the Bureau of Immigration, in accordance with a rule in deportation proceedings, the full record of a deportation proceeding, does not infringe any constitutional right of the alien sought to be deported.

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

8. ALIENS ⟸32—PROCEEDINGS TO DEPORT—VALIDITY.
An alien in deportation proceedings is not legally entitled to the right to cross-examine witnesses giving testimony preliminary to the issuance of the warrant of arrest, and an alien who may produce the testimony of any witness may not complain of a refusal to recall the witnesses preliminarily examined for cross-examination.

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

9. ALIENS ⟸32—PROCEEDINGS TO DEPORT—VALIDITY.
In proceedings to deport an alien, affidavits procured by the government are admissible, though taken without first notifying the alien of the intention to take them and without affording her the privilege of cross-examination, where the affidavits were inspected by her counsel, and no objection was interposed on the ground that the alien was not given an opportunity to answer them, and no request for an extension of time in which to produce testimony to refute them was made.

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

10. HABEAS CORPUS ⇐54—CONCLUSIONS—DEPORTATION PROCEEDINGS.
An allegation in a petition by an alien, held for deportation, for release from custody, that the immigration inspector or the commissioner submitted evidence detrimental to the alien, which evidence was never presented to her for inspection, but was clandestinely forwarded to Washington, and that by reason thereof she was denied an opportunity to see and inspect it or to rebut it, is but a conclusion, and is insufficient to support a charge of bad faith essential to justify judicial interference with the action of the executive department or subordinate officers charged with the duty of enforcing the law.
[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 51; Dec. Dig. ⇐54.]

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

Petition for habeas corpus by Choy Gum, sometimes referred to as Lo King, against Samuel W. Backus, as Commissioner of Immigration at the Port of San Francisco. From a judgment dismissing the petition on sustaining a demurrer thereto, petitioner appeals. Affirmed.

Geo. A. McGowan, of San Francisco, Cal., for appellant.

John W. Preston, U. S. Atty., and Walter E. Hettman, Asst. U. S. Atty., both of San Francisco, Cal., for appellee.

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

WOLVERTON, District Judge. This cause is here on appeal from a judgment dismissing a petition for a writ of habeas corpus; a demurrer having been sustained to such petition. The petitioner is a Chinese woman, who is charged with being unlawfully in this country because engaged in practicing prostitution, and is held for deportation upon warrant of the Secretary of Commerce and Labor. The purpose of suing out the writ was to effect her release from such custody.

The alleged illegality of her restraint consists in abuse of discretion by the immigration officers in the examination of the petitioner for deportation, and in failing to render her a fair and impartial hearing, in the following particulars:

(1) Incorporating into the record against the petitioner the testimony of Leong Toe, Ton Yook Lan, and Wong Go, and refusing to set a time and place for the examination of said witnesses on behalf of petitioner.

(2) Taking the testimony of Arthur D. Layne and Dennis Bohle on affidavit against petitioner, without notice to her, and withholding the fact that such testimony had been taken until the final hearing, and embodying the same in the record without affording opportunity to her of answering the same.

(3) Submitting evidence detrimental to the petitioner's case, previously withheld and clandestinely forwarded to the department, after the close of the hearing, and not affording her an opportunity of answering such evidence, and so abridging and limiting the right of her counsel as to prevent him from ascertaining all the evidence against her.

(4) Submitting evidence against petitioner in the form of oral examination of witnesses had prior to according her the right of an attor-

ney, and thereafter presenting evidence in behalf of the government in the form of affidavits without affording petitioner the opportunity of confronting any of the witnesses appearing against her.

A copy of the proceedings before the immigration officers is appended to the petition, so that what was actually done is made to appear from the record.

The testimony of Leong Toe, Ton Yook Lan, and Wong Go was taken by question and answer before Inspector F. H. Ainsworth September 20, 1912, and on the same day Samuel W. Backus, Immigration Commissioner at San Francisco, recommended to the Department of Commerce and Labor that a warrant issue for the arrest of petitioner and Leong Toe, because found in a well-known house of prostitution; the said petitioner Choy Gum claiming to have been in this country for 19 years, although only 21 years of age.

On September 21st the department declined to issue the warrant. On September 25th the commissioner again wired that:

"It now appears that Choy Gum's true name is Lo King, landed October 23, 1908, from steamship China as wife of native."

Whereupon, on the next day, the acting Secretary of Commerce and Labor directed that petitioner be taken into custody and granted a hearing to enable her to show cause why she should not be deported.

On October 10th a hearing was had before Inspector Ainsworth, at which were present petitioner and her counsel, and petitioner was examined through an interpreter. Her counsel was advised that he could ask her any questions he thought pertinent, or make any statement he wished, but he only asked that the matter be continued. Counsel was thereupon provided with the previous record in the case, being a record of the whole proceeding, with the exception of what occurred on that day in his presence, and the hearing was continued until October 24, 1912, to give petitioner opportunity to show cause why she should not be deported.

The next recorded proceeding bears date November 7, 1912, and shows the hearing to have been continued to that time. At this hearing counsel for petitioner advised the inspector that the evidence in her behalf would be submitted in the form of affidavits, and the government offered in evidence the affidavits of two policemen, namely, Arthur D. Layne and Dennis Bohle, copies of which had been furnished counsel. Counsel for petitioner at the same hearing entered protest, first, against any further action being taken in the cause, on the ground that petitioner had resided continuously in the United States for more than three years prior to the date of the arrest; second, against the incorporation into the record of the testimony of Wong Go and Ton Yook Lan, on the ground that petitioner had not been accorded the opportunity of cross-examining, and against closing the hearing without affording such opportunity; third, against the introduction of the affidavits of Layne and Bohle, on the ground that the evidence was presented after the petitioner was permitted the right of counsel, and counsel was not afforded the opportunity to cross-examine the affiants; and, fourth, that the proceeding is in violation of the rights of an alien domiciled in the United States, and contrary to the letter and spirit of the Constitution. When

it was announced by the inspector that the hearing would be closed and counsel's protests would be forwarded along with the record and evidence to Washington, counsel further protested against the limitation of the petitioner in properly presenting a full and adequate defense.

The affidavits which counsel announced would be submitted in behalf of petitioner were accordingly submitted, and were incorporated in the record, which was subsequently transmitted to the Secretary of Commerce and Labor for his consideration. Based upon the proofs thus submitted, the Acting Secretary of Commerce and Labor, on November 15th, commanded petitioner's deportation.

[1] The petition for the writ being tested by demurrer, the statements of fact made in the petition must be taken as true, but this does not apply to statements of mere conclusions.

[2, 3] In Zakonaite v. Wolf, 226 U. S. 272, 275, 33 Sup. Ct. 31, 32 (57 L. Ed. 218), it is said:

"It is entirely settled that the authority of Congress to prohibit aliens from coming within the United States and to regulate their coming includes authority to impose conditions upon the performance of which the continued liberty of the alien to reside within the bounds of this country may be made to depend; that a proceeding to enforce such regulations is not a criminal prosecution, within the meaning of the fifth and sixth amendments; that such an inquiry may be properly devolved upon an executive department or subordinate officials thereof; and that the findings of fact reached by such officials, after a fair, though summary, hearing, may constitutionally be made conclusive, as they are made by the provisions of the act in question."

This holding has been later reaffirmed in Bugajewitz v. Adams, 228 U. S. 585, 591, 33 Sup. Ct. 607, 57 L. Ed. 978. In an earlier case (Yeung How v. North, 223 U. S. 705, 32 Sup. Ct. 517, 56 L. Ed. 621), the contention was made that the statute and procedure thereunder (the case being one for deportation) deprived the petitioner of due process of law under the Constitution, inasmuch as there was no provision by which the commissioner could procure or compel the attendance of witnesses, and because such alien lawfully in this country could not be deported without a hearing of a judicial character. Notwithstanding such contention, the appeal was dismissed. For this statement of the case, see Low Wah Suey v. Backus, 225 U. S. 460, 468, 32 Sup. Ct. 734, 56 L. Ed. 1165. These authorities answer fully the constitutional objection insisted upon by counsel for appellant.

[4] The protest against further action on the part of the immigration officers, because the petitioner was not proceeded against within three years after her entry into the country, is also answered by Bugajewitz v. Adams, supra.

[5] Immigration rule 22, in pursuance of which the proceeding was had in the present controversy, accords to the alien a right to inspect the warrant of arrest and all evidence upon which it was issued, and to be apprised, at such stage of the hearing as the officer before whom it is being held may deem proper, that he may thereafter be represented by counsel. If counsel be selected, he shall be permitted to be present during the further conduct of the hearing, to inspect and make a copy of the minutes of the hearing, so far as it has proceeded, and to offer evidence to meet any evidence theretofore or thereafter presented by

the government; and if, during the hearing, new facts are proved which constitute a reason, additional to those stated in the warrant of arrest, why the alien is in the country in violation of law, the alien is entitled to have his attention directed to such facts and reason, and to be given an opportunity to show cause why he should not be deported therefor. The rule has the approval of the Supreme Court in the following language:

"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." Low Wah Suey v. Backus, supra, 225 U. S. 472, 32 Sup. Ct. 737, 56 L. Ed. 1165.

[6-8] The testimony of Leong Toe, Ton Yook Lan, and Wong Go, the embodying of which in the record is complained of, was taken preliminarily to the issuance of the warrant of arrest, and the petitioner was allowed the right to inspect such warrant and the testimony in accordance with the injunction of the rule. Having had the opportunity to inspect the warrant and the evidence, and the right by counsel to inspect and make copy of the minutes of the hearing, the petitioner was put into possession of all information necessary to enable her to concert her defense, and to produce such witnesses and testimony as she may have deemed essential to her cause. By a subsequent clause in the rule, the full record is required to be forwarded to the Bureau of Immigration, and no constitutional right of the petitioner can be infringed by such a practice. Emphasis is placed, however, upon the refusal of the inspector to recall such witnesses for examination by the petitioner, or to afford her an opportunity for cross-examining them. But, the testimony being preliminary to the issuance of the warrant, she was not legally entitled to the right of cross-examination. The statute does not give authority to issue process to compel the attendance of witnesses in behalf of persons detained for inquiry touching their right to remain in this country. Low Wah Suey v. Backus, supra. And it does not appear that the petitioner might not have produced the testimony of any witness she so desired. Indeed, the record would indicate that she was afforded such opportunity. Hence she cannot complain of the inspector's action in that regard.

[9] The next contention arises touching the admission in evidence of the affidavits of Layne and Bohle. It is complained that such testimony by affidavit was taken without notice to petitioner; that she was not afforded the opportunity of cross-examination; and that the testimony was embodied in the record without affording her opportunity for answering it.

The affidavits were inspected by counsel for petitioner, and the only objection or protest made to their admission was that the petitioner was not afforded the opportunity to cross-examine the affiants; none was interposed on the ground that petitioner was not given the opportunity of answering them; nor was any request made for an extension of time in which to produce further testimony to refute the same. So the question rests on the propriety of admitting affidavits in evidence,

against petitioner, without first having notified her of the intention of taking such affidavits, and without affording her the privilege of cross-examination.

This kind of testimony, while not ordinarily competent for judicial inquiry in the sense of a trial in a court of justice, has nevertheless been resorted to before executive officers and boards of immigration inspectors for determining the right of aliens to remain in this country, and yet the aliens have been refused their liberty upon habeas corpus, where the inquiry appeared to be fair and impartial, and where the immigration officers had been guilty of no abuse of discretion reposed in them. Such a case was Healy v. Backus, Commissioner of Immigration, 221 Fed. 358, recently decided by this court. In that case many affidavits were taken and admitted, both for and against the petitioner, and a very wide range of inquiry was indulged in by which information was gathered by means of letters and reports, and yet the court was of the view that the inquiry was fairly conducted toward the aliens whom Healy represented, and without abuse of discretion on the part of the immigration officers, and consequently refused to liberate them upon habeas corpus; there being pertinent testimony adduced from which the finding made could be reasonably inferred. To the same purpose are also the recently decided cases of White v. Gregory, 213 Fed. 768, 130 C. C. A. 282, in this court, and United States v. Uhl, 215 Fed. 573, 131 C. C. A. 641, in the Circuit Court of Appeals for the Second Circuit.

The language of the court in Low Wah Suey v. Backus, supra, 225 U. S. 468, 32 Sup. Ct. 735, 56 L. Ed. 1165, is pertinent for repetition here:

> "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."

We are not convinced, from the petition and the record made a part thereof, that any unfairness or impartiality was practiced by the immigration officers in the conduct of petitioner's examination touching her deportation, nor do we find that they were guilty of any abuse of discretion. The objections and protest insisted upon, therefore, are not well taken.

[10] As it relates to the charge that the immigration inspector or the commissioner submitted evidence of some kind detrimental to the petitioner, and that such evidence was never presented to petitioner for inspection, but was clandestinely forwarded to Washington, and that by reason thereof the petitioner was denied any opportunity to see and inspect such evidence, or to rebut the same, the statements are but conclusions, without assertion of facts in their support. Such allegations are insufficient to support the charge of bad faith. Low Wah Suey v. Backus, supra, 225 U. S. 472, 32 Sup. Ct. 734, 56 L. Ed. 1165.

Judgment of the District Court affirmed.

HAMILTON TRUST CO. v. CORNUCOPIA MINES CO. OF OREGON et al. (BISHER, Intervener).

(Circuit Court of Appeals, Ninth Circuit. May 10, 1915.)

No. 2526.

1. APPEAL AND ERROR ⟸150—PARTIES ENTITLED TO APPEAL.

In a suit by the trustee named in a corporate mortgage to foreclose such mortgage, a receiver was appointed to operate the property pendente lite, and the property was ordered sold and was sold to a trustee for the bondholders, who, in payment of the amount due, surrendered the bonds, which were thereupon canceled. The trustee was fully paid and its cause of action fully and completely discharged of record. An employé of the receiver obtained a judgment for personal injuries, intervened in the foreclosure suit, and procured a decree adjudging that he had a lien on the property for the amount of his judgment. A new corporation, to which the purchaser conveyed, was not a party to the proceedings and had not asked to be made a party, and the mortgage trustee did not represent it. *Held*, that such trustee had no appealable interest in the controversy, and an appeal by it would be dismissed, as it had parted with whatever rights it had in the property and could not be prejudiced by subsequent proceedings, and it was not interested in the reversal of the decree to avoid liability for a deficiency in the funds of the receivership to pay the judgment, as it was not liable for any such deficiency.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 934–946; Dec. Dig. ⟸150.]

2. APPEAL AND ERROR ⟸150—PARTIES ENTITLED TO APPEAL.

Every person desiring to appeal from a decree must be interested in in the subject-matter of the litigation, and the interest must be immediate and pecuniary and not a remote consequence of the judgment and must be substantial; a merely nominal party to the action not having a right to appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 934–946; Dec. Dig. ⟸150.]

3. APPEAL AND ERROR ⟸150—PARTIES ENTITLED TO APPEAL.

The interest of a party seeking to appeal must be subsisting, and though a party may have an appealable interest at the commencement of a suit, if that interest has terminated before the entry of the judgment or decree sought to be appealed from, he cannot appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 934–946; Dec. Dig. ⟸150.]

4. APPEAL AND ERROR ⟸150—PARTIES ENTITLED TO APPEAL.

The right or title which a party seeking to appeal seeks to establish must be his own and not that of a third person.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 934–946; Dec. Dig. ⟸150.]

5. MORTGAGES ⟸551—FORECLOSURE OF CORPORATE MORTGAGE—EXPENSES OF RECEIVERSHIP—LIABILITY OF PROPERTY.

In a suit to foreclose a corporate mortgage, a receiver was appointed by an order which authorized him to operate the mortgaged property and from the moneys coming into his hands to pay the necessary expenses incident to such operation. The foreclosure decree provided for the payment out of the proceeds of sale of the expenses of the receivership prior to the payment of the amount due the bondholders. The purchaser at the sale paid the purchase price by the surrender of bonds without the payment into court of any funds for the adjustment or pay-

ment of the expenses of the receivership. *Held* that, such expenses not having been adjusted or paid at the time of the conveyance, the purchaser took the property burdened with whatever deficiency there might be in such expenses.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1578, 1579; Dec. Dig. ⟸551.]

Appeal from the District Court of the United States for the District of Oregon; Chas. E. Wolverton, Judge.

Action by the Hamilton Trust Company against the Cornucopia Mines Company of Oregon and others, in which John L. Bisher, Jr., by John L. Bisher, his guardian ad litem, intervened. From a judgment in favor of the intervener, complainant and the defendants appeal. Appeal dismissed.

Emmett Callahan and Wood, Montague & Hunt, all of Portland, Or., for appellants.

Boothe & Richardson and Charles A. Johns, all of Portland, Or., for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge: On April 1, 1905, the Cornucopia Mines Company of Oregon, hereinafter referred to as the mines company, issued $300,000 in first mortgage bonds, with interest at 6 per cent. per annum, interest payable semiannually. To secure the bonds, the mines company made and executed a first mortgage upon certain particularly described mines and other property of the company, and named the Hamilton Trust Company, of Brooklyn, N. Y., hereinafter called the trust company, as trustee. The bonds were sold, and when they became due and payable on April 1, 1911, the mines company made default in payment of the principal sum of $300,000, and likewise defaulted in the payment of the interest on the bonds in the sum of $99,000. On December 5, 1911, the trust company filed its bill of complaint in the United States Circuit Court for the District of Oregon against the mines company and other defendants to foreclose the mortgage. In the complaint the lands and other property of the mines company were particularly described in detail. Service having been had upon the mines company and the other defendants, C. E. S. Wood, one of the attorneys for the complainant, moved the court for the appointment of a receiver, based upon the bill of complaint and the affidavit of Emmett Callahan, who for eight years had been the general agent and attorney for the mines company. In this affidavit it was alleged:

"That it is necessary that said mines should continue in operation and development; that, if the said mines were closed down and ceased to be operated and developed, great irreparable injury and loss would occur by said mines being closed down and not operated; that, if said mines are not continued in operation and development, the stamp mill, electric power plant, engines, pumps, and other machinery will greatly deteriorate in value and loss; that the tunnels, shafts, winzes, stopes, and other underground openings and workings of said Cornucopia mining claims and mines would cave in and be greatly damaged and great loss follow by the action of the elements

and flooding of said openings in said mines and mining claims filling up with water deteriorating, destroying, and damaging said mines and mining claims, its buildings and operating plants, in a reasonably estimated sum of at least from $40,000 to $100,000."

Upon this showing the court, on December 21, 1911, appointed Robert M. Betts receiver of the real and personal property of the mines company, with authority to continue the operation of said mining and other property, and every part and portion thereof, as theretofore operated, and to preserve the said property in proper condition and keep the same in repair and to employ such persons and make such payments and disbursements as might be needful and proper in doing so. It was further ordered:

"That, out of the moneys that shall come into the hands of said receiver from the operation of said property or otherwise, he shall pay the necessary expenses incident to the operation of said property, and hold the remainder, if any there be, subject to the order of the court."

On January 2, 1912, Betts qualified as such receiver and took possession of the property and proceeded to operate the same as directed by the court. The mines company, on January 22, 1912, filed its demurrer to the bill of complaint, which demurrer was by the court on February 19, 1912, overruled, and, the mines company refusing to plead further, the court ordered that the bill of the plaintiff be taken as confessed against the mines company and the other defendants. A final decree of foreclosure and sale was made and entered in favor of the trust company and against the mines company and the other defendants on April 30, 1912. The decree provided that the trust company have and recover the sum of $422,940 and interest, as therein provided, and the further sum of $10,000 as attorneys' fees, together with its costs and disbursements to be taxed, and that the mortgaged property described in the bill of complaint should be sold under the direction of a special master appointed by the court. It was further provided:

"That the purchaser or purchasers of said mortgaged property at such sale shall be entitled to use and apply in making payment of the purchase price any of the outstanding bonds secured by said mortgage, as therein provided, but a sufficient portion of the purchase price shall be paid in cash to provide funds for payment of all costs and expenses incurred herein, and that the master return the cash proceeds of said sale to the clerk of this court, and that the same be paid to the clerk of this court, and, upon the completion and confirmation by this court of the sale made under and in pursuance of this decree, the said clerk of this court shall pay out such moneys as follows: (1) The expenses of the sale of said property. (2) The expenses of the receivership herein. (3) The costs of this suit. (4) Complainant's attorneys' fees. (5) The taxes and other expenses incurred and paid pursuant to the provisions of said mortgage. (6) All amounts due or to become due upon the bonds secured by said mortgage, and, in case such proceeds shall be insufficient to pay in full the whole amount of principal and interest so due and unpaid on such bonds, then the proceeds shall be applied ratably upon the whole amount due according to the aggregate thereof, without preference or priority of any part over any other part thereof. (7) The remainder, if any, to respondent the Cornucopia Mines Company of Oregon, its successors and assigns."

The sale took place, as provided in the decree, on the 29th day of June, 1912, and the mortgaged premises were sold by the special mas-

ter to C. E. S. Wood, as trustee for the bondholders, for the sum of $432,000. Thereupon Wood, as such trustee, delivered to the special master the first mortgage bonds described in the complaint, amounting to the sum of $300,000 principal and $136,000 interest, a total sum of $436,000. The master received the bonds with the accrued interest in full payment and satisfaction of the bid of said Wood and as liquidation of the indebtedness of the mines company, and thereupon delivered to said Wood a certificate of sale of the property described in the complaint. On the 5th day of July, 1912, the special master made his report of the sale to the court, and on the 6th day of August, 1912, the complainant made and filed its motion for confirmation of such sale, and on said date the court confirmed and approved such sale. On the 30th day of August, 1912, Robert M. Betts, as receiver, prepared and filed his report as such receiver, and asked to be discharged, but it does not appear that the report has ever been approved or the receiver discharged. The order confirming the sale provided that if no redemption of said properties or any of them be had, or other proceedings in the nature of a stay, the special master should on the expiration of the redemption period, to wit, 60 days from date, convey to said C. E. S. Wood, trustee, by the usual master's deed, in due form, all of the properties of the Cornucopia Mines Company. No redemption being made, the special master, on October 7, 1912, made and executed his deed conveying the property to C. E. S. Wood, and on the same date the said Wood made and executed his deed conveying said property to the Cornucopia Mines Company of New York.

On the 29th day of July, 1912, John L. Bisher, Jr., a minor, while in the employ of the receiver, Robert M. Betts, sustained certain personal injuries alleged to have been caused by the negligence of said receiver. Thereupon Bisher applied to the United States District Court (the successor of the United States Circuit Court) for the appointment of a guardian ad litem to institute legal proceedings in his behalf to recover damages from Robert M. Betts, as receiver of the mines company. Upon the showing made, the court appointed John L. Bisher guardian ad litem of said John L. Bisher, Jr., and authorized said guardian to institute and carry on legal proceedings against the receiver of the mines company and against the said corporation to recover damages for the injuries sustained by said John L. Bisher, Jr. Thereupon, on October 12, 1912, Bisher, as guardian ad litem for John L. Bisher, Jr., commenced in the United States District Court for the District of Oregon an action against the receiver, as authorized by the court, and thereafter, and on April 11, 1913, recovered judgment in said action against such receiver in the sum of $12,500. The action was brought to this court upon a writ of error sued out by the receiver, and the judgment was affirmed. Betts v. Bisher, 213 Fed. 581, 130 C. C. A. 161. After the rendition of the judgment in the trial court, and on May 14, 1913, John L. Bisher, Jr., by his guardian, filed a petition in intervention herein, setting up the proceedings resulting in the judgment in his favor against the receiver, and also the proceedings in the foreclosure suit, and asking, among other things, that the entire property belonging to such corporation and in the hands

of the receiver, as well as that included in the mortgage of the complainant, be subjected to the payment of the intervener's claim, as represented by his said judgment. There was a motion on the part of the mines company to dismiss the petition in intervention, which was denied by the court, and an order was entered that John L. Bisher, Jr., and John L. Bisher, his guardian ad litem, be made parties defendant, and that the receiver show cause why the judgment obtained by the guardian ad litem should not be paid. Such proceedings were thereupon had upon the order to show cause that on December 22, 1913, the court found as a fact that the injuries which the said John L. Bisher, Jr., sustained, and which were the basis of the judgment against the said receiver, were sustained in the operation and development of the property by the receiver under the order of the court appointing him as such. The court further found as a fact that there were no funds in the hands of the receiver with which to pay said judgment or any part thereof, and that, at the time of making the sale of the property, no funds were paid into court or to any person by the bondholders or any other person for the payment or satisfaction of said judgment or any part thereof, and that no provision had been made for the payment or satisfaction of said judgment, and that the terms and conditions of such decree had not been carried out and had not been followed in this: That no funds had been provided or paid into court for the payment or satisfaction of such judgment.

A decree was thereafter, and on July 10, 1914, entered by the court adjudging and declaring a lien in favor of John L. Bisher, as guardian ad litem of John L. Bisher, Jr., for the injuries sustained by the latter on July 29, 1912, while in the employ of the receiver, and the claim based thereon evidenced by the judgment, for the amount thereof and costs and accrued interest thereon, and such lien was declared to be and exist upon any and all of the property mentioned and described in the trust deed or mortgage, and on any and all property thereafter acquired by the mines company or by the receiver thereof, and for the payment and satisfaction of the claim and lien all of said property was seized, and any and all of said property was declared to be subject to said lien and claim, and said lien and claim was declared to be superior and prior in time and right to the lien created by the trust deed or mortgage on any property conveyed to or acquired by the mines company after the trust deed or mortgage, and on any and all property conveyed to or acquired by the receiver of said property. The decree further provided for the sale of the property and for the appointment of a special master to make the sale and apply the proceeds of sale in the manner therein directed. In the findings of fact supporting this decree, the court found that a certain water right appropriation and its amendment, which had been acquired by the receiver during his receivership, had been conveyed by the mines company to the Cornucopia Mines Company of New York, and that certain parcels of real estate had been acquired during such receivership by the mines company, but none of this property was specifically mentioned or described in the trust deed or mortgage executed by the mines company to the trust company.

From the decree in favor of the appellee, an appeal has been taken by the trust company.

[1] The appellee has interposed a motion to dismiss on the ground that the appellant is not a party in interest in this appeal, and in support of the motion points out that the decree in the lower court is not against the trust company, but is a decree in rem against certain property in which the appellant has no interest; that the suit herein was originally brought by the appellant to foreclose a mortgage or deed of trust wherein the appellant had been made a trustee for the benefit of certain bondholders; that the appellant obtained the decree prayed for in the complaint; that all of the property mentioned in the complaint, which was the identical property mentioned in the mortgage or deed of trust, was ordered sold, and was thereafter sold in accordance with that decree; that, in accordance with the terms of the decree of foreclosure, the bonds which were secured by the mortgage or deed of trust were taken in full payment of the mortgage debt, and the bonds have been surrendered and canceled; that the appellant has been fully paid and its cause of action fully and completely discharged of record; that the present appeal does not relate to or in any way affect such proceedings, and the appellant is not interested either adversely or otherwise in preventing the enforcement of the decree now before the court.

[2-4] It is a fundamental rule of appellate jurisdiction that every person desiring to appeal from a decree must be interested in the subject-matter of the litigation, and the interest must be immediate and pecuniary and not a remote consequence of the judgment. The interest must be substantial, and a merely nominal party to an action cannot appeal. The interest must also be subsisting, for although a party may have an appealable interest at the commencement of the suit, if that interest has terminated before the entry of the judgment or decree sought to be appealed from, he cannot appeal. Again, the right or title which the appellant seeks to establish must be his own and not that of a third person. 2 Ruling Case Law, pars. 33, 34. See, also, notes to In re Switzer, 119 Am. St. Rep. 741, where cases in support of the principles stated are cited.

If it be contended that the appellant is interested in the reversal of the decree involved in this appeal to avoid liability for a deficiency in the funds of the receivership to pay the judgment in favor of the appellee, the answer is that there is no such liability. That was held by the Supreme Court of the United States in Atlantic Trust Co. v. Chapman, 208 U. S. 360, 28 Sup. Ct. 406, 52 L. Ed. 528, 13 Ann. Cas. 1155. In that case, after a decree in favor of the complainant foreclosing a mortgage, and after the mortgage property had been sold in satisfaction of the decree, it was found that there was a deficiency in the funds to pay the expenses of the receivership. This was not anticipated and not provided for at the commencement of the suit or upon the appointment of the receiver. Upon the petition of the receiver, there was an order upon the complainant to show cause why it should not be required to pay this deficiency. The circuit court held that it was without authority to compel the complainant to pay the deficiency. The Circuit Court of Appeals held otherwise. The case was finally

taken to the Supreme Court, where it was held that the complainant was not liable to make good the deficiency found to exist in the funds required for the expenses of the receivership, and that, unless terms are imposed by the court as a condition of the appointment or continuation in office of the receiver, his employés must look to the property in the custody of the court and its income for their compensation. The court distinctly holds that the employés have no claim whatever on any of the parties to the litigation; that they are the employés and servants of the court and not of the parties. This principle is clearly as applicable to an employé claiming damages for injuries sustained while in the employment of a receiver as a claim by an employé for wages while in such employment.

The principle that the property is liable for the expenses of the receivership was declared by the Appellate Division of the Supreme Court of New York in Robinson v. New York & S. I. Electric Co., 99 App. Div. 509, 512, 91 N. Y. Supp. 153, 155. That court said:

"When the court took into its possession the property of the defendant, and undertook to continue the plant in operation for the benefit of judgment creditors, it did so subject to the same risks which would attach to the corporation if it continued to exercise its franchises, and among these risks was that of personal injuries to employés through the negligence of the agent or servants of the court. It could not continue the operation of the plant and deny to those injured through its negligence a remedy so long as the property in the hands of the court was adequate to discharge the obligation, for it would be a gross injustice to hold that the rights of the injured employé could be made secondary to those of creditors in whose behalf the plant was being operated; that they could take some portion of his rights and apply them to the payment of their debts. While it is true that claims for injuries occurring before the receivership are not commonly allowed a preference over the claims of others, we know of no case which is controlling here which has asserted the doctrine that creditors or holders of receiver's certificates can be preferred over the claim of those who have suffered injury through negligence while the plant was in the control of the receiver for the benefit of creditors. On the contrary, the rule is established by authority that damages for injuries to persons or property during the receivership, caused by the torts of the receiver's agents and employés, are passed as operating expenses, and are accorded the same priority of payment as belongs to other necessary expenses of the receivership. Such claims are paid out of the net income, if that is sufficient; but, in the event of a deficiency, they will be paid out of the corpus. Such claims, therefore, have priority over mortgage debts, or other debts existing when the action was brought in which the receiver was appointed."

[5] It follows that while the present case, as here stated, seems to call for an affirmance of the decree of the court below on the merits, there are serious objections to such a disposition of this appeal. As far as we can determine from the record before us, the legal title to the property in controversy has been conveyed to the Cornucopia Mines Company of New York, and that corporation is not a party to these proceedings, has not asked to be made a party, and the appellant does not represent it. The property was conveyed pendente lite; that is to say, the order appointing the receiver provided that, out of the money that should come into the hands of the receiver, the expenses incurred in operating the property should be paid; and the decree under which the property was conveyed provided for the payment of the expenses

of the receivership prior to the payment of the amount due the bondholders, and the expenses of the receivership had not been adjusted or paid at the time of the conveyance. The purchaser took the property, therefore, burdened with whatever deficiency there might be in the expenses of the receivership. The court deals with the property in rem and not with the parties, unless the parties show they have an interest in the property and come into court in that behalf. In this view of the proceedings it is clear the appellant has no appealable interest in this controversy. It has parted with whatever rights it had in the property upon which the judgment of the lower court has been imposed as a lien and cannot be prejudiced by subsequent proceedings.

It appears to us that this situation calls for a dismissal of the appeal; and it is so ordered.

SABIN v. BLAKE-McFALL CO. et al.

In re EQUAL RIGHTS CO., Inc.

(Circuit Court of Appeals, Ninth Circuit. May 10, 1915.)

No. 2541.

1. BANKRUPTCY ⟸84, 446—AMENDMENT OF PETITION—DISCRETION OF COURT.
Whether an amended petition of involuntary bankruptcy should be permitted to be filed after the expiration of the time allowed by the court for filing it rested entirely in the sound judicial discretion of such court, and its decision would not be interfered with by a reviewing court, except for an abuse of discretion.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 126–129, 929; Dec. Dig. ⟸84, 446.]

2. BANKRUPTCY ⟸81—INVOLUNTARY PROCEEDINGS—SUFFICIENCY OF PETITION—BUSINESS CORPORATION.
Bankruptcy Act July 1, 1898, c. 541, § 4b, 30 Stat. 547, as amended by Act June 25, 1910, c. 412, § 4, 36 Stat. 839 (Comp. St. 1913, § 9588), provides that any incorporated company and any moneyed business, or commercial corporation, except a municipal, railroad, insurance, or banking corporation, may be adjudged an involuntary bankrupt. A petition alleged that the alleged bankrupt was a corporation engaged in the general retail merchandise business, and that it was neither a municipal, railroad, insurance, nor banking corporation. *Held*, that this sufficiently showed that the alleged bankrupt was a "business corporation," which might be adjudged an involuntary bankrupt, as any language, the fair and reasonable import of which is that the alleged bankrupt is a moneyed, a business, or a commercial corporation, is sufficient.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 59, 113–118, 125; Dec. Dig. ⟸81.]

8. BANKRUPTCY ⟸81—INVOLUNTARY PROCEEDINGS—SUFFICIENCY OF PETITION—"OPEN ACCOUNT"—"STATED ACCOUNT."
An involuntary petition in bankruptcy alleged that the claim of one of the petitioning creditors was for money due on an open account from the alleged bankrupt upon a stated account rendered on a specified date. *Held*, that while an "open account" is an account in which some item is not settled between the parties, or a running account, while a "stated account" is an account presented by the creditor and assented to as correct by the debtor, there was no inconsistency in the use of both terms, and the petition was not defective, as it was undoubtedly intended to allege that the claim was represented by a stated account,

based upon an open account, and it is sufficient if the language used is of sufficient definiteness to identify the claim in the mind of the alleged bankrupt.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 59, 113–118, 125; Dec. Dig. ⟸81.

For other definitions, see Words and Phrases, First Series, Stated Accounts; also First and Second Series, Account Stated; Open Account.]

4. BANKRUPTCY ⟸22—ORDERS AND FORMS—FORCE AND EFFECT.
The general orders and forms in bankruptcy, adopted and established by the Supreme Court, have the force and effect of law.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 11; Dec. Dig. ⟸22.]

5. BANKRUPTCY ⟸82—INVOLUNTARY PROCEEDINGS—PETITION—SUFFICIENCY OF VERIFICATION.
General Order in Bankruptcy No. 38 (89 Fed. xv, 32 C. C. A. xxxvii) provides that the forms annexed to such general orders shall be used with such alterations as shall be necessary. Form 1 (89 Fed. xv, 32 C. C. A. xxxix) requires a debtor's voluntary petition to be verified by an oath that the statements therein contained are true according to the best of the petitioner's knowledge, information, and belief. Form 3 (89 Fed. xxviii, 32 C. C. A. lii) requires a creditor's petition in involuntary bankruptcy to be verified by an oath that the statements therein contained are true. *Held*, that the verification of an involuntary petition by an oath that the facts contained therein were true, as the petitioner verily believed, was insufficient; there being nothing to show that the qualification as to the petitioner's belief was necessary to suit the circumstances of the particular case.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 123; Dec. Dig. ⟸82.]

6. BANKRUPTCY ⟸84—INVOLUNTARY PROCEEDINGS—PETITION—AMENDMENT.
Though the verification of a petition in involuntary bankruptcy upon belief is insufficient, the defect is not jurisdictional and may be cured by amendment.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 126–129; Dec. Dig. ⟸84.]

7. BANKRUPTCY ⟸22—INVOLUNTARY PROCEEDINGS—PETITION—FORM.
It is important and necessary that the provisions of the bankruptcy act and the forms and methods of procedure promulgated thereby and by the Supreme Court pursuant thereto should be closely followed in the preparation of petitions and all other papers, instead of using whatever form of statement may occur to the pleader.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 11; Dec. Dig. ⟸22.]

Petition for Revision of Order of the District Court of the United States for the District of Oregon; Robert S. Bean, Judge.

Petition by the Blake-McFall Company and others to have the Equal Rights Company, Incorporated, adjudged a bankrupt. On petition by R. L. Sabin for revision of an order denying a motion to dismiss the creditors' third amended petition in bankruptcy. Reversed, and petition dismissed, unless creditors properly verify the petition.

Sidney Teiser, of Portland, Or., for petitioner.

Seitz & Clark and Manning, Slater & Leonard, all of Portland, Or., for respondents.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge. On September 8, 1914, an involuntary petition in bankruptcy was filed by certain alleged creditors (the respondents herein) of the Equal Rights Company, Incorporated, a corporation, wherein they prayed that such corporation be adjudged a bankrupt. Thereafter R. L. Sabin, the petitioner herein, having asked for and obtained leave to intervene as a creditor in the bankruptcy proceedings, filed a motion to dismiss the petition, which motion was sustained. On September 26, 1914, by permission of the court below, the petitioning creditors filed an amended petition, and, the petitioner herein having interposed a motion to dismiss the petition as amended, the motion was sustained. Thereafter, and on the 26th day of October, 1914, a second amended petition was filed by the petitioning creditors, and it also, upon motion of the petitioner herein, was dismissed on November 16, 1914; the court in its order of dismissal granting the petitioning creditors five days within which to file a third amended petition. On November 23, 1914 (two days after the expiration of the time thus granted), the petitioning creditors moved the court for further time within which to file the third amended petition (the court at that time being occupied by a judge other than the one who had granted the former orders in the proceeding); and the petitioning creditors, pursuant to such request, were granted to and including the 23d day of November, 1914, within which to file the third amended petition. The third amended petition, denominated by the petitioning creditors as "second amended petition," was, however, not filed until November 25, 1914, two days after the expiration of the time as last extended by the court. On December 3, 1914, the petitioner herein filed a motion to dismiss the third amended petition of the petitioning creditors, which motion was denied. The present petition for revision has been filed for the purpose of having this court review, in matters of law, the order of the court below denying the petitioner's motion to dismiss the third amended petition.

The grounds upon which the petition for review are based are four:

[1] First. That the third amended petition was not filed within the time allowed by the order permitting the amendment.

The whole matter of permitting or refusing amendments in bankruptcy proceedings in the federal courts rests entirely in the sound judicial discretion of the lower court, and, in accordance with the general rule, its decision will not be interfered with by a reviewing court, unless abuse of discretion has been shown. Pittsburgh Laundry Supply Co. v. Imperial Laundry Co., 154 Fed. 662, 83 C. C. A. 486; Loveland on Bankruptcy, vol. 1, p. 421. In the present case we cannot say that no good and sufficient reason was presented to the court below for permitting the filing of the amendment after the expiration of the time fixed for that purpose. It is sufficient that no abuse of discretion has been shown.

[2] Second. That the petition, as amended, does not show that the alleged bankrupt is amenable to the provisions of the Bankruptcy Act.

It is alleged in the amended petition that the Equal Rights Company, Incorporated, is a corporation duly organized and existing under and by virtue of the laws of the state of Oregon, with its principal place

of business in the city of St. Johns, county of Multnomah, state of Oregon; that the corporation, for the greater part of six months preceding the date of the filing of the original petition herein, has had its principal place of business in the city of St. Johns, county of Multnomah, state of Oregon, and as such was engaged in the general retail merchandise business; that the company is insolvent and is neither a wage-earner nor a person engaged in farming or tillage of the soil, nor a municipal, railroad, insurance, or banking corporation. The objection to the petition is that it does not allege that the company is a "moneyed, business, or commercial corporation," in the language of section 4b of the Bankruptcy Act of 1898, as amended by the act of June 25, 1910. That section provides that:

"Any natural person, except a wage-earner or a person engaged chiefly in farming or the tillage of the soil, any unincorporated company, and any moneyed, business, or commercial corporation, except a municipal, railroad, insurance, or banking corporation, owing debts to the amount of one thousand dollars or over, may be adjudged an involuntary bankrupt."

The respondents in their petition having negatived the exceptions set forth in the above section, and having alleged that the company was engaged in the "general retail merchandise business," the question is: Was it necessary that they also allege that the corporation sought to be adjudged bankrupt was a "moneyed, business, or commercial" corporation? Counsel for the petitioner refer us to no decision, and our own research reveals none, in which it has been held that the character of the business of an alleged bankrupt corporation must be set forth in the phraseology of the bankruptcy act. While such would undoubtedly be the better practice, we think that any language, the fair and reasonable import of which is that the alleged bankrupt is a moneyed, or a business, or a commercial corporation, is sufficient. The allegation in the present petition that the alleged bankrupt is engaged in the "general retail merchandise business" undoubtedly brings the corporation within the class of "business" corporations which under the act may be adjudged involuntary bankrupts. To place upon the language used any other construction would be hypercritical.

[3] Third. That the nature of the claim of Dryer, Bollam & Co., one of the petitioning creditors, is not properly or fully set forth.

The claim to which exception is taken is as follows:

"Dryer, Bollam & Co., a copartnership, money due on open account from Equal Rights Company, Incorporated, a corporation, upon a stated account rendered July 2, 1914, $80.00."

The specific objection to the claim seems to be that it is not set forth with "sufficient consistency and particularity required in pleading." The lack of "sufficient consistency" is claimed to be in the use of the terms "open account" and "stated account." An open account is an account in which some item is not settled between the parties—a running account. A stated account is an account presented by the creditor and assented to as correct by the debtor. Funk & Wagnall's Standard Dictionary of the English Language. But there is no inconsistency in the terms, as used in the claim above set forth. The language employed is not entirely free from ambiguity, but what the pleader un-

doubtedly intended to allege was that the claim of $80 of Dryer, Bollam & Co. is represented by a stated account rendered July 2, 1914; the stated account being based upon an open account between the parties. No specific method of setting forth a claim is provided by the bankruptcy act, and we think the only requirement necessary is that the language used be of sufficient definiteness to identify the claim in the mind of the person or corporation sought to be adjudged bankrupt.

[4, 5] Fourth. That the amended petition was not verified according to law.

The Supreme Court of the United States in 1898, in pursuance of the power conferred by the Constitution of the United States and particularly by the act of Congress approved July 1, 1898, adopted and established certain general orders and forms in bankruptcy. These orders and forms were published in 172 U. S. 653–723 (18 Sup. Ct. iv–xlviii, and 89 Fed. xiv, 32 C. C. A. xxxvii). They have the force and effect of law. In re Gerber, 26 Am. Bankr. Rep. 608, 617, 186 Fed. 693, 700, 108 C. C. A. 511. In Order No. XXXVIII it is provided that:

"The several forms annexed to these general orders shall be observed and used, with such alterations as may be necessary to suit the circumstances of any particular case."

Form No. 1 (89 Fed. xv, 32 C. C. A. xxxix) requires a verification to a debtor's petition (voluntary bankruptcy) in the following form:

"I, ———, the petitioning debtor mentioned and described in the foregoing petition, do hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information, and belief."

Form No. 3 (89 Fed. xxviii, 32 C. C. A. lii) requires a verification to a creditors' petition (involuntary bankruptcy) in the following form:

"———, being three of the petitioners above named, do hereby make solemn oath that the statements contained in the foregoing petition, subscribed by them, are true."

We must assume that the difference in the forms of verification for the debtor's and creditors' petition had a purpose, and that a positive statement of the facts in a debtor's petition is not required, but may be made upon the best of the petitioner's knowledge, information, and belief. The allegations of the form of petition show why the verification is in this form. The debtor admits his insolvency and proposes to surrender his property for the benefit of his creditors. He is required to attach a Schedule A, which is to contain a full and true statement of all his debts and (so far as possible to ascertain) the names and places of residence of his creditors, and in Schedule B to be attached there must be set forth an accurate inventory of all his property, both real and personal. It is evident that it may often occur that items of this character can only be set forth by the debtor on information and belief, and a more positive statement is not required. But with respect to a creditors' petition, the situation is different, and the difference is important. In this petition the statement must show the principal place of business of the debtor; that he owes debts to the amount of $1,000; that the petitioners are creditors having provable claims

amounting in the aggregate, in excess of securities held by them, to the sum of $500; the nature and amount of the petitioners' claims; and that the debtor has committed an act of bankruptcy within four months. This statement can be and ought to be direct and positive. The hailing of a debtor into a bankruptcy court may be a very serious matter and bring about a bankruptcy that might have been avoided. Bankruptcy proceedings ought not to be subject to the alarm of creditors acting upon information and belief, based, possibly, upon mere gossip and rumor. They ought to know positively the truthfulness of the few facts they are required to present to the court to secure an adjudication of bankruptcy. In the petition now before the court, the creditors stated all the facts required, and in the verification each stated that "the facts contained in the foregoing petition are true," but added this qualification: "As I verily believe." Such qualification is no part of the form prescribed, and there is nothing in the petition showing or tending to show that the qualification was necessary to suit the circumstances of the particular case, as provided in order No. XXXVIII. It may be that the added qualification was inserted by mistake, following some erroneous form, but in any view it rendered the verification defective.

[6] Although a verification of a petition in involuntary bankruptcy upon belief is insufficient, nevertheless the defect is not jurisdictional and may be cured by amendment. The infirmity will not work a dismissal of the petition.

[7] We take advantage of this petition to revise, to impress upon counsel in bankruptcy proceedings the necessity and importance of closely scrutinizing and following the provisions of the bankruptcy act in the preparation of petitions, and, indeed, in the preparation of all papers connected with such proceedings. Definite, prescribed forms and methods of procedure in bankruptcy have been promulgated by the act, and also by the Supreme Court pursuant thereto. These forms and methods of procedure are especially adapted to the purposes sought to be accomplished by the act, and they are in the main free from ambiguity and easily comprehended. To ignore them and trust to whatever form of statement may occur to the pleader is to invite criticism and objection from opposing counsel and to materially add to the expense of the proceeding and to the labors of the lower and appellate courts. If the provisions of the bankruptcy act are followed and the forms adhered to, proceedings in bankruptcy may be made inexpensive, and the questions involved may receive, at the hands of the courts, the immediate attention and the prompt disposition and determination which the framers of the act sought to accomplish.

The order will therefore be that the petitioning creditors have leave to verify the petition in accordance with the prescribed form within ten days after notice of this order. If not so verified, the order of the lower court will be reversed, and the creditors' petition dismissed. Costs on this petition in favor of the petitioner.

MILKMAN v. ARTHE et al.

(Circuit Court of Appeals, Second Circuit. April 13, 1915.)

No. 238.

1. BANKRUPTCY ⟸293—JURISDICTION OF BANKRUPTCY COURT—SUITS BY TRUSTEE.

Bankruptcy Act July 1, 1898, c. 541, 30 Stat. 565, § 70c, as amended by Act Feb. 5, 1903, c. 487, § 16, 32 Stat. 800 (Comp. St. 1913, § 9654), taken in connection with section 23b, as amended by Act June 25, 1910, c. 412, § 7, 36 Stat. 840 (Comp. St. 1913, § 9607), and section 1 (8), c. 541, 30 Stat. 544 (Comp. St. 1913, § 9585), give to a District Court as a court of bankruptcy jurisdiction of a suit by a trustee against a third person to recover property alleged to belong to the bankrupt's estate.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 411, 417; Dec. Dig. ⟸293.]

2. BANKRUPTCY ⟸172—SUIT BY TRUSTEE TO RECOVER PROPERTY—PROPERTY BOUGHT BY WIFE—GIFTS FROM HUSBAND.

Property bought by the wife of a bankrupt with money saved by her from sums given her by her husband from time to time for household expenses when he was not indebted and for which he asked no accounting cannot be recovered by his trustee for the benefit of his subsequent creditors, but it is otherwise as to money similarly given to her after he became indebted to such creditors.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 220; Dec. Dig. ⟸172.]

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

This cause comes here upon appeal from a decree of the District Court, Eastern District of New York, adjudging that 45 shares of stock of the Arthe Levy Bernhard Company are the property of the estate in bankruptcy of defendant John C. Arthe, and directing that Lancaster, the record owner of the stock, execute and deliver to the trustee an assignment of said shares. The opinion of the District Judge will be found in 221 Fed. 134.

R. A. Inch, of New York City (Marshall S. Hagar, of New York City, of counsel), for appellants.

Harry E. Lewis, of Brooklyn (D. Steckler, of New York City, of counsel), for appellee.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

LACOMBE, Circuit Judge. The stock was bought in June, 1909, and was put in the name of Lancaster, who is the brother of Lucy Arthe, the wife of the bankrupt, John C. Arthe. The price paid was $4,500. That money was furnished by Mrs. Arthe. Part of it, $2,000, came from a mortgage she placed upon a house, which she had bought September 25, 1905, with moneys which she then had in savings banks; $1,700 in a Utica bank, and apparently $1,200 (or $1,350) in the Empire City Savings Bank. Part of the price of the stock, $1,000, came from the repayment to Mrs. Arthe of a loan she had made to one Spangeman. A further part of $724.26 came from a loan made by a

life insurance company on a policy on the life of John Arthe, his wife being named as the beneficiary. Apparently the balance came from cash which Mrs. Arthe had.

It is the contention of the trustee that all the money paid for the stock in reality belonged to John C. Arthe. Judge Chatfield has stated the facts quite fully, and it will not be necessary to rehearse them all here; his opinion may be referred to.

[1] Objection is taken to the jurisdiction of the District Court. It seems to us that section 70e of the Bankrupt Act, as amended in 1903, taken in connection with section 23b, as amended in 1910, and section 1 (8), give the District Court, as a court of bankruptcy, jurisdiction of this suit. Newcomb v. Biwer, 199 Fed. 529. The appellant does not quote section 70e as amended in 1903, and Harris v. Bank, 216 U. S. 382, 30 Sup. Ct. 296, 54 L. Ed. 528, arose out of transactions occurring before the amendment of section 23b in 1910.

[2] All the money that Mrs. Arthe had she apparently received at one time or another from her husband. Ordinarily it is presumed that the earnings of a husband remain his property although he hands them over to his wife and she deposits them in her own name. This presumption, however, may be rebutted by proof; it may be shown that he made her a gift of money at a time when his circumstances were such that he could properly thus dispose of his property.

John C. Arthe married in August, 1888. He was then a traveling salesman receiving a weekly salary and commissions from his employers. Out of this he retained what he needed for his own expenses; while he was on the road they were presumably small, his employers paying traveling expenses. He also turned over to his wife each week a sum which varied as his own pay increased from $40 to $70. During the ensuing 16 years four children were born. Out of what he gave her the wife maintained the home and brought up the children. She also clothed herself and met her own personal expenses. Being a hard-working, thrifty woman, she laid by something each week out of her own allowance. Her husband never asked her for any accounting as to any surplus above the cost of maintaining the home and supporting the children. After he had turned the weekly amount, whatever it was, over to her, he made no further inquiries about it. Mrs. Arthe deposited what she did not spend in savings banks in her own name. In view of the amount of the income thus disposed of and of the obligation of the husband not only to support his children but also to supply his wife with sufficient to meet her own needs, it would seem a reasonable inference that he intended that whatever of the amount thus handed to her was not spent for these purposes should be a gift to her. The wife testified:

"My husband gave me an amount of his weekly salary with the understanding that it was my own. * * * My husband had nothing to do with my saving it, and he never questioned me. * * * All the money which I did not expend in household expenses, taking care of the family, he certainly gave to me."

The District Judge expressly found, with regard to these sums, that they were voluntary gifts from the husband to the wife. In that conclusion we concur.

A husband, however, may not make such gifts to his wife unless he is at the time in financial condition to do so. During the 16 years from 1888 to 1904, Arthe was not engaged in business on his own account and was receiving a regular salary week by week. There is nothing to indicate that he owed a dollar to any one, or that he was likely to become indebteded. Under these circumstances, we see no reason to hold that the various small sums which he voluntarily gave his wife from time to time, when he was entirely solvent, should be taken from her to pay persons who became creditors as a result of a business enterprise in which he subsequently engaged.

In September, 1904, however, the situation changed. Arthe went into partnership with another man and bought out the business of his former employers, giving notes (on some of which he was maker, on others indorser) for $25,000 in payment therefor. Some $6,000 or $7,000 of this amount apparently has been paid, and notes aggregating nearly $8,000 have been proved against Arthe's estate in bankruptcy. The original notes did not mature until some years after their date, September 28, 1904; but they were obligations of his, and their holders were his creditors. From that time therefore we are satisfied that his financial condition was such that he could no longer make voluntary gifts to his wife of money, which he should have kept to meet his own obligations.

Applying what has been held above to the facts of the case so far as they are disclosed in the record, we reach the following conclusions:

1. The real estate which stands in Mrs. Arthe's name was bought almost entirely with the savings she had made prior to September, 1904. But it may be that the price she paid for it includes also gifts of money received from her husband between September, 1904, and September, 1905, when she bought the property. To the extent that those later gifts entered into the purchase of the house the estate should be reimbursed. Such amount of the $4,500 shares of stock as this sum represents should be transferred to the trustee, because it was really money which belonged to John C. Arthe's estate.

2. If Mrs. Arthe had merely raised $2,000 by mortgage of her real estate, and put it into this stock, the stock to that extent would be her property; but there is a further complication. When she bought the real estate, it was mortgaged to the amount of $5,000. In February, 1909, she made a payment on that mortgage of $2,000. From what is disclosed here we are inclined to infer that such payment was made entirely with money given to her by her husband subsequent to September, 1904. If this be so, it follows that when she increased the mortgage again to $5,000, in June, 1909, the $2,000 then received by her from the mortgagee represented the money which she had theretofore used to reduce the mortgage, viz., her savings since 1904. Possibly part of this $2,000 represents rental received from the house. We cannot tell on this record, and if defendants wish an accounting in which they may undertake to show that the entire $2,000 is not money received by the wife from the husband subsequent to September, 1904, the decree may so provide. It is thought, however, that, as the amount must be small, counsel may be able to reach some agreement as to it. If the family

occupied the whole house, soon after its purchase, as the evidence seems to imply, there would of course, be no rental.

The decision below was rendered prior to our disposition of In re L. Hammil & Co., 221 Fed. 56, — C. C. A. — (February 9, 1915). The policy of insurance, so far as we can discover from the summary printed in the record, is an ordinary wife's policy with no provision as to change of beneficiary. Upon this there was borrowed $1,210, on June 2, 1909. Out of this sum there was paid premium and interest, and the balance $724.26 was used in payment for the stock. The loan was made by the company on the application of the beneficiary, and under our opinion in the Hammil Case the creditors of John C. Arthe were not entitled to the proceeds. To that extent the shares of stock in which such proceeds are invested should not be disturbed.

Decree reversed, with instructions to decree in conformity with this opinion.

BROWNELL IMPROVEMENT CO. v. SWEENEY.

(Circuit Court of Appeals, Sixth Circuit. June 8, 1915.)

No. 2607.

1. MASTER AND SERVANT ⟸286—ACTIONS FOR INJURIES—QUESTIONS FOR JURY.

In an action for injuries to an employé of a company engaged in railroad construction work, who fell from a plank alongside a railroad trestle, evidence *held* to make questions for the jury as to whether the trestle was still in course of construction and under the control of the employer, and whether it was used by workmen in going to and coming from their work with the employer's knowledge and permission.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1008, 1010–1015, 1017–1033, 1036–1042, 1044, 1046–1050; Dec. Dig. ⟸286.]

2. MASTER AND SERVANT ⟸88—LIABILITY FOR INJURIES—UNSAFE PLACE TO WORK.

That an employé of a railroad construction company, injured by falling from a plank alongside a railroad trestle in course of construction, was on his way home from work, or that he had remained on the premises a short time after he was free to leave for the purpose of discharging a duty he thought owing to his employer by reporting a matter to the superintendent, did not make him any less an employé as respected the employer's duty to furnish a safe place to work.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 144–151; Dec. Dig. ⟸88.]

3. MASTER AND SERVANT ⟸291—ACTIONS FOR INJURIES—INSTRUCTIONS.

In an employé's action for injuries, an instruction that the defenses of assumption of risk, contributory negligence, or fellow servant had nothing to do with the case was not objectionable as leading the jury to suppose that there was no substantial defense, and that its duty was merely to assess damages.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1133, 1134, 1136–1146; Dec. Dig. ⟸291.]

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

Action by Thomas Sweeney, executor of Thomas Finnerty, deceased, against the Brownell Improvement Company. Judgment for plaintiff, and defendant brings error. Affirmed.

L. B. Bacon, of Cleveland, Ohio, for plaintiff in error.

H. F. Payer, of Cleveland, Ohio, for defendant in error.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

KNAPPEN, Circuit Judge. Thomas Finnerty, since deceased, recovered verdict and judgment against plaintiff in error, whom we shall call defendant, for personal injuries sustained, as alleged, through defendant's negligence while decedent was in its employ.

At and for some time before the accident defendant was engaged in certain railroad construction work for the Pennsylvania Company in Cleveland, including the building of a trestle for carrying three elevated railroad tracks, which tracks were all laid and in condition for use. There was also a surface track between the second and third elevated tracks, and several feet below the upper surface of the trestle. Decedent was employed as night watchman; his duties requiring him, as alleged, to pass, not only over the surface track, but over the elevated tracks, to guard certain of defendant's property upon the trestle. He was relieved from duty a little after 6:30 a. m. of the day on which the accident occurred, which was Sunday. According to his testimony, he waited some time for the appearance of defendant's superintendent, for the purpose of giving the latter information and report in defendant's interest; that between 7:30 and 8 o'clock, the superintendent not having appeared, decedent started home, walking up the incline of the trestle upon a plankway about 5 or 6 feet wide, between the first and second elevated tracks, his ordinary way from his work to his home being, as alleged, over the trestle; that while upon the level of the trestle he saw the superintendent on the track below, and accordingly called to and started toward him, walking across the two rails of the adjoining track (easterly) and then stepping upon a plank 12 inches wide spiked onto the outer (eastern) end of the ties, its inner edge being about 4 inches from the outer rail. As he stepped upon this plank his foot caught in what turned out to be a protruding spike in the plank and he was thrown down the incline, receiving serious injuries. It was decedent's claim that the plank in question was controlled and maintained by defendant, and was at the time, and long before had been, regularly in use by decedent and a large number of defendant's employés as a walkway in going to and returning from work, that such use was with defendant's knowledge and without its objection, and that defendant negligently permitted the existence of the projecting spike.

Defendant claimed that decedent was intoxicated at the time, and that the fall occurred from that cause; that decedent was discharged just before the accident because of this intoxication; that the plank was not in its control or being maintained by it at the time of the accident, but was under the sole control of the Pennsylvania Company, which had begun to run its trains over the trestle; and that the

plank was never intended as a walkway, but was merely a part of the track construction. Defendant's motion for instructed verdict was denied, and the case submitted under instructions that, in order to recover, it must be established (1) that the plank was at the time of the accident under defendant's control and management; (2) that it was used by defendant's workmen in going to and coming from their work as a necessary way or path for the purpose, openly and with defendant's knowledge and permission; (3) that decedent was necessarily and rightfully on the plank in the discharge of his duty to defendant, and in the course of his employment, for the purpose of communicating conditions of the work as night watchman to his foreman; and (4) that the accident was due to the defendant's negligence in permitting the protruding of the spike from the plank. There was also an instruction that if decedent was intoxicated, and staggered off the middle planking and onto the rails, and then upon the plank in question, from which he fell, he could not recover.

[1] There was substantial testimony tending to show the affirmative of each of the propositions so held by the court necessary to recovery. While there was testimony that decedent was intoxicated and was discharged, the jury apparently did not believe it; and there was abundant testimony sustaining the verdict in that regard. Although there was testimony that defendant no longer controlled or maintained the trestle and that it was in the sole control of the railroad company, which had taken upon itself the maintenance of the trestle, including the plank in question, there was testimony from which the jury might properly find that defendant had not yet completed its construction work, that it had at least a joint possession with the railroad company, and was still maintaining the premises, including the plank. Defendant was still at least engaged in a construction work of which the trestle formed a part, and had many employés thereabouts. Decedent testified that the trestle was not completed. There was also testimony that large numbers of defendant's employés were in the habit of using the plank in question as a regular way of passage between their homes and their work, and presumably with defendant's knowledge and approval; one witness, in especial, testifying that about 200 of defendant's employés went up and down the trestle mornings and evenings, and that the witness, an employé of defendant, supposed the plank in question was there to walk on. While the use of the plank in question was not (by reason of the planking between the first and second tracks) necessary in the sense of being absolutely indispensable to the use of the trestle as a passageway, its regular and convenient use tended to prove it, in a very proper sense, a necessary way. Decedent testified to the regular use of the plank as a walkway, and that he did not know "what other purpose it was used for." It is inferable from decedent's testimony that it was sometimes needed in avoiding switching trains and passing gangs of workmen with picks and shovels.

The existence of the board walk is thus not, in our opinion, sufficient of itself to overcome the effect of the positive testimony tending to show habitual use of the plank as a way of passage with defendant's

knowledge and presumed permission, especially in view of the fact that decedent was crossing the track and was upon the plank in the course of his duty, as alleged, and while on his way to communicate with defendant's superintendent.

[2] There was testimony from which the jury might properly find that defendant knew of the tendency of the spike to draw out of the plank and was negligent regarding it, and that the accident was actually caused by the protruding of the spike. That decedent was, if his testimony is to be believed, still in defendant's employ, is clear. The relation of employé was not lost by his remaining on the premises a short time after he was free to leave, for the purpose of conscientiously discharging a duty he thought owing to his employer; and he was none the less an employé, as respects a safe place to work, from the fact that he was on his way home from his work. Philadelphia, etc., R. R. Co. v. Tucker, 35 App. Cas. D. C. 123, 138, affirmed 220 U. S. 608, 31 Sup. Ct. 725, 55 L. Ed. 607. In fact, according to decedent's testimony, the trestle was his regular way of egress from defendant's premises. The court thus did not err in refusing to direct verdict for defendant.

[3] The jury was instructed that the defenses of "assumption of risk, contributory negligence, or fellow servant" had nothing to do with the case. The complaint made of this instruction is not that the defenses of contributory negligence and of assumption of risk were withdrawn, for both of these defenses were by the Ohio Workmen's Compensation Act denied to defendant through its failure to come under the act (102 Ohio Laws, p. 524, § 21–1). Forge Co. v. Moir (C. C. A. 6) 219 Fed. 15. The specific criticism is that the jurors were led to suppose by this instruction that there was no substantial defense, and that the jury's duty was merely to assess damages. We see no point in this criticism.

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

GRUSHLAW v. PHŒNIX KNITTING WORKS.

(Circuit Court of Appeals, Third Circuit. May 15, 1915.)

No. 1937.

1. INJUNCTION ⇐=251—LIABILITY ON BOND—EVIDENCE OF DAMAGE.

Evidence considered, and *held* to establish the fact that the defendant, in a suit for making and selling an article infringing a patent did not abandon the manufacture prior to the issuance of a preliminary injunction in such suit, but merely suspended it to await the result of the hearing, that its subsequent discontinuance and the sale of the special machinery and material on hand were due to the injunction, and that on his successful defense to the suit and its dismissal he was entitled to recover damages on the injunction bond.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 582–585; Dec. Dig. ⇐=251.]

2. EQUITY ⊂⊃409—FINDINGS OF FACT BY MASTER—REVIEW.
The conclusions of a master on matters of fact 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 Equity, Cent. Dig. §§ 904, 920–923; Dec. Dig. ⊂⊃409.]

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

Suit in equity by the Phœnix Knitting Works against Samuel Grushlaw, trading as the Pennsylvania Knitting Mills. From a decree denying him recovery of damages on injunction bond, defendant appeals. Reversed.

Frank S. Busser, of Philadelphia, Pa., for appellant.
F. E. Dennett, of Milwaukee, Wis., for appellee.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

WOOLLEY, Circuit Judge. This is an appeal from a decree of the District Court reversing a master's finding of damages occasioned the defendant by a preliminary injunction awarded in a suit for infringement of a patent, and raising the question whether the damages were sustained before or after the issuance of the writ.

Grushlaw, the defendant, was a manufacturer of sweaters. In May, 1910, he added to his business a department for the manufacture of neck scarfs or mufflers of the particular type of the patent in suit. He rented a floor of a building, bought machinery, employed operators especially skilled in the manufacture of such wear, and made over 700 dozen mufflers, for some of which he had received orders for delivery in the fall of that year. On August 3, 1910, Phœnix Knitting Works, the complainant, filed a bill against the defendant charging infringement of its design patent No. 39,347 for neck scarfs or mufflers. Upon the date of the filing of the bill, a rule was entered against Grushlaw to show cause why a preliminary injunction should not issue, returnable August 15, 1910. The patent had previously been sustained by the Circuit Court for the Eastern District of Wisconsin, and found to be infringed by a muffler similar to the muffler of the defendant. On August 11, 1910, which is a date between the issuance and return of the rule, Grushlaw, acting upon advice of counsel and in fear that a preliminary injunction, if directed against him, would find him with his manufactured supply of mufflers on hand, sold all the mufflers he had manufactured, gave to the vendee the names of his customers, and stopped business. On August 29, 1910, the court entered its expected decree for a preliminary injunction, conditioned, however, upon the complainant filing an injunction bond in the sum of $10,000. With this condition the complainant promptly complied. The litigation continued until October 7, 1911, when the preliminary injunction was dissolved and the bill thereafter dismissed, whereupon the cause was referred to a special master to ascertain the losses and damages suffered by Grushlaw by reason of the injunction. The master disallowed Grushlaw's claim for lost profits, past and prospective, and found that because of

the injunction, Grushlaw had suffered damages as follows: Two months' rent for the premises in which he had installed his muffler manufactory, $83.32; depreciation in the value of machinery and equipment, $850.30; depreciation in the value of boxes and labels, made, designed, and printed especially for mufflers manufactured by him, $954.59, making a total of $1,888.21. Upon exceptions to the master's report, filed by both parties, the District Court approved the master's disallowance of Grushlaw's claim for profits, and reversed his finding of damages, upon the ground that the damages found were caused by Grushlaw abandoning his business before the injunction was issued and the bond given. On this appeal we are concerned only with that part of the decree which reversed the master's finding of damages.

[1] The question is, whether Grushlaw abandoned his business prior to the issuance of the writ of injunction, or, in order to save himself from threatened losses, merely suspended business pending the decision of the court on the motion for an injunction. If, by disposing of the mufflers in stock, Grushlaw voluntarily abandoned his business, then the losses and damages found by the master could not have been caused by the injunction subsequently awarded, and would have been sustained whether the injunction had been awarded or refused. If, on the contrary, Grushlaw merely suspended business pending decision on the motion, and intended and was prepared to resume business had the motion been dismissed, then the damages sustained may have been occasioned by the injunction. Upon the simple issue, therefore, whether the conduct of Grushlaw amounted to a suspension or an abandonment of his business, and accordingly whether the damages he sustained were caused by the injunction or by himself, hinges the decision on this appeal.

What was the conduct of Grushlaw and the motives which inspired it? Having on hand several hundred dozen mufflers of a type adjudged by another court to infringe the complainant's patent, he was advised that in all probability he would be enjoined disposing of them, whereupon he promptly sold them without awaiting the decision of the court. If Grushlaw had done nothing more and had permitted with indifference the litigation against him to take its course, the sale of the mufflers on hand and the stopping of the manufacture of mufflers might readily be construed an abandonment of the business. But Grushlaw was not indifferent to the results of the litigation. On the contrary, he vigorously opposed the motion for an injunction, and for more than a year contested the complainant's action to a successful conclusion. During a portion of that period he retained and paid rent for the premises leased for the sole purpose of manufacturing mufflers. Having equipped his plant with light and power, and having purchased machinery costing more than $1,700, which was particularly adapted to knitting mufflers, and having purchased yarn, boxes, and labels at a cost exceeding $3,600, he kept his plant for a time intact and ready for the resumption of manufacture. Having assembled a force of operators especially skilled in knitting mufflers, he retained a number of them by giving them other employment in which they were not skilled. With this equipment and organization, Grushlaw did nothing before the issuing of the prelimi-

nary injunction that would indicate an abandonment of the business for which it was established and brought together. His sole act, before the writ of injunction was issued, was to dispose of the manufactured mufflers in stock before their sale could be stayed by injunction, for loss upon which no damages were allowed by the master. His acts after the injunction consisted, first, in waiting, and then in gradually disestablishing the manufactory.

It is urged, however, that after the injunction was dissolved, Grushlaw did not resume the manufacture of mufflers, and therefore he must have abandoned their manufacture at the time he sold his stock. The injunction was dissolved on October 7, 1911, or about 14 months after it was granted. In the meantime, Grushlaw vacated the leased premises, stored a portion, and employed in other uses another portion, of the machines, discharged his employés, and packed away the unsalable raw materials. The reason given by Grushlaw for not resuming business was that at the period when, in May, 1910, he started to manufacture mufflers, the prospect for trade was good, but as time went on, the vogue for the particular style of mufflers he was prepared to make passed, and the opportunity for prosecuting a profitable business more than a year thereafter was gone. The failure of Grushlaw to resume, in October, 1911, the manufacture of the particular style of mufflers he was making in August, 1910, is not persuasive evidence that the business was abandoned by Grushlaw at the earlier period. On the contrary, the circumstances of the case are corroborative of the direct testimony of Grushlaw and his brother that in August, 1910, he suspended business, awaiting a favorable decision on the motion for a preliminary injunction, and intended to resume business in the event that the motion was denied.

[2] We are of opinion that the District Court erred in sustaining the exceptions of the complainant, and that the measure of damages found by the master should have been followed. We are not inclined to disturb the actual damages found by the master, in view of the well-settled rule, that:

"The conclusions of the master" on matters of fact "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." Continuous Glass Press Co. v. Schmertz Wire Glass Co. (C. C. A.) 219 Fed. 199, 205, cases cited.

The judgment below is reversed.

D. W. STANDROD & CO. v. UTAH IMPLEMENT-VEHICLE CO.

(Circuit Court of Appeals, Ninth Circuit. May 24, 1915.)

No. 2437.

1. APPEAL AND ERROR ⇐162—RIGHT OF REVIEW—WAIVER.
A defendant in a foreclosure suit, which was trustee for a number of lien creditors, by accepting payment for one from the proceeds of the sale under the decree, did not waive the right to appeal therefrom on behalf of the others.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 179, 981, 982, 984–990; Dec. Dig. ⇐162.]

2 MECHANICS' LIENS ⇐260—SUIT TO ENFORCE—SPECIAL LIMITATION—INCUMBRANCERS NOT MADE PARTIES.
Under the Mechanic's Lien Law of Idaho (Rev. Codes, § 5118), which requires suit for enforcement to be brought within six months after filing of the lien claim, the lien is void as to all subsequent incumbrancers who are not made parties to a suit to foreclose within the six months.
[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 456, 458–468; Dec. Dig. ⇐260.]

3 BANKRUPTCY ⇐283—SUIT TO SET ASIDE PREFERENTIAL MORTGAGE—SETTLEMENT—RIGHTS OF LIENHOLDERS.
Denial of a petition by lienholders on property of a bankrupt, who had not filed claims as creditors, to set aside a settlement made by the trustee of a suit to have a mortgage on the same property declared void as a preference, *held* within the discretion of the court.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 429; Dec. Dig. ⇐283.]

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

Suit in equity by the Utah Implement-Vehicle Company against N. C. Mickelson, D. W. Standrod & Co., a corporation, as trustee for the Idaho Lumber Company, and the George A. Lowe Company and others. Decree for complainant, and defendant trustee appeals. Affirmed.

N. C. Mickelson, the owner of certain real estate in the district of Idaho, during the summer of 1910 caused a building to be erected thereon. Thereafter, on February 7th, March 7th, March 10th, March 11th, and May 1st, all in 1911, five mechanic's liens were filed for work done and material furnished in the construction of the building. Within six months from the date of the filing of the respective liens, the lien claimants brought suits to foreclose their respective liens. Prior to the filing of the liens, and on January 2, 1911, Mickelson and his wife executed to E. E. Rodgers and F. C. Rodgers a mortgage on said property to secure the sum of $3,000. Early in April, 1911, Mickelson was adjudged a bankrupt. On January 11, 1912, a suit was commenced to foreclose the Rodgers mortgage. Thereafter all the suits were consolidated, and on November 25, 1912, a final decree was entered, wherein it was ordered that the property be sold. A sale was had pursuant to the decree, and the property was sold to D. W. Standrod & Co., a corporation, as trustee for the mortgagees and for the lien claimants, for the sum of $6,728.41. Mickelson was indebted to the appellee herein, the Utah Implement-Vehicle Company, a corporation of the state of Utah, in the sum of $12,575.75 on notes and open account. To secure such prior indebtedness, he executed to the appellee on February 6, 1911, a note for said amount and a mortgage on the real estate involved herein, which mortgage was, on Feb-

ruary 21, 1911, duly recorded. Although the mortgage was recorded prior to the commencement of the foreclosure of the mechanics' liens and the foreclosure of the Rodgers mortgage, the appellee was not made a party defendant in any of those suits. On May 29, 1913, the appellee commenced the present suit in the court below for the foreclosure of its mortgage, alleging that its lien on the property was second only to that of the Rodgers mortgage, and that the lien of the lien claimants was extinguished as to the appellee's mortgage by reason of the fact that no proceeding was brought by the lien claimants against the appellee within the six months limited by the statute of Idaho. The trustee, Standrod & Co., in its answer to the bill, denied the validity of the appellee's mortgage on the ground that the same was taken for a prior indebtedness, and that Mickelson, at the time of the execution of said mortgage, was insolvent, as the appellee well knew, and that the mortgage was given by the bankrupt and was received by the appellee for the purpose and with the intention of securing a preference on its part over the creditors of said Mickelson. It was the decree of the court below that the mechanic's liens were extinguished as to the appellee, but that there was due on the Rodgers mortgage $4,616.58, which sum was ordered to be first paid out of the proceeds of the property which the court directed to be sold. On the sale the appellee bought in the property for $8,000, and paid Standrod & Co., the trustee for E. E. and F. C. Rodgers, the sum of $4,616.58.

William A. Lee, of Blackfoot, Idaho, for appellant.

Clency St. Clair and Charles C. St. Clair, both of Idaho Falls, Idaho, for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). [1] A motion is made to dismiss the appeal on the ground that the appellant, Standrod & Co., waived its right of appeal by accepting and retaining $4,616.58, a portion of the proceeds of the sale, and upon the ground that, while a severance was granted by the lower court, the severance was not permissible, and that no citation on appeal was issued to Bowman, the trustee in bankruptcy of the estate of Mickelson.

We find no merit in the motion. The right of Standrod & Co., as trustee, to appeal on behalf of the lien claimants, is not affected by its having accepted the sum found due on the Rodgers mortgage. The beneficiaries of the trust as to that mortgage were fully satisfied by the decree, and had no interest in appealing. It was proper, therefore, for the trustee, as it did, to take the appeal in his capacity as trustee of the mechanic's lien claimants. Their right to an appeal was unquestionable, and they were not in privity with the beneficiaries of the Rodgers mortgage. Bowman, the trustee in bankruptcy, had been notified in writing to joint in the appeal, and he refused to do so. Upon a petition for an order allowing the appeal, that fact was set forth, and thereupon the court properly ordered a severance as to the parties who refused to join in the appeal. The motion to dismiss is denied.

[2] It is contended that the court below erred in holding that, under the law of Idaho, a mechanic's lien is void as against all subsequent incumbrancers who were not made parties to an action to foreclose the lien within six months from the date of the filing thereof. The question so presented is one upon which the authorities are about evenly divided. In the case of Continental & Commercial Trust & Savings Bank v. Pacific Coast Pipe Co., 222 Fed. 781, —— C. C. A. ——, recent-

ly decided by this court, the same question was presented, and we upheld the construction given to the Idaho statute by the court below. Upon a reconsideration of the question, we are not convinced that that construction is erroneous, notwithstanding that, in the present case, it results in harshness and injustice to the lien claimants.

[3] It is further contended that the court below erred in denying the appellant, Standrod & Co., trustee, the relief prayed for in its supplemental petition. In that petition it was alleged that on August 26, 1911, Bowman, the trustee in bankruptcy, commenced a suit against the appellee herein to set aside and vacate its mortgage, and in his complaint alleged that the mortgage was voidable for the reason that it was given solely to secure a previous existing indebtedness of the bankrupt to the mortgagee within four months of the time when the petition in bankruptcy was filed, and was given with the intention of enabling the mortgagee to obtain a greater percentage of its debt than any other of the creditors of the same class, and with the intention on the part of the parties thereto to effect a preference in the appellee over other creditors of the bankrupt of the same class; and that thereafter, about April, 1913, an agreement was made between the parties to that suit whereby Bowman was to be paid $800 by the appellee in consideration that he would dismiss the same; that that agreement was wrongful and operated to the prejudice of the rights of Standrod & Co., and was a fraud upon it; and that the trustee should be required to proceed to judgment upon the issues presented in said suit. The prayer of the petition was that the agreement between the trustee in bankruptcy and the appellee be set aside and vacated, and that the court direct the trustee in bankruptcy to prosecute said action to final judgment, or, in case of his failure so to do, that the petitioner be permitted to do so, and that, pending the termination of those issues, proceedings to foreclose the appellee's mortgage be stayed and held in abeyance. To that petition the trustee in bankruptcy answered, denying that the settlement of the suit between him and the appellee was in prejudice of the rights of Standrod & Co., and alleging that the value of the property involved was fully absorbed by the claims represented by Standrod & Co. as trustee in the first foreclosure suits, and that the trustee could not, even if he deemed it advisable, redeem from those liens, and that it was to the best interest of the estate in bankruptcy to settle the suit as the trustee in bankruptcy agreed to do upon the payment to him of the sum of $800 by the appellee. He further alleged that, after having taken the deposition of the bankrupt concerning the alleged preference, he was in doubt as to his possible success in maintaining the suit, and that he was also influenced to make the agreement to dismiss the suit by the fact that the contest over the real property involved only the priority of lien claims to the same, and that the claims of the lien claimants had not been presented against the estate in bankruptcy.

If, at the time when Standrod & Co. made their application to the court below to direct the trustee to proceed with the suit to set aside the alleged preference, the lien claimants represented by Standrod & Co. had, as unsecured creditors, presented their claims against the estate, and had offered to hold the trustee harmless against a judgment

for costs, a very different question would here be presented on the appeal. But, as the facts and the situation are set forth in the supplemental pleadings, we find no ground for holding that the judge of the court below abused the discretion which is vested in him when he denied Standrod & Co.'s application.

The decree is affirmed, without prejudice to the right of Standrod & Co., or the lien claimants represented by it, to proceed against the estate in bankruptcy.

UNITED STATES v. HOM LIM.

(Circuit Court of Appeals, Second Circuit. April 13, 1915.)

No. 213.

ALIENS ⊂⊃32—PROCEEDINGS FOR DEPORTATION OF CHINESE—BURDEN OF PROOF.

A person of the Chinese race, apparently a laborer, who claims to be a native-born citizen, but produces no certificate, may be taken before a commissioner for examination as to his status, and the burden rests upon him to prove that he was born within the United States by affirmative evidence.

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

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

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

This cause comes here upon appeal from a decision of the District Court, Eastern District of New York, reversing an order of deportation made by the United States commissioner. The opinion of the District Judge will be found in 214 Fed. 456.

L. R. Bick, Asst. U. S. Atty., of Brooklyn, N. Y., for the United States.

M. J. Kohler, of New York City, for appellee.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

LACOMBE, Circuit Judge. The United States Chinese and immigrant inspector went to a Chinese laundry at 610 Fulton street, Brooklyn, having with him the government interpreter and stenographer, in search of a Chinese person named Ing So, whom he did not find. He did find this defendant, Hom Lim, concededly of Chinese descent, who was working in the laundry. He questioned him through the interpreter, and the stenographer recorded the conversation. Defendant stated that he was born in the United States, but that he did not know where; that some cousins could prove where he was born. Asked where they were, he said he had heard some one mention it, but he did not know who. Asked if he had ever been arrested and discharged by a United States commissioner, he answered he didn't remember; he would have to ask "some cousins." Having testified that

his father died about 20 years ago, he was asked where he died, and answered in the United States. Asked whereabouts in the United States, he answered he did not remember. Asked with whom he lived after his father and mother died, he did not remember. Asked who was the first person he remembered living with, he answered he stayed in the Yee Hing store most of the time. Afterwards, when his testimony was read over to him for correction, he said he wished to change his statement that he lived in Yee Hing Company, and that he meant he just made calls there. Asked if he remembered ever having lived with a Chinese or American family since his birth, he said he stayed with his cousins. Asked where he stayed with them, he said in the Yee Hing Company. Asked where he stayed with them in the store, he said he went to work with his cousins in different places. Asked if he could give the address of any one of those places, he said "No." Thereupon the inspector arrested him and took him before a United States commissioner. Examination was had before the commissioner, defendant being represented by counsel, and several witnesses were examined. The commissioner held that he was not born in the United States and should be deported to China.

Appeal was taken to the District Court, where apparently none of the witnesses who had appeared before the commissioner were produced or examined. The record before the commissioner was submitted, and one additional witness was examined. This was a lady who had taught Hom Lim in Sunday school in the summer of 1904 or 1905 and had seen him at intervals since that time. Her testimony in no way related to the question of his birthplace. Judge Chatfield held that Hom Lim was born in the United States and entitled to remain therein. He reversed the order of the commissioner. It is quite apparent from the record and from his opinion that this disposition of the cause was made on the theory that the government had the burden of proof.

Counsel for defendant contends that since Hom Lim asserted, when questioned under oath, that he was born in the United States, the inspector acted without legal authority in taking him before the commissioner, without first having obtained a warrant upon affirmative testimony produced by the government showing that he was not born in the United States; also that in the case of a Chinese person who asserts that he has never been out of the United States the burden is on the government to prove that he was not born here. Authorities in support of this contention are cited on the brief. Moy Suey v. U. S., 147 Fed. 697, 78 C. C. A. 85; Gee Cue Bing v. U. S., 184 Fed. 383, 106 C. C. A. 493. But we cannot assent to these propositions.

Congress has provided a procedure whereby a person of Chinese descent, apparently a laborer, who, upon being interrogated by the inspector, produces no certificate such as the statutes call for, shall be brought before a United States commissioner for examination as to his status. Upon such examination the burden of proof is on the Chinese person to satisfy the commissioner or the reviewing court that he is entitled to remain in this country. He cannot avoid that investigation merely by stating to the inspector, even under oath, that he was

born in the United States. In view of the decision of the Supreme Court in U. S. v. Ju Toy, 198 U. S. 253, 25 Sup. Ct. 644, 49 L. Ed. 1040, we are satisfied that it was within the constitutional power of Congress to provide for this procedure, even in the case of Chinese persons who eventually, upon examination before the proper tribunals, succeed in establishing by satisfactory proof the proposition that they are native-born citizens. The constitutional rights of a native-born citizen are no greater and no less, whether he remain here continuously after birth, or return here after some temporary absence.

Hom Lim testified before the commissioner that he was born in San Francisco on November 29, 1888; his father's name being Hom Sing and his mother's Yee Shee. Of course he had no personal knowledge of the date or place of his own birth. It was competent to introduce testimony of declarations made to him by his parents or other near relatives as to such place and time, but examination of the record fails to disclose any satisfactory evidence of this sort. On his examination before the inspector he stated that "some cousins"—he did not know who—told him he was born in the United States. He did not know where. Before the commissioner he testified that when he was a boy a cousin named Mon Pong told him he was "born in this country"; also that between the time of his arrest and his examination before the commissioner (November 7 to December 30, 1912) he saw another cousin, Wing Gee, who told him that he knew his father well and that he (Hom Lim) was born in San Francisco—no date stated. Wing Gee was not called as a witness, nor was any excuse offered for his nonproduction. He also testified that his uncle, Hom Shed, was very sick and went to China when defendant was 14 years old, and that before going his uncle told him he had his "birth paper from a doctor" and would keep it. If the uncle were then returning to China, leaving his nephew here, the natural thing to do would have been to give him the birth certificate, or to place it with some responsible person who was expecting to stay here. There are many contradictions and inconsistencies in defendant's testimony. His narrative as to what took place when the inspector arrested him—he testified that the inspector struck and shook him—is contradicted by three witnesses who were present. Some of the inconsistencies in the recorded testimony may perhaps be explained by errors in interpretation; but his evidence is no more persuasive than was that of defendant in the Fong Pin Ngar Case, 223 Fed. 523, —— C. C. A. ——, which was argued here at the same time.

The only other material witness is a Chinaman, who testified to attending the christening feast of a 2 months old child of Hom Sing 25 years ago in San Francisco, to seeing that child with his father for 3 or 4 years afterward, and to his seeing at Hom Shed's place in New York, some 9 years after the christening, a boy of whom Hom Shed made the statement, "This is Hom Sing's son." It nowhere appears how many sons Hom Sing had, and there is nothing to show that this was the child whom the witness saw christened.

The commissioner saw and heard all these witnesses, and had an opportunity to judge of the credibility of their narratives which we

do not possess, and which the District Judge did not avail of. His conclusions as to the facts are properly accorded much weight in Jin Dun v. U. S., 164 Fed. 330, 90 C. C. A. 542. Moreover, from an independent examination of the testimony as it is recorded, we are satisfied that defendant has failed "to establish by affirmative proof to the satisfaction" of the tribunal authorized to pass upon the question "his lawful right to remain in the United States."

The order of the District Court is reversed, and the order of the commissioner is affirmed.

FONG PING NGAR v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. April 13, 1915.)

No. 211.

1. ALIENS ⟸32—PROCEEDINGS FOR DEPORTATION OF CHINESE—CITIZENSHIP —BURDEN OF PROOF.
   The burden is upon a Chinese person, who claims to be a citizen, to show by affirmative proof that he was born within the United States.
   [Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 84, 92-95; Dec. Dig. ⟸32.]

2. ALIENS ⟸32—PROCEEDINGS FOR DEPORTATION OF CHINESE—REVIEW.
   Unless there are special circumstances, a finding by a commissioner, and also by a District Court on a hearing de novo, that a Chinese person was not born in the United States, will not be reversed on appeal.
   [Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 84, 92-95; Dec. Dig. ⟸32.
   What Chinese persons are excluded from the United States, see note to Wong You v. United States, 104 C. C. A. 538.]

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

This cause comes here upon appeal from an order of the District Court, Southern District of New York, affirming an order of the United States commissioner and ordering defendant's deportation to China.

M. J. Kohler, of New York City, for appellant.

H. Snowden Marshall, U. S. Atty., and F. M. Roosa, Asst. U. S. Atty., both of New York City, for the United States.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

LACOMBE, Circuit Judge. Defendant alleged that he was born in San Francisco—or rather that his father told him he was born there—and that he had never been out of the United States. His counsel has argued at great length and with an abundant citation of authorities that on questions of pedigree hearsay evidence is admissible. He evidently supposes that in our recent decision in Lee Sim v. U. S. (C. C. A.) 218 Fed. 432 † (Nov. 1914), we held that such testimony was not admissible. This is a mistake; testimony may be competent, and nevertheless unconvincing or even unpersuasive, and we were not impressed by Lee Sim's statements that he was "born here."

[1, 2] In the case at bar the defendant was examined, first by the

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

† 134 C. C. A. 232.

United States Chinese and immigrant inspector, with interpreter and stenographer. He was next given a hearing before the United States commissioner, at which he was examined at considerable length, as also were several witnesses called on his behalf. Finally he was given a trial de novo before Judge Hough in the District Court, when he was himself re-examined by the judge. In the testimony as it stands on the record before us there are numerous inconsistencies and contradictions, and there was a lack of testimony which it would seem might have been produced if defendant had, as he said, lived in New York City for 20 years. The burden is upon a Chinese person, who claims to be a citizen, to show by affirmative proof that he was born within the United States. The two tribunals who had the opportunity of seeing and hearing the appellant and his witnesses have both agreed that he has not established his right to remain here. We find nothing peculiar or exceptional in the case, and under the authorities see no reason for reversing their judgment. Chin Bak Kan v. U. S., 186 U. S. 193, 22 Sup. Ct. 891, 46 L. Ed. 1121; Tom Hong v. U. S., 193 U. S. 522, 24 Sup. Ct. 517, 48 L. Ed. 772; Chu King Foon v. U. S., 191 Fed. 822, 112 C. C. A. 336; Gong Nom Wood v. U. S., 191 Fed. 830, 112 C. C. A. 344; Jin Dun v. U. S., 164 Fed. 330, 90 C. C. A. 542.

A further point raised on this appeal is discussed in our opinion in Hom Lim v. U. S., 223 Fed. 520, — C. C. A. —, handed down herewith.

The order is affirmed.

THE SENATOR RICE.

THE LUZERNE.

(Circuit Court of Appeals, Second Circuit. April 13, 1915.)

Nos. 188–198.

COLLISION ⇐61—TUGS AND TOWS CROSSING—COMMON FAULTS.

The railroad tug Luzerne, with a carfloat on the side, backed from her slip in North River a short distance above the Battery and started to turn up stream for the purpose of crossing the river to the company's terminal nearly opposite in Jersey City. There was a strong ebb tide, which swung the bow of the float temporarily down stream, from which direction the tug Senator Rice was approaching with a hawser tow. The Rice gave a signal to pass starboard to starboard, which was answered with a single whistle. Both vessels proceeded, and a collision occurred between the carfloat and a barge in tow of the Rice. *Held*, that the vessels were in fact on crossing courses, as the Rice should have known, and the starboard hand rule applied, which required the Rice to keep out of the way, and that she was in fault for not doing so; that the Luzerne was also in fault for not sooner stopping when the signals were crossed until the courses of the two vessels were definitely determined.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 78; Dec. Dig. ⇐61.

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

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

On appeal by the Lehigh Valley Transportation Company, claimant of the steamer Luzerne, and libelant in the second of the above-entitled suits, from a final decree of the District Court for the Eastern District of New York in a cause arising out of a collision between the barge Southern Cross in tow of the steamtug Senator Rice and a carfloat in tow of the tug Luzerne; which decree (215 Fed. 149) held the tug Luzerne wholly in fault and dismissed the libel against the Senator Rice, without costs.

Harrington, Bigham & Englar and D. Roger Englar, all of New York City, for Lehigh Valley Transp. Co.

J. Parker Kirlin and William H. McGrann, both of New York City, for The Senator Rice.

Foley & Martin, of New York City, for C. F. Harms Co., owner of the scow Southern Cross.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

COXE, Circuit Judge. These appeals involve the question of negligence growing out of a collision between a carfloat lashed to the starboard side of the steamtug Luzerne, belonging to the Lehigh Valley Railroad Company, and a scow boat, the Southern Cross, the leading boat on a hawser tow of the Senator Rice, a large tug bound from the East River around the Battery and up the Hudson River. The Luzerne was destined for the Lehigh Valley Railroad terminal in Jersey City in the Morris Canal Basin opposite Pier No. 2 from which she started, directly above the Battery. The tide was ebb and, on emerging from the pier, the starboard bow of the carfloat caught the full force of the tide and it was impossible to avoid the temporary swinging of the bow down stream. We think, however, it is quite improbable that any experienced navigator, having knowledge of the harbor of the city of New York, and generally, of the destination of the railroad tugs, would suppose that a Lehigh Valley tug leaving pier No. 2 with a loaded float was destined for any point in the East River, or, in fact, for any point other than the Lehigh Valley terminal in New Jersey. There is no doubt that the bows of the carfloat and tug were headed down stream for a short period while the Luzerne was making the turn to the west and straightening on her course to Jersey City.

Neither is there any doubt that the ultimate courses of the two tugs were crossing and if they were in this position when the signals were given, or if the situation was such that the master of the Senator Rice knew, or should have known, that the courses would be crossing the moment the Luzerne got clear of the pier and had straightened on her course, it was his duty to keep out of the way. Even upon the Rice's testimony the courses were crossing and the starboard hand rule applied. It is well to have that rule distinctly in mind. Article 19 of the Pilot Rules (Act June 7, 1897, c. 4, 30 Stat. 101 [Comp. St. 1913, § 7893]) for inland waters provides:

"When two steam-vessels are crossing, so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other."

The Rice had the Luzerne on her own starboard side and we think the situation when it first developed was such as to involve risk of collision. Certainly if the Rice knew or had reasonable cause to believe that a Lehigh Valley tug was destined for the Lehigh Valley terminal, prudence required that her master should not insist upon passing starboard to starboard.

We have little doubt that when the signals were given the starboard hand rule applied. After the Luzerne had backed out of her slip, she commenced the turn under a port helm, making it evident that her course was not down the river or around the Battery. It was then the duty of the Senator Rice to keep out of the way until it was made plain what course the Luzerne intended to take.

When the Luzerne had cleared it was only a question of a few moments before it became evident that she was heading for her Jersey destination. While executing this maneuver the Rice blew two blasts, indicating that she would continue on her course and pass the Luzerne starboard to starboard. The Luzerne answered with one blast, indicating that she did not agree to the Rice's proposal. It may be true that at the time the signals were given they were not on crossing courses and there was nothing to indicate to the Rice what course the Luzerne intended to take. Still, after the Luzerne had indicated her intention not to accept the Rice's invitation to pass starboard to starboard it must have been evident that she was not destined for any point on the East River and common prudence would seem to require that the Rice should not insist upon proceeding upon the course indicated by her signals.

We see no reason why the Rice could not have slowed down and permitted the Luzerne with her unwieldy tow to straighten out and cross her bows. The District Judge expressly finds that:

"According to the testimony she had made this turn and was proceeding towards New Jersey for some distance before she crossed the bow of the tramp steamer and before any danger arose because of the proximity to the Senator Rice."

Anderson, a witness for the Cornell Company, testified that the Luzerne and tow were going across the river. The engineer of the Rice testified when he first saw the carfloat and the Luzerne "she was headed across the river." It seems to us that in view of the fact that the Rice had reason to believe, if, in fact, she did not know, that the Luzerne was destined for Jersey City as soon as she got straightened out, that the starboard hand rule applied. The least the Rice should have done was to slow down, which she could easily have done in the ebb tide, and wait until the situation developed. This is equally true of the Luzerne and results in both parties being held negligent for not recognizing a dangerous situation and waiting until it developed sufficiently to enable them to navigate safely. Such a result seems to us to be the best solution of a collision which appears to have been due to the stubbornness of both parties. That such a collision should have

occurred in broad daylight at a time when there was nothing in the elements to interfere with navigation seems inexplicable. It is hardly possible that the stupidity or obstinacy of a single master could have produced such a result and we think the collision was due to their combined action. Where property and life are at stake, neither party should insist upon persisting in a course which is likely to result in disaster when the delay of a few moments will insure the safety of both.

The decree is reversed with the costs of this court to the Luzerne and the District Court is directed to enter a decree in favor of the libelant against the Luzerne and the Rice each for one-half the damages and costs.

GLEASON v. THAW.

(Circuit Court of Appeals, Second Circuit. March 9, 1915.)

No. 206.

JUDGMENT ⊂=585—CONCLUSIVENESS—MATTERS CONCLUDED.

Plaintiff was employed to defend T., who was charged with murder. On August 8th, as claimed by him, T.'s mother, to induce him to extend credit to T., represented that all disbursements theretofore made by her for the defense of T. were made in her own behalf, and not as loans to T., that she had agreed with T. to pay all sums necessary in his defense other than plaintiff's charges, and that under his father's will T.'s income was subject only to specified restrictions. Plaintiff sued the mother on an alleged contract, made on August 8th, to make on her own behalf all disbursements necessary in the defense of T., other than payments to plaintiff, and the complaint was dismissed, on the ground that no breach of the contract pleaded was shown. *Held* that, while this dismissal barred a new action for representations, subsequent to August 8th, that she was making all such disbursements as agreed, since plaintiff had elected to rely on the contract, and not upon her representations that she was performing it, the judgment did not bar an action for the representations as to existing conditions prior to August 8th, nor as to the availability of T.'s income to meet his own obligations.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1062–1064, 1067, 1073, 1084, 1085, 1092–1095, 1132; Dec. Dig. ⊂=585.

Conclusiveness of judgment as dependent on theory of action or recovery, see note to Miller Iron Mining Co. v. M'Kinney, 96 C. C. A. 163.]

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

This cause comes here upon writ of error to review a judgment of the District Court, Southern District of New York, in favor of defendant in error, who was defendant below. The cause was disposed of below on the pleadings, complaint, answer, and reply; the court directing a judgment for defendant.

John B. Gleason, of New York City, pro se.

Kellogg & Rose, of New York City (Abram J. Rose and Alfred C. Petti, both of New York City, of counsel), for defendant in error.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

LACOMBE, Circuit Judge. The facts as stated in the complaint are these. Harry K. Thaw, defendant's son, was about to be tried under indictment for murder. The indictment was found June 28, 1906. Early in July plaintiff, at Harry Thaw's request, agreed to act temporarily for him as counsel, upon condition that the continuing of his services upon credit should cease unless in some way he was made certain and satisfied as to his ultimate payment. Under his father's will Harry Thaw was in receipt of an income somewhat in excess of $30,000; but, presumably, plaintiff realized that the amount of money which would be lavishly expended in his defense might make this sum insufficient to pay the bills. It is alleged in the complaint that on or about August 8, 1906, plaintiff had an interview with defendant, in which, "for the purpose of inducing plaintiff to perform [professional] services for her son upon a single credit to be extended to him, she stated and represented to the plaintiff as facts of her own knowledge and with the intention that plaintiff should perform services for Harry Thaw upon the latter's personal credit," as follows:

(1) That all the disbursements thus far made by her on account of her son were made in her own behalf, as mother and head of the family, and were not liabilities of her son to her, nor chargeable against him, unless by way of advances against his interest under her last will.

(2) That she had agreed with Harry Thaw to pay in her own behalf all sums necessary on account of her son and his defense (other than plaintiff's charges), by way of advancement and not creating any liability on his part for their repayment.

(3) That the only restrictions as to Harry Thaw's income under his father's will were contained in an abrogated codicil, and that the provisions of the will affecting his share were in all respects the same as the provisions as to her income, and were in all respects unconditional.

The complaint further alleges that about November 1, 1906, he had another interview with defendant, when she repeated, in substance, the former representations, stating that all her disbursements down to that date, including, of course, all from August 8th to about November 1st, were not liabilities of her son to her. It further alleges that plaintiff, relying on these representations, rendered services to Harry K. Thaw which have not been paid, and that the representations above stated were to the knowledge of defendant untrue and fraudulent.

The defense is based upon the record of a prior adjudication between plaintiff and defendant; the prior controversy arising out of the same transactions. In that case there was a judgment in favor of defendant. The argument in the case at bar is that plaintiff elected the remedy he sought to avail of in the prior action, and is therefore debarred from now seeking to avail of some different remedy. The prior action was before this court and disposed of in Gleason v. Thaw, 205 Fed. 505, 123 C. C. A. 573. The complaint in that action was inartificially drawn. It contained averments appropriate to an action on contract, and also averments appropriate to an action in tort. Commenting on this we said:

"Upon the argument plaintiff would not state definitely whether he sought to recover upon his alleged contract, or upon some tort; indeed, he contended that he relied on both."

We construed his pleading as a declaration on contract, and that construction is binding upon both parties. Inasmuch as the earlier action was disposed of on the pleadings, the alleged contract was taken as established. That contract made August 8, 1906, was found to be that:

"Defendant agreed that she would herself, in her own behalf as head of the family, make all the disbursements (other than payments to plaintiff) that were expedient on account of the indictment, and that such payments should be chargeable against her son only as advancement; i. e., advancements on what he would receive at her death, one-third of such advancements to be remitted under her will."

We affirmed the dismissal of the complaint in that prior action, because the facts averred did not show a breach of the contract pleaded, and on the pleadings taken as proved. As to all representations of defendant, subsequent to August 8, 1906, which would be in accord with the obligations of defendant under this contract, this prior adjudication is a flat bar. Plaintiff elected to rely on the contract and upon defendant fulfilling her obligations thereunder, not upon representations (alleged to be false) that she was fulfilling those obligations.

But that does not entirely dispose of the complaint in this later action. There remain the averments touching representations as to existing conditions prior to August 8, 1906; that all prior disbursements made by defendant on behalf of her son, subsequent to indictment and to save him from the penalty of his crime, were not loans, but paid by her as head of the family, with no recourse to her son for reimbursement. These were not disposed of in the prior suit. Nor were the averments as to willful misrepresentations as to the availability of Harry Thaw's income to meet his own obligations. We referred to them in the opinion incidentally, because the singularly composite structure of the complaint in that action invited a reference to them; but, when we held that the prior action was founded solely on the alleged contract, all reference to such alleged misrepresentations became, of course, obiter.

The judgment is reversed, with instructions to allow plaintiff to amend his complaint, so as to present the only issues which, under this opinion, he is entitled to try.

RIGGIO v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. April 13, 1915. On Petition for Rehearing, April 20, 1915.)

No. 209.

COUNTERFEITING ⊜18—PROSECUTION—EVIDENCE.

Evidence considered, and *held* sufficient to sustain a verdict finding defendant guilty of counterfeiting and having in his possession counterfeit coins.

[Ed. Note.—For other cases, see Counterfeiting, Cent. Dig. §§ 41–45; Dec. Dig. ⊜18.]

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

On writ of error to review a judgment of conviction entered upon the verdict of a jury in the Eastern District of New York upon an indictment charging the defendant with counterfeiting and having in his possession counterfeit coin made to resemble silver coins of the United States.

Achille J. Oishei, of New York City, for plaintiff in error.

Louis R. Bick, U. S. Atty., of Brooklyn, for the United States.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

COXE, Circuit Judge. The indictment contains four counts. The first count charges the defendant and one Carmela Quartucci with having, in the Borough of Brooklyn, on the 6th day of April, 1914, knowingly counterfeited and assisted in counterfeiting ten false, forged and counterfeited coins in resemblance of the silver coins cast at the United States mints and known as quarters, with intent to defraud divers persons whose names are unknown. The second count charges the defendant and Quartucci with having, at the same time and place, the said coins in their possession. The third count charges them with having, at the same time and place, counterfeited ten false, forged and counterfeit coins called dimes. The fourth count charges them with having the said counterfeit dimes in their possession.

The question of the defendant's guilt was purely one of fact and the verdict of the jury is conclusive on this question. There can be no doubt that, upon the testimony, counterfeit coin was being made at No. 6511 Eleventh avenue, Brooklyn, at and prior to the time of the defendant's arrest. The question is, did he know of and assist in the manufacture? It was shown that he was frequently there using the rear door for entrance and exit. On April 6th, the day of the arrest, the officers shadowed the defendant and Quartucci, who was indicted with the defendant, pleaded guilty and was used as a witness for the United States. The testimony of the officers who entered the house was to the effect that after Quartucci reached the house Riggio left and returned in about half an hour, using the rear entrance. Six secret service agents surrounded the house and two entered the rear door, finding Riggio and Quartucci in the room. They found a gas stove with a ladle on the stove, molten lead and a burning gas jet under the ladle. They also found a board full of counterfeit dimes, 275 in all, two bags of metal and a mold for making quarters. There was also evidence that the defendant stated that he lived at No. 6511. The principal defense of the defendant was that he did not live at the premises in question at the time of the arrest and that prior to April 6th he had not been there for a month. He also testified that the premises were locked up at night during January, February and March, but he was unable to give any intelligent reason for having paid the gas bill for this period when confronted with the receipted bills. Besides these circumstances we have the direct testimony of one of the officers that when asked who lived there he answered that he did.

We deem it unnecessary to discuss the testimony further as we have

no doubt whatever that it presented a question of fact which was properly submitted to the jury. If they believed the defendant it was their duty to acquit, but the circumstances pointed strongly to him as one who knew what was going on at No. 6511 and who participated in the making of the spurious coin found on the premises. In view of the many evidences of counterfeiting, the jury were fully justified in finding that the defendant must have known what was being done in the rear room.

The defendant relies upon the case of Hauger v. United States, 173 Fed. 54, 97 C. C. A. 372, but we do not regard the law as there laid down applicable to the present situation. It would be in point if Quartucci, in the absence of the defendant, had confessed to one of the officers that Riggio and he had made the counterfeit coin in question and the officer had sworn to his statement upon the trial.

The judgment is affirmed.

On Petition for Rehearing.

PER CURIAM. Rubano testified as follows:

"Agent Schroeder put his shoulder to that door and forced it. It gave, and I told Riggio to remain there if that was his house, to stay with me. We got that door in, that was a pantry door, and we found another door and forced that open, and as the door gave, the first glance of the room I saw Quartucci going from the stove towards the bedroom, and Schroeder and I entered, Riggio and the two boys he was talking to also. I then motioned to Agent Rich and said, 'This way, it's all right,' and the other agents followed. When we entered the door we told Riggio and Quartucci to sit down, that we were government officers. Then I had a conversation with Riggio. * * *

"A. Those two smaller pans are the ones I have reference to being near the stove. The other pot was brought in from the bedroom by Schlam, and contained mold frames. Right after Agent Schlam had brought in the bags from under the bed with plaster in it.

"Q. Riggio was there? A. Yes.

"Q. Was the defendant Riggio there at that time? A. From the moment we entered that door until we left.

"Q. And right in that room? A. Yes."

The statement in the opinion referred to in the motion for a rehearing was made for the purpose of showing that the defendant was present when the officers made the search and discovered the evidence tending to show that counterfeit money was being made in the house. Of course it is immaterial whether he went into the house before the officers arrived or entered at the same time they did.

Petition for a rehearing is denied.

EASTERN STEEL CO. v. GODAIR-WIMMER BLDG. CO.

Appeal of 1482 BROADWAY CORPORATION.

(Circuit Court of Appeals, Second Circuit. April 13, 1915.)

No. 223.

RECEIVERS ⇐139—SALE OF PROPERTY—OPENING OR VACATING—MISCONDUCT AFFECTING.

A showing *held* insufficient to entitle a purchaser of property at receiver's sale to relief on the ground that the receiver or auctioneer misrepresented the incumbrances on the property.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 243, 244; Dec. Dig. ⇐139.]

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

Rockwood & Haldane, of New York City (Nash Rockwood and Charles A. Winter, both of New York City, of counsel), for appellant.

Everett, Clarke & Benedict, of New York City (A. L. Everett, of New York City, of counsel), for appellee.

K. McEwen, of Brooklyn, N. Y., in pro. per.

Before COXE, WARD, and ROGERS, Circuit Judges.

WARD, Circuit Judge. The Godair-Wimmer Company went into the hands of a receiver appointed in the above suit by the District Court for the Southern District of New York. A lease of premises at the corner of Forty-Second street and Broadway, New York City, known as the Heidelberg Building, for 21 years from the 1st day of May, 1909, with the privilege of 3 renewals of 21 years each, practically constituted its only asset.

The court ordered the receiver to sell at public sale March 11, 1914, at 11 a. m., the whole of the company's capital stock and its entire issue of bonds secured by mortgage on the lease. This was because the lease contained a covenant against assignment and in no other way could a purchaser get title to it. The terms of sale required the bidder to pay $5,000 down, one-third of the purchase price on confirmation of the sale, one-third in 6 months, and one-third in 12 months, with interest on deferred payments at 6 per cent. per annum; said payments to be secured in a manner satisfactory to the receiver.

The property was struck down to the 1482 Broadway Corporation for $98,600 and the sale was confirmed by the court March 27, 1914; the purchaser being required to pay one-third of the purchase price April 10, 1914, and to secure the payment of the balance by bond with sureties to be approved by the court.

April 14th, upon motion of the purchaser, the order of confirmation was modified by requiring it to pay $11,347.50 on account of the first installment on or before the 16th day of April and the balance thereof of $16,519.16 on the 29th day of April, the second installment of one-third, with interest from March 11th, within six months from that

date, and the remaining one-third of the purchase price, with interest from March 11, 1914, within one year from that date, as security for said payments; the receiver to retain possession of the stock and bonds of the Godair-Wimmer Company and to administer the property at the purchaser's risk until payment of the purchase price in full. April 16th the purchaser did pay the sum of $16,519.16. April 27, 1914, the purchaser obtained an order to show cause why the order of confirmation should not be modified by requiring the receiver to protect it against a blanket mortgage executed by the Coe estate for $720,000, covering 41 parcels of land in New York and Brooklyn, including the premises in question.

In support of this motion the affidavit of the attorney for the purchaser averred that he had asked at the time of the sale whether there were any incumbrance upon the building ahead of the lease, and that the auctioneer and receiver replied that there was not, whereas on or just before April 13th he learned of the existence of the mortgage in question. Some confirmation of this appeared in other affidavits. The affidavit of the receiver alleged that the only representation he made was that the stock and bonds of the Godair-Wimmer Company were to be sold free and clear of the debts of that company. This was confirmed both as to him and as to the auctioneer by other affidavits. The affidavit of the auctioneer was taken by neither party and each contends that it ought to have been taken by the other. As after the sale he was not in the employment of the receiver and as the burden of proof was upon the petitioner, we think that between the receiver and the purchaser the duty of taking the affidavit of the auctioneer lay naturally upon the purchaser.

The order to show cause was denied, with leave to renew, and, having been renewed September 5th, was denied by Judge Mayer, "without prejudice to move for leave to bring an action or suit in which the receiver may be made a party defendant." This is the order appealed from.

If the auctioneer or receiver did make the representation alleged by the purchaser, it should be granted relief. Laight v. Pell, 1 Edw. Ch. 577; Hudson v. New York & Albany, 180 Fed. 973, 104 C. C. A. 129. Upon the affidavits, however, the District Judge was not satisfied that such representations had been made, and we concur in his conclusion.

Order affirmed.

HOTCHKISS v. NATIONAL CITY BANK OF NEW YORK.

(Circuit Court of Appeals, Second Circuit. April 13, 1915.)

No. 212.

STIPULATIONS ⇐14—CONSTRUCTION—LIABILITY ON APPEAL BOND.

In a suit in equity by a trustee in bankruptcy against a bank to recover securities delivered to the bank by the bankrupt, on the ground that such delivery was a voidable preference, it was stipulated that the bank might sell the securities in its discretion, the proceeds to stand in their place and "to represent the amount of liability of the * * * bank, * * *

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

should it be adjudicated that the delivery of the said securities to the bank was preferential." *Held*, that the "adjudication" contemplated by the stipulation was the final adjudication, and that, the bank not having sold the securities, on their recovery by complainant after successive appeals by the defendant, he could not recover on the supersedeas bonds the amount of their depreciation in market value pending the appeals.

[Ed. Note.—For other cases, see Stipulations, Cent. Dig. §§ 24–37; Dec. Dig. ⟸14.]

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

This cause comes here on writ of error to review a judgment of the District Court, Southern District of New York, in favor of defendant in error who was defendant below. The action is on supersedeas bonds given by defendant on appeals taken by it to this court and to the Supreme Court in a suit in equity between the same parties, which suit was brought by the plaintiff herein, as trustee in bankruptcy of Lathrop Haskins & Co. to recover the possession of certain securities delivered by that firm to defendant, on the ground that the delivery constituted a voidable preference under the Bankruptcy Act.

See, also, 201 Fed. 664, 120 C. C. A. 92.

A. I. Elkus and Wm. A. Barber, both of New York City (Wesley S. Sawyer, of New York City, of counsel), for plaintiff in error.

Shearman & Sterling, of New York City (J. A. Garver, of New York City, of counsel), for defendant in error.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge. The transfer of the securities was on January 19, 1910, the equity suit to set it aside was begun in May, 1910. As a result of that suit the District Court held that the securities should be delivered to complainant, but that he could not recover in addition thereto the amount which they had declined in market value subsequent to January 19, 1910. Before such suit was brought the parties entered into a stipulation that the securities, then held by the bank, "may be sold by the National City Bank at the best price obtainable, at such times as may seem best to the officers of the National City Bank, * * * such sales to be without prejudice to the rights of either [the bank or the trustee]. * * * It being further stipulated that the rights and claims of bank and receiver and trustee * * * shall attach to the proceeds realized from the sale of the securities * * * and the amount realized shall stand in lieu of the securities and shall represent the amount of the liability of the National City Bank to the receiver and trustee, * * * should it be adjudicated that the delivery of the said certificates to the bank was preferential and void as against rights of creditors; * * * it being the intention of the stipulation that the securities in the possession of the National City Bank shall be converted into money at the best prices obtainable and that all rights of the parties shall remain as against the proceeds," etc.

The supersedeas bonds are in the usual form to answer for all damages and costs if appellant shall fail to make its plea good.

Upon disposition in the original equity suit of the contention that complainant could recover not only the securities, but also the amount of depreciation subsequent to the transfer on January 19, 1910, the District Court said (200 Fed. 287):

"This suit is in equity to recover the actual securities in specie. That is the prayer, and that was what was intended. It is quite likely that the trustee may have had the right to sue at law after rescinding the transfer and making a demand, because the refusal would have been a conversion. However, he did nothing of the kind, but proceeded in equity to reclaim the securities; and he cannot now blow hot and cold. The decree will be for the delivery of the securities, with any dividends received upon them."

Upon appeal to this court, we said (201 Fed. 664, 120 C. C. A. 92):

"The special master and the court below, however, held, and we think rightly, that the trustee had left the disposition of the securities to the absolute discretion of the bank; their proceeds, if sold, to stand in their place. Under such circumstances, it would be inequitable to hold the bank liable for the depreciation. All the trustee is entitled to is a return of the securities and an accounting as to any dividends or interest collected in the meantime."

In disposing of the appeal from our decision the Supreme Court said (231 U. S. 50, 34 Sup. Ct. 20, 58 L. Ed. 115):

"This was answered sufficiently by Judge Hand in the District Court. As he observed, the court was in equity to recover the securities in specie. After the agreement the bank was authorized to hold them until it thought * * * wise to sell. If it had sold, there can be no doubt that the plaintiff's claim would have been limited to the proceeds, by the words of the contract. Its judgment not to sell, exercised for the benefit of both parties, cannot have been intended to put it in a worse position. Such an understanding would have deprived the plaintiff of the judgment of the bank."

As to the question now before this court we concur with the District Judge that plaintiff cannot recover for depreciation of the securities intermediate the decision of the original suit in the District Court and their final delivery. Had no stipulation been entered into, it is very doubtful whether in that suit in equity to recover specific securities "damages" can be held to cover depreciation. Kountze v. Omaha Hotel Company, 107 U. S. 378, 2 Sup. Ct. 911, 27 L. Ed. 609. Certainly it is the law for these parties that depreciation down to the date of decision in the District Court is not recoverable. But all doubts are relieved by the stipulation. Manifestly it was thought that the bank was better able to judge of the situation in Wall Street and to select the best time to sell the securities than the receiver or trustee would be; it was for the interest of all to sell for the best possible price and the stipulation was a very sensible arrangement to make of a difficult situation. It certainly contemplated that the bank should hold the securities (unless it decided for the general interest to sell all or some) until it "should be adjudicated that the delivery * * * was preferential." We are of the opinion that the "adjudication" contemplated in the stipulation was the final adjudication.

Judgment affirmed.

BENTLEY v. YOUNG et al.

(Circuit Court of Appeals, Second Circuit. April 13, 1915.)

No. 185.

BANKRUPTCY ⟸303—FRAUDULENT SALE BY BANKRUPT—SUIT BY TRUSTEE.

A finding by the trial court that a sale by a bankrupt, when insolvent, of his retail stock of boots and shoes in bulk, was fraudulent and voidable at suit of the trustee, *held* sustained by the evidence under the law of New York, which provides that such a sale in bulk shall be presumed fraudulent unless the purchaser makes full inquiry of the seller as to his creditors and gives at least five days' notice to each.

[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 Southern District of New York.

This cause comes here on appeal from a decree of the District Court, Southern District of New York, setting aside a sale of the entire stock of Israel Kruger, bankrupt, as null and void as against creditors, and adjudging defendants to pay $2,500 to the trustee as the value of the goods thus disposed of. The opinion of the District Judge will be found in 210 Fed. 202.

M. Mackenzie and Hastings & Gleason, all of New York City, for appellants.

Lesser Bros., of New York City (W. Lesser, of New York City, of counsel), for appellee.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

PER CURIAM. Judge Learned Hand has stated the facts very fully in his opinion, and it will not be necessary to repeat them here. Kruger, who was in failing circumstances, sold his entire stock—he was conducting a retail shoe store—to Henry Young and absconded shortly afterwards. The purchase was made with money advanced to Henry Young by his father, John Young, an auctioneer, to whose place of business the goods were sent, and who sold them at auction. That the sale, so far as the bankrupt is concerned, was fraudulent is undisputed. The sole question is as to the good faith of defendants.

The offer of Kruger's entire stock at a lump sum was a circumstance to put Henry Young upon inquiry. Moreover, the Personal Property Law of New York in force at that time declared that such a transfer in bulk shall be presumed fraudulent as against creditors of the transferror, unless the proposed transferee shall at least five days before the transfer, in good faith, make full and explicit inquiry of the transferror as to each and all of transferror's creditors, and unless the transferee shall give notice by mail to each of the creditors of whom such transferee has knowledge or can with the exercise of ordinary diligence acquire knowledge. Henry Young took the stand and undertook to satisfy the trial court that he had acted with reasonable diligence and entire good faith. He failed to convince Judge Hand, who

had the advantage of seeing and hearing him, which is not surprising, as his testimony even in cold type is unpersuasive. He said that he asked Kruger if he had any creditors, to whom the latter replied that there was only one, for $200, whom he paid in Young's presence; also that he examined some of the paid bills which Kruger showed him, and, finding them receipted, supposed he could take the word of the bankrupt for the rest. On the trial two years after the event he gave the names of a number of wholesalers whose bills Kruger had shown; but when he was examined before the commissioner, two or three days only after the event he failed to remember any of the names.

The evidence is not so strong as to John Young's connection with the fraud; but there are many circumstances indicating that although he did not, like Henry Young, negotiate the sale, which was effected with money he advanced, he was informed as to its circumstances, and adopted it for his own benefit. The District Judge expressly states that his bearing on the witness stand did not impress the court with the value of his testimony. The questions presented are wholly questions of fact, and there is nothing in the record which should induce us to reverse the findings of the trial court, which saw and heard the witnesses.

Decree affirmed, with costs.

THE HARLEM RIVER NO. 1.

THE T. W. WELLINGTON.

(Circuit Court of Appeals, Second Circuit. April 13, 1915.)

No. 234.

COLLISION ⇐105—TUGS WITH TOWS MEETING—CARELESS NAVIGATION.

Evidence *held* to support a finding that a collision between a tow alongside a tug bound down Harlem River and one on the side of a tug upbound was due solely to the fault of the latter tug in carelessly permitting herself and her tow to be caught on the side by the strong ebb tide and swung around against the other tow.

[Ed. Note.—For other cases, see Collision, Dec. Dig. ⇐105.

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

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

On appeal from a decree of the District Court for the Eastern District of New York dismissing the libel as to the tug Harlem River No. 1 and holding the tug Wellington solely at fault for the damages sustained by the libelant's coal barge Governor Glynn. The collision which resulted in the injury to the Glynn occurred November 26, 1913, in the Harlem River opposite Little Hell Gate and near the New York shore, between the libelant's coal boat in tow of the tug Harlem River No. 1, bound down, and the sand scow Whitehall, in tow of the tug Wellington, bound up.

Before LACOMBE, COXE, and WARD, Circuit Judges.

Foley & Martin, of New York City, for the Wellington.

James J. Macklin and Frank V. Barns, both of New York City (William J. Martin and George V. A. McCloskey, both of New York City, of counsel), for the Harlem River No. 1.

COXE, Circuit Judge. The decree herein dismissed the libel as to the tug Harlem River No. 1 and held the tug Wellington solely at fault for the damages sustained by a collision which occurred between 10 and 11 a. m. November 26, 1913, between the libelant's coal barge Governor Glynn in tow of the tug Harlem River No. 1 bound down and the scow Whitehall, in tow on the port side of the tug Wellington.

The weather was clear, the tide was strong ebb. The place of collision was near the New York shore about opposite Little Hell Gate. The Harlem River No. 1 had the covered barge Royal on her starboard side and the coal barge Governor Glynn on her port side. When the tugs first sighted each other they were well over on their respective sides of the river and would have passed safely had they kept their courses. The Wellington had to cross the tide running out of Little Hell Gate and, instead of navigating so as to meet the tide bow on, she allowed her tow and herself to swerve to port so that the tide struck the starboard side of the tow, causing both tug and tow to swing across the Harlem River. It was then too late to avoid collision. The question was one of fact and we think the testimony strongly supports Judge Veeder's finding that the collision occurred by reason of the careless navigation of the Wellington in permitting the vessels to be caught in the tide at Little Hell Gate and thus to be thrown over onto the New York shore. Even if the testimony were more evenly balanced it would still be our duty not to interfere with a finding of fact based upon conflicting testimony.

The decree is affirmed with costs against the Wellington.

THE NELLIE FOLLETTE.

THE ELMER D. WALLING.

(Circuit Court of Appeals, Second Circuit. April 13, 1915.)

No. 130.

COLLISION ⊂⊃153—MEETING TOWS IN CANAL—FAULT.

A finding by the trial court, on conflicting evidence, that a collision between meeting tows in the Erie Canal was due solely to the fault of one in sheering to the wrong side of the channel, affirmed.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 305–307, 311; Dec. Dig. ⊂⊃153.

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

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

This cause comes here upon appeal from a decree of the District Court, Western District of New York, holding the Nellie Follette and

the Elmer D. Walling solely responsible for a collision between those vessels and the canal boat Patrick Bowen. The opinion of Judge Hazel will be found in 221 Fed. 137.

Ray M. Stanley, of Buffalo, N. Y., for appellants.

Brown, Ely & Richards, of Buffalo, N. Y. (J. B. Richards, of Buffalo, N. Y., of counsel), for appellees Van Orden and others.

Clinton, Clinton & Stricker, of Buffalo, N. Y. (George Clinton, Jr., of Buffalo, N. Y., of counsel), for appellee Rand.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

LACOMBE, Circuit Judge. The Bowen and two other canal boats lashed together, one behind the other, with the Bowen ahead, were bound east on the Erie Canal, in tow of four mules. As they approached Studor's Bridge, between Lyons Lock and Berlin Lock, they encountered the Nellie Follette bound west under steam, with the Walling rigidly fastened in front of her. The two flotillas came into collision; the Walling's stern striking the port bow of the Bowen three or four feet from the latter's stern. The details of the navigation are fully set forth in the opinion of the District Judge.

The controversy presents most emphatically a question of fact, pure and simple: Did the east-bound tow kink up, at the bend in the canal, and the Bowen thus get over into the heelpath side of the channel? Or did the Walling for some reason sheer over into the towpath side of the channel? It is manifest that the boat which, at the time of collision, was on the wrong side of the channel, caused the damage, and whoever was responsible for her being where she had no business to be was in fault. The trial judge answered the first question in the negative and the second question in the affirmative. There was much conflict of testimony—six witnesses to six on the second question. He saw and heard all the witnesses, except two or three unimportant ones, and we find nothing in the record which leads us to dissent from his carefully considered findings of fact.

The decree is affirmed, with interest and costs.

EVANS et al. v. HALL PRINTING PRESS CO.

(Circuit Court of Appeals, Second Circuit. April 13, 1915.)

No. 231.

1. PATENTS ⇐165—CONSTRUCTION OF CLAIMS.
When the language of the claims of a patent is clear and distinct, the patentee is bound by it.
[Ed. Note.—For other cases, see Patents, Cent. Dig. § 241; Dec. Dig. ⇐165.]

2. PATENTS ⇐246—INFRINGEMENT—COMBINATION.
A patent for a combination is not infringed by a device from which some of the elements of the combination are omitted.
[Ed. Note.—For other cases, see Patents, Cent. Dig. § 387; Dec. Dig. ⇐246.]

3. PATENTS ⊂⊃328—INFRINGEMENT—ROTARY PRINTING MACHINE.
The Evans & Wichmann patent, No. 958,484, for a rotary printing machine, claim 3, *held* not infringed.

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

On appeal from a decree of the District Court of the United States for the Southern District of New York finding claim 3 of letters patent No. 958,484 granted to A. B. Evans and G. C. H. Wichmann valid and infringed.

J. Edgar Bull and George F. Scull, both of New York City, for appellant.

Victor D. Borst and William M. Stockbridge, both of New York City, for appellees.

Before LACOMBE, COXE, and WARD, Circuit Judges.

COXE, Circuit Judge. The patent in controversy was granted May 17, 1910, to Evans and Wichmann for improvements in rotary printing machines for printing on sheets of paper, card, metal and the like in the form of sheets which can be bent around a cylinder. The machine comprises suitable printing surfaces grouped upon the periphery of three constantly rotating cylinders, which may be brought into mutual contact or removed from such contact as may be required during the working of the machine.

The first cylinder carries on its printing surface or surfaces one or more designs in the same or different colors, which are inked or damped and inked in the usual manner. The second cylinder carries a number of printing surfaces adapted to receive impressions from the surfaces of the first cylinder. The third cylinder carries a single printing surface adapted to receive impressions from the surfaces on the second cylinder. The diameter of the third cylinder is a submultiple of the diameter of the second cylinder, such submultiple corresponding with the number of printing surfaces carried on the second cylinder. By bringing into use all or some of the printing surfaces and by proper adjustment of the gripping and releasing mechanism, such a machine can be arranged to print upon either or both sides of the paper or metal, in one or more colors. Figure 1 shows the machine arranged for printing in a single color; in figure 2 the cylinder *a* is of the same diameter as cylinder *c* and carries only one printing surface adapted to transfer an impression to each of the blankets on cylinder *b*, at each revolution of the machine. If a sheet is fed to cylinder *c*, at each revolution thereof, there will be two sheets printed at every revolution of the machine. The specification points out how the machine may be altered for printing in two colors consecutively on the same side of the sheets or on the same side in different colors at the same time. The third claim, which alone is involved, is as follows:

"3. A rotary printing machine comprising a continuously rotating first cylinder, a plurality of printing surfaces on its periphery, a continuously rotating second cylinder of the same diameter as the first cylinder, printing surfaces on the second cylinder equal in number to those on the first cylinder,

a continuously rotating third cylinder of a diameter which is a submultiple of that on the second cylinder, a single printing surface on the said third cylinder, the three cylinders being adapted to be moved into and out of printing contact with each other and means carried by the third cylinder for retaining a sheet to be printed when fed thereto."

The only defense is noninfringement. Since the argument we have received letters from counsel for the complainants to the effect that a German patent corresponding to the patent in suit has been sustained by the "highest legal court of Leipzig." We have also received a similar communication from counsel for defendant stating that the British patent, for the same combination has been declared "invalid and not infringed." As the question here is one of infringement, we do not think that these decisions, if both were before us, would be particularly helpful. We must construe the terms of the patent as they are understood in this country. The term "printing surfaces" means in the English language "surfaces from which you actually print."

The claim contains the following elements, in a rotary printing machine:

First, a continuously rotating first cylinder.

Second, a plurality of printing surfaces on its periphery.

Third, a continuously rotating second cylinder of the same diameter as the first cylinder.

Fourth, printing surfaces on the second cylinder equal in number to those on the first cylinder.

Fifth, a continuously rotating third cylinder of a diameter which is a submultiple of that of the second cylinder.

Sixth, a single printing surface on the said third cylinder.

Seventh, the three cylinders being adapted to be moved into and out of printing contact with each other.

Eighth, means carried by the third cylinder for retaining a sheet to be printed when fed thereto.

We have, then a claim containing eight elements. It is axiomatic that one who omits one of these does not infringe. It is contended by the defendant that the construction placed upon the claim by the court below fails to take into consideration the second, fourth and sixth of the elements as above stated, and that these elements are not found in the defendant's combination. We do not understand that this is seriously controverted by the complainants and are unable to adopt the explanation suggested by them as follows:

"Of course only one (segment) was used in the printing operation in a single color machine. That is pointed out in lines 3 to 9 of page 2 of their specification and is plainly indicated in plates 4 and 8 at the end of appellant's brief. But in drafting their claim they looked beyond the simplest embodiment of their invention, they saw the potential uses of these segments and they naturally, inadvertently if you will, referred to them both as printing surfaces, even when only one of them was used."

[1] The inventor can, of course, use any language he wishes in describing his invention and in stating his claims. Having done so, however, he must abide by the phraseology chosen. It is then too late to reconstruct his claims by adding to or subtracting from the language used. This rule may result in hardship in many cases but a contrary rule would work a far greater injustice and would enable the patentee

to hold as infringers those who have invested their capital in what they supposed, relying on the plain language of the patent, to be a perfectly legitimate business. When the language of the claims of a patent is clear and distinct, the patentee is bound by it. Keystone Bridge Co. v. Phœnix Iron Co., 95 U. S. 274, 24 L. Ed. 344; Merrill v. Yeomans, 94 U. S. 568, 24 L. Ed. 235.

[2, 3] We know of no authority where a defendant has been held as an infringer of a combination claim where he omits three of the elements of the combination. If the defendant omits one or more of the elements which make up the combination he no longer uses the combination. It is no answer to assert that the omitted elements are not essential and that the combination operates as well without as with them. The patentee was at liberty to describe his combination as he saw fit, having done so, the rights of the public are involved and the court cannot construe the claim precisely as if all reference to the said printing surfaces were omitted.

The decree is reversed with costs.

GUARANTY TRUST CO. OF NEW YORK et al. v. BETTENDORF AXLE CO.

(Circuit Court of Appeals, Eighth Circuit. May 3, 1915. Rehearing Denied July 24, 1915.)

No. 4297.

PATENTS ⇐328—INVENTION—UNDERFRAME FOR RAILWAY CARS.

The Hansen patent, No. 650,792, for an improvement in underframes for railway cars, claim 1, is void for lack of invention in view of the prior art.

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

Suit in equity by the Guaranty Trust Company of New York and another against the Bettendorf Axle Company. Decree for defendant, and complainants appeal. Affirmed.

Alfred W. Kiddle, of New York City (Wilson, Grilk & Wilson, of Davenport, Iowa, and Wylie C. Margeson and William F. Bissing, both of New York City, on the brief), for appellants.

James R. Sheffield, of New York City (Ramsay Hoguet, of New York City, and Lane & Waterman, of Davenport, Iowa, on the brief), for appellees.

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

HOOK, Circuit Judge. This is an appeal from a decree dismissing, on final hearing, the suit of the Guaranty Trust Company and the Pressed Steel Car Company against the Bettendorf Axle Company, for infringement of claim 1 of patent, No. 650,792, issued May 29, 1900, to John M. Hansen for an improvement in underframes for railway

cars. The trial court held there was no infringement, and dismissed the bill.

A complete railroad car consists, generally speaking, of three parts; the trucks or running gear, the underframe which rests on the trucks, and the car box or body carried on the underframe. The claim in suit is as follows:

"A metallic underframe for cars, comprising bolsters, center sills extending from bolster to bolster and rising above the same *to receive the floor nailing-strips and restrain or prevent sidewise movement of the car-body on the underframe*, and draft-rigging beams or sills alined with said center sills in length only, substantially as described."

The words we have italicized were inserted in the claim as first presented to meet the ruling of the Patent Office that, unless the object of the center sills rising above the bolsters was specified, it would appear that the claim was met by patents 223,437, January 13, 1880, to Cushing, and 554,641, February 18, 1896, to Bagshawe. Originally the specifications stated that in practice the center sills stood about five inches above the upper flanges of the draft-rigging beams to provide for the nailing stringers and to increase the bearing surface for the floor, and that they effected those purposes without in any wise decreasing the capacity of the car body. When the claim was amended to meet the objection of the Patent Office the applicant also interpolated in his specifications the following:

"Such projection of these center sills affords an anchorage for the car-body which restrains or prevents its sidewise movement on the underframe, and, further, adds materially to the strength of the sills without occupying space that could be advantageously used otherwise."

The elements of the claim are: (1) Bolsters; (2) center sills extending from bolster to bolster and rising above the same; (3) draft-rigging beams or sills aligned with the center sills in length only. Metallic underframes for cars, with transverse bolsters, longitudinal center sills and draft-rigging beams or extensions of the center sills to the ends of the underframes were all old. It was old to have detachable draft-rigging beams aligned with the center sills in length only, though it is difficult to see what particular purpose such limited alignment serves except a lessening of the weight. The only feature of the claim for which there can be any color of novelty is in raising the center sills above the bolsters into the floor stringer space. That was the view of the Patent Office in the citations of the Bagshawe and Cushing patents. But even this feature is anticipated by the patent to Westinghouse, No. 615,118, November 29, 1898, for an improvement in center sills. True, the sill there described runs from end to end of the car frame, and between the two metal beams composing it is a timber filling, but in respect of its rising above the bolster and the offices performed by that particular position it is like Hansen's. There is no difference in principle or function between placing wooden stringers along the outside of the metal beams comprising the Hansen center sill, as should be done to secure the anchorage claimed by him, and placing a wooden stringer between them as with Westinghouse. The car floor is nailed to the upper surface of the Hansen stringers. Westinghouse says his wooden stringer or filling "also provides a bed to

which the flooring of the car can be secured along its longitudinal center line." But aside from this, Westinghouse provides alternatively for dispensing with the stringer between the beams and using distance or spacing pieces to keep them apart. He also specifies a method of saddling his center sill beams upon the bolsters, and so, like Hansen's they may be said to rise from the bolster. In the proceedings of the Master Car Builders Association in 1897 the value of having draft-rigging sills detachable from the center sills was plainly expressed.

It is urged that anticipation is not shown by finding the elements of the claim separately in old structures. But in respect of the particular forms and arrangements of the center sills and the draft-rigging sills of the claim in suit there is no coaction between them toward a common, new, and useful result. In the sense of the patent law no new result is obtained by their assemblage in a single structure. Each performs its original work in the underframe separately from the other. The draft-rigging sills are aligned in length with the center sills, are detachable when damaged, and are reduced in dimensions to lessen weight, but such things have no co-operative bearing upon the functions claimed for the height of the center sills above the bolsters. We think the claim in suit is invalid.

Affirmed.

FOUNTAIN ELECTRICAL FLOOR BOX CORPORATION v. STEEL CITY ELECTRIC CO.

(Circuit Court of Appeals, Second Circuit. April 13, 1915.)

No. 222.

PATENTS ⊂⊃297—SUIT FOR INFRINGEMENT—PRIOR ADJUDICATIONS.

A verdict of a jury, on which judgment was rendered, finding a patent valid and infringed, does not preclude a court of equity from exercising an independent judgment on those issues, on a motion for preliminary injunction in a subsequent suit between the same parties, but involving a different structure, and where the evidence may not be the same.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 481–488; Dec. Dig. ⊂⊃297.

Operation and effect of decision in equitable suit for infringement, see note to Westinghouse Electric & Mfg. Co. v. Stanley Instrument Co., 68 C. C. A. 541.]

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

This cause comes here upon appeal from an order of the District Court, Southern District of New York, refusing a preliminary injunction to restrain alleged infringement of United States patent No. 738,688 issued September 8, 1903, to Herbert Krantz for a floor box.

Fred Francis Weiss, of New York City (S. E. Darby, of New York City, of counsel), for appellant.

J. H. Roney, of Pittsburgh, Pa. (Paul M. Goodrich, of New York City, of counsel), for appellee.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

LACOMBE, Circuit Judge. An action at law for infringement of the same patent was heretofore brought against the trustees of Masonic Hall. The cause was tried with a jury, which upon the evidence before it decided the two questions of patentable novelty and infringement in favor of the plaintiff. Appeal was taken to this court. In our opinion affirming the judgment (218 Fed. 642), we said:

"These were both questions of fact. * * * We think the jury were entitled to pass upon these questions, and it was entirely proper for the judge, if, indeed, it was not his duty, to send them to the jury. The damages were only nominal, and the verdict was, of course, based upon the facts here in evidence. It does not prevent a different conclusion being reached upon different facts relating to invention and infringement."

The device found to infringe in the Masonic Hall Case (C. C. A.) 218 Fed. 642, was installed by defendant in this case, which itself conducted the defense in the earlier case. Complainant contends that in view of that circumstance preliminary injunction should have issued in the case at bar. In denying the motion Judge Hough said:

"A jury has found as a matter of fact that there was infringement. Assuming that the same evidence were used here, I should be of the opposite opinion, as I do not think a tiltable cover set in a cement to be the equivalent of a screwed sleeve."

In the Masonic Hall Case a motion had been made in the trial court to set aside the verdict as against the weight of evidence, and denied; but the writ of error did not bring the question of the propriety of that decision before us for review. There was conflicting evidence, and, whatever might be our opinion as to the weight of evidence, the verdict of the jury in that case could not be disturbed. That, however, will in no way prevent this court from deciding the question of fact upon the evidence in another record, when that question is presented in a suit in equity, where we are the triers of the facts.

Under these circumstances, we are not inclined to hold the District Judge in error for refusing to grant injunction to restrain the device which defendant is now making, until upon the trial it shall appear whether or not, upon testimony therein to be introduced, the device which defendant is now marketing infringes the claim of the patent.

Order affirmed.

HILDRETH v. AUERBACH et al.

(District Court, S. D. New York. March 14, 1914.)

No. 211.

1. PATENTS ⇐297—VALIDITY—PRECEDENTS—DECISIONS OF COURTS OF OTHER CIRCUITS.

The affirmance by the Circuit Court of Appeals of another circuit of a judgment holding a patent void, though not absolutely controlling, is substantially res judicata in case of doubt.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 481–488; Dec. Dig. ⇐297.]

2. PATENTS ⇐328—VALIDITY—IMPROVEMENTS IN CANDY-PULLING MACHINE.

Following a judgment of the Circuit Court of Appeals for the Fourth Circuit, the fourth claim of the Hildreth patent, No. 832,384, for improvements in candy-pulling machines, *held* void.

3. PATENTS ⊂=328—INFRINGEMENT—IMPROVEMENTS IN CANDY-PULLING MACHINES.

The Thibodeau patent, No. 857,770, for improvements in candy-pulling machines, *held* infringed.

4. PATENTS ⊂=312—SUITS FOR INFRINGEMENT—SUFFICIENCY OF EVIDENCE.

In a suit for infringement of a patent, evidence *held* sufficient to show that infringing machines were manufactured by defendants, especially where the testimony of one of the defendants was evasive, and his bearing and manner indicated that he did not desire to disclose the whole situation.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 544–549; Dec. Dig. ⊂=312.]

5. PATENTS ⊂=312—ACTIONS FOR INFRINGEMENT—BURDEN OF PROOF.

While, in a suit for infringement of a patent, plaintiff has the burden of proof with respect to the infringement, this does not mean that he must do more than show a preponderance of the evidence.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 544–549; Dec. Dig. ⊂=312.]

6. PATENTS ⊂=310—INFRINGEMENT SUIT—DEMURRER—DECISION AS LAW OF THE CASE.

Where, in a suit for infringement of a patent, the facts as to the title to the patent were all set forth upon the face of the bill and were proved as alleged, the decision on demurrer to the bill would be followed as the law of the case.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 507–540; Dec. Dig. ⊂=310.]

7. PATENTS ⊂=198—ASSIGNMENTS—ACKNOWLEDGMENT—APPLICATION OF STATE LAWS.

Under the act of Congress requiring the assignment of a patent to be acknowledged, where the acknowledger has the same name as the person described in the instrument and executing it, it is sufficient if the notary knows the acknowledger and certifies that he acknowledged the execution of the paper, and it is not necessary that the acknowledger should be known to the notary to be the person described in the assignment and executing it, as required by the state law.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 277; Dec. Dig. ⊂=198.]

8. PATENTS ⊂=312—ACTIONS FOR INFRINGEMENT—PROOF OF TITLE.

In a suit for infringement of a patent by an assignee thereof, where conveyances to P. and by P. were as trustee, it was not necessary to show that he had power to convey, since, if he acted in dereliction of his trust, this was not a matter for a third party, and a prima facie title was at least made out which the defendant must attack.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 544–549; Dec. Dig. ⊂=312.]

In Equity. Suit by Herbert L. Hildreth against A. Leopold Auerbach and another, for infringement of the Hildreth patent, No. 832,384, and the Thibodeau patent, No. 857,770, for improvements in candy-pulling machines. Bill dismissed as to the Hildreth patent, and decree for complainant as to the Thibodeau patent.

Decree affirmed 223 Fed. 651, — C. C. A. —. See, also, 200 Fed. 972.

George P. Dike, of Boston, Mass., for complainant.

Joseph L. Levy, of New York City, for defendants.

LEARNED HAND, District Judge. [1] The Circuit Court of Appeals for the Fourth Circuit has now affirmed Judge Rose's judgment in Hildreth v. Lauer & Suter Co. (D. C.) 204 Fed. 792, upon his opinion in that case. Of course, this is not absolutely controlling upon me (Mast-Foos Co. v. Stover Co., 177 U. S. 485, 20 Sup. Ct. 708, 44 L. Ed. 856) in the sense that it is res adjudicata; yet, in case of doubt, it is substantially so (Voigtmann v. Seely, 198 Fed. 485, 119 C. C. A. 386; Doelger v. German-American Filter Co., 204 Fed. 274, 122 C. C. A. 472), even in cases other than patents (Gleason v. Thaw, 196 Fed. 359). It would be a strong thing now to hold in the face of the unanimous decision of four judges to the contrary that there was no doubt about the validity of the fourth claim of this patent.

[2] The difficulty arises from the interpretation of the claim, especially in respect of the words, "means for supporting the candy." Judge Rose has held that these words must be read broadly to cover every means of supporting the candy, between which and the "pulling means" a "relative in-and-out motion" can take place, but that beyond the disclosure the monopoly should not go. He mentions that Dickinson referred in his specifications to the possible substitution of another kind of support than the trough, and that he speaks of his pins as "hooks or supports," in claim 1. From these he infers that there was no invention merely in conceiving of the supporting means as being hooks, and that the invention can only rest in the particular form of device disclosed. The plaintiff insists that he ought not to be met by Dickinson's claim 1 because it was lifted bodily out of his own patent, though it should, on the contrary, be remembered that he accepted and fought through an interference without protest, which assumed that the claim read upon Dickinson's disclosure. I must confess that the conception of the pins as "supports" seems to me quite foreign to Dickinson's disclosure. However that may be, it is always a question open at least to discussion how far a disclosure should be permitted to be generalized. Even when he is the first in the field, an inventor should get a monopoly only for the ideas which those who come later must use. I am not disposed to think that the mere idea of supporting the candy upon the hooks justified a monopoly of every conceivable means of support which might have an in-and-out motion. Personally, I should have interpreted those general terms as limited by the disclosure and as only including means substantially identical with the disclosure, but I hardly feel disposed to follow my own judgment in a case where I must be wholly free from doubt. Patent claims are notoriously elusive in interpretation; their meaning depends very largely, if not altogether, upon the temper in which you approach them; and a judge, certainly a judge of first instance, unless he is of unusually sturdy personality, quickly learns diffidence in his own conclusions upon them. It is of chiefest consequence that they should not mean something different in each of the nine circuits. I cannot feel that I ought to disregard the interpretation of the Circuit Court of Appeals for the Fourth Circuit.

Thibodeau Patent.

[3-5] Three points arise respecting this patent: Infringement, title, and the acknowledgment of the assignment. Some suggestion was

made in addition that the Engineer's Sketch Book was an anticipation, but it cannot be seriously regarded. As to infringement, I have no trouble in finding that the defendants made the two machines which Proctor saw in Fink's brewery and that they corresponded to his drawings of them. Each was an embodiment of the Thibodeau patent, except that the arms were straight instead of being bent, a difference which does not avoid infringement. It is suggested that the proof does not show that the defendants sent the two machines made by them to Fink's brewery, but this appears from Auerbach's own cross-examination, questions 117, 118, 121, 122. Again, if there be thought to be any ambiguity in this testimony, as mere matter of inference, the same result follows prima facie from the undoubted evidence that the defendants sent some candy-pulling machinery to the brewery, and that these three machines were later found there. Of course, it is possible that some one else was also storing such candy machines in this brewery, but it is not likely. Furthermore, I think the testimony of Deutschman and Kammer was enough even without Proctor's testimony to show that the defendants had made at least one machine in imitation of the Duff machine. Especially is all this proof sufficient when one recalls that the contrary proof, if there was any, lay in the power of the defendants to produce; they had the machines somewhere, if not at Fink's brewery; and, if any question is to be made, they must produce them. It is idle to talk about burden of proof; of course, the plaintiff has the burden, upon infringement; but that does not mean that he must do more than show a preponderance of evidence. Nor does it mean that evasion like Auerbach's should have no probative force in determining whether there was any merit in the position of noninfringement. Certainly I got the strongest impression from his bearing and manner that he had no desire to disclose the whole situation. If there be any doubt about the manufacture of the machines which Proctor saw, it does not lie in the defendants' mouth to urge it under these circumstances.

[6] The next point relates to the title; but as the facts upon which that question depends were all set forth upon the face of the bill, and have been passed on already on demurrer, Judge Noyes' decision is the law of the case. If the plaintiff proves his case upon the trial as he has alleged it, it is our uniform custom to follow the ruling of the judge who decides the demurrer; otherwise that decision goes for nothing.

[7] The last question is of the acknowledgments upon the assignments. Toledo Computing Scale Co. v. Computing Scale Co., 208 Fed. 410, 125 C. C. A. 622, does not mean to lay it down that a patent acknowledgment must conform to the laws of the state where it is taken. The case was one where it did not appear from the certificate to a corporate acknowledgment that the individuals acting had the power to bind the corporation, and the language of the opinion was well directed to those facts. Of course, an act of Congress laying down what shall be evidence in a United States court ought not to be construed as incorporating the law of the state, except upon the clearest possible evidence of Congress' intention; the act itself should be the measure of Congress' intention, and in this case the act only says that

the assignment must be acknowledged. In New York the statute controlling acknowledgments specifically requires that the acknowledger not only must be known to the notary, but known to be the person described in the document and executing the same. The same is true of the Illinois statute quoted in Mr. Levy's brief. In the absence of such a statute, I think it is a good acknowledgment if the notary knows the acknowledger and certifies that he acknowledged the execution of the paper, provided, of course, that the acknowledger has the same name as the person described in the instrument and executing it. The identity of the person so described and executing, with the person who acknowledged, must generally be known to the notary only by identity of name, together with the fact that he asserts the identity himself. I think it an extremely technical construction of the statute to insist that the notary must certify that he knew the identity independently of these grounds.

[8] It was not necessary to show that Piel, trustee, had the power to convey. The conveyance into him was as trustee and out of him the same; he had title to the patent; and, if he acted in dereliction of his trust in the sale, it is not a matter for a third party. If the position is that his title might have been such that he could not even pass a legal title, I can only say that I know no such trustee's title in personalty, and, if there be any such, a prima facie title was at least made out which the defendant must attack.

A decree may go dismissing the bill as to the Hildreth patent and giving the usual relief as to the Thibodeau patent. No costs.

HORN v. MITCHELL, U. S. Marshal.

(District Court, D. Massachusetts. May 11, 1915.)

No. 1254.

1. HABEAS CORPUS ⊂⊃45—PETITION—DEMURRER.
   Whether or not a formal demurrer will lie to a petition for a writ of habeas corpus, Rev. St. § 755 (Comp. St. 1913, § 1283), requires a federal court to refuse to issue the writ, if it appears from the petition itself that the petitioner is not entitled thereto.
   [Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 38–45; Dec. Dig. ⊂⊃45.]

2. HABEAS CORPUS ⊂⊃54—JURISDICTION OF FEDERAL COURTS—PRISONERS IN JAIL—SUBJECTS OF FOREIGN STATE—LAW OF NATIONS.
   Under the provision of Rev. St. § 753 (Comp. St. 1913, § 1281), that "the writ of habeas corpus shall in no case extend to a prisoner in jail, unless where he, * * * being a subject or citizen of a foreign state, and domiciled therein, is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, or order, or sanction of any foreign state, or under color thereof, the validity and effect whereof depend upon the law of nations," a petition which does not show the domicile of petitioner does not bring him within the statute, nor do allegations that he is a lieutenant in the army of a foreign nation, of which he is a subject, and committed the acts charged to be violations of the criminal law of the United States, and for

which he is held for trial, in connection with, and as a necessary part of, an attack upon the territory of a county with which his nation is at war, without alleging that such acts were authorized or commanded by his government, present any question dependent on the law of nations.

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

3. HABEAS CORPUS ⟸92—PROCEEDINGS—SCOPE OF INQUIRY.

Where an order is made by a judicial officer of one federal district, having authority to act, for the removal of a person arrested in that district to another, where he is charged with crime, and the order is regular on its face and was based on proceedings of which the court had jurisdiction, it will not be reviewed by the court in the latter district in habeas corpus proceedings.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 81, 83, 87–96; Dec. Dig. ⟸92.]

Petition by Werner Horn against John J. Mitchell, United States Marshal for the District of Massachusetts, for writ of habeas corpus. On demurrer to petition. Petition dismissed.

Joseph F. O'Connell, Daniel T. O'Connell, and James E. O'Connell, all of Boston, Mass., for petitioner.

George W. Anderson, U. S. Atty., and Leo A. Rogers, Asst. U. S. Atty., for respondent.

MORTON, District Judge. This is a petition for habeas corpus, brought against the United States marshal for this district. An order of notice issued to show cause why the writ should not issue. The respondent has demurred in writing, assigning various causes which amount to a general demurrer.

[1] A preliminary question is whether a demurrer lies to a petition for habeas corpus. It is contended by the petitioner that it does not, and that the court should not consider such cases, except upon the actual facts as established at a hearing. This petition is unusually full and explicit. I see no reason to doubt that it sets forth accurately and completely the substantial facts upon which the petitioner relies. No request to amend it has been made on his behalf; and it has not been suggested that any further material facts would or might be developed upon a hearing. It may be assumed, as was done in Frank's Case, infra, that the petition states all facts helpful to the prisoner. I greatly doubt whether a formal demurrer is necessary or proper in a case heard upon a petition and an order to show cause why the writ should not issue. In view of Revised Statutes, § 755, it is, I think, sufficient if the respondent orally demurs, or, what amounts to the same thing, suggests to the court that the petition does not state a case entitling the petitioner to the writ. This was, apparently, the course followed in Leo M. Frank's Case, 237 U. S. 309, 35 Sup. Ct. 582, 59 L. Ed. — (U. S. Supreme Court, April 19, 1915), and is the general practice in the Supreme Judicial Court of Massachusetts. "Under section 755, Revised Statutes, it was the duty of the court to refuse the writ if it appeared from the petition itself that the appellant was not entitled to it." Pitney, J., Frank's Case, supra. To the same effect, aside from

any statute, was the opinion of Shaw, C. J., in Sim's Case, 7 Cush. (Mass.) 285, 293. See, too, In re Boardman, 169 U. S. 39, 18 Sup. Ct. 291, 42 L. Ed. 653, and Ex parte Baez, 177 U. S. 378, 20 Sup. Ct. 673, 44 L. Ed. 813. I therefore proceed to consider whether upon the facts stated in the petition sufficient cause appears for granting the writ.

Two principal contentions are made by the petitioner: First, that he is not subject to prosecution on the indictment which has been found against him in this district, because he is an officer of the German army and committed the acts alleged to be violations of our criminal law in connection with an attack upon British territory; second, that the removal proceedings under which the petitioner was taken from the district of Maine, where he was first arrested, into this district, were illegal and in violation of his rights.

[2] As to the first: It appears from the petition that the petitioner is now confined under an order of this court directing that he furnish bail to answer to said indictment, and that, in default thereof, he stand committed. No formal defect or irregularity affecting this order is alleged. The indictment charges that the petitioner illegally transported explosives interstate from New York to Boston, and from Boston to Vanceboro. The petition alleges that this transportation was "necessarily connected with and part of the aforesaid destruction of the bridge [near Vanceboro in British territory] in the possession of the British government." The issues involved in a criminal prosecution cannot, generally speaking, be anticipated and tried out upon a petition for habeas corpus. All questions raised by the petitioner on this branch of this petition are open to him in the criminal case and can be determined in connection therewith. Apart from statute, therefore, the petitioner's first contention is plainly unfounded. A similar question arose in People v. McLeod, 25 Wend. (N. Y.) 483, 568, 37 Am. Dec. 328, and it was there held that the writ ought not to issue before the indictment had been tried. While some portions of the opinion in that case have been much criticised, it has not, so far as I am aware, been seriously doubted upon this point.

The petitioner contends however, that under Revised Statutes, section 753, passed since the McLeod Case, he is, of right, entitled to have the question of his immunity from prosecution on account of his alleged connection with the German army determined upon habeas corpus proceedings. That section reads as follows:

"The writ of habeas corpus shall in no case extend to a prisoner in jail, unless where he is in custody under or by color of the authority of the United States, or is committed for trial before some court thereof; or is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process, or decree of a court or judge thereof; or is in custody in violation of the Constitution or of a law or treaty of the United States; or, being a subject or citizen of a foreign state, and domiciled therein, is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, or order, or sanction of any foreign state, or under color thereof, the validity and effect whereof depend upon the law of nations; or unless it is necessary to bring the prisoner into court to testify."

The part of this section relating to subjects and citizens of foreign states was passed because of the McLeod Case, and was designed to

give jurisdiction of such matters to the federal courts. It does not seem to me that it gives to such subjects or citizens more absolute rights to habeas corpus than belong to the other classes of prisoners specified therein.

Assuming, however, that the statute should be given the construction contended for by the petitioner, it is to be considered whether he has brought himself within its provisions. It appears by the petition that he is a subject of a foreign state, and that he is in custody for an act which he alleges was done under right, authority, protection, or exemption claimed under the commission of a foreign state. This is not sufficient to bring the case within the statute referred to. In order to do so, it must further appear that the petitioner's domicile was in the foreign state, and that the validity and effect of the right, authority, protection or exemption claimed under the foreign commission "depend upon the law of nations." The petition contains no allegation as to the petitioner's domicile, and on that account alone is plainly insufficient under the statute. For aught that appears, the petitioner may have been a German officer domiciled in the United States. While the petition alleges that the petitioner is an officer in the German army and that he did the acts, charged as criminal, as a necessary part of an attack upon the territory of Great Britain, with which his country is at war, it nowhere states that the acts in question were authorized or commanded by the foreign state whose commission he holds, or that it has avowed responsibility therefor. In the absence of such authorization and avowal, I do not think that the prisoner can invoke the law of nations or his foreign commission in his defense. See letter of Mr. Webster, Secretary of State, to Mr. Fox, April 24, 1841, 26 Wend. (N. Y.) 682.

It is urged that an act done by a German officer, in the United States, in furtherance of an attack upon British territory, is presumed to have been done with the authority and under the command of his government. But I do not think that this contention can be supported. A lieutenant in the German army has presumptively no authority to act for his government in a foreign country and to bind it by what he does there.

It follows that the petition does not, on this branch of the case, state facts requiring the issue of the writ.

[3] As to the petitioner's second contention: From the allegations in the petition, it is clear that all formalities required by law in connection with the order of removal were observed. What the petitioner complains of is, therefore, not that there is a defect in the removal proceedings apparent upon the record, but that the judicial officers of the United States in the district of Maine, in the removal and attempted habeas corpus proceedings there, erroneously and illegally deprived him of rights to which he was entitled. It is not the business of this court to revise or correct judicial proceedings in the district of Maine. It has no power to do so. Where an order of removal is made by a judicial officer in another district having power to act in such matters, and appears upon its face to be regular, and is based upon an indictment properly returned and appearing upon its face to charge a crime within the jurisdiction of the grand jury returning it, this court ought not to

undertake to go behind the order of removal, nor to examine the conduct and alleged mistakes in reference thereto of the judicial officer by whom it was made. United States v. Shepard, 1 Abb. U. S. 431, 433, Fed. Cas. No. 16,273.

Upon the facts stated in the petition, the writ of habeas corpus ought not to issue.

Petition dismissed.

In re McGOWIN LUMBER CO.

(District Court, S. D. Alabama. April 1, 1915.)

No. 1436.

BANKRUPTCY ⊜348—DEBTS ENTITLED TO PRIORITY—HOLDERS OF LABORERS' TIME CHECKS.

By an arrangement between bankrupt, a lumber company, and claimants, a mercantile firm, bankrupt issued time checks to its laborers, not dated nor negotiable, but which were accepted by claimants in payment for goods, and at the end of each month were to be taken up and paid by bankrupt, less a 10 per cent. commission agreed upon. Such checks were not assigned, nor was there any agreement whatever between claimants and the laborers from whom they were received. *Held*, that claimants relied upon bankrupt's credit, and that there was no subrogation to the right of the laborers to a preference under Bankr. Act July 1, 1898, c. 541, § 64b (4), 30 Stat. 563 (Comp. St. 1913, § 9648), especially as, if such preference were allowed, the estate would be insufficient to pay other preferred claims in full. *Held*, further, that the evidence was insufficient to establish the fact that the checks presented were for labor done within the three months prior to the bankruptcy necessary in any case to entitle them to a preference.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 536; Dec. Dig. ⊜348.]

In Bankruptcy. In the matter of the McGowin Lumber Company, bankrupt. On review of order of referee allowing claim of J. C. Stewart & Co. as entitled to priority. Reversed.

Gregory L. & H. T. Smith, of Mobile, Ala., for claimants.
Stevens, McCorvey & McLeod, of Mobile, Ala., for trustee.

TOULMIN, District Judge. The claim of J. C. Stewart & Co., filed against the bankrupt estate, is on labor checks issued by the bankrupt to its workmen. J. C. Stewart & Co. got possession of these checks when the workmen came to their store to trade for merchandise, and would give to Stewart & Co. the checks in exchange for and in payment of the merchandise received by the workmen. The checks were counted each day by the said company and carried to the bankrupt and left there because it had a good safe to keep them in. The bankrupt issued a time check every day to its laborers. They could either trade in the entire check and turn it in, or could trade a part of it and turn in the rest to the bankrupt. Sometimes the laborer would trade in a smaller amount than his check called for, and the merchant took off a coupon for the amount traded. Stewart & Co. kept a list of the

checks daily that were traded in to them. After they had been paid, they were destroyed. If the amount traded in for merchandise purchased was less than the amount of the check used in the purchase, a coupon for the proper amount was torn off the check. No memorandum was made on the check or coupon to show who traded it. Frequently a man would bring in a check which was not issued to him. J. C. Stewart, Jr., who it appeared from the evidence knew more tbout the course of business between J. C. Stewart & Co. and McGowin Lumber Company than any other witness, testified that their books showed how they charged up the McGowin Lumber Company money. It appeared that they kept a "kitchen account" separate from what the witness called the McGowin Lumber Company money. He further testified that the entries on the books of the McGowin Lumber Company, showing a credit to J. C. Stewart & Co. of $6,183.91 is not their whole claim against them, but is their whole claim for labor within three months from the bankruptcy proceedings. The sample check attached to the opinion of the referee does not correspond with the checks presented by the claimant, which checks were in evidence as the basis of his claim for priority of payment, and presumed to have been filed in support of such claim. Said sample has the word "date" on it. On the checks and coupons filed as evidence even the word "date" is not found. The checks filed do not show any date on which they were issued, and the coupons in evidence are without date and without names of the persons to whom issued. There is a large number of these coupons detached from checks. If the claimant cannot show to whom and on what date they were issued, and from whom he received them, how can he establish the fact that they were given to a laborer for work done within three months from the bankruptcy proceedings?

The bankruptcy proceedings were begun on September 28, 1914. Three months prior to that date was June 28th. As the date of the issue of the labor checks and coupons turned in to Stewart & Co. are not shown by said checks and coupons, it is not clear from the evidence how J. C. Stewart & Co. know or could know that said checks and coupons were for labor within the three-month period named. The evidence further was that when the laborers came in the store of said J. C. Stewart & Co. and traded their checks, there was no conversation with them about an assignment of any claim they had against McGowin Lumber Company, or anything like it. The party with the check handed it in, and if the amount traded for took up the full amount of the check it was retained by the merchant, and, if less, coupons were torn off and the balance of the check returned to the laborer. Nothing was said about an assignment. J. C. Stewart, Jr., testified that they took in the checks in the month in which they were earned, yet he stated that it was frequently the case that the checks earned during one month were given to Stewart & Co. the next month. Said witness further stated that "the way that he could tell whether a check was issued one month or another month is that the checks are supposed to be dated." It is true that the sample check attached to the referee's opinion had the word "date" on it, but no date affixed.

Moreover, it appears that the checks and coupons filed in evidence before the court are without date. The witness was doubtless correct in saying that they were supposed to be dated, while the fact is those submitted in evidence as a basis for the claimant's claim for priority of payment of the sum due on said checks and coupons were not dated. They, therefore, could not have served the purpose of informing the witness in what month the checks were issued.

The witness also said that "these new tickets have been used since about April 1, 1914," and that (he) "I don't think that there are any of those checks or coupons that came in for months prior to June." If they were issued for labor or work done prior to June 28th, they would not be a basis for the claim of priority of payment, being without the three-month period, from the bankruptcy proceedings, September 28th.

J. C. Stewart, a member of the firm of J. C. Stewart & Co., testified that he arranged with McGowin Lumber Company for the handling of these labor checks; that the agreement was that said Lumber Company would issue labor checks, for which Stewart & Co. would let the men have merchandise from his store, they giving Stewart & Co. the checks in payment for the merchandise traded for. And Stewart & Co. agreed to give the McGowin Lumber Company 10 per cent. discount on all checks which Stewart & Co. took in. McGowin Lumber Company, in settling with Stewart & Co. for the amount due the latter on said checks, deducted therefrom the 10 per cent., according to their agreement. J. C. Stewart further stated that McGowin Lumber Company kept books at its office, and that he would go there when he wished to see how the account stood. He also stated the only agreement he had about the checks was the one with McGowin Lumber Company, and in that agreement the labor checks were to be counted at the end of each month taken up and account turned in, and on the first Saturday after the fifteenth of the next month Stewart & Co. were to be paid. His evidence also was that they had no agreement with the laborers relative to the checks.

The evidence is that the total labor claims against the bankrupt are something over $12,000 and that the assets of the bankrupt estate will not be sufficient to pay the labor claims in full, after paying the expenses of administration, if the claim of J. C. Stewart & Co. is allowed as a claim entitled to priority. The material and important facts in this case are as above stated.

The question presented by the record before the court is whether the claim of J. C. Stewart & Co. is one entitled to priority of payment on the facts shown by the evidence.

I cannot concur with the referee in all of his findings of the facts, and am constrained to differ with him in his views and conclusions as expressed by him in his opinion and decree in this case.

There is no question that, under the agreement between the bankrupt and J. C. Stewart & Co. the checks issued by the bankrupt to its laborers could be transferred in trade by delivery to said J. C. Stewart & Co. in payment or exchange for merchandise. Said checks were not negotiable, and were in terms not transferable, except in trade.

The purpose of said agreement manifestly was to enable Stewart & Co. to get the trade of said laborers, or at least promote their chances to get such trade, and receive the profit accruing therefrom, and at the same time to benefit McGowin Lumber Company by the allowance of 10 per cent. discount in the aggregate amount due on the checks taken in by Stewart & Co., which amount, less 10 per cent., was to be paid Stewart & Co. by McGowin Lumber Company for the checks. By this agreement said lumber company was enabled to get its labor at 10 per cent. less cost than paying for it in money direct to the laborers.

From the evidence in the case, I find the facts to be that said labor checks were not purchased by said Stewart & Co. from the laborers from whom they were obtained, and that said checks were not assigned to Stewart & Co. by said laborers. Moreover, it appears from the agreement between the bankrupt and the claimant, and by their course of dealing under the agreement, that the claimant was relying on the bankrupt's credit for payment of the checks.

I am further of opinion that the evidence is insufficient to establish the fact that the checks in evidence were all earned for labor done within three months from the bankruptcy proceedings—an essential fact to be established to entitle claimant to a priority of payment, even if otherwise so entitled.

My opinion, therefore, is that the claim of J. C. Stewart & Co. is not entitled to priority of payment.

In Re Erie Rolling Mills Co. (D. C.) 1 Fed. 585, the company had issued orders to its employés for wages, in form following:

"No. 573. Erie, Pa., Oct. 12, 1875.
"Pay to Mr. J. Heffner, or bearer, five dollars in goods and charge to
"$5.00. Erie Rolling Company."

These orders had been taken by merchants from such laborers, and preference was claimed, but it was held that they were not entitled thereto.

In Browder & Co. v. Hill, 136 Fed. 821, 69 C. C. A. 499 (Sixth Circuit), the court held:

"A bankrupt corporation gave to its employés orders on claimants for goods, and charged the same against the current wages of the men. Claimants filed such orders, and charged the amount to the corporation, which paid the same from time to time, either in cash, or by note or credits on its books. Under the statute [of Tennessee] the employés were entitled to laborers' liens on the property of the corporation for wages earned within three months prior to the bankruptcy. Held, that no right of subrogation to such liens arose in favor of claimants from such transactions, nor to the priority given labor claims by the bankruptcy act, and that such subrogation would not be accorded them where it appeared that, if it were, the estate would not be sufficient to pay the preferred claims in full."

Where at the time of bankrupt's adjudication, claimants, under an agreement with the bankrupt, furnished merchandise to its laborers upon presentation of orders or time checks issued by the bankrupt for work done, evidence examined, and held that claimants were relying on bankrupt's credit for payment, and were not entitled to a lien under an assignment of laborers' claims. Digest A. B. R., vol. 3, p. 533;

Bell v. Arledge (C. C. A. 5th Cir.) 192 Fed. 837, 113 C. C. A. 161. In the opinion of the court Judge Pardee said:

"The evidence does not show any assignment of any laborer's claim or lien. Under the facts in this case, an assignment [to carry a lien] of script or duebills, passing by delivery and payable to bearer, * * * cannot well be presumed, and an assignment of laborers' claims, where neither the laborer nor the specific labor is proved, should not be presumed."

"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 the claimants to a lien on the lumber company's assets in bankruptcy." In re Long Leaf Lumber Co., 219 Fed. 675, 135 C. C. A. 347.

The referee in his opinion cited the case of Shropshire Woodliff & Co. v. Bush, 204 U. S. 186, 27 Sup. Ct. 178, 51 L. Ed. 436, to sustain his finding that the claimant in this case is entitled to priority of payment on the checks held by him. The case cited is not, in my opinion, applicable to the case here. The opinion of the Supreme Court was given as an answer to a question by a Circuit Court of Appeals certified for instructions. The question was:

"Is an assignee of a claim for wages earned within three months before the commencement of proceedings in bankruptcy against a bankrupt debtor entitled to priority of payment under section 64 (4) of the Bankruptcy Act, when the assignment occurred prior to the commencement of such bankruptcy proceedings?"

In the case cited there was an assignment of a claim for wages. The character of the claim, other than it was for wages, was not stated. It may have been a negotiable promissory note. It might have been a labor ticket or check which issued without any restrictions on its transferability. It may have been by its terms made negotiable or transferable, and it may have been purchased by the assignee from the original holder of the claim, and, as said by the judge in the case cited, "the right of prior payment of the wage-earner" was "attached to the claim of the wage-earner and passed with the transfer to the assignee." In my view of the instant case and its facts, the case cited is not applicable to it, in the absence of facts showing its applicability.

An assignable check may be assigned before proceedings in bankruptcy, and it may be proved by the assignee upon proper showing by the owner. But the proof of the claim which has been assigned should set forth the date and facts of transfer and the name of the original creditor. Collier on Bankruptcy (10th Ed.) page 717.

A priority debt should not be ordered paid until it appears that there will be enough assets to pay in full all like debts of the same and higher classes. Collier on Bankruptcy (10th Ed.) 889.

"The findings of a referee in bankruptcy are not conclusive, and will be set aside where the court is of opinion they are manifestly erroneous." In re Miner, 9 Am. Bankr. Rep. p. 100, 117 Fed. 953; In re Elmore Cotton Mills (D. C.) 217 Fed. 819.

The order of the referee is reversed and set aside. And it is so ordered.

THE ANNA.

(District Court, E. D. Pennsylvania. May 7, 1915.)

No. 16 of 1910.

SHIPPING ⊂=132, 141—LIABILITY FOR DAMAGE TO CARGO—BURDEN OF PROOF.

A provision of a bill of lading exempting a ship from liability for damage to cargo from decay does not include decay due to negligence of the carrier, and where it is shown that the cargo was received in good condition, and delivered in a decayed condition, due to the action of sea water, the case is not brought within the exception, and the burden rests on the ship to show that the entry of the sea water was due to dangers of the sea or other cause excepted or for which it is not responsible.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 471–487, 493, 497–499; Dec. Dig. ⊂=132, 141.]

In Admiralty. Suit by the Peter Woll Sons Manufacturing Company against the steamship Anna for damage to cargo. Decree for libelant.

Lewis, Adler & Laws, of Philadelphia, Pa., for libelant.
Biddle, Paul & Jayne, of Philadelphia, Pa., for respondent.

DICKINSON, District Judge. There is no controversy here over the facts. The case is really one to be determined by the query: Upon whom rests the burden of proof? The case was tried and has been argued in a spirit of fairness and frankness which is more than commendable—it is admirable.

The libelants shipped by the steamship Anna a quantity of vegetable fiber. It was received on board ship at Oran January 21, 1910, in apparent good order and condition. It was landed in Philadelphia February 22d in both apparent and actual damaged condition. The bearing points of the contract of shipment are these: The carrier was not to be responsible for damages: (1) From decay, putrefaction, change of character, etc., of the cargo. (2) From dangers of the sea. (3) To goods which might have been insured. (4) Beyond the declared or invoice value of the goods.

As already stated, the main question is one of the burden of proof. A subsidiary question bears upon the limitation of the obligations of carriers by special contracts. Almost the only fact which is directly evidenced in this case is the fact that these goods were damaged and that contact with sea water would have caused the damage. We do not even know (for whatever light it might possibly throw upon the fact of negligence) in what part of the hold of the steamer the damaged part of the cargo was stowed. To fix the responsibility for the damage we are driven to presumptions—presumptions of fact and those raised by law.

The first proposition is one of fact—that the shipments were in good condition when received on board. This fact is evidenced by the admission of the respondent. The admission is that they were in apparent good order and condition—in good condition so far as the respondent could see or had reason to believe. This is entitled to all

the weight accorded to any self-disserving declaration and is made by statute prima facie evidence of the receipt of the merchandise. The fact of condition is a deduction, an inference from other facts, and is borne out by the condition of the rest of the cargo received at the same time and the known fact that the damage was due to sea water.

This latter thought runs into the second proposition, which is one of law—the obligation visited upon common carriers to disprove negligence. This springs from the policy of the law. One motive behind the policy is to impose the affirmative obligation to use due care. The other is to apply the evidential principle that the party who has the goods under his care, and is therefore in a position to know what happened to them, should show the exculpating facts, rather than the other party, who has no opportunity for knowledge, should be called upon to prove negligence. We have, therefore, two facts: These goods were received on board in good condition. They were unloaded in a damaged condition, due to sea water. As goods carried with due and proper care are ordinarily delivered in an undamaged condition, the inference is, if they are damaged, and no other cause of damage appears, that the damage was due to negligence. Such, at least, is the inference we are required to draw as against common carriers, upon whom the burden of disproving negligence rests. It is the application to them of the res ipsa loquitur rule. Thus seems to stand the case in the absence of any special contract features. We are relieved (except in one respect) of the necessity of inquiring what limitation of liability by special contract the policy of the law permits to common carriers, because the present case may be disposed of without this inquiry. The effect of salt water upon this fiber is to bring about a change of its character, to cause it to decay, and to give out a bad odor, and in this sense to putrefy.

In this description of the damaged fiber we have paraphrased the language of one of the clauses in the bill of lading exempting the carrier from liability, for the purpose of meeting the claim of exemption squarely. Clearly this clause does not include such decay as is caused by the negligence of the carrier, but only such as is brought about from causes which may be termed inherent in the cargo itself. The argument that, when the damage is of the kind included in the excepted class, the burden of proving negligence is shifted, applied to the facts of this case, assumes too much. It assumes one cause from a result which may be the product of any one or more of several causes. The fact deduction, and as against common carriers the legal presumption, refutes the argument. We know contact with salt water would account for the deterioration in condition. We do not know that it even could be of spontaneous origin. To ascribe the condition to the latter cause is a mere assumption, absolutely without evidential warrant. Nor can escape from the legal presumption of culpable cause be found in the assertion of a shift in the burden of proof. The damage must be brought within the excepted classification to halt the presumption of negligence. The fallacy involved in asserting nonresponsibility for the damage because it is of the excepted kind is easily exposed.

With respect to the "dangers of the sea" exemption from liability we have first the fact of danger. This has been shown. The voyage was long. It was tempestuous, the steamer encountering heavy weather and meeting heavy seas. It was none the less such weather as was to be ordinarily expected at that time of year in those waters. It was not extraordinary in an exculpating sense. The fact of "danger of seas" is not enough. There must be also the fact of damage flowing from this cause. Here again the inference of fact and the legal presumption are both against the respondent. The same evidence and testimony which calls for a finding that the sea was tempestuous suggests the finding that the damage was not due to this cause, or at least does not justify the finding that it was so due. The legal presumption is neither met nor overcome. The hatches were well secured and tightly battened down. No water entered the hold from this cause. This phase of the case is met by the Folmina Case, 212 U. S. 354, 29 Sup. Ct. 363, 53 L. Ed. 546, 15 Ann. Cas. 748.

The clause exempting the carrier from damages due to an insurable risk cannot avail the respondent. This follows from the general principles of law and express statutory provision and is supported by abundant authority. Inman v. Railway Co., 129 U. S. 128, 9 Sup. Ct. 249, 32 L. Ed. 612.

The remaining claim of exemption for damage beyond the amount of the invoice value is practically conceded by libelants. We do not therefore feel called upon to discuss its merits. The concession is forced by the rulings in Pearse v. Steamship Co. (D. C.) 24 Fed. 287, and Lace Mills v. Navigation Co. (D. C.) 145 Fed. 701. Whatever may be urged upon general principles, we are not asked to disregard these rulings.

The case itself calls for no further discussion. The exceptional thoroughness, frankness, and ability with which it has been presented by counsel does, however, call for perhaps one further observation upon the first point discussed by counsel for respondent. The argument is met by a challenge of the fact upon which it is based. The condition of the shipment was apparently good when loaded and obviously bad when unloaded. Salt water would have caused the damage. There is nothing to justify a finding that the bad effect from contact with salt water is instantaneous or immediately noticeable. It may possibly be that the goods had been damaged by salt water before being put aboard the ship, although in apparent good condition when received. On the other hand, no finding can be made that they were so damaged. What their condition was when received is a fact to be found, and the finding is against the respondent. The legal conclusion follows the fact, and the evidence of the fact is sufficient.

The conclusion reached is that the libelants are entitled to recover the sum of $776.34 as of the date of February 22, 1910, to which is added an allowance equivalent to interest at the rate of 6 per cent. per annum, with costs.

A decree to this effect may be submitted.

THAMES & MERSEY MARINE INS. CO., Limited, v. PACIFIC CREOSOTING CO.

(Circuit Court of Appeals, Ninth Circuit. May 10, 1915.)

No. 2459.

1. INSURANCE ⟸146—CONSTRUCTION OF POLICY—EXCEPTIONS TO LIABILITY.
A stipulation in an insurance policy which is in the nature of an exception to the liability of the insurer must be construed strictly against it, and words of exception in a policy, if doubtful, are to be construed most strongly against the party for whose benefit they are intended.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 292, 294–298; Dec. Dig. ⟸146.]

2. INSURANCE ⟸478—CONSTRUCTION OF MARINE POLICY—VESSEL "ON FIRE."
In an exception in a marine policy on cargo warranting free from particular average "unless the vessel * * * be stranded, sunk or on fire," the words "on fire" are not to be construed as meaning the same as "burnt" which was formerly used in their place, but as having reference to a present state or condition regardless of any definite fixed result, and the effect of their use is to open the warranty if some structural part of the vessel was actually on fire, without regard to its extent.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1230–1238; Dec. Dig. ⟸478.

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

3. INSURANCE ⟸478—EXCEPTION IN MARINE POLICY—VESSEL ON FIRE.
While a ship was lying in harbor for the discharge of cargo, fire was discovered in the after between-decks, which was still full of cargo. In response to an alarm crews of neighboring vessels came to her assistance, as well as employés of the consignee from shore, who brought chemical fire extinguishers, and, after working from half an hour to an hour, the fire was extinguished. A bulkhead, which was a part of the vessel, was blistered and blackened as was the deck above, and a door in the bulkhead was deeply charred over a considerable portion of its surface. A policy of insurance on the cargo warranted free from average unless general or the ship "be stranded, sunk or burnt," but a rider attached warranted "free from particular average unless the vessel or craft or the interest insured be stranded, sunk or on fire." *Held*, that the substitution of such provision for that in the body of the policy evidenced an intention to change the nature of the perils insured against, and that within its meaning the ship was on fire to such an extent as to open the warranty.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1230–1238; Dec. Dig. ⟸478.]

4. INSURANCE ⟸402—MARINE INSURANCE—RISKS INSURED AGAINST.
Under a cargo policy covering "all risks of craft and boats," and "all risks of transshipment and of craft, lighterage, and for any other conveyance from the warehouse until on board the vessel and from the vessel until safely delivered into warehouse," the insurer is liable for a loss sustained by the capsizing of a lighter used in discharging the cargo, in the absence of fault or negligence on the part of the insured.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1088–1090, 1093, 1103–1105; Dec. Dig. ⟸402.]

5. INSURANCE ⟸646—ACTION ON MARINE POLICY—DEFENSES—BURDEN OF PROOF.
The burden of proving that a loss of insured cargo by the capsizing of a lighter on which it was loaded was due to unseaworthiness of the lighter rests upon the insured, who relies upon it as a defense.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1555, 1645–1668; Dec. Dig. ⟸646.]

6. INSURANCE ⊂=273—MARINE INSURANCE—RISKS INSURED AGAINST.
Under a policy insuring cargo "against all perils, losses and misfortune that have or shall come to the hurt, detriment and damage of the aforesaid subject-matter of this insurance or any part thereof," there is no implied warranty by the insured of the seaworthiness of a lighter used in discharging the cargo at the end of the voyage.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 583–588; Dec. Dig. ⊂=273.]

7. INSURANCE ⊂=478—MARINE INSURANCE—CONSTRUCTION OF POLICY.
Under the English law, which determines the liability under an English contract of insurance, where a marine policy on cargo contains a warranty "free from particular average unless the vessel * * * be stranded, sunk or on fire," where the vessel is stranded, sunk, or on fire during the adventure, the insurer is liable for a loss to the cargo, although it does not result therefrom.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1230–1238; Dec. Dig. ⊂=478.]

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

Suit in admiralty by the Pacific Creosoting Company against the Thames & Mersey Marine Insurance Company, Limited. Decree for libelant, and respondent appeals. Affirmed.

For opinion below, see 210 Fed. 958.

This is a libel in personam filed by the Pacific Creosoting Company, a corporation of the state of Washington, against the Thames & Mersey Marine Insurance Company, Limited, a corporation of Great Britain, to recover the sum of $1,197.20 as insurance alleged to be due and owing to the Creosoting Company from the Insurance Company under a policy of Marine insurance issued by the latter on a cargo of creosote in drums shipped from London, England, to the Creosoting Company, at Eagle Harbor, Seattle, Wash., upon the British bark Sardhana. The policy of insurance was as follows:

"Whereas, W. R. Lyon Lohr & Co. and/or as agents have represented to the Thames & Mersey Marine Insurance Company, Limited, that they are interested in or duly authorized as owner, agent or otherwise to make the insurance hereinafter mentioned and described with the said company and have promised or otherwise obligated themselves to pay forthwith for the use of the said company at the office of the said company the sum of forty-four pounds eighteen shillings and ten pence, as a premium or consideration at and after the rate of ninety shillings per cent for such insurance:

"Now this policy of insurance witnesseth, that in consideration of the premises and of the said sum of forty-four pounds eighteen shillings and ten pence the said company promises and agrees with the said company, their executors, administrators and assigns that the said company will pay and make good all such losses and damages hereinafter expressed as may happen to the subject-matter of this policy and may attach to this policy in respect of the sum of nine hundred and thirty-two pounds hereby insured which insurance is hereby declared to be upon creosote in drums including packages and freight advanced valued at seven thousand four hundred and fifty pounds in the ship or vessel called the Sardhana whereof ——— is at present master or whoever shall go for master of the said ship or vessel, lost or not lost, at and from London to Eagle Harbor, Puget Sound, or held covered at a premium to be arranged.

"Including the risk of craft and/or raft to and from the vessel.

"Warranted free from capture, seizure and detention and the consequences thereof, or any attempt thereat, piracy excepted, and also from all consequences of hostilities or warlike operations, whether before or after declaration of war.

"And the said company promises and agrees that the insurance aforesaid shall commence upon the freight and goods or merchandise aforesaid from the loading of the said goods or merchandise on board the said ship or vessel at as above and continue until the said goods or merchandise be discharged and safely landed at as above.

"And that it shall be lawful for the said ship or vessel to proceed and sail to and touch and stay at any ports or places whatsoever in the course of her said voyage for all necessary purposes without prejudice to this insurance.

"And touching the adventures and perils which the capital stock and funds of the said company are made liable unto or are intended to be made liable unto by this insurance they are of the seas, men of war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, surprisals, takings at sea, arrests, restraints and detainments of all kings, princes and people of what nation, condition or quality soever, barratry of the master and mariners, and of all other perils losses and misfortunes that have or shall come to the hurt, detriment or damage of the aforesaid subject-matter of this insurance or any part thereof. And in case of any loss or misfortune it shall be lawful to the insured, their factors, servants and assigns to sue labor and travel for, in and about the defense, safeguard and recovery of the aforesaid subject-matter of this insurance the charges whereof the said company will bear in proportion to the sum hereby insured. And it is expressly declared and agreed that no acts of the insurer or insured in recovering, saving or preserving the property insured, shall be considered as a waiver or acceptance of abandonment. And it is declared and agreed that corn, fish, salt, fruit, flour and seed are warranted free from average unless general or the ship be stranded, sunk or burnt, and that sugar, tobacco, hemp, flax, hides and skins are warranted free from average under five pounds per centum unless general or the ship be stranded sunk or burnt; and that all other goods also freight are warranted free from average under three pounds per centum unless general or the ship be stranded sunk or burnt."

To the margin of the policy the Insurance Company had attached a printed slip containing additional clauses respecting its liability for a partial loss as follows:

"Warranted free from particular average, unless the vessel or craft or the interest insured be stranded, sunk or on fire, or in collision with ice or any substance other than water, (floating or nonfloating), the collision to be of such a nature as may reasonably be supposed to have caused or lead to damage of cargo, or vessel put into a port of refuge or distress and discharge part or whole cargo, each craft or lighter to be deemed a separate insurance, but to pay warehousing, forwarding and special charges if incurred, as well as partial loss arising from transshipment.

"General average and salvage charges payable according to foreign statement or York-Antwerp rules, or 1890 rules, if in accordance with the contract of affreightment. Including all risks of craft and boats. Including negligence and all liberties as per bill of lading and/or charter party.

"Including all risks of transshipment and of craft, lighterage and/or any other conveyances, from the warehouse until on board the vessel, and from the vessel until safely delivered into warehouse, or destination in the interior, or of fire while awaiting shipment.

"In case of deviation, change of voyage, or additional risk not specified, to be held covered upon terms to be arranged."

The Sardhana left the Thames on May 30, 1908, with 2,753 drums of creosote in good order and condition consigned to the Pacific Creosoting Company at Eagle Harbor, Seattle, Wash. It appears from extracts from the log, which were introduced in evidence, that on June 6th a sounding was made, and it was discovered that the sounding rod was slightly colored with creosote; that on June 11th the crew were employed placing extra chocks among the cargo; that from July 16th to September 14th the vessel experienced a succession of heavy gales, during which it rolled and pitched and strained and labored heavily; that the sea ran high, and the vessel shipped heavy seas on deck; that numerous sails were blown away; that on July 29th it was noticed that the cargo in the hold had commenced to

work, and it became necessary for the crew to enter the hold and secure it; that on July 30th the cargo again began to work, and that it continued to work from that date until August 4th, on which date the weather moderated a little and an old spanker boom was cut and used to chock off the cargo; that from that date until August 7th the crew were employed securing the cargo; that on August 25th it was discovered that the cargo was again loose in the hold and it remained loose until September 4th, when it was found that the drums were adrift and were rolling about in all directions; that it was impossible to secure the cargo at that time, and the cargo was not secured until September 14th, when the weather moderated; that on September 26th it was noticed by soundings in the pump well that there was an increase of liquid, which appeared to be mostly creosote; that on November 2d another strong gale was encountered, accompanied by a high sea, which continued during that day and the following day, during which the ship labored heavily and shipped much water on deck, and the cargo again worked badly.

The vessel arrived at Eagle Harbor, Seattle, on November 9, 1908. On November 17, 1908, the work of discharging the cargo was commenced, and was continued during that day and the following day, November 18, 1908; the unloading of the vessel being effected by means of a barge or lighter owned by the Pacific Barge Company, the drums being unloaded at the side of the vessel onto the barge or lighter and transported thence across the harbor to the wharf of the Creosoting Company. On November 18, 1908, fire broke out aboard the vessel. The entry in the log pertaining to the fire was as follows: "About 9:30 p. m. smoke was discovered issuing from the after hatch, by one of the crew, who immediately notified the master and then gave the alarm. This alarm was responded to by the crews of the ship Jupiter, the steamship Hornelen, and the employés of the Pacific Creosoting Company, who brought with them several fire extinguishers. The master went below through the lazarette and saw the reflection of the fire over the top of the bulkhead between the after 'tween-decks and the lazarette. The after 'tween-decks were still full of cargo. After considerable trouble the fire was extinguished, and it was then discovered that the aforesaid bulkhead together with the door thereof (the bulkhead was built in the vessel) and the dunnage in the after 'tween-decks were burned, and some of the ship's stores in the lazarette were damaged by water and chemicals. The origin of the fire was not discovered."

During the progress of the unloading of the vessel, and on November 21, 1908, 272 drums of creosote were discharged from the ship onto the lighter, and, evening having fallen, the lighter with the creosote was left moored to the side of the vessel, the intent being to convey the lighter and the drums to the wharf of the Creosoting Company on the following morning. During the night the lighter capsized, and the creosote was precipitated to the bottom of the harbor. It appeared from a survey made by Mr. Frank Walker, marine surveyor, and also from the testimony in the case, that the capsizing of the lighter was caused by a heavy gale which sprang up during the night. Subsequently 253 drums, undamaged, were recovered by divers, and 15 empty drums, that came to the surface, were recovered by a launch and crew of the creosoting works. The remaining four drums lost from the lighter were never recovered.

The unloading of the entire cargo from the vessel was surveyed by Walker, the marine surveyor. His survey showed that of the 2,753 drums of creosote consigned to the Creosoting Company 2,012 drums (which included the four drums lost from the lighter) were discharged full and in good order, 716 drums were discharged partially empty and in a damaged condition, and 25 drums were discharged in a damaged condition and entirely empty. Subsequently the creosote found in the partially filled drums, together with about 4,000 gallons which were pumped from the ship's limbers, was emptied into tanks of the Creosoting Company and measured, and it was thereby ascertained that the total loss of creosote (including the loss from the 25 drums which were found damaged and entirely empty, and the four drums lost from the lighter) was 56,267.2 gallons. The libel filed in the court below was for the recovery from the Insurance Company, under a general average adjustment, of its proportion of the value of the creosote not delivered, and of the 741 damaged drums (the drums having a distinct market value separate and apart from the creosote),

and of its proportion of the "sue and labor" expenses incurred by the Creosoting Company in recovering and salving the drums lost from the lighter, the total amount claimed to be due from the Insurance Company being $1,197.20. Judgment was entered in the court below in favor of the Creosoting Company for that amount, together with interest, from which judgment the Insurance Company has appealed to this court.

E. B. McClanahan and S. H. Derby, both of San Francisco, Cal., and Brady & Rummens, of Seattle, Wash., for appellant.

W. H. Bogle, Carroll B. Graves, F. T. Merritt, and Lawrence Bogle, all of Seattle, Wash., for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge (after stating the facts as above). 1. The policy of insurance upon which the present suit is based is embodied in a printed form, containing blanks which have been filled in by the Insurance Company with words and clauses appropriate and necessary to cover the risks assumed. At the end of the policy and as a part of such printed form there is the following clause:

"It is declared and agreed that corn, fish, salt, fruit, flour and seed are warranted free from average unless general or the ship be stranded, sunk or burnt, and that sugar, tobacco, hemp, flax, hides and skins are warranted free from average under five pounds per centum unless general or the ship be stranded, sunk or burnt; and that all other goods, also freight, are warranted free from average under three pounds per centum unless general or the ship be stranded, sunk, or burnt."

This clause is plainly inapplicable to the risk provided in the present policy, and is superseded by the following clause contained in certain conditions attached as a slip or rider to the margin of the policy:

"Warranted free from particular average, unless the vessel or craft or the interest insured, be stranded, sunk or on fire."

The warranty contained in the body of the printed form of the policy becomes therefore immaterial in the determination of the questions arising on this appeal, except in so far as its phraseology may throw some light upon the true interpretation and construction to be accorded to the special warranty contained in the attached slip above set forth. The warranty is what is known among insurance brokers as an "F. P. A." (free from particular average), or, a "particular average" warranty. In the absence of such a warranty a policy of insurance such as that involved in this case would be a particular average policy, and would cover both total and partial loss of cargo. The "F. P. A." warranty, however, overrides and controls the other terms of the policy, and changes the protection of the policy. By its provisions only a total loss of cargo is insured against, unless one of the excepted events therein enumerated, stranding, sinking, or being on fire, should come to pass. Upon the happening of one of the excepted events the warranty is then deleated, blotted out, or canceled, and the policy is to be construed as if it had never attached, and the insured thereupon becomes entitled to recover from the Insurance Company for any partial loss of cargo suffered by it. In the present case the loss sustained by the libelant was a partial loss. If, therefore, the Sardhana can be said to have been "on fire" within the meaning of that term as

used in the policy, the libelant is entitled to recover the amount due from the Insurance Company by reason of such partial loss; if the vessel was not "on fire" then the Insurance Company is not liable. The history of the warranty is set forth by Gow in his work on Marine Insurance (3d Ed.). It appears therefrom that the clause, as originally worded, read as follows:

"Warranted free from average, unless general, or the ship be stranded."

But later it was found necessary to permit the occurrence of other casualties, besides stranding, to annul the exception, and (the English courts having held that "average, unless general" was equivalent to "free of particular average") the clause consequently took the form, "warranted free from particular average unless the ship be stranded, sunk or burnt." The clause remained in that condition until 1893, when it came under the consideration of the English courts for the first time in the case of The Glenlivet, 68 L. T. Rep. N. S. 860, 69 L. T. Rep. 706. In that case fires had broken out in the coal bunkers of the vessel on different occasions and some damage was done to the structure of the vessel—a plate was cracked and some angle irons were burnt—and the question before the court was whether the ship had been "burnt" within the meaning of the word as used in a particular average warranty in a policy of marine insurance. The court held that the ship was not "burnt," and the rule was there laid down that a ship is not "burnt" within the meaning of the warranty unless the injury by fire be of so substantial a character that the ship as a whole can be said to be "burnt" in the popular sense of the term. Gow, in his work on Marine Insurance (page 179), referring to the word "burnt" as used in a particular average clause, and commenting upon the above decision, says:

"It is the ship that must be burnt, say a beam scorched, a floor charred, a ceiling burnt. Consequently the destruction of a cabin by fire removes the exception, while a fire in the cargo itself does not. Such was the view acted upon almost universally until quite lately. But a recent decision of Mr. Justice Barnes [the Glenlivet, 1893] has raised a new point. Fire occurred thrice, once on each of three separate and distinct voyages, in the Glenlivet's coal bunkers, but did not pass beyond them. As it was decided by Lord Ellenborough that a mere touching of the ground was not sufficient to make a stranding, so it is now decided in the Glenlivet Case that a mere burning is not sufficient to take the exception out of the memorandum; it must be such a burning as to constitute a substantial burning of the ship as a whole. The judgment in the Glenlivet Case has excited considerable attention, as it takes away on principle what was long granted without question. But indeed it is not easy to see why a fire in a ship's bunkers or cabin should be enough to establish a claim for damage to cargo arising from some other peril barred by the memorandum, when a touch and go graze on a rock, even if actually causing damage is not enough. Since the issue of the decision some ships have had the words 'on fire' added to 'burnt,' confessedly in the hope and expectation of thus restoring to the assured what has been taken from him by the decision."

And this is the condition in which we find the warranty in the present case, with the exception that the word "burnt" has been entirely left out, and the words "on fire" substituted therefor. The clause thus worded has never been construed by the courts of either the United States or Great Britain; and in our determination of the question we

must be guided by the history of the clause as above set forth, and such additional light as has been thrown upon the subject by the testimony of the witnesses in the case.

[1] It is a fundamental rule in the law of insurance that a stipulation in a policy which is in the nature of an exception to the liability of the insurer must be construed strictly against it, and that words of exception in a policy, if doubtful, are to be construed most strongly against the party for whose benefit they were intended. Canton Ins. Office v. Woodside, 90 Fed. 301, 33 C. C. A. 63. If the company by the use of an expression found in a policy leaves it a matter of doubt as to the true construction to be given the language, the court should lean against the construction which would limit the liability of the company. London Assurance v. Companhia de Moagens, 167 U. S. 149, 17 Sup. Ct. 785, 42 L. Ed. 113; National Bank v. Insurance Co., 95 U. S. 673, 24 L. Ed. 563. As said by Mr. Justice Harlan in the latter case:

"The company cannot justly complain of such a rule. Its attorneys, officers, or agents prepared the policy for the purpose, we shall assume, both of protecting the company against fraud, and of securing the just rights of the assured under a valid contract of insurance. It is its language which the court is invited to interpret, and it is both reasonable and just that its own words should be construed most strongly against itself."

[2] What, then, was the true intent and meaning of the words "on fire" in the clause, "warranted free from particular average unless the vessel or craft, or the interest of the insured, be stranded, sunk or on fire?" The learned proctors for the Insurance Company contend that the expression is synonymous with the word "burnt" as used in the policies prior to the decision in the Glenlivet Case, and must be construed even as the word "burnt" was construed in that case. If that construction be the true one, it follows that a ship cannot be deemed to be "on fire" within the meaning of the warranty unless the injury by fire is of so substantial a character that the ship as a whole can be held to be "on fire" in the popular sense of the term. In this construction we are unable to concur. But we do agree with the learned proctors for the Insurance Company that the words must be construed in the light of their popular meaning. That popular meaning is vastly different from the popular meaning of the word "burnt." In a strict, technical sense, perhaps, the words are closely allied. Generally speaking, it would be impossible to conceive of an object being "burnt" which had not also been "on fire," although the Court of Appeals in the Glenlivet Case refers to angle irons as being "burnt," despite the fact that the angle irons could not have been on fire. And vice versa, no object could, in the nature of things, ever be said to have been on fire without also being burnt. All this, we say, in a strict, technical sense; but the term is not to be interpreted by any such method. In a general and popular sense the two expressions convey very different ideas to the mind. The word "burnt" creates in the mind the idea of a definite, accomplished condition, a completed result. The words "on fire" convey rather the idea of a present state or condition, regardless of any definite, fixed result. And this natural meaning, rather than any strained

effect, must be the meaning attributed to the words in the present policy of insurance, and must be deemed to have been the construction placed upon them by the parties to the contract of insurance. Thus construed, it seems entirely plain to us that the Sardhana might well have been on fire, although the injury therefrom might not have been of so substantial a character that the ship as a whole could have been said to be either "burnt" or "on fire." In the determination of the question we are, of course, confronted with the same difficulty which beset the English Court of Appeals, and we concur with that court that each case must be decided according to the actual facts appertaining to each particular case.

[3] In the present case, there is the usual conflict of testimony, respecting not only the extent of the damage caused by the fire, but also in the circumstances surrounding it. It is, however, not denied that a large door, called a bulkhead door, which constituted a part of the bulkhead, was on fire and was burned. This door separated the lazarette from the 'tween-decks. The door was of wood, about 6 feet high, 4½ feet wide, and 1 inch thick. It has been brought to this court, and an examination shows it to be deeply charred over a considerable portion of its surface, the remainder of the surface being blackened and blistered by the smoke and flames. It is also admitted that the paintwork on the bulkhead proper in the vicinity of the door was blackened and blistered, as was also the deck or ceiling above. There is conflict in the testimony as to whether the bulkhead proper was actually on fire or burned, but we think this conflict, as well as the conflict with respect to the difficulty experienced in putting the fire out, is definitely settled by the entry in the log, made immediately after the fire by the master of the vessel. That entry was as follows:

"About 9:30 p. m. smoke was discovered issuing from the after hatch by one of the crew, who immediately notified the master and then gave the alarm. This alarm was responded to by the crews of the ship Jupiter, the steamship Hornelen and the employés of the Pacific Creosoting Company, who brought with them several chemical fire extinguishers. The master went below through the lazarette and saw the reflection of the fire over the top of the bulkhead between the after 'tween-decks and the lazarette. The after 'tween-decks were still full of cargo. After considerable trouble the fire was extinguished, and it was then discovered that the aforesaid bulkhead, together with the door thereof [the bulkhead was built in the vessel] and the dunnage in the after 'tween-decks were burned, and some of the ship's stores in the lazarette were damaged by water and chemicals. The origin of the fire was not discovered."

This entry is supported by testimony in the case to the effect that the fire appeared to be quite stubborn, and a great deal of difficulty was experienced in putting it out, and that the time which elapsed from the time the alarm was given until the fire was out was from one-half to one hour. It is not denied that assistance was rendered by crews of neighboring vessels, and that chemical fire extinguishers furnished by the libelant were used in putting out the fire.

We are of opinion that the testimony of the witnesses, together with the exhibit above referred to, show beyond dispute that the Sardhana was "on fire" within the meaning of the term as used in the warranty. This determination finds support in the comment of Gow above set

forth, to the effect that the words were inserted after the decision in the Glenlivet Case for the purpose of restoring to the assured what was taken from him by that decision, and also in the testimony of A. M. Beckett, an average adjuster of many years' experience in England and in America, who was called as a witness for the libelant. He testified that after the decision in the Glenlivet Case the insurance companies immediately changed their policies because the assured wanted better protection; that it was the practice of adjusters in England to consider a warranty such as the one in the policy of insurance in this case, open, if some structural part of the vessel was actually on fire; that it depended on the fact that the structure was on fire, but not the extent of the fire; that such construction of the warranty had never been contested by the marine insurance underwriters as far as he knew; that under the practice of the English adjusters he would consider that the burning of the door which was built into the bulkhead in the Sardhana would be a burning of the structure of the vessel, and would open the warranty.

In connection with the testimony of the witness Beckett there must also be noted the change of terms in the policy involved in this case. In the body of the policy, and constituting a part of the printed form thereof, corn, fish, salt, fruit, flour, and seed were warranted free from average, unless general, or the ship be "stranded, sunk or burnt," sugar, tobacco, hemp, flax, hides, and skins were warranted free from average under five pounds per centum, unless general, or the ship be "stranded, sunk or burnt," and all other goods, including freight, were warranted free from average under three pounds per centum, unless general, or the ship be "stranded, sunk or burnt." The fact that in the special warranty the term "on fire" was substituted for the word "burnt" conclusively shows, in our judgment, a deliberate intent on the part of the Insurance Company to change the nature of the perils assured against and to increase the risk assumed by it under the policy.

The conclusion at which we have arrived is based mainly upon the facts as they appear in the present case, and we must not be understood as laying down a rule which would be applicable to all cases which might arise under similar warranties. Each case, as we have stated, must be determined with reference to its own particular facts. The Supreme Court of the United States in construing the word "collision" in a policy of marine insurance laid down a similar rule in the case of London Assurance v. Companhia de Moagens, supra, and the English courts have consistently left to be determined by the facts of each case the vexing questions relating to the word "stranded" in warranties similar to the one now under consideration.

[4] 2. The next question relates to the right of the libelant to recover the value of the four drums lost from the barge when it capsized during the night of November 21, 1908, and also the "sue and labor" expenses incident to salvaging the drums which were recovered from the waters of the harbor. It is not denied by the Insurance Company that the expenses incurred in recovering the creosote lost from the barge were proper expenses, and that the same were paid by the Creosoting Company. In the body of the policy it is provided:

"And the said company promises and agrees that the insurance aforesaid shall commence upon the freight and goods or merchandise aforesaid from the loading of the said goods or merchandise on board the said ship or vessel at as above, and continue until the said goods or merchandise be discharged and safely landed as above."

Then after enumerating certain perils insured against it was provided:

"And of all other perils, losses and misfortunes that have or shall come to the hurt, detriment or damage of the aforesaid subject-matter of this insurance or any part thereof."

Turning again to the special warranty contained in the slip attached to the policy of insurance, we find that the insurance there provided covers "all risks of craft and boats," and also—

"all risks of transshipment and of craft, lighterage and/or any other conveyances, from the warehouse until on board the vessel and from the vessel until safely delivered into warehouse."

The liability of the Insurance Company for the loss sustained by the capsizing of the lighter or barge on which the creosote had been loaded preparatory to being conveyed from the vessel and delivered into the warehouse could hardly be expressed in plainer language, and these clauses must be deemed to be decisive of the question. The contention of the Insurance Company that under the contract of affreightment it was incumbent upon the libelant to furnish a lighter in all respects seaworthy, and that duty was not performed by it, does not, for many reasons, appear to be available to the Insurance Company as a defense to the loss here claimed by the libelant. The contract of affreightment is not in the record, and we do not know what the provisions of that contract were. Nor do we know that the libelant furnished the lighters for the landing of the cargo, or was required so to do. The only evidence upon the subject is that of Capt. David Baird, who was called as a witness on behalf of the Insurance Company. He testified that he was the marine surveyor or superintendent at Seattle for the owners of the vessel; that part of his duty was to see the vessel discharged; that he didn't know who furnished the scows, and was unable to state what the conditions of the charter were. In answer to the direct leading question whether the ship was freed from liability after the cargo left her tackle he answered in the affirmative, and when asked how he knew that he replied it was in the charter party, "that it was the usual clause in every case," but when asked if he knew it was in this charter party he said he "would not swear at present that it was." Capt. Alexander Wallace, the master of the vessel, whose deposition was taken by the Insurance Company, testified that the cargo was discharged by stevedores under his supervision, but he was not asked and did not state who furnished the lighters for conveying the cargo to the warehouse. How can it be said upon this testimony that it was incumbent upon the libelant to furnish a lighter in all respects seaworthy? But assuming that it did furnish the lighter, what evidence is there that it was unseaworthy? The presumption of law is that every vessel is seaworthy until the contrary is proven.

[5] The burden of proving that a vessel is unseaworthy lies upon the Insurance Company. Gow on Marine Insurance, page 273; Nome

Beach Lighterage, etc., Co. v. Munich Assur. Co. (C. C.) 123 Fed. 820, 827, and cases there cited. That burden has not been sustained by the latter company. No one witnessed the capsizing of the barge; but it appears that on the night in question there was a gale blowing, and, although the Sardhana and the barge were not exposed to the fury of the storm, nevertheless there was a heavy swell in the section of the harbor in which the vessel, with the barge moored to its side, was anchored. The Insurance Company claims that the barge could not have capsized unless it was in a leaking condition by which water was permitted to enter the hold. But the barge was placed in dry dock shortly after the accident, and a survey thereof revealed that the timbers were sound and the barge did not leak. But suppose the lighter was unseaworthy, how would that fact relieve the Insurance Company from liability unless with respect thereto there was some neglect or misconduct on the part of the libelant which was not alleged in the answer and has not been proven? We look in vain through the insurance policy to find any warranty on the part of the libelant that either the vessel or the lighter employed to deliver the cargo into the warehouse was seaworthy. Now, while there is an implied warranty on the part of the owner of cargo that the vessel is seaworthy at the commencement of the voyage, there is no such implied warranty with respect to a lighter employed to transport the cargo from the vessel to the warehouse at the end of the voyage. 2 Arnould Marine Ins. § 689; Lane v. Nixon, 1866, L. R. 1 C. P. 412.

[6] The case of The Galileo (Aspinall's Mar. Law Cas. advance sheets, vol. 12, pt. 6, page 461; s. c., in House of Lords, Law Rep. A. C. 1915, page 199), is cited by the Insurance Company as authority for the rule that an implied warranty of seaworthiness extends to all lighters used in the course of transshipment of a cargo, and this irrespective of whether the lighters are furnished by the shipper or not, and irrespective of whether the contract of shipment contain a clause that the carriage of goods in such lighter is to be "at the risk of the owner of the goods." The action in that case was by the shipper against the shipowner to recover damages for a breach of a contract of affreightment to carry and deliver certain articles of machinery from New York to Norrkoping, in Sweden. The bill of lading was a through bill of lading, providing that the goods were "to be delivered in like good order and condition at the port of Hull and to be thence transshipped at the ship's expense and the shipper's risk to the port of Norrkoping," and it was thereby mutually agreed that the carrier should have "liberty of conveying the goods in crafts and/or lighters to and from the steamer at the risk of the owners of the goods," and that he should not be liable "for risk of craft or transshipment." The freight was a through freight rate; but the goods were to be transshipped at Hull into another vessel belonging to the shipowner for carriage to Norrkoping. When the vessel reached Hull there was no steamer ready to immediately carry the goods to Norrkoping, and thereupon the defendants hired a lighter and placed the goods therein whilst waiting to be transshipped in another of the defendants' steamers for conveyance to Norrkoping. The light-

er was left unattended in a crowded harbor. Two or three nights after the goods went over the side of the vessel the lighter foundered. Part of its planking was rotten, and it was found upon examination that a hole had been punched in its side apparently by a boat hook from a neighboring lighter. The result was that plaintiff's machinery was damaged. The defendants had received the plaintiff's goods on board their vessel in New York in "apparent good order and condition." Under the terms of the through bill of lading they were obligated to deliver these goods at Norrkoping in "like good order and condition." The duty of transshipment at Hull rested upon the shipowner, and this duty was accompanied with the corresponding duty to care for the shipper's goods and avoid negligence. This they failed to do, and it was found as a fact that the defendant was negligent in making the transshipment of the goods at Hull. If there was an implied warranty that the lighter was seaworthy, it rested equally upon the shipper and the shipowner, but the primary and underlying contractual obligation rested upon the shipowner to care for the shipper's goods and deliver them in good order and condition at Norrkoping, and it was for the breach of this obligation that the shipowner was held liable. The decision does not, in our opinion, extend the law of implied warranty respecting the seaworthiness of lighters at the end of a voyage, and manifestly it has no bearing upon the contractual obligation of an insurance company to indemnify the insured against "all perils, losses and misfortunes that have or shall come to the hurt, detriment and damage of the aforesaid subject-matter of this insurance or any part thereof."

[7] 3. Lastly, it is contended that the libelant cannot recover in any event: First, because it has not been shown that the creosote was lost; and, second, because the creosote, if lost, was not on board the vessel at the time of the fire, and hence the particular average warranty is not applicable. These claims are based on testimony tending to show that all of the creosote which leaked from the drums during the voyage remained in the bottom of the ship and was pumped out and delivered to the libelant at the time of discharge of the cargo. But the great preponderance of the evidence is against this testimony, and conclusively shows that all of the creosote shipped at London was not delivered to the libelant. The marine surveyor, Walker, so found in his survey. It is true about 4,000 gallons of creosote were pumped from the ship's limbers and delivered to the libelant; but it was found that with this addition there still remained a shortage of 56,267.2 gallons. With respect to this shortage, the marine surveyor testified that in the course of his investigations he was told by the mates of the Sardhana, and also by members of the crew thereof, that the creosote was pumped overboard while the vessel was at sea. But the Insurance Company contends that, conceding that the creosote was pumped overboard while the vessel was at sea, the libelant cannot recover for its loss because the creosote was not on board the vessel at the time of the fire, citing the cases of Thames & Mersey Marine Ins. Co. v. Pitts, Law Reports, Q. B. Div. (1893) vol. 2, p. 476, and The Alsace Lorraine, 69 L. T. Rep. page 261.

Neither of the cases cited are applicable to the facts of this case. In the former, the portion of the cargo for which recovery was sought had never been aboard the vessel, but was in a lighter awaiting the arrival of the vessel at the time the latter "stranded"; in the latter case, at the time the vessel "stranded" the whole of the cargo had been placed on shore at a port of refuge for the purpose of having the vessel repaired.

The policy of insurance in the present case is an English policy, and any controversy respecting its terms must, of course, be determined by the law of that country. London Assurance v. Companhia de Moagens, 167 U. S. 149, 162, 17 Sup. Ct. 785, 42 L. Ed. 113.

"The English courts have held, and do now hold, that the expression 'free of particular average unless the vessel be stranded', meant that if a loss occurred during the adventure, although from a cause not related in any way to the stranding of the ship, the insurers were liable upon the general language of the policy. * * * Although the original language of the memorandum confined the exception to a stranding of the ship, it was afterwards extended so as to read, 'free of particular average unless the vessel be sunk, burned, stranded or in collision.' The same rule applies to all, and if the vessel be either sunk, burned, stranded or in collision, it is sufficient to render the insurer liable, although the loss does not result therefrom." London Assurance v. Companhia de Moagens, supra.

The decree of the court below is affirmed.

CLARK v. BELT.

(Circuit Court of Appeals, Eighth Circuit. March 16, 1915.)

No. 4014.

1. CONTRACTS ⊜10—VALIDITY—MUTUALITY.

A contract for an exchange of real estate, although conditioned on the acceptance of one of the parties after examination of the property of the other, is not void for want of mutuality, where after such examination he accepts and at the request of the other party makes advance payment of the difference agreed upon in the contract between the value of the two properties.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 21–40; Dec. Dig. ⊜10.

Mutuality in contracts, see notes to American Cotton Oil Co. v. Kirk, 15 C. C. A. 543; Oakland Motor Car Co. v. Indiana Automobile Co., 121 C. C. A. 326.]

2. CONTRACTS ⊜145—CONSTRUCTION AND OPERATION—PLACE OF MAKING CONTRACT.

The place of a contract is the place at which the last act was done by either of the parties essential to a meeting of minds.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 728; Dec. Dig. ⊜145.]

3. COURTS ⊜372—FEDERAL COURTS—AUTHORITY OF STATE DECISIONS.

In the absence of any state statute on the subject, the measure of damages for breach of a contract to convey land is a matter of general law, upon which the federal courts exercise their independent judgment.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 977–979; Dec. Dig. ⊜372.

Conclusiveness of judgment between federal and state courts, see notes to Kansas City, Ft. S. & M. R. Co. v. Morgan, 21 C. C. A. 478; Union &

Planters' Bank of Memphis v. City of Memphis, 49 C. C. A. 468; Converse v. Stewart, 118 C. C. A. 215.]

4. VENDOR AND PURCHASER ⊂=351—ACTION BY PURCHASER FOR BREACH OF CONTRACT—MEASURE OF DAMAGES.

Under the rule of the federal courts, the measure of damages for breach of a contract to convey land is the difference between the contract price and the market price at the time of the breach.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 1017, 1047–1058; Dec. Dig. ⊂=351.]

5. APPEAL AND ERROR ⊂=854—HARMLESS ERROR—ERRONEOUS GROUND OF DECISION.

A judgment will not be reversed because rendered on an erroneous theory on proceedings in error by the adverse party, where the findings of fact on which it was based entitled the prevailing party to a larger judgment.

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

Hook, Circuit Judge, dissenting.

In Error to the District Court of the United States for the District of South Dakota; James D. Elliott, Judge.

Action at law by Denton Deo Belt against Stanley L. Clark. Judgment for plaintiff, and defendant brings error. Affirmed.

Sterling & Clark, of Redfield, S. D., for plaintiff in error.

Tinley, Mitchell & Pryor, of Council Bluffs, Iowa, and W. F. Bruell, of Redfield, S. D., for defendant in error.

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

POPE, District Judge. Belt owned property in the city of Essex, Iowa. Clark had a farm in Spink county, S. D. They exchanged. By the terms of their agreement the South Dakota farm was to be taken at $32,000, subject to a mortgage of $16,800, thus leaving the net equity $15,200. The Iowa town property was placed at $18,500, with a mortgage of $4,000, making the net equity $14,500. To cover the difference of $700 in the two equities, resulting from the valuations thus placed, Belt was to pay Clark $700 in cash. The contract gave Belt one-third of all crops raised on the farm, evidently for the current year, 1908, but Belt was to assume a contract outstanding for 150 acres of breaking at the rate of $2.75. While there is some ambiguity in the contract as to the date when the papers were finally to be delivered, it seems reasonably clear that November 1, 1908, was the final date for such delivery. The contract was made by an agent of Clark on his behalf, and was subject to his approval of the trade, as it was subject also to an inspection of the South Dakota land by Belt. Clark subsequently approved the trade, but upon the further condition that Belt was to let Clark have $800 on or before July 2, 1908, and thus in advance of the exchange of deeds. This amount, it will be noted, was $100 more than the cash payment which Belt ultimately was to make to Clark, but the difference was to be protected by a lien given by Clark to Belt on part of the town property received on the exchange. This proposition was agreed to by Belt after an inspection by him of the

South Dakota property, and the sum of $800 was, pursuant to such agreement, paid to Clark by Belt in July, 1908. On October 31, 1908, Belt tendered Clark the necessary papers covering the town property, and also the sum of $700 as stipulated, and demanded a deed to the South Dakota property in return. Clark had, however, previous to this, transferred the property to another, and refused to make the deed in return. Following the refusal of Clark to make title, Belt filed this suit for damages for the breach of the contract. The damages claimed were in three items:

(a) The $800 advanced in July, 1908, and for which, with interest, a return is demanded.

(b) A number of items representing the value of one-third of the crops raised in 1908 on the South Dakota property, and aggregating $1,517.53.

(c) The difference at the date of the breach between the value of the South Dakota property and the Iowa property. Upon this point the allegation of the complaint is that the South Dakota property was, at the date of the breach, worth $25,184, with an incumbrance of $16,800, leaving an equity, which would have come to the plaintiff had the trade gone through, of $8,384. The actual value of the Iowa property at the date of the breach is alleged to have been $8,500, allowing against which an incumbrance of $4,000, there was left $4,500 as the equity which would have gone to the defendant, or a difference of $3,884 in favor of plaintiff had the trade been consummated.

These three items aggregate $6,201.33, for which judgment was asked, with interest from November 1, 1908. The answer sets up various allegations of fraud by Belt in pointing out the town property, and which, it is claimed, relieved Clark from a compliance with his contract. There is in the answer a tender back of the $800 paid in July, 1908. Upon the trial, which by stipulation was to the court, there were findings against the defendant on the issue as to fraud, and a finding that plaintiff should recover. The court in assessing the damage allowed the $800 advanced, and also the value of one-third of the crops grown on the land in the season of 1908, which value was fixed at $1,207.06. The court declined to allow anything for the alleged loss to plaintiff as contained in allegation (c) above set forth. There is a finding by the court, however, that on or about September 1, 1908, the South Dakota equity was worth $8,384, and the Iowa equity amounted to $3,800, thus leaving a balance of $4,584 in favor of the South Dakota property had the trade been effected.

There is no bill of exceptions in the case, so that the only question is as to the sufficiency of the facts found to support the judgment. R. S. 700. In the absence of the evidence, of course, the findings of fact must be deemed to have been properly supported at the trial.

[1] The point is made against the judgment below that the arrangement was void for lack of mutuality in that the acceptance of the South Dakota property by plaintiff was left dependent upon his being satisfied with it upon inspecting it, and particularly because the contract provided that "if found [by Belt] to be otherwise than as represented or as understood by said second party [Belt] this agreement to

be null and void." It is urged that a contract leaving it to the understanding of one of the parties as to what was represented was without binding effect upon him, and bound the one without binding the other, and was thus lacking in mutuality. The trade, however, was not closed upon that basis. It appears from the record that plaintiff did inspect the South Dakota land, and was satisfied therewith, and that defendant thereupon made a proposition by which the trade was closed upon the further consideration that $800 should be paid down in July, instead of awaiting the exchange of papers. While the original transaction was more or less one of negotiation on each side, there was created by the later transaction a condition binding upon all concerned, and a final situation characterized by mutuality.

It is also said that the contract is too indefinite for enforcement; that it fails, for example, to state in what year the crops referred to in the contract were to be raised; that it does not prescribe the date for the delivery of the deeds; that it is not sufficiently definite as to when the breaking of the 150 acres was to be done, or as to the incumbrance on the Essex property. The trial court, with all the surrounding circumstances before it, seems to have had no difficulty in ascertaining that the year for which crops mentioned in the contract were to be raised was the current year, to wit, 1908; that the date by which exchange of deeds was, at all events, to be effected, was November 1, 1908, and that as to the other matters upon which uncertainty is contended for, there was no difficulty in ascertaining the intent of the parties. We entertain no doubt of the correctness of the court's findings upon these points. Indeed, in the absence of the testimony, we are in no position to question them.

It is urged that there should have been no judgment in favor of plaintiff for the $800 advanced for the reason that this amount was tendered before suit. There is no proof, however, of a tender, and no finding of such, and it is not pretended that the tender included interest, so that there was no obligation on plaintiff to have accepted this in satisfaction of his claim.

The chief contention, however, upon the record is one of more substance, and goes to the amount of damages as found by the court. As we have seen, the damages allowed was the $800 item, with interest from July, 1908, and also $1,207.06, the value of one-third of the crops grown upon the South Dakota farm in the summer of 1908. The first item was, in view of what we have said, clearly a proper allowance. But, what as to the second? This involves a consideration of questions not entirely free from difficulty. The primary question in determining this is whether this was a South Dakota or an Iowa contract. If a South Dakota contract, the matter of damages was controlled by the following statute of that state:

"The detriment caused by the breach of an agreement to convey an estate in real property, is deemed to be the price paid, and the expenses properly incurred in examining the title and preparing the necessary papers, with interest thereon; but adding thereto, in case of bad faith, the difference between the price agreed to be paid, and the value of the estate agreed to be conveyed, at the time of the breach, and the expenses properly incurred in preparing to enter upon the land."

This statute is cited and applied in Dal v. Fischer, 20 S. D. 426, 107 N. W. 534. If it be a South Dakota contract, then the whole matter is governed by the statute above quoted, for in the presence of a state statute regulating the measure of damages, the duty of the federal courts ends with the enforcement of such statute. Under this statute, the only amount recoverable, unless there was bad faith, is the price paid, to wit, $800, with interest. In the presence of bad faith, which, however, is not here in terms found, there would be added the difference between the price agreed to be paid to wit, the Iowa property and $700, and the value of the estate agreed to be conveyed, to wit, the South Dakota property and one-third of the crop. Since the judgment of the court does not conform to either of these measures of damage, it is clearly erroneous if tested by the South Dakota statute. But is this a contract of that state? To determine this, we must, of course, go to the findings, and while these are lacking in fullness, it seems reasonably clear that it is an Iowa contract.

[2] The test of the place of a contract is as to the place at which the last act was done by either of the parties essential to a meeting of minds. Until this act was done there was no contract, and upon its being done at a given place the contract became existent, and became existent at the place where the act was done. Until then there was no contract. 2 Wharton on the Conflict of Laws (3d Ed.) § 422a. Tested by this rule, this was an Iowa contract. Clark ratified the act of his agent only upon the condition that Belt should agree to something further, to wit, the advancement in July, 1908, of $800 towards the purchase money. Until this was accepted by Belt there was no contract. The findings show that Belt at all times during 1908 resided in Iowa, so that presumably any acceptance by him was in Iowa, and thus the contract was born in Iowa. The same result is reached by testing the matter from the standpoint of where the obligation was to be performed, for this, as to the effect of a breach, is the material consideration where the performance is to be at a place different from the place of the contract. In Scudder v. Union National Bank, 91 U. S. 406, 23 L. Ed. 245, it is said:

"Matters bearing upon the execution, the interpretation, and the validity of a contract are determined by the law of the place where the contract is made. Matters connected with its performance are regulated by the law prevailing at the place of performance. Matters respecting the remedy, such as the bringing of suits, admissibility of evidence, statutes of limitation, depend upon the law of the place where the suit is brought. Andrews v. Pond, 13 Pet. 65 [10 L. Ed. 61]."

The performance by Clark, for the default of which he became liable in damages to Belt, was the delivery of a deed to Belt. As above stated, Belt was a resident of Iowa all through 1908, so that the delivery to him was there, and the performance by Clark was thus to be in Iowa. So that, from either standpoint, whether the place of the making of the contract, or the place of performance, its locus was in Iowa.

If, as we have seen, this be an Iowa contract, then the South Dakota statute upon the measure of damages is to be eliminated from consideration, and we must seek elsewhere for the rule fixing the amount. There is no statute in Iowa upon the subject. It seems to be mutually

conceded in the briefs that the state rule in Iowa is the same as in South Dakota. This we deem far from clear. The following line of authorities from the Iowa Supreme Court indicate a more liberal rule in favor of the vendee than is prescribed by the Dakota statute: Foley v. McKeegan, 4 Iowa, 1, 12, 66 Am. Dec. 107; Sweem v. Steele, 5 Iowa, 352; Sawyer v. Warner, 36 Iowa, 333; Burdick v. Seymour, 39 Iowa, 452; Yokum v. McBride, 56 Iowa, 139, 142, 8 N. W. 795; Warren v. Chandler, 98 Iowa, 238, 242, 67 N. W. 242; Conner v. Baxter, 124 Iowa, 219, 227, 99 N. W. 726; Eggert v. Pratt, 126 Iowa, 727, 102 N. W. 786.

[3] But we deem it unnecessary to enter upon a determination of the state rule in Iowa. The matter, in our judgment, is one of general jurisprudence, and upon it the federal courts exercise their independent judgment. Swift v. Tyson, 16 Pet. 1, 10 L. Ed. 865; Oates v. National Bank, 100 U. S. 239, 25 L. Ed. 580; Railroad Co. v. National Bank, 102 U. S. 14, 14 L. Ed. 26; Hambly v. Bancroft (C. C.) 83 Fed. 444; Dygert v. Vt. Loan & Trust Co., 94 Fed. 913, 37 C. C. A. 389; Bancroft v. Hambly, 94 Fed. 975, 36 C. C. A. 595; L. Bucki & Son Lbr. Co. v. Fidelity & Deposit Co. of Md., 109 Fed. 393, 48 C. C. A. 436; Gordon v. Ware National Bank, Mass., 132 Fed. 444, 65 C. C. A. 580, 67 L. R. A. 550; Woldson v. Larson, 164 Fed. 548, 90 C. C. A. 422; Chicago & N. W. Ry. Co. v. Kendall, 167 Fed. 62, 93 C. C. A. 422, 16 Ann. Cas. 560; Snare & Triest Co. v. Friedman, 169 Fed. 1, 94 C. C. A. 369, 40 L. R. A. (N. S.) 367; Norfolk & P. Traction Co. v. Miller, 174 Fed. 607, 98 C. C. A. 453; Western Union Telegraph Co. v. Burris, 179 Fed. 92, 102 C. C. A. 386; Mechanics' Natl. Bank v. Coleman, 204 Fed. 25, 122 C. C. A. 338; Hartford Fire Ins. Co. v. Chicago, Milwaukee & St. P. Ry. Co., 174 U. S. 91, 20 Sup. Ct. 33, 44 L. Ed. 84.

[4] The rule of the federal courts was stated as long ago as Hopkins v. Lee, 6 Wheat. 109, 118 (5 L. Ed. 218), as follows:

"In the assessment of damages, the counsel for the plaintiff in error prayed the court to instruct the jury that they should take the price of the land, as agreed upon by the parties, in the articles of agreement upon which the suit was brought, for their government. But the court refused to give this instruction, and directed the jury to take the price of the lands, at the time they ought to have been conveyed, as the measure of damages. To this instruction the plaintiff in error excepted. The rule is settled in this court that in an action by the vendee for a breach of contract on the part of the vendor, for not delivering the article, the measure of damages is its price, at the time of the breach. The price being settled by the contract, which is generally the case, makes no difference, nor ought it to make any; otherwise the vendor, if the article has risen in value, would always have it in his power to discharge himself from his contract, and put the enhanced value in his own pocket. Nor can it make any difference in principle whether the contract be for the sale of real or personal property, if the lands, as is the case here, have not been improved or built on. In both cases, the vendee is entitled to have the thing agreed for, at the contract price, and to sell it himself at its increased value. If it be withheld, the vendor ought to make good to him the difference."

This has never been departed from in the United States courts, but was adhered to by the Supreme Court of the United States as recently as Harten v. Loffler, 212 U. S. 397, 29 Sup. Ct. 351, 53 L. Ed. 568, in

which case it is held that where the vendee sues for breach of a contract to sell real estate, and the benefit of the business and good will as well, the measure of damages is the difference between the purchase price and the market value. This we understand to be also the weight of state authority in the United States. Flureau v. Thornhill, 2 W. Bl. 1078, the case which in England confined damages strictly to the return of the purchase money with interest, has never found favor in this country. 2 Sutherland on Damages (3d Ed.) 579 et seq.; Arensten v. Moreland, 122 Wis. 167, 99 N. W. 790, 65 L. R. A. 973, 106 Am. St. Rep. 951, 2 Ann. Cas. 628.

Applying therefore, the rule in the federal courts, may the conclusion of the trial judge as to the matter of crops be sustained? The allowance of profits on crops, while withholding the loss to plaintiff arising out of the difference in value between the real estate to be received and that to be given in exchange, impresses us as illogical. If one is to be given, it would seem that both should be given. If plaintiff lost the profits on the crops, and if this, as the court held, was a legitimate item of damage, he, having also lost the difference in the value of the land, is entitled to recover that. The profits arising from the land itself belong to the plaintiff no less than the increment from the soil. Applying the federal rule to the finding, the plaintiff was entitled to recover just what he lost by defendant's default, i. e., the amount he would have received, less the consideration he would have had to pay to be entitled to receive it. The amount he would have received, had the trade gone through, was the South Dakota equity, worth $8,384, one-third of the crop, found by the court to be worth $1,207.06, and the $800, with interest advanced upon the purchase price. The expenditure he would have been called upon to make, had the trade gone through, was a transfer of the Iowa equity, valued at $3,800, and the $700 purchase price contracted for. We eliminate from consideration either way the sum for breaking the land, since it is not shown that the land was ever broken, or would ever have been broken, had the trade gone through. Casting up the foregoing items, it will be found that upon the law and the findings, plaintiff, Belt, is entitled to more than was given him by the trial court.

[5] It is true that he can have no relief on that question, for he has not appealed. It is also true that the judgment below proceeded upon a wrong theory, in that it allowed items to plaintiff without making a corresponding charge against him, but while the process was wrong, the result attained was not in excess of what is right. Under R. S. § 700 (Comp. St. 1913, § 1668), the only question for our determination is whether the findings of fact justify the judgment. We find that they do so, and more. With that ascertained, our duty ends. The matter thereupon falls within the familiar rule that a wrong reason for a right conclusion does not justify disturbing the latter.

In reaching this conclusion we have not overlooked the contention of the defendant that the contract is an entire one, and that to allow the purchase price as a credit in behalf of defendant when there is awarded plaintiff only a part of the results of such purchase, in that the loss on the land is not awarded him, is, in effect, to divide the con-

tract into segments, and, contrary to the intention of the parties, to apply the purchase price proceeding from Clark in payment of less than plaintiff should receive under the contract. But this is not a matter of which defendant can complain. If, by reason of an error in the judgment below, of which plaintiff is not complaining, he has received less than should have been awarded him, that affords him no ground for exception. We hold that under a proper view of the matter the plaintiff, upon being charged with the consideration he would have had to pay, to wit, the payment of $700 and the giving of a deed covering his Iowa property, would have been entitled to receive the South Dakota property, and the profit on the crops, and also the payment back of $800. That he is getting less than this under the trial court's judgment is a matter for complaint, not by the defendant, but by plaintiff. The situation is one in which the contract is enforced as an entirety, but plaintiff in that enforcement has not gotten all to which he was entitled, and of this he is not complaining.

There seems to be some hint in the findings of the court that the award for crops was made upon the theory that plaintiff became, in July, 1908, the equitable owner of the property, and that as such owner the value of crops raised upon his land went to him. But that theory, carried out, would give him the entire value of the crops. This, however, is not a suit to recover as the owner, but to recover by virtue of a contract which the other party has broken. He had no equities save such as were conferred by his contract, and no ownership except as was thus given him.

Upon a consideration of the whole case, we are, for the reasons stated, of the opinion that the judgment below should be affirmed.

HOOK, Circuit Judge (dissenting). I do not think the conclusion of the court accords with good appellate practice. Belt sued Clark for breach of contract of sale and purchase of land in South Dakota and one-third of the crops of the year. Belt was given judgment for the full value of the one-third of the crops. He got nothing on account of the land, but did not appeal. Clark, the defendant, appealed from the award as to the crops. We all agree Clark has good cause for complaint on that score, and that the measure of damages applied was erroneously excessive, but my Brothers nevertheless condone the erroneous excess to Belt by finding the trial court erred also as to the land. Whether there was error as to the land depends upon the place of the contract. South Dakota has a statute definitely prescribing the measure of damages for breach of contract for sale of land. If the contract was made there where Clark lived, instead of in Iowa where Belt resided, the South Dakota statutory rule would apply, and the decision of the trial court on the land item would be right. The local statutory rule of the state would, in such case, be applied in the federal court. The trial court assumed that the South Dakota rule of damages also prevailed in Iowa, and therefore it made no finding upon the issue as to the place of contract. The brief of Belt's counsel also contains an explicit concession that the rule is the same in both states. But to escape the South Dakota statute my Brothers conclude that the contract was not made there, but was made in Iowa. They reach

that conclusion by inferring that certain acts with respect to the contract were done in Iowa solely because Belt, the plaintiff, resided there. And this though no evidence is shown in the record, and, as already stated, the trial court made no finding upon the issue. Having located the contract in Iowa, a rule of damages differing from that of South Dakota is applied. It seems quite plain to me the case should be sent back and the parties given a chance to try the issue of fact upon which their rights depend. The practice is well settled. Graham v. Bayne, 18 How. 60, 63, 15 L. Ed. 265; The E. A. Packer, 140 U. S. 360, 365, 11 Sup. Ct. 794, 35 L. Ed. 453. "Inferences will not be made to supply omitted findings of fact." Chief Justice Marshall in Barnes v. Williams, 11 Wheat. 414, 6 L. Ed. 508. Little Miami R. Co. v. United States, 108 U. S. 277, 2 Sup. Ct. 627, 27 L. Ed. 724, like the case at bar, went up on a finding of facts. After speaking of certain items of depreciation the court said:

"For this reason we are unable to decide whether these losses, or any part of them, should be deducted. As the omission to make the finding sufficiently specific in this particular undoubtedly arose from the fact that the court ruled as a matter of law that no deductions could be made on account of losses of this character, we will remand the cause, so that further inquiry may be had on that point."

In Murdock v. Ward, 178 U. S. 139, 149, 20 Sup. Ct. 775, 44 L. Ed. 1009, it was said:

"As, however, the parties proceeded on a mutual mistake of law, we think the practical injustice that might result from an affirmance of the judgment may be avoided by reversing the judgment at the cost of the plaintiff in error, and sending the cause back to the Circuit Court with directions to proceed therein according to law."

ARGO S. S. CO. v. BUFFALO S. S. CO.

(Circuit Court of Appeals, Sixth Circuit. May 14, 1915.)

Nos. 2555–2558, 2591, 2592, 2678.

1. COLLISION ⇐102—STEAMSHIPS MEETING—CONCURRING FAULTS.

A collision on the Detroit river on a calm and clear night, in an 800-foot channel, between two meeting steamships, *held* due to concurring faults on the part of both vessels; the up-bound vessel being in fault for failing to maintain a proper lookout at and after the time the passing agreement was made and for inattentive navigation thereafter, and the down-bound vessel also being in fault in that, although the master thought such passing dangerous and blew an alarm, he accepted the signal without alteration of his helm or reducing speed to bare steerageway, as required by rules 23 and 26 of the Navigation Rules for the Great Lakes (Act Feb. 8, 1895, c. 64, § 1, 28 Stat. 649 [Comp. St. 1913, §§ 7933, 7936]).

[Ed. Note.—For other cases, see Collision, Dec. Dig. ⇐102.

Signals of meeting vessels, see note to The New York, 30 C. C. A. 630.]

2. ADMIRALTY ⇐70—PLEADING—VARIANCE.

Under the liberal rules of practice prevailing in the admiralty courts, the failure of a party to allege in his pleading a fact which proves material, where it was not designedly omitted, and where it was shown by

evidence introduced without objection, will not prevent its consideration by either the trial or appellate court.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 544–556; Dec. Dig. ⊂⊃70.]

Appeals from the District Court of the United States for the Eastern District of Michigan; Arthur J. Tuttle, Judge.

Suit in admiralty by the Buffalo Steamship Company, as owner of the steamship Stephen M. Clement, for limitation of liability for a collision with the steamship E. L. Fisher; the Argo Steamship Company, claimant. From a decree holding the Clement without fault, the Argo Company, the National Tube Company, the Drake Coal Company, Jennie M. Auhl, administratrix, Henry C. Smith, administrator of the estates of Lewis Sugden and Kate Sugden, deceased, and Thomas W. Stock, damage claimants, appeal. Reversed.

Between the hours of 11 and 12 o'clock on the night of May 4, 1911, the steamers Stephen M. Clement and E. L. Fisher collided in the Detroit river at a point near what is known as Grosse Isle north channel range, between its crossing with the south channel range of that name and its intersection with Grassy Island south channel range. The Clement was down-bound with a cargo of iron ore, and the Fisher was up-bound with a cargo of soft coal and a deck cargo of steel rails; and the collision resulted in the sinking of the Fisher, the deaths of three, and injuries to another of her crew, with substantial damages to the ship's cargoes of coal and steel rails.

The Buffalo Steamship Company, as owner of the Clement, filed a petition in the court below, claiming the benefits of sections 4283, 4284 and 4285, with their amendments and supplements, of the Revised Statutes (Comp. St. 1913, §§ 8021–8023), and contesting liability of either the petitioner or the Clement for any of the losses or injuries caused by the collision. Upon surrender of the ship, her appraisal was fixed at $247,381.73, and stipulation covering such appraisal was substituted; monition and publication addressed specially to the Argo Steamship Company, as owner of the Fisher, the owners of the cargoes, and all others claiming damages, were issued and made, citing such owners and other persons to appear in the court below and make proof of their respective claims; and the usual restraining order was allowed. The petition also set out the petitioner's version of the collision, and charged the Fisher with being solely in fault. The claimants presented their respective claims, and also filed separate answers and cross-libels setting up the damages they respectively sought in consequence of the collision and asking judgments for such damages against the owner of the Clement. In the court below the testimony and proofs were taken in the presence of the court and confined to the question of fault as respects the two colliding ships. Decree was entered finding the Fisher solely in fault and dismissing the several claims of the cross-libelants, with costs. The cross-libelants appeal under assignments which are limited to errors charged against the ruling so made.

F. S. Masten, of Cleveland, Ohio, for appellant Argo S. S. Co.

H. S. Harrington, of New York, N. Y., for appellant National Tube Co.

F. C. Bosworth, of Cleveland, Ohio, for appellant Auhl.

W. H. Gilman, of Watertown, N. Y., for appellant Smith.

H. D. Goulder, of Cleveland, Ohio, for appellee.

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

WARRINGTON, Circuit Judge (after stating the facts as above). [1] Our study of the record has convinced us that both steamships

were in fault. The district judge had the advantage, it is true, of seeing and hearing the witnesses. The investigation before him took a wide range both as to matters of fact and expert opinions. The steamships, the portion of the Detroit river and its sailing lines and lights which were involved after the ships each became concerned with the navigation of the other, the acts and omissions of the controlling officers and men of each ship during that period, and the relative steering qualities of the vessels, together with expert opinions as to means and methods of controlling them (especially the Fisher) under conditions stated and claimed by the respective crews, were described in great detail; and the cargoes were incidentally shown both in kind and tonnage. The testimony of the two navigating crews resulted as usual in two distinct and opposed theories; and, of course, if each ship had been navigated along the course her crew described, the admitted accident could not have taken place. In these circumstances the learned trial judge deemed it safer to determine which theory was "the more reasonable or most likely to be true," than to pass upon the credibility of the witnesses. It must be conceded that the problem was not one of easy solution. Some of the facts, however, are not in material controversy, and we think they inevitably lead to controlling consequences.

1. *Sailing Conditions Favorable.* The navigating conditions were entirely consistent with a safe passing of these ships. Admittedly, the night was clear, and the lights of the ships and on the adjacent shores were alike easily discerned; there were no intervening boats to disconcert the eye and no wind or noises to disturb the hearing; the channel with abundant water was 800 feet in width; and the sailing line was straight and in the center of the channel between the points at which the boats were respectively sighted. In spite of these conditions, surprising difficulties arose soon after each boat had picked up the other. The Fisher was bound up the river and the Clement bound down.

2. *Passing Agreement.* The first difficulty of the case is met here. According to the master of the Fisher, immediately after making the turn from the south to the north Grosse Isle channel range, he sighted a vessel ahead and a little below the Mamajuda lights, which proved to be the Clement, and received from her a one-blast passing signal, to which he responded with a like signal; and an agreement for passing port to port was thus concluded. The master of the Clement admits that a port to port passing agreement was made, though not through an initial signal of one blast from the Clement. He testifies that something else happened before. In one instance, he said when the Clement was above the Mamajuda lights, and, in another instance, when she was a little westward of the north channel Grosse Isle range, he "noticed the Fisher coming up the bend at Fighting Island," and that when she crossed the intersection of the south and north Grosse Isle channel ranges he gave the Fisher "two whistles," but got no answer, and after waiting "a sufficient time" he "blew two more." The master of the Fisher declares he did not hear these signals; but however this may be, the master of the Clement thereupon noticed from her lights that the Fisher was on his starboard, and again that she had turned to her

starboard so as to open her red light to the Clement, which, of course, means that the Fisher was then nearly parallel to, if not on, the north range. He says the Fisher then blew him "one whistle," but that the Clement had not previously given a one-blast signal. Upon this subject the master of the Clement made several statements. In his direct testimony he said:

"When he blowed me the one I checked my steamboat down at once to slow speed and blew him an alarm or an attention whistle, whatever you might call it, to attract his attention, and then as he had gone further over to the eastward, and the boats were so there was no danger, plenty of room to pass by, I answered with the one whistle."

On cross-examination he stated that he thought it safe to accept the Fisher's one-blast signal at the time it was given, but also said:

"I blowed a danger signal to attract his attention, and then answered it to let him know I understood he wanted that side, and was going to let him have it. Q. In other words, you said to him, 'That is dangerous, old fellow, but you can have it if you want it'? A. Yes, sir. Q. What did you blow a danger signal then for? A. To attract his attention. If he had understood me, I said, 'Now, if you want that side, take it, all right, but understand it is dangerous.' Q. To look out for yourself? A. Yes, understand we were agreed on it."

It will be observed that the masters placed the two ships at substantially the same points in the Detroit river at the time each sighted the ship of the other; that they are in harmony as to the exchange of a one-blast signal; but that they differ as to the initial signal, each saying that his one-blast was given in response to a like signal from the other. Further, while both state that when the one-blast signals were exchanged the ships were in situations safely to pass port to port, yet it is plain that the ships could not then have been as far apart as the masters say they were when sighted. At that time they placed the Clement near the Mamajuda lights and the Fisher at the crossing of the two Grosse Isle channel ranges. That portion of the north channel range is 6,000 feet in length. The master of the Fisher testifies that, when the ships exchanged one-blast signals, the Clement was in the neighborhood of three-quarters of a mile away, while the master of the Clement testifies that when the Fisher sounded one blast the Clement was within "five or six lengths" of the Fisher—"2,500 or 2,600 feet or more." Such estimates of distance, it is true, are not very reliable. Yet these masters were men of long experience in navigating the Great Lakes and the Detroit river, and it is hard to conceive that they could have so mistaken the length of the portion of the range they were sailing. This is especially true of the master of the Clement, since he estimated the distance in lengths of his ship and in close correspondence with the distance he gave in feet. We are therefore constrained to believe that the Clement, if not also the Fisher, was well advanced on the Grosse Isle north channel range when the exchange of one-blast signals was concluded; and that the masters are so much at odds concerning both the distance between their ships and the circumstances which led to the exchange of single blasts as practically to destroy the value of their opinions touching the safety of passing port to port. Above all, the repeated admissions of the master of the Clement that

such a passing would be dangerous ought not to escape consideration when it is sought to ascertain the real causes of the collision. Such admissions reveal the effect made upon the mind of an experienced navigator at the inception of the conditions which so quickly culminated in disaster. This is not to exculpate the Fisher. It is in part to test the soundness of the claim of the Clement that she was in no respect at fault. It is not an uncommon thing, it is the rule, to look for causes having their origin at some appreciable and material time before the collision, rather than to search for causes occurring after disaster becomes inevitable. Mr. Justice Clifford reiterated the rule in The Sunnyside, 91 U. S. 208, 209, 23 L. Ed. 302:

"Inability to avoid a collision usually exists at the time the collision occurs; but it is seldom a matter of much difficulty to trace the cause of the disaster to some antecedent omission of duty on the part of one or the other, or both, of the colliding vessels."

3. *The Collision.* Although the master of the Clement did not explain why he believed the port to port passing arangement would be dangerous, it is to be presumed that the conditions were such as to require most careful maneuvering of the ships in order to avoid disaster. In seeking causal connection then between the passing arrangement and the collision, it will be helpful to consider what the relations of the ships were at that time to the channel range, what was then done by both sets of navigators to avert danger, and also the speed of the ships. The navigating officers of the Fisher claim that when the passing arrangement was concluded they had the Grosse Isle north channel range lights astern of the Fisher, and the ship, which turned out to be the Clement, nearly dead ahead, whereupon an order was given and executed to port the Fisher's wheel, and shortly after this order was repeated and obeyed for the purpose of opening the Clement's range lights. The master of the Clement (in connection with a statement that he had shortly before passed certain other ships port to port) said the Clement "was on the north channel Grosse Isle ranges, or a little to the westward, or had been on the range"; again he and his second mate said the compasses of the Clement were then compared and adjusted and a reading taken with relation to the chart course, the one saying this was before the Clement reached the intersection of the Grosse Isle north channel and the Grassy Island ranges, and the other that it was done on the Grosse Isle north channel range; and it may be added that this location of the Clement agrees with the testimony of the navigating officers of the Fisher that when they got the channel range lights over her stern they had the Clement nearly dead ahead. Further, the master of the Clement says that, when the one-blast passing signals were concluded, the Fisher was over his port bow from 150 to 200 feet. He states, however, that he gave no order to his helm at that time, because he did not consider that there was any occasion for such an order. Plainly, then, whether under the testimony the Clement be treated as sailing on the range line, or on a parallel line to the westward, at the time it is said she accepted the Fisher's one-blast signal, the distance between either line continued and the continuation of that of the Fisher, and consequently the degree of safe-

ty or danger in sailing the ships to the point of passing does not definitely appear. The most that can be said of the statement of the master of the Clement that the Fisher stood over his port bow, as stated, is that it tends to corroborate the claim of the Fisher that she ported twice after the conclusion of the passing arrangement; but the reason stated by the master of the Clement for failure to give any order to her helm at that time is not convincing. We have seen that he claims to have checked the Clement down to slow speed and blown an alarm before he accepted the Fisher's signal for a port to port passing. He does not claim, however, to have reduced her speed "to bare steerageway" (Navigation Rule 26, 28 Stat. 649); nor did he accompany his acceptance of the Fisher's signal by a "corresponding alteration" of the Clement's helm (Navigation Rule 23, Id.). Whether the Clement's conduct, then, upon her own showing, should or should not, as matter of law, be tested alone by either or both of these rules, it is certain that her justification in omitting to observe them is essentially dependent upon the opinion of a master who admits the passing arrangement was dangerous. Necessarily the value of an opinion of this master concerning the need of observance or not of these rules would be further affected by the combined speed of the vessels. The speed at which the Fisher was then sailing was about 10 miles an hour. The normal speed of the Clement was the same, and, besides, she had the advantage of the current of the river which was about 1½ miles an hour; but this is to be qualified by the statement of her master that she had been checked down to slow speed, whatever that may in truth mean. Clearly the precautions, if they can be called such, which the navigating officers of these ships were taking to avert danger, are of unusual moment here.

It would be futile to attempt to reconcile the testimony as to what happened as the boats approached the point of collision. The steamers seem to have been kept on the courses they respectively selected upon the completion of the passing arrangement, until it was too late to maneuver effectively to escape danger. Much is said on both sides as to which vessel disrupted the situation. The master of the Fisher testifies that the Clement turned to her port suddenly, and "appeared to be crowding us." And the master of the Clement insists that the Fisher sheered to the westward and across the range line or bow of the Clement, disclosing her green light, but quickly turned back showing her red light and attempted to cross the Clement's bow to the eastward; that, in spite of the Clement's effort to avoid collision, the bluff of her port bow struck the Fisher on her port side aft of the boiler house. The testimony describing these movements of the ships shows a degree of excitement and confusion on the part of the respective navigating crews which was calculated to exaggerate alike their impressions and narrations of the situation and the events. This is seen, for example, in a sudden, though vain, effort of the master of the Fisher to sound a danger signal at the time he claims the Clement was crowding the Fisher. He says the gear fouled and only "two short toots" resulted. The Clement did not regard them as an ordinary two-blast signal, yet responded with two blasts. The confusion is further

shown by repeated and varying orders which were given by the masters to their helms. It would not be helpful to recite these orders, for they were occasioned by and so do not explain the sudden changes in courses ascribed to the respective vessels as before pointed out. The testimony bearing upon these features of the controversy fails to impress us with the belief that the Fisher alone swerved from her course sufficiently to bring the ships into collision. According to the Clement's own version of the situation at the approach of the crisis, the distance between the two ships was not enough, as we view the testimony, to admit of such unusual movements on the part of the Fisher; and an apparently disinterested and competent navigator of long experience on the Great Lakes and the Detroit river testified, with unmistakable candor and much show of reason, that such movements were impossible. It is true that the designs and dimensions of the two vessels materially differ. The Fisher is 220 feet in length with a beam of 40 feet, while the Clement is 480 feet in length with a beam of 52 feet; and, besides, the Fisher was relatively more heavily laden than the Clement. It must therefore be conceded under the testimony that the former was harder to steer steadily and more likely to sheer than the latter. Still the admitted fact of her recovery and return to the eastward through the use of her helm shows that the Fisher was able to overcome the very conditions that are here claimed to have caused her to sheer. This is not to say, however, that the Fisher did not to some extent turn to her port side. We believe she did, and through failure attentively to watch her helm. We are not satisfied, however, that she at any time got beyond the control of her navigating officers. On the other hand, we do not think the Clement was suffered to turn so far to her port side as the Fisher claims; but upon the whole testimony we are led to believe that she turned materially to the eastward rather than that the Fisher both sheered and recovered to the extent claimed. Indeed, if we rightly interpret the evidence touching the Fisher's movements, there is no perceivable way to account for the disaster at all except through a movement of the Clement in material degree to the eastward. It is significant, too, that the collision, though its exact place cannot be located, occurred eastward of the north channel range. This tends to corroborate the testimony that the Clement was "crowding" the Fisher; and we cannot think that the Clement's movement to the eastward is sufficiently explained by the turn it is said she made to avoid the collision.

Furthermore, both of these ships are open to criticism on account of their lookouts. At the time the passing arrangement was concluded, the Fisher's lookout was not at his place of duty; and while the Clement had her lookout in proper position from the time the Fisher was sighted until the collision, the lookout was neither called to testify nor his absence accounted for. The Clement had the right of way at the start (Navigation Rule 24 [Comp. St. 1913, § 7934]) and insists, as we have seen, that she claimed it by calling for a starboard passing. The master of the Fisher qualifies his statement that he did not hear the two-blast signal by admitting that, under the circumstances, he may have heard but one of the blasts of the Clement. The result was, as

already shown, that a passing arrangement was concluded which the master of the Clement regarded as dangerous. In view of the result, it cannot be said either that a starboard to starboard passing would not have avoided a collision, or that, if the Fisher's lookout had been at his proper place, an agreement for such a passing would not have been made. The Fisher at this vital period, and the Clement from the time the ships were sighted, might as well have been without lookouts at all, for, as respects the times mentioned, we are in practical effect required to consider the case as though the ships in fact were in this plight. Surely, in view of rule 28 (Comp. St. 1913, § 7938), such conditions are not consistent with due care on the part of either ship. The Ariadne, 13 Wall. 475, 478, 20 L. Ed. 542; The George W. Roby, 111 Fed. 601, 612, 49 C. C. A. 481 (C. C. A. 6th Cir.); Robinson v. Detroit & C. Steam Nav. Co., 73 Fed. 883, 892, 20 C. C. A. 86 (C. C. A. 6th Cir.). The present question differs from the one in relation to the Ellwood's lookout and passed upon by this court in Great Lakes Co. v. Pittsburgh Co., 222 Fed. 862, May 4, 1915. Under the facts of that case it clearly appeared that the presence of the lookout would have made no difference. The circumstances here are not the same. The passing agreement there had been concluded before the withdrawal of the lookout, but during the corresponding period here the Fisher's lookout was below; and, while the lookout claims to have heard the signals, it is manifest that his post of duty was the better place to hear the controverted signals of the Clement. Further, it is claimed by the Fisher, and not without some evidential support, that the comparison of the compasses of the Clement and their adjustment and reading with relation to the chart course took place and so engaged the attention of the master and second mate while the ship was on the Grosse Isle north channel range; and the Clement offered testimony tending to show that the Fisher could not be kept steadily upon a given course. It hardly need be said that the Clement's lookout was in a position to have rendered material assistance in clearing up all these questions.

[2] If anything more were necessary in respect of the Clement's conduct, it might be added that we think she violated rules 23 and 26. The master of the Clement admits that he gave no order to the ship's helm either at the time of closing the arrangement to pass port to port or until the Fisher sounded the "two short toots" before mentioned; and we have seen that, when these sounds of the Fisher's whistle were given, the ships were well within the zone of danger. It is insisted that rule 23 cannot be employed here to put the Clement in fault, for the reasons that neither the pleadings nor the course pursued in the court below will admit of it. The answering claimants, it is true, did not in their cross-libels distinctly allege the breach of this rule as a fault of the Clement; yet the testimony showing that the rule was not observed was offered and received without objection; and, moreover, the testimony came from the Clement's master himself both as to the dangerous character of the passing arrangement and the failure to observe this rule. We therefore do not see how the consideration or effect of this testimony can be said to have taken the owner of the Clement by surprise either in the court below or here; and, under the liberal rules

of practice prevailing in the admiralty courts, the failure to set up the matter in the pleadings ought not to be allowed to work any injury to the cross-libelants, for such failure was plainly not designed. As Mr. Justice Davis said, in The Steamer Syracuse, 12 Wall. 167, 173, 20 L. Ed. 382, where it was objected that the libel did not specifically charge an antecedent negligence as a fault:

"This is true, and the libel is defective on that account, but in admiralty an omission to state some facts which prove to be material, but which cannot have occasioned any surprise to the opposite party, will not be allowed to work any injury to the libelant, if the court can see there was no design on his part in omitting to state them. There is no doctrine of mere technical variance in the admiralty, and subject to the rule above stated, it is the duty of the court to extract the real case from the whole record, and decide accordingly."

See, also, The Gazelle, 128 U. S. 474, 487, 9 Sup. Ct. 139, 32 L. Ed. 496; Davis v. Adams, 102 Fed. 520, 523, 524, 42 C. C. A. 493, and citations (C. C. A. 9th Cir.). If objection to the testimony had been taken below it is clear that the cross-libels might have been cured by amendment. Pioneer Steamship Co. v. McCann, 170 Fed. 873, 880, 96 C. C. A. 49 (C. C. A. 6th Cir.); Monongahela River Consol. C. & C. Co. v. Shinnerer, 196 Fed. 375, 384, 117 C. C. A. 193 (C. C. A. 6th Cir.). It certainly cannot be safely said that the collision might not have been avoided if the Clement had ported her helm upon closing the passing arrangement, or if her speed had been reduced to bare steerageway. In saying this, we appreciate the language of rule 23, which only exacts an alteration of the helm "whenever required," and also of rule 26, which only requires reduction of the speed to "bare steerageway" when the ships have "approached within half a mile of each other"; and still it cannot be that a master can rightfully omit to alter the ship's helm when he knows that the passing agreement he enters into is dangerous; and, further, this master himself says the ships were within the half-mile limit when the agreement was closed.

It results that in our view the faults found as to the two ships were concurrent in causing the collision, and that the damages must be divided. Since the issues, the testimony, and the assignments relate only to the question of fault and the rulings thereon, as pointed out in the statement, it is neither necessary nor proper to pass upon any of the questions, apart from those determined by the decree itself, that may arise between either of the shipowners and the cargo appellants or those representing death claims or the claim for personal injuries.

The decree (except so far as it accords to the Buffalo Steamship Company the benefit of the limitation of liability under sections 4283, 4284, and 4285, with their amendments and supplements, of the Revised Statutes) is reversed, with costs; and each cause is remanded, with direction to enter a decree in accordance with this opinion and order a reference therein to ascertain the damages.

COLBURN et al. v. UNITED STATES. †

(Circuit Court of Appeals, Eighth Circuit. April 28, 1915.)

No. 4127.

1. POST OFFICE ⊂=48—USING MAILS TO DEFRAUD—SUFFICIENCY OF INDICTMENT.

In an indictment under Rev. St. § 5480, for using the mails in aid of a scheme to defraud, the mailing of the letter or other mentioned article which is the gist of the offense must be pleaded with great certainty as to time, place, and circumstance; but, while the devising of the scheme to defraud is a necessary prerequisite to the commission of the offense, and must be described with certainty sufficient to show its existence and character, it need not be pleaded with all the certainty requisite in charging the gist of the offense.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 67–80; Dec. Dig. ⊂=48.]

2. POST OFFICE ⊂=48—USING MAILS TO DEFRAUD—INDICTMENT—"WORTHLESS."

An indictment for using the mails in furtherance of a scheme to defraud is not bad, for repugnancy or inconsistency, because in describing the scheme to defraud it is first alleged to be to acquire a tract of worthless land, and later that the land so acquired was not worth to exceed $2 per acre; the adjective "worthless" not being a word of absolute, but of relative, signification.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 67–80; Dec. Dig. ⊂=48.]

3. POST OFFICE ⊂=50—USING MAILS TO DEFRAUD—QUESTIONS FOR JURY.

Evidence in support of an indictment for using the mails in carrying out a scheme to defraud, relating to the falsity and fraudulent character of representations made as to the value of land sold by defendants, *held* sufficient to justify the submission of the case to the jury.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 87–89; Dec. Dig. ⊂=50.

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

4. POST OFFICE ⊂=50—USING MAILS TO DEFRAUD—INSTRUCTIONS.

Refusal of instructions requested on trial of defendants, charged with using the mails in furtherance of a scheme to defraud, *held* proper.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 87–89; Dec. Dig. ⊂=50.]

5. CRIMINAL LAW ⊂=811—INSTRUCTIONS—REFUSAL OF REQUESTS.

An instruction is properly refused in a criminal case, which singles out a particular fact or matter and emphasizes it in such a way as to give it undue force, in view of other facts and of the material issue in the case.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1787, 1969–1972; Dec. Dig. ⊂=811.]

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

Criminal prosecution by the United States against George L. Colburn and M. G. Winegar. From a judgment of conviction, defendants bring error. Affirmed.

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

† Rehearing denied August 23, 1915.

Chester H. Krum, of St. Louis, Mo., for plaintiffs in error.

Homer Hall, Asst. U. S. Atty., of St. Louis, Mo. (Arthur L. Oliver, U. S. Atty., of St. Louis, Mo., on the brief), for the United States.

Before SANBORN, ADAMS, and SMITH, Circuit Judges.

ADAMS, Circuit Judge. Plaintiffs in error were convicted in the court below of devising a scheme to defraud and making use of the postal establishment of the United States in its execution. There were two indictments, containing in the aggregate 22 counts. One of them was based on section 5480 of the Revised Statutes, and the other on section 215 of the Penal Code (Act March 4, 1909, c. 321, 35 Stat. 1130 [Comp. St. 1913, § 10,385]), and these were consolidated for the purposes of a trial.

The scheme laid in each count of the indictments was that the defendants should secure in their own names or in the name of a corporation, the Washington & Choctaw Land Company, organized by them and of which they were the chief executive officers, the ownership or control of large tracts of worthless land, and should then falsely pretend and represent to the public, by advertisements in newspapers, letters circulated by mail, and otherwise, that the land was without marshes, swamps, stumps, or brush that would interfere with successful cultivation; that it was rich and fertile and of rapidly increasing value, capable of producing a great variety and large quantities of grains, fruits, nuts, and vegetables; that it presented an attractive colonization scheme, was tributary to a railroad carrying freight and passengers throughout its extent, which would furnish free passage and transportation to all locators; that it was well adapted to home building; that townsites were platted here and there on the land, which were destined to develop rapidly into large and flourishing cities, and other like glittering representations. It is then alleged that all these pretensions and representations were so made with the hope and expectation that the credulous, to whom they or some of them might come, would be attracted by their allurements and induced to purchase tracts of land and pay the price asked for the same, and thus enable defendants to convert the money to be received to their own use without giving any substantial consideration therefor.

The indictments then falsified most of these representations, and alleged, among other things, that, instead of the land being rich, fertile, and productive, and of great or rapidly increasing value, readily producing large quantities of grains, fruits, nuts, and vegetables, as represented, it was sterile, unproductive, and valueless for raising grains, fruits, nuts, and vegetables, and that it was incapable of being made fertile, productive, or valuable, and was not worth to exceed $2 per acre. The indictments in each count thereof alleged that defendants, in executing their scheme, mailed a letter which was there set out in full.

The legal sufficiency of the indictments was not questioned by demurrer or otherwise, but on arraignment the defendants entered a plea of not guilty, and the trial on the issues of fact so joined proceeded; in its progress their counsel admitted the mailing of the several letters

at the post offices and to the addressees alleged in the indictments to have been mailed in and for executing the alleged scheme to defraud. Many witnesses were produced on the part of the government, and many pamphlets, pictures, advertisements, letters, and other literature, proved to have been prepared or authorized by the defendants, were also shown in evidence, and the defendants on their part produced witnesses and other evidence. Without undertaking the laborious and useless task of analyzing this testimony, it is sufficient to say that that produced on behalf of the government, taken in the aggregate, tended to prove the devising by the defendants of the scheme to defraud as alleged in the several counts of the indictments, and the evidence produced by the defendants tended to disprove the same.

The cause was then submitted to the jury, and a verdict of guilty followed on each of the 8 counts of the first indictment and on each of the 14 counts of the second indictment, and the court sentenced each of the defendants on the first mentioned indictment, founded on section 5480 of the Revised Statutes, to pay a fine of $500 and to be imprisoned in the United States penitentiary at Leavenworth, Kan., for the period of 18 months, and on the second mentioned indictment, founded on section 215 of the Criminal Code, to pay a fine of $500 and be imprisoned in the United States penitentiary at Leavenworth, Kan., for a period of 5 years. A motion in arrest of judgment was then filed by defendants, assigning two reasons therefor: First, that the indictments did not state facts sufficient to constitute an offense; and, second, that they failed to sufficiently advise the defendants of the charge they were called upon to meet, and did not contain averments sufficient to enable them to intelligently prepare for a trial. This motion having been overruled, the defendants sued out this writ of error.

They assign and specify for error that the court erred in denying their motion in arrest of judgment, in denying their motion for an instructed verdict in their favor, in its charge to the jury, in refusing certain requests for instructions, and in its rulings on the introduction of evidence. It is argued that the indictments are bad for repugnancy, in that they contain two inconsistent allegations of substance, and for that reason fail to so advise defendants of the nature and cause of the accusation against them as to enable them to prepare their defense. It is said this repugnancy appears in the allegation that one of the steps in the defendants' scheme to defraud was to acquire a tract of *worthless* land, and in a later allegation that the land so to be acquired was worth at least $2 an acre.

[1] In view of our former opinions in cases involving violation of section 5480, we may confidently summarize the law applicable to such cases as this as follows: (1) The gist of the offense denounced by the statutes involved in this case is the mailing of a letter or other mentioned article in the execution or attempted execution of a scheme to defraud. (2) The devising of a scheme is a necessary prerequisite or condition to the commission of the offense, but in itself constitutes no federal offense. (3) The mailing of the letter or other mentioned article, being the gist of the offense, must therefore be pleaded in an indictment with great certainty as to time, place, and circumstance, so

as thereby to advise the accused of the exact nature and cause of the accusation against him, in order that he may properly prepare his defense and be able to make use of a conviction or acquittal as a protection against a further prosecution for the same offense. (4) While the particulars of the scheme are matters of substance, and must be described with certainty sufficient to show its existence and character, and to fairly acquaint the accused with the particular fraudulent scheme charged against them, the scheme itself need not be pleaded with all the certainty as to time, place, and circumstance requisite in charging the gist of the offense, the mailing of the letter or other article, in execution or attempted execution of the scheme. Brooks v. United States, 146 Fed. 223, 76 C. C. A. 581; Lemon v. United States, 164 Fed. 953, 90 C. C. A. 617; Horn v. United States, 182 Fed. 721, 105 C. C. A. 163.

[2] Guided by the principles enunciated in the foregoing cases, we first take up the question whether the indictments were so repugnant and inconsistent as not to advise the accused of the nature and cause of the accusation against them or enable them to prepare their defense. It is contended that in describing the scheme to defraud it was first alleged to be to acquire, and that defendants did acquire, a large tract of *worthless* land, and later that the land so acquired was not worth to exceed the sum of $2 per acre; and the contention is that the two allegations, one of worthlessness and the other of value, are so inconsistent and repugnant as to vitiate the indictments.

Reading the indictments in their entirety, as we must, we think there is no merit in the contention. No land is absolutely worthless; that is, worthless for any purpose whatsoever. Land may be worthless for agricultural purposes and valuable for pasturage or grazing, or worthless, because swampy or marshy, for the purpose of raising grain, fruit, vegetables, or nuts, and yet valuable, as the proof in this case abundantly shows, for the propagation of crawfish. A building may be worthless for a residence, and at the same time valuable for a stable. In other words, the adjective "worthless" is not a word of absolute, but of relative, signification, and we think the indictments, taken as a whole, clearly advised the defendants of the meaning attributable to the word by the grand jury.

After stating and falsifying the representations alleged to have been made by defendants to the effect that the land was well adapted for agricultural and home-planting purposes, free from swamps, marshes, brush, and timber, the averment follows in close connection that it was unproductive and valueless for raising grain, fruit, nuts, or vegetables, and was incapable of being made fertile, etc. In this way the indictments themselves make it clear in what relation the word "worthless" was employed, namely, worthless for the purposes for which the land was advertised for sale.

The indictments, measured by the rule laid down in Brooks v. United States and other cases cited, disclose, in our opinion, a scheme designed and reasonably adapted to defraud, one that held out to the unsuspecting the hope of obtaining a home and competency on the expenditure of a comparatively small amount of money, and thus appeals to

one of the strongest passions of reasonable men and women. The scheme is explicitly charged to have been fraudulent in its design, and entered upon by the defendants for the purpose of defrauding any person that might be attracted by its promises; and in our opinion its averments, taken as a whole and read with the real purpose to understand its meaning, are quite sufficient to advise the defendants of the nature and cause of the accusation against them and enable them to adequately prepare for trial. In fact, it seems to us that the scheme is laid with much unnecessary detail. The substance of it, as already stated, is that the defendants should secure some worthless land in Mississippi and Alabama, and disseminate through the mail false statements of the availability and value of the land for agricultural, colonization, and home-planting purposes, with the hope and expectation that the credulous to whom such statements and representations should come would, on receiving them, purchase parts of the land and pay money therefor to the defendants, which they could and would appropriate to their own use without giving adequate consideration therefor. The defendants must certainly have understood this charge against them. It presented a plain and unmistakable charge, which they could well have met, had they been able to do so.

We conclude, therefore, that there was no error in denying the motion in arrest of judgment on the ground that the indictments failed to charge an offense.

[3] The next assignment of error is that the trial court erred in overruling defendants' motion for an instructed verdict in their favor. Concerning the merits of this assignment, the main argument is that there was no proof that the lands schemed to be acquired and actually acquired by defendants were worthless, as alleged in the indictments, but, on the contrary, were proved to have had some value. For the reasons indicated in treating of the sufficiency of the indictments, we cannot adopt the suggestions of this argument.

Defendants' counsel also urge in support of this assignment that many of the separate representations made by defendants in their advertisements and correspondence were not proved to have been false in fact, but were proved substantially true; that other representations were proved to have been consonant with an honest purpose and intention on the part of the defendants; and that many of the representations concerned immaterial and trivial matters, permissible as trade talk, or as an expression of an opinion merely. Mr. Justice Brewer in rendering the decision of the Supreme Court in the case of Durland v. United States, 161 U. S. 306, 313, 16 Sup. Ct. 508, 40 L. Ed. 709, said:

"But beyond the letter of the statute is the evil sought to be remedied, which is always significant in determining the meaning. It is common knowledge that nothing is more alluring than the expectation of receiving large returns on small investments. Eagerness to take the chances of large gains lies at the foundation of all lottery schemes, and, even when the matter of chance is eliminated, any scheme or plan which holds out the prospect of receiving more than is parted with appeals to the cupidity of all. In the light of this the statute must be read. * * * It was with the purpose of protecting the public against all such intentional efforts to despoil, and to prevent the post office from being used to carry them into effect, that this

statute was passed; and it would strip it of value to confine it to such cases as disclose an actual misrepresentation as to some existing fact, and exclude those in which is only the allurement of a specious and glittering promise."

In the case of McCarthy v. United States, 187 Fed. 117, 110 C. C. A. 547, the Court of Appeals for the Second Circuit, in considering a refusal of the trial court to direct a verdict in favor of the defendants in a case wherein they were accused of devising a fraudulent scheme to work off a sandy and worthless tract of land called a "park," made use of the following language:

"The first alleged error argued in the brief is that the court refused to direct a verdict for the defendants, on the ground that there was no evidence establishing that any fraudulent scheme had been devised or operated. It is not necessary to reproduce the circulars, maps, and bird's-eye views which were exhibited to persons who responded to the first request. Without containing an absolute misstatement as to any single fact, the whole description was carefully devised to lead prospective purchasers, resident some of them in distant states, to suppose that the 'Park' was practically an extension of the well-known 'Westhampton Beach,' with its churches, schools, electric light," etc., "and that it was a 'suburban district of Greater New York.'"

After then quoting from the decision of the Supreme Court in the Durland Case, the court proceeded as follows:

"Enough was shown to send the case to the jury to decide whether the scheme involved a device reasonably calculated to deceive persons."

In this case we have no occasion to apply the doctrine so broadly. Here many material representations charged in the indictments to have been made by defendants which from their nature were calculated to attract purchasers and which taken together were reasonably adapted to deceive were proved to have been false, and the testimony taken as a whole tended strongly to show a fraudulent scheme on the part of the defendants as charged in the indictments to dispose of land represented by them to be valuable and useful for agricultural purposes which was practically worthless for those purposes. There was, therefore, no error in refusing to instruct a verdict in favor of the defendants.

[4] Defendants' counsel requested the court to give several instructions to the jury, among them one to the effect that the averment of worthlessness of the land as found in the indictments was a material averment, and that the burden was on the government to prove that a part of the scheme was to obtain land which was worthless, and which defendants knew was worthless and without any value, and that unless the government has so proven beyond a reasonable doubt the jury must acquit. This request, for reasons already stated, attributed an erroneous meaning to the adjective "worthless" and was rightly refused. Among them was another thus:

"The law indulges sellers of property in what is commonly known as 'puffing their property,' in order to induce buyers to take it at the highest price obtainable, so it was entirely lawful for the defendants to commend their property in terms of extreme commendation and to indicate that it was capable of great uses in the future and that it had possibilities of even unusual character."

In view of the fact that the charge in the indictments was that the defendants made the representations concerning the land fraudulently and with the intent and purpose of deceiving persons to whom they might come, an instruction telling the jury that the law indulges sellers in "puffing their property" to bring about sales at the highest attainable price, and otherwise as stated in the requested instruction, would have been contradictory to the general scheme of the indictments and fatally misleading, without some modification to the effect that the justifiable "puffing" must have been within the limits of honesty and fair dealing. Without such modification the instruction would have justified the jury in finding the defendants not guilty, however fraudulent their representations might have been. The request was properly denied.

[5] Error is also assigned for the refusal to give other requested instructions, but it appears that the substance or equivalent of those requested was embodied in the main charge to the jury. It was therefore no error to refuse to give them in the language as requested. Moreover, some of these requested instructions singled out a particular fact or matter, and emphasized it in such a way as to give improper force and meaning to it, in view of other facts and of the material issue in the case. Such instructions tend to mislead the jury and should not be given. Perovich v. United States, 205 U. S. 86, 92, 27 Sup. Ct. 456, 51 L. Ed. 722; Weddel v. United States, 213 Fed. 208, 210, 129 C. C. A. 552.

Exception is also taken to a certain expression in the charge of the court to the jury. As to this it is sufficient to say the particular expression criticized is so explained or so related to other parts of the charge as to be inoffensive. The entire charge must be read together, and when so read the matter complained of is unobjectionable.

Error is assigned to the admission of certain evidence over defendants' objections. We have carefully read and considered all the evidence in connection with or relating to that objected to by defendants' counsel, and in view of it all we are unable to say there was any error in the rulings of the court in the particulars complained of.

Finding no reversible error, the judgment of the District Court is affirmed.

OREGON-WASHINGTON R. & NAV. CO. v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. May 26, 1915.)

No. 2470.

MASTER AND SERVANT ⇐13—HOURS OF SERVICE—STATUTORY PROVISIONS.

Act March 4, 1907, c. 2939, § 2, 34 Stat. 1416 (Comp. St. 1913, § 8678), provides that no railroad telegraph or telephone operator shall be permitted to remain on duty more than 9 hours in any 24-hour period at stations continuously operated night and day, and section 3 provides that, in all prosecutions thereunder, the carrier shall be deemed to have had knowledge of all acts of all its officers and agents. A carrier discharged one of its three operators at a station operated continuously, and after

making inquiries to obtain an additional operator, instructed the station agent to work three hours a day as agent, and six hours as telegraph operator, and that he should not work in excess of nine hours. The agent found himself required by the exigencies of the situation to work 12 hours a day as agent in addition to 5 hours as operator. *Held*, a violation of the statute, as such agent was within the prohibition of the statute, and under the circumstances it was not a harsh application of the statute to hold that the company had knowledge of all the acts of all its officers and agents, especially as it would seem that it was charged with actual notice of the agent's excessive service.

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

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

In Error to the District Court of the United States for the Northern Division of the Eastern District of Washington; Frank H. Rudkin, Judge.

Action for statutory penalties by the United States against the Oregon-Washington Railroad & Navigation Company. Judgment for plaintiff (213 Fed. 688), and defendant brings error. Affirmed.

Arthur C. Spencer, of Portland, Or., Hamblen & Gilbert, of Spokane, Wash, and Charles E. Cochran, of Portland, Or., for plaintiff in error.

Francis A. Garrecht, U. S. Atty., of Spokane, Wash., and Philip J. Doherty, Sp. Asst. U. S. Atty., of Washington, D. C.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge. This is an action on the part of the United States to recover from the Oregon-Washington Railroad & Navigation Company 10 penalties of $100 each, for violations of the act of Congress, entitled, "An act to promote the safety of employés and travelers upon railroads by limiting the hours of service of employés thereon," approved March 4, 1907 (34 Stat. p. 1415). It is admitted that the Railroad Company is and was at the times mentioned in the complaint a common carrier organized and doing business under the laws of the state of Oregon and having an office and place of business at Wallula in the state of Washington, and that it was during said times engaged in interstate commerce. The complaint contains 10 counts, alleging excess of service of one Longabaugh at the office and station of the Railroad Company at Wallula, in the state of Washington. This station was continuously operated night and day, and the excess of service rendered by Longabaugh was for a period of 10 days, from April 21, to April 30, 1913, both days inclusive, and consisted in being on duty at the station from 7 a. m. to 7 p. m. as agent, and from 7 p. m. until midnight as telegraph operator. The circumstances under which the services were rendered, as appears by the admitted and stipulated facts, arose out of the fact that it became necessary for the railroad company to discharge one of its telegraph operators and employés at Wallula, leaving two telegraph operators for the performance of the duties of telegraphing at said station during

such time. The railroad company inquired at various places likely to enable it to obtain an additional operator, to wit, at Portland, Or., The Dalles, Pendleton, La Grande, Walla Walla and Spokane in the state of Washington, and elsewhere; but was unable to obtain the services of an operator during such time. The Railroad Company thereupon directed Longabaugh to work 3 hours as station agent and 6 hours as telegraph operator, making a total of nine hours in each 24-hour period; but it is admitted that Longabaugh, without the knowledge of the plaintiff in error or any of its officers or agents, erroneously construed such directions as to his work, and did work 12 hours as a station agent and 6 hours as an operator, making a total of 18 hours in each 24-hour period, from the 21st day of April, to the 30th day of April, 1913. There appears to be an error in the statement that Longabaugh was on duty 6 hours as a telegraph operator in each period of 24 hours. The hours mentioned for this duty were from 7 p. m. until 12 midnight, or a period of five hours. It is admitted that on April 30, 1913, the excessive service of Longabaugh was discovered by and known to the plaintiff in error, when the work of Longabaugh immediately ceased and was caused to be discontinued by the direction of the plaintiff in error and its officers and agents. It is stipulated:

"That on said 21st day of April, 1913, and before he had performed any excess service, the said Longabaugh was instructed by his superior officer not to work in excess of 9 hours in any 24-hour period, either as agent or operator, or in both capacities; that the said Longabaugh remained on duty longer than 9 hours, as aforesaid, in violation of said instruction, and without actual knowledge of the superior officers of said Longabaugh."

A jury was waived, and the case submitted to the court for judgment. The court thereupon entered judgment in favor of the government for the sum of $100 upon each count of the complaint, aggregating $1,000 in all, together with costs and disbursements. United States v. O.-W. R. R. & Nav. Co. (D. C.) 213 Fed. 688. The case is here upon writ of error.

It is provided in section 2 of the "act to promote the safety of employés and travelers upon railroads by limiting the hours of service * * * thereon" (34 Stat. 1415) that:

"No operator, train dispatcher, or other employé who by the use of the telegraph or telephone dispatches, reports, transmits, receives, or delivers orders pertaining to or affecting train movements shall be required or permitted to be or remain on duty for a longer period than nine hours in any twenty-four-hour period in all towers, offices, places, and stations continuously operated night and day."

Section 3 of the act provides that:

"In all prosecutions under this act the common carrier shall be deemed to have had knowledge of all acts of all its officers and agents."

The station at Wallula was continuously operated night and day. Longabaugh was an employé at that station whose duties as operator and otherwise were therefore limited by the statute to 9 hours in any 24-hour period. His period of duty for 10 days was 17 hours in each period of 24 hours, but it is admitted that he was not required by his employer to be on duty for more than 9 hours in any period of 24 hours. Was he permitted to be on duty in excess of that time?

This question was submitted to the trial court as a question of law upon the facts stated; and it was held that, as section 3 of the act provided that in all prosecutions under the act the common carrier "shall be deemed to have had knowledge of all acts of all its officers and agents," it followed that the Railroad Company had constructive knowledge and permitted Longabaugh to render the excessive service.

The case would seem to be a hard one for the application of the strict letter of the statute, but for the fact that the Railroad Company admits in its answer that during Longabaugh's excessive service it was short-handed at the station where he was employed. A telegraph operator had been discharged, leaving only two telegraph operators for the performance of the duties of telegraphing at this station. Manifestly two telegraph operators on duty for 9 hours each in a period of 24 hours could not perform the duties for the whole of that period without violating the statute. It is accordingly alleged by the Railroad Company in its answer that it inquired at various places likely to enable it to obtain an additional operator, but was unable to secure the services of an operator during that time. Thereupon it directed Longabaugh to work three hours as a station agent and six hours as a telegraph operator. These instructions were followed by Longabaugh in the performance of the duty of telegraph operator, except that he was on duty 5 hours as telegraph operator instead of 6, which, with the 9 hours' duty of each of the other two operators, made up 23 hours in the 24-hour period for the telegraph operators. How the remaining hour of the telegraph operators was supplied does not appear. The duty of station agent does not appear to have been fully provided for either, and Longabaugh evidently found himself required by the exigencies of the situation to perform the duties of station agent for a period of 12 hours, from 7 in the morning until 7 in the evening, instead of for a period of 3 hours, as directed by his superior officer. It will be observed that the prohibition of the statute is not limited to employés performing the duties of operators or train dispatchers only, but includes any "other employé who by the use of the telegraph or telephone dispatches, reports, transmits, receives, or delivers orders pertaining to or affecting train movements." Longabaugh was such an employé, and his duty was specifically and positively limited to 9 hours service in any 24-hour period. But it is contended that the Railroad Company is excused from liability for Longabaugh's excessive service because, as stated in the stipulation, he—

"was instructed by his superior officer not to work in excess of nine hours in any twenty-four hour period either as agent or operator or in both capacities."

But this stipulation is qualified by the admitted fact that one of the telegraph operators at the station where Longabaugh was employed was discharged, leaving only two telegraph operators at the station for the performance of the duties of moving the trains. The Railroad Company undertook to secure some one to supply the place of the discharged operator and failed, and then proceeded to arrange the hours of those on duty to cover the service of the discharged employé, and in doing so assigned Longabaugh to three hours service as station agent and six hours as telegraph operator. In other words, the Railroad

Company abandoned the effort, for the time being at least, to provide the full force of employés required at the station, leaving the station short-handed in the service of both station agent and telegraph operator, and Longabaugh found himself compelled to serve 12 hours as station agent, instead of 3 as directed, or close that office for the greater part of the day. In this situation we do not think it is a very harsh application of the letter of the statute to hold that the Railroad Company had knowledge of all of the acts of all its officers and agents with respect to the excessive employment of Longabaugh. It seems to us that upon the admitted facts the Railroad Company was charged with actual notice of Longabaugh's excessive service, notwithstanding the stipulation.

The judgment of the court below is affirmed.

DUPLAN SILK CO. v. LEHIGH VALLEY R. CO.

(Circuit Court of Appeals, Second Circuit. March 9, 1915.)

No. 183.

CARRIERS ⊂=158—LIABILITY FOR DAMAGE TO GOODS—CONSTRUCTION OF BILL OF LADING.

A bill of lading for a shipment of raw silk provided that "the amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property, * * * unless a lower value has been represented in writing by the shipper or has been agreed upon, * * * in any of which events such lower value shall be the maximum amount to govern such computation." The following clause was stamped on the face of the bill: "Liability limited to one dollar per pound. The consignor of this property has the option of shipping same at a higher rate without limitation as to value in case of loss or damage from causes which would make the carrier liable, but agrees to the specified valuation named in case of loss or damage * * * because of the lower rate thereby accorded for transportation." The silk was damaged from a cause which rendered the carrier liable. *Held*, that such provisions were consistent and should be construed together; that the specified sum of $1 per pound was not a limitation of the carrier's liability, but an agreed conventional valuation, which under such provisions was to be taken as the real value of the goods for the purpose of computing the amount of the carrier's liability; and that the measure of such liability was the difference between the damaged value of the goods and their value at $1 per pound.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 663–667, 699–703½, 708–710, 718, 718½; Dec. Dig. ⊂=158.]

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 libel.

The suit was brought to recover damages to 21 cases of raw silk, total weight of silk 3,319 pounds, shipped on a car of defendant's railroad, which was knocked overboard in a collision due to causes for which defendant was liable. The sound market value of the goods was $6,273.20; after disaster they were sold for $2,831.39. The respondent has paid and libelant accepted $3,319

(and interest), which is $1 per pound, without prejudice to the further rights of either party. Respondent claims that nothing more is due. Libelant claims to be entitled to a further payment of $1,333.36. This is calculated as follows:

Sound market value		$6,273 20
Net proceeds		2,831 39
		$3,441 81
Percentage of loss		54.865%
That percentage of bill of lading value is		1,820 97
Amount paid by carrier	$3,319 00	
Including proceeds	2,831 39	
Leaves payment on account of damage only	487 61	487 61
Balance claimed		$1,333 36

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

Certain silk belonging to libelant was in charge of respondent. It fell overboard from a lighter under circumstances producing admitted liability. It was on board of the lighter under and by virtue of a bill of lading containing the following proviso stamped on the face of the bill: "Liability Limited to One Dollar per Pound. The consignor of this property has the option of shipping same at a higher rate without limitation as to value in case of loss or damage from causes which would make the carrier liable, but agrees to the specified valuation named in case of loss or damage from causes which would make the carrier liable, because of the lower rate thereby accorded for transportation."

The printed portion of the bill contained another and entirely different style of limitation. In my judgment it was entirely superseded by the stamped clause and is not to be considered or regarded in this case. It is further admitted that the provision above quoted was incorporated in the bill of lading in consonance with a classification and tariff rate filed with the Interstate Commerce Commission pursuant to law, and that under the provisions of said classification the shipper or consignor, by accepting the stamped clause on his bill of lading, obtained a freight rate only one-third as great as it would have been (in the language of the classification and tariff) "when consignor's valuation is not expressed or when expressed exceeding one dollar per pound." At $1 a pound the injured silk amounted to $3,319. Its actual market value was $6,273.20. In its damaged condition it sold for $2,831.39. Therefore the actual loss by disaster was $3,441.81. The carrier is willing to pay the difference between the proceeds of the injured silk and $3,319; whereas libelant demands the same proportion of the "bill of lading value" as its actual loss bears to the sound market value.

It is obvious that a short and accurate description of libelant's claim is this: Where a partial loss occurs on goods covered by a bill of lading valuation, damages are to be settled for just as if the bill of lading were a valued insurance policy. This may be, and I think is, a very good way of settling damage claims, provided it is understood and agreed upon before contract made. But this and other similar contracts are presumed to have been made in contemplation of the law as it existed at the time of contract formation.

It is a hopeless task to reconcile decisions from all over the United States relating to limitations of carrier's liability by contract or notice. The maritime bill of lading with which the admiralty bar was entirely familiar a few years ago was usually a document offensive to one's sense of justice, especially in that it attempted to arbitrarily limit cargo owners' recoveries, without granting for the limitation any quid pro quo. The rate of freight was uniform; the shipper could take the bill of lading or take away his goods; nor did the bill itself or the ordinary freight contract offer him any opportunity of getting additional security by paying a little more freight. Of course, the bills of lading commonly in use among land carriers were open to much the

same criticism; but competition offered a partial remedy, rarely afforded to those who wished to send goods on ocean voyages.

The just method of escape from the situation in which shippers found themselves was approved in Hart v. Pennsylvania Railroad Co., 112 U. S. 331, 5 Sup. Ct. 151, 28 L. Ed. 717, some 30 years ago. The method is simple enough. The shipper who wishes to pay a full rate declares, and the carrier accepts, the full value of his goods. If he wishes to take advantage of a cheap rate, there is substituted a conventional or contractual value, the result of an agreement between both parties to the contract; and when this agreement is reached both parties are to be held to the contract they have made. When shipments are made on conventional values, the difference between such value and the real value is covered by insurance, presumably for the reason that insurance rates are lower than freight rates, though, of course, also, the insurer's liability is usually wider than is that of the carrier.

Since the doctrine of valued shipments has become well known, and its justice usually accepted, there is one inquiry (easy to make, but not always easy to answer) that should be directed to every bill of lading containing a limitation clause, viz.: Is the clause in question a mere limit upon the extent of carrier's liability, or a conventional valuation to be used as the basis for fixing damages? If the clause amounts to no more than a limit of liability, then the simplest method of interpretation is to find out the shipper's damage, just as though there was no limitation clause, and make him pay up to the limit fixed. This is the method of Holmes, J., in Brown v. Cunard S. S. Co., 147 Mass. 60, 16 N. E. 717, and distinctly approved in this circuit in The Styria, 101 Fed. 735, 41 C. C. A. 639.

Putting the inquiry above stated in this case, it has been agreed by counsel that the clause in question here is not a mere limitation clause, but is a conventional valuation. After considering the whole clause, the reason for it, and the favorable terms of shipment accorded in consideration of the contract evidenced by said clause, I agree with counsel, and hold that it was the intention of the parties, by giving and accepting this bill of lading, to treat the libelant's silk as worth no more than $1 a pound, in exactly the same way and for the same reasons as horses were valued at $200 apiece (although worth much more) in the Hart Case, supra. Thus the question here becomes merely one of the manner of assessing damages. It is undoubtedly true that libelant's method has been followed in Indiana. United States Express Co. v. Joyce, 72 N. E. 865. And this method of adjustment has been looked on with favor by Mr. Hutchinson in his work on Carriers (section 429).

It is true that by this method of computation the carrier can never be made to pay more than the conventional or agreed value of the goods; but it is also true that the shipper may, and in cases of partial loss often will, get more than the agreed value of his goods. I cannot see that there is any moral principle involved in either method of computation; the question is: What contract was made? In my judgment the United States courts have held that, when a valid, fair valuation contract has been made, the articles shipped "have no greater value, for the purposes of the contract of transportation, between the parties to that contract; * * * the shipper is estopped from saying that the value is greater." Hart v. Pennsylvania Railroad Co., 112 U. S. at page 341, 5 Sup. Ct. at page 156, 28 L. Ed. 717. This is a simple and fair rule, and if the shipper cannot even refer to any greater value than the conventional value, then, of course, there is no basis for the sort of computation sought to be made by the libelant herein.

Exactly the same method of interpretation has been adopted in this circuit in The Oneida, 128 Fed. 687, 692, 63 C. C. A. 239, 244, where a valuation clause not so plain in language, and (to my personal knowledge) not based on such an obvious consideration as is here present, was interpreted to mean "either that the damage recoverable shall not exceed the cost or value of the goods at the time and place of shipment, or, alternatively, that as a basis for computing the damages their cost or value at the place of shipment is to be substituted for their market value at the place of destination." It was held to be a conventional substitution of the former value for the latter; the shippers were estopped from using or claiming the higher value, which was the real value.

The result must be the same here. The respondent carrier has turned over to the shipper the proceeds of the goods in their damaged condition, and enough more to make up the full limit of the conventional value of the shipment. Under the rule of the Supreme Court and the rule followed in The Oneida, no other value can be mentioned, used, or referred to, because that is the value the parties agree should prevail throughout all their relations with each other.

Any rule on this subject is artificial. It can never represent more than an approximation to abstract justice, but upon the whole it seems to me better that, when upon a fair consideration a conventional value has been agreed upon, the result should be that not only can the carrier never be made to pay more than the agreed value, but the shipper can never get more than that same value. The difference he ought to cover by insurance, as he almost invariably does. It is confirmatory of this view that actions of this kind are usually promoted by insurance companies (subrogated to shipper's rights), who are trying to get back from the carrier the loss which the shipper paid them to shoulder.

The libel is dismissed.

Kneeland, Harison & Hewitt, of New York City (W. Harrison, of New York City, of counsel), for appellant.

Harrington, Bigham & Englar, of New York City (D. R. Englar, of New York City, of counsel), for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge. Examination of the claim shows that it is based on the theory that the rule to be applied in calculating loss is the same as would be applied when computing a particular average loss under a policy of marine insurance. But this is not an insurance case; it is a case of carriage under a bill of lading. The question presented is: What is the meaning of two clauses in the bill of lading, both lawfully included in the bill. The first clause is printed in the body of the bill; it reads as follows:

"The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property (being the bona fide invoice price, if any, to the consignee, including the freight charges, if prepaid) at the place and time of shipment under this bill of lading, unless a lower value has been represented in writing by the shipper or has been agreed upon or is determined by the classification or tariffs upon which the rate is based, in any of which events such lower value shall be the maximum amount to govern such computation, whether or not such loss or damage occurs from negligence."

The other clause is stamped on the bill of lading; it reads:

"Liability limited to one dollar per pound. The consignor of this property has the option of shipping same at a higher rate without limitation as to value in case of loss or damage from causes which would make the carrier liable, but agrees to the specified valuation named in case of loss or damage from causes which would make the carrier liable, because of the lower rate thereby accorded for transportation."

The "specified value" or the "value represented in writing by the shipper" in this case was $1 per pound. So far as any question here presented is concerned, we find no substantial difference between the ideas expressed by the two clauses, in which respect we differ apparently from the District Judge.

When the valuation fixed in a bill of lading is intended to limit the extent of the carrier's liability, damages are to be ascertained in the

usual way, and the carrier pays them up to that amount. The Styria, 101 Fed. 735, 41 C. C. A. 639; Bradley v. Lehigh Valley R. R., 153 Fed. 350, 82 C. C. A. 426. When, however, the valuation fixed is intended to express the agreed value of the goods, the carrier will be liable for the difference only between the damaged value and the agreed value. Hart v. Penn. R. R., 112 U. S. 331, 5 Sup. Ct. 151, 28 L. Ed. 717; Bachman v. Clyde S. S. Co., 152 Fed. 403, 81 C. C. A. 529; Hohl v. Norddeutscher, Lloyd, 175 Fed. 544, 99 C. C. A. 166; Pierce v. Wells Fargo Co., 189 Fed. 561, 110 C. C. A. 645. As in all other controversies arising upon written contracts, the fundamental question is: What does the contract provide? That the method of calculation provided may not be as equitable as the method of calculation provided under some other contracts—e. g., under policies of marine insurance—is not important, the question is whether the parties have agreed on that method.

The printed clause provides that the loss or damage shall be *computed* on the *basis* of the *real value* of the property, *unless* a lower one has been agreed upon, in which event such lower value shall be the "maximum amount to *govern such computation.*" This, as we read it, means that, when computations are being made, the maximum value placed on the goods shall be the agreed value. The stamped clause provides for making a conventional valuation of the property, and, when such conventional valuation is made, "the shipper agrees to the specified valuation named in case of loss or damage." This, as we read it, means that, when loss or damage is being computed, the valuation of the goods shall be *not the real value,* but the *specified value.*

Libelant's counsel in his brief puts the question:

"Would any business man, when valuing goods at the time of shipment, ever suppose that he was valuing them, not in their condition at that time, but in a subsequent damaged condition?"

We should say that, if he read the clauses, he would suppose that he was agreeing that whenever, damage having occurred, he was computing the amount he should recover from the carrier, his goods, no matter what their real value might be, were to be treated as worth at the time of shipment only the stipulated value.

Decree affirmed, with costs of appeal.

COLUMBIA & P. S. R. CO. v. SAUTER.

(Circuit Court of Appeals, Ninth Circuit. May 26, 1915.)

No. 2489.

1. COMMERCE ⊂⊃27—EMPLOYERS' LIABILITY ACT—"EMPLOYED IN INTERSTATE COMMERCE."

A railroad employé, who was killed while constructing a temporary bridge over which the railroad intended to move interstate trains, was "employed in interstate commerce" within Employers' Liability Act U. S. April 22, 1908, c. 149, 35 Stat. 65 (Comp. St. 1913, §§ 8657-8665), since

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

that work was not independent of the interstate commerce in which the carrier was engaged.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 25; Dec. Dig. ⟸27.

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

2. MASTER AND SERVANT ⟸204—EMPLOYERS' LIABILITY ACT—DEFENSES—ASSUMPTION OF RISK.

Under Employers' Liability Act U. S. § 3, providing that the employer's contributory negligence shall not bar recovery, but shall only diminish the damages, with a proviso that no employé shall be held contributorily negligent where the carrier's violation of any statute enacted for the safety of employés contributed to his injury, and section 4, providing that an employé shall not be held to have assumed the risks of his employment, where the violation by the carrier of any statute enacted for the safety of employés contributed to his injury, assumption of risk is a defense to an action for injuries under that statute, where the negligence of the carrier, other than its violation of a safety statute, contributed to the injury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 544–546; Dec. Dig. ⟸204.

Assumption of risk incident to employment, see note to Chesapeake & O. R. Co. v. Hennessey, 38 C. C. A. 314.]

In Error to the District Court of the United States for the Northern Division of the Western District of Washington; Jeremiah Neterer, Judge.

Action by Otto E. Sauter against the Columbia & Puget Sound Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded for new trial.

The Columbia & Puget Sound Railroad Company is a local corporation of the state of Washington, and was, at the time of the happening of the accident about which inquiry is made, operating a steam railroad within the state, and engaged in interstate commerce. The company maintained a truss bridge across Cedar river, in King county, Wash., which rested on concrete piers, one upon each side of the stream. A few days prior to November 26, 1911, one of these piers was undermined by a freshet, so that it toppled over, but was left standing at a slant, and the bridge truss at that end settled with it, so that one side of the truss was still resting upon the pier; the other being unsupported. The truss at the other end, across the stream, was still resting upon the undamaged pier. By the settling of the truss, the rails carrying the ties were left suspended above it. The Milwaukee Railroad was at the same time operating a railroad paralleling the road of the Columbia & Puget Sound at this point, and maintained a bridge across Cedar river in proximity to the bridge of the latter company. The freshet also so injured the bridge of the Milwaukee Railroad as to render it unfit for use. In order, therefore, to get quick construction of a temporary bridge across the stream for the use of both roads for the time being, the Milwaukee joined forces with the Columbia & Puget Sound, and both were engaged at the time of the accident in driving piling and constructing false works over the old bridge of the Columbia & Puget Sound road; the false work being designed also for use in reconstructing such bridge. The freshet had carried logs and débris down against, and some of it into, the framework of the truss.

Walter Gilbert Thomson, the decedent, was at the time of the accident, and immediately preceding, engaged with other workmen in sawing the logs into lengths suitable for removing, and in making a cable fast to such as it was designed to remove. While he was doing the latter service, the bridge fell from its support upon him, causing his death. The method of removing the

logs was by a cable, operated by an engine stationed on the same side of the river on which the decedent was at work and running across the stream and over a pulley, thence back again to where decedent was engaged. The logs or timbers were attached to the cable and drawn into the stream, and, the cable being there disengaged, they were allowed to be carried away.

Now, in view of the situation, the plaintiff alleges that at the time of the accident there were present the bridge superintendent of the defendant and its roadmaster supervising the work; "that there was also engaged in said work a foreman directing the work of the men who were engaged in doing the work in connection with said bridge, which foreman was obeying the immediate orders and instructions of said superintendent of bridge work and said roadmaster, and the said Thomson was working under the immediate direction of the said foreman; that the said Thomson and several other men in the employ of the defendant, acting under the immediate directions of said foreman, were engaged in removing certain logs and timber which were jammed against the said bridge, and the said Thomson was engaged in doing the exact work which he was directed by said foreman to do; that at the time the said Thomson was thus working as aforesaid * * * the work of repairing and reconstructing said bridge was done by a careless, negligent, and improper method, in that the broken and sunken framework of said bridge above described was partially supported and sustained and resting upon the logs and timber above described, which were jammed against said bridge, and the defendant and its roadmaster, and the superintendent of bridges, and the foreman, carelessly and negligently failed to make any provision by props or supports of any kind for the holding up and sustaining of said broken frame of said bridge when said logs and timber should be removed; that by reason of the lack of such props and supports as above described, upon the removal of said logs and timber, the said framework of said truss bridge collapsed and fell down in a heap of wreckage, and as said bridge fell the said Thomson was struck in the head by a portion of the framework of said bridge," whereby he was killed.

The trial resulted in a verdict for plaintiff, and the cause is here on writ of error.

Farrell, Kane & Stratton and Stanley J. Padden, all of Seattle, Wash., for plaintiff in error.

Edward Judd and O. E. Sauter, both of Seattle, Wash., for defendant in error.

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

WOLVERTON, District Judge (after stating the facts as above). It is first urged in behalf of the railroad company that there is to be found in the record no sufficient evidence to support plaintiff's allegations that the defendant negligently and carelessly failed to make provision by props or supports of any kind for holding up and sustaining the broken frame of the bridge when the logs and timber should be removed. It was a material factor in plaintiff's case that this allegation should be established by competent proof. Without noticing the evidence particularly, it is sufficient, as this case must be reversed upon another ground, to say that we have examined the testimony and are persuaded that the allegation appears to be amply supported by evidence sufficient to carry the case to the jury.

[1] The next contention is that, in prosecuting the work of erecting the temporary structure for use by both railroad companies in passing their engines and trains over Cedar river, the defendant was not engaged in interstate commerce, and hence that the action could not

be maintained upon the theory on which it was instituted, it having been instituted under the federal Employers' Liability Act. It was admitted, beyond peradventure, at the trial, that the defendant company was engaged in interstate commerce, aside from the particular work in hand, by the following colloquy between counsel:

"Mr. Judd: If the court please, it was agreed by counsel, so that I need not subpœna here the principal officers of the railroad, that this railroad during the times mentioned in this complaint was engaged in transporting freight in interstate commerce.

"Mr. Padden: That is admitted, if your honor please.

"Mr. Judd: That it was a common carrier of freight, of interstate commerce freight; that the railroad as engaged in that business ran over this bridge.

"Mr. Padden: We do not admit anything further than the railroad was engaged in interstate commerce.

"Mr. Judd: Over this bridge and over this right of way. If not, I have been misled by counsel, and I will have to subpœna and call their head officers.

"Mr. Farrell: What is it you want us to admit?

"Mr. Judd: I want you to admit that you were taking this interstate commerce along the right of way which crosses this bridge.

"Mr. Farrell: We will admit that."

"Both roads," as counsel for defendant say, "had joined in the construction of this trestle for the purpose of expediting the traffic. The Milwaukee Company was building the trestle from one bank, and the Columbia Company from the other, with the intention of meeting at the center. The deceased was engaged in making clear a space in which piles could be driven, not to support the old bridge, but to support the new trestle."

While it is denied that the defendant company was at the time engaged in any way in constructing the new bridge, it clearly appears from the testimony that it had the new bridge in view at the time, and that the trestle was to serve, not only for a temporary structure for passing engines and trains over in interstate traffic, but also as false works for rebuilding the old bridge.

P. C. Brown, superintendent of bridges and buildings for the defendant company, testified:

"Q. You were building a new bridge in the same place? A. Well, later on. At that time it was just to get the traffic over. Q. Just for what purpose were you removing the logs and rubbish and stuff that had accumulated around the concrete abutment—what were you doing that for? A. We were pulling the drift out to get them started with our driver on the east end. The Milwaukee was driving on the west end, and this drift was in the way of our first piles, and all we had to do was to pull the drift out and start our driver. We did not intend to do anything with the bridge at all until after we got the traffic across. * * * Q. They were driving the piles for the new temporary bridge? A. Yes, sir; they had one bent driven and were reaching out to get the next."

Later on the same witness testified that the purpose of removing the rubbish was to drive piles for a false work across, and that it was impossible to drive those piles without removing that rubbish. Now, such being the purpose and such the work under way, was the carrying on of the work an engagement in interstate commerce?

It has very recently been declared by the Supreme Court that the right to recover, under the Employers' Liability Act (35 Stat. 65, c. 149), arises only where the injury is suffered while the carrier is engaged in interstate commerce and while the employé is employed by

the carrier in such commerce. "The true test always is," says the court, "is the work in question a part of the interstate commerce in which the carrier is engaged." Pedersen v. Del., Lack. & West. R. R., 229 U. S. 146, 152, 33 Sup. Ct. 648, 57 L. Ed. 1125, Ann. Cas. 1914C, 153. The principle has been later reaffirmed. Ill. Cent. R. R. v. Behrens, 233 U. S. 473, 478, 34 Sup. Ct. 646, 58 L. Ed. 1051, Ann. Cas. 1914C, 163.

Does the case at bar fall within the principle? In the Pedersen Case, supra, the party seeking to recover and another employé, acting under the direction of the foreman, were carrying from a tool car to a bridge some bolts and rivets which were to be used by them in repairing the bridge, the repair to consist in taking out an existing girder and inserting a new one. The bridge could be reached only by passing over an intervening temporary bridge at another avenue. These bridges were each being regularly used, both in intrastate and interstate commerce. While carrying a sack of bolts or rivets over the temporary bridge on his way to the other bridge, the party suing was run down and injured by an intrastate passenger train. Passing upon this state of facts, the court said:

"We are only concerned with the nature of the work in which the plaintiff was employed at the time of his injury. Among the questions which naturally arise in this connection are these: Was that work being done independently of the interstate commerce in which the defendant was engaged, or was it so closely connected therewith as to be a part of it? Was its performance a matter of indifference so far as that commerce was concerned, or was it in the nature of a duty resting upon the carrier? The answers are obvious. Tracks and bridges are as indispensable to interstate commerce by railroad as are engines and cars, and sound economic reasons unite with settled rules of law in demanding that all of these instrumentalities be kept in repair. The security, expedition, and efficiency of the commerce depends in large measure upon this being done. Indeed, the statute now before us proceeds upon the theory that the carrier is charged with the duty of exercising appropriate care to prevent or correct 'any defect or insufficiency * * * in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment' used in interstate commerce."

In Lamphere v. Oregon R. & Nav. Co., 196 Fed. 336, 116 C. C. A. 156, 47 L. R. A. (N. S.) 1, it was held that:

"A locomotive fireman in the employment of a railroad company engaged in interstate commerce, who was ordered by his superiors to report at a station to be transported with others to another station to relieve the crew of an interstate train, and who, when approaching the station over a crossing, was struck and killed through the negligence of other servants of the company, also operating an interstate train, was employed in interstate commerce at the time of his death within the meaning of the Employers' Liability Act."

And in Northern Pacific Ry. Co. v. Maerkl, 198 Fed. 1, 117 C. C. A. 237, another case in this court, it was held that:

"Where an employé of defendant, an interstate railroad company, was injured, in part through the negligence of a fellow servant, when working in repair shops connected with an interstate track, engaged in repairing a car used by defendant indiscriminately in both interstate and intrastate commerce as occasion required, defendant was at the time 'engaged in interstate commerce,' and the employé was employed by defendant in such commerce."

The analogy of the present case to these is sufficiently clear to impel us to the conclusion that the defendant was at the time of the accident engaged in interstate commerce in doing the work in hand, and that the plaintiff was employed in such commerce. To the inquiry of the court in the Pedersen Case: "Was that work being done independently of the interstate commerce in which the defendant was engaged, or was it so closely connected therewith as to be a part of it? Was its performance a matter of indifference so far as that commerce was concerned, or was it in the nature of a duty resting upon the carrier?"—we say here, with that court, "The answers are obvious."

[2] The defendant complains of the following instruction of the court as erroneous, and as affecting it injuriously, namely:

"The defendant in this case contends that the decedent assumed all the risks incident to the employment which were open and apparent, and under the evidence claims that the plaintiff cannot recover. You are instructed that, in an action prosecuted under the act of Congress upon which this action is predicated, the doctrine of assumption of risk does not apply to the extent that the employé assumes all the risks which are open, obvious, and apparent, whether the defendant was negligent or not. This act in question made the defendant liable for injuries resulting from negligence, and it does not make any exception at all. So in this case the decedent would be charged with the element of danger which this employment occasioned, and would assume the risks which were inherent in the employment and in the work, and which did not comprehend negligence on the defendant's part, and would not forego the right to recover damages caused by negligence on the part of the defendant."

Employers' Liability Act, § 3, provides:

"The fact that the employé may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employé: Provided, that no such employé who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employés contributed to the injury or death of such employé."

And section 4 provides:

"Such employé shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employés contributed to the injury or death of such employé."

The court, in the case of Seaboard Air Line v. Horton, 233 U. S. 492, 34 Sup. Ct. 635, 58 L. Ed. 1062, having under consideration these two clauses of the statute, made this comment:

"It seems to us that section 4, in eliminating the defense of assumption of risk in the cases indicated, quite plainly evidences the legislative intent that in all other cases such assumption shall have its former effect as a complete bar to the action. And, taking sections 3 and 4 together, there is no doubt that Congress recognized the distinction between contributory negligence and assumption of risk; for, while it is declared that neither of these shall avail the carrier in cases where the violation of a statute has contributed to the injury or death of the employé, there is, with respect to cases not in this category, a limitation upon the effect that is to be given to contributory negligence, while no corresponding limitation is imposed upon the defense of assumption of risk—perhaps none was deemed feasible."

The phrase used in section 3, namely, "any statute enacted for the safety of employés," evidently has reference to the federal statutes, such as the Safety Appliance Act (Act March 2, 1893, c. 196, 27 Stat. 531 [Comp. St. 1913, §§ 2605–8612]), the Hours of Service Act (Act March 4, 1907, c. 2939, 34 Stat. 1415 [Comp. St. 1913, §§ 8677–8680]), and the like, and the negligence referred to must be in violation of such statutes, and does not apply to negligence generally.

In this same case the court reaffirmed the principle of the common law respecting the doctrine of assumption of risk, which the following declaration indicates:

"When the employé does know of the defect, and appreciates the risk that is attributable to it, then if he continues in the employment, without objection, or without obtaining from the employer or his representative an assurance that the defect will be remedied, the employé assumes the risk, even though it arise out of the master's breach of duty."

The interpretation of the statute here declared is reaffirmed in the case of Southern Ry. Co. v. Crockett, 234 U. S. 725, 730, 34 Sup. Ct. 897, 899 (58 L. Ed. 1564) where the court says:

"Upon the merits, we of course sustain the contention that by the Employers' Liability Act the defense of assumption of risk remains as at common law, saving in the cases mentioned in section 4; that is to say: 'Any case where the violation by such common carrier of any statute enacted for the safety of employés contributed to the injury or death of such employé.'"

The jury was instructed in the present case, in effect, that under the Employers' Liability Act of Congress the defendant would be rendered liable for injuries resulting from its negligence, and that to this rule there is no exception. So it was concluded that the decedent was chargeable with the element of danger which his employment occasioned, and assumed the risks which were inherent in his employment and work, but that these did not comprehend negligence on the part of the defendant, and that he would not thereby forego the right to recover damages caused by negligence on the part of the defendant. In other words, the jury was left to infer that, if the defendant were guilty of any negligence at all, or any kind of negligence, contributing to the injury, then the decedent assumed none of the risks incident to his employment.

Such is not the law, in view of decisions above cited. The assumption of risk is eradicated only in case the employer is negligent in the violation of some statute enacted for the safety of employés. In other negligence the rule remains as at common law.

Other questions are reserved, but they may not arise again on a new trial, and hence we omit their consideration for the present.

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

CAMDEN IRON WORKS CO. et al. v. SATER, District Judge.

(Circuit Court of Appeals, Sixth Circuit. June 8, 1915.)

No. 2735.

1. EXCEPTIONS, BILL OF ⊂=40—TIME TO FILE—EXTENSION—JUDGMENT ENTRY.
The entry on September 11, 1914, during the February term of court, of a judgment giving 60 days for preparation and settlement of a bill of exceptions, carries ipso facto control over the bill of exceptions into the October term, and the court has jurisdiction to make further extension of time during that term.
[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. §§ 44, 45, 57–64; Dec. Dig. ⊂=40.]

2. EXCEPTIONS, BILL OF ⊂=40—TIME FOR SETTLEMENT—EXTENSION—DELAY IN ENTERING EXTENSION ORDER—EFFECT.
A delay of two days in entering an order extending the time for preparing and settling a bill of exceptions, seasonably made, does not deprive the court of jurisdiction over a bill of exceptions.
[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. §§ 44, 45, 57–64; Dec. Dig. ⊂=40.]

3. EXCEPTIONS, BILL OF ⊂=36—SETTLEMENT—MOTION FOR NEW TRIAL—EFFECT.
The pendency of a motion for a new trial preserves the court's control over the judgment, including a settlement of a bill of exceptions.
[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. §§ 44–46, 48, 51–53, 60; Dec. Dig. ⊂=36.]

4. EXCEPTIONS, BILL OF ⊂=40—JURISDICTION OF COURT—PENDENCY OF MOTION TO VACATE ORDER OF EXTENSION OF TIME.
The entertaining by the court of a motion to vacate an order extending the time for the presentation for settlement of a bill of exceptions preserves the court's control over the settlement of the bill pending the disposition of the motion.
[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. §§ 44, 45, 57–64; Dec. Dig. ⊂=40.]

5. EXCEPTIONS, BILL OF ⊂=53—COMPELLING SETTLEMENT—MANDAMUS.
Where no complete bill of exceptions was ever presented to the court for signature, and the question is whether time should be granted therefor, mandamus will not issue to control the discretion of the court as to granting further time.
[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. §§ 80–85, 87, 88; Dec. Dig. ⊂=53.]

6. APPEAL AND ERROR ⊂=353—WRIT OF ERROR—TIME TO TAKE OUT—EXTENSION OF TIME.
The courts have no power to extend the statutory period for taking out a writ of error.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1920–1922; Dec. Dig. ⊂=353.]

7. APPEAL AND ERROR ⊂=343—WRIT OF ERROR—TIME TO TAKE OUT—EXTENSION OF TIME.
The pendency of settlement of a bill of exceptions does not extend the period for taking out a writ of error, since there is no reason why issue of a writ of error should not precede settlement of the bill.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1889–1904; Dec. Dig. ⊂=343.]

8. EXCEPTIONS, BILL OF ⊂=53—DISPUTED QUESTION OF FACT—JURISDICTION —MANDAMUS.

Where the claim whether a petition for writ of error and granting of order of allowance were lodged with the clerk of the court within six months after the judgment involved a disputed question of fact, not within the issues in mandamus to compel settlement of a bill of exceptions, the petition for which and answer thereto were filed within the six months, the court will not determine whether petitioner preserved his right to a writ of error.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. §§ 80–85, 87, 88; Dec. Dig. ⊂=53.]

Petition for writ of mandamus by the Camden Iron Works Company and another directed to Hon. John E. Sater, District Judge for the Southern District of Ohio, to compel the approval and settlement of a bill of exceptions. Dismissed.

C. D. Robertson, of Cincinnati, Ohio, for petitioner.

Constant Southworth, of Cincinnati, Ohio, for respondent.

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

PER CURIAM. Petition for writ of mandamus directing respondent to approve and settle bill of exceptions in the case of Camden Iron Works v. City of Cincinnati. Respondent's reasons, given in his answer, for not approving and signing a bill of exceptions are, broadly stated, first, that no completed bill ready for approval and signature was ever presented to him; second, that respondent had lost jurisdiction to sign and settle the bill, because the time therefor had expired; and, third, that, if respondent still had discretionary power to extend the time, it ought not to be exercised because of petitioner's lack of diligence in preparing the bill.

The question of jurisdiction arises in this way: Judgment was entered September 11, 1914, and 60 days given plaintiff for preparing bill of exceptions and assignment of errors and filing the same for the consideration of the court. November 9th another extension of 10 days was given. On November 18th or 19th respondent signed an extension for 15 days and mailed it to petitioner's counsel, who received it on November 19th, but did not file it with the clerk of the court until November 21st. Three days later defendant filed a motion to vacate the order of extension on the ground (so far as now material) that it was filed two days late and that the court had no jurisdiction to make the extension or to sign a bill of exceptions. This motion was entertained by the court, but was not decided until December 21st. Meanwhile, on December 11th, defendant filed objections and proposed amendments to the bill of exceptions tendered; its objections expressly stating that its motion of November 24th was not waived. On the next day plaintiff's counsel presented to respondent a proposed bill, stating, however, that certain exhibits had not been made part thereof, and that a controversy existed to some extent between opposing counsel regarding the contents of the bill. Respondent de-

clined at the time to grant a hearing on the bill, for the reason that he had not decided the motion of November 24th, and because of defendant's denial of respondent's right to allow and sign a bill. At this time plaintiff's counsel presented draft of an order for filing the extension order in question nunc pro tunc as of November 19th, instead of November 21st, and orally requested its entry, which respondent refused. On December 15th hearing was had, presumably including the motion of November 24th and the question generally of respondent's jurisdiction to settle the bill, as well as the propriety of the bill as tendered. On December 21st respondent denied the application to allow and sign the bill, and in effect sustained defendant's motion of November 24th and its contentions generally. He also announced, in his written opinion, a denial of plaintiff's nunc pro tunc order, and on the same day lodged with the clerk of the court plaintiff's proposed entry, with respondent's refusal indorsed thereon. The petition for mandamus followed.

[1, 2] We think respondent did not lose jurisdiction to settle and sign a bill of exceptions. While the judgment was entered at the February term, and jurisdiction to settle bill of exceptions would, unless under extraordinary circumstances, be lost by the expiration of that term, unless control was in some way reserved (Morse v. Anderson, 150 U. S. 156, 14 Sup. Ct. 43, 37 L. Ed. 1037; Jennings v. Railroad Co., 218 U. S. 255, 257, 31 Sup. Ct. 1, 54 L. Ed. 1031), yet the extension of 60 days embraced in the judgment entry ipso facto carried the control over the bill of exceptions into the October term. Jurisdiction was clearly not lost by the 2 days' delay in entering the extension order of November 19th. The order was seasonably made, and there was no unconscionable delay in filing. The only substantial question, so far as jurisdiction is concerned, was whether it should date from November 19th or November 21st, and thus whether it would expire on December 4th or December 6th. Control over the settlement of bill having been carried into the October term, there was jurisdiction to make further extension during the term. Mahoning Valley Ry. Co. v. O'Hara (C. C. A. 6) 196 Fed. 945, 947, 116 C. C. A. 495. The cases relied upon are not authority for a contrary contention.

[3, 4] There was thus jurisdiction, between December 4th and December 21st, to settle bill or extend time therefor, provided the court meanwhile kept control over the subject. The rule is well settled that the pendency of motion for new trial preserves the court's control over the judgment, including the settlement of bill of exceptions. Kingman v. Manufacturing Co., 170 U. S. 675, 678, 18 Sup. Ct. 786, 42 L. Ed. 1192; Merchants' Ins. Co. v. Buckner (C. C. A. 6) 98 Fed. 222, 224, 225, 39 C. C. A. 19; Mahoning Valley Ry. Co. v. O'Hara, supra. We think the same principle applies here, and that such control was preserved by the entertaining of the motion of November 24th, the continuation of the proceedings between counsel relating to the form of bill (for defendant's nonwaiver of its motion did not affect jurisdiction), the formal hearing of December 12th, and the final orders of disposition of December 21st. While formal applica-

tion was not made, during the pendency of these motions, for an extension of time beyond December 4th or December 6th, yet, as respondent returns, he "assumed in his opinion filed December 21st that plaintiff's counsel must have intended to ask for a nunc pro tunc order, which would preserve their right to present and file a bill of exceptions." This intention, shown by efforts to settle bill of exceptions on and after December 12th, is not negatived by the fact that respondent did not know, until that date, that the previous extension had expired. It follows that jurisdiction over the settlement of the bill was not lost when the order of December 21st was made, and, this being so, that respondent still has such jurisdiction.

[5] We cannot, however, award the writ of mandamus; for not only was no complete bill ever presented in actual readiness for signature (and thus there has been no refusal to actually sign a confessedly proper bill), but the question whether further time should be granted therefor was within respondent's judicial discretion, over which we have no control, unless that discretion has been abused; and we cannot so say. We have stated our views on the subject of jurisdiction only because it is not clear how far respondent's exercise of discretion with respect to granting further time may have been influenced by the view that jurisdiction was lost. Whether such discretion shall be further exercised rests with respondent.

[6-8] It is urged that no writ of error has been taken out, that the time therefor has expired, and that for these reasons bill of exceptions should not be settled. If the premises are correct the conclusion follows, for in such case a bill of exceptions would be futile. No writ of error has ever issued, nor has order therefor been made; and courts have no power to extend the statutory period for taking out the writ. Nor did the pendency of settlement of bill of exceptions have that effect, for there was no legal reason why issue of writ should not precede settlement of bill. Hunnicutt v. Peyton, 102 U. S. 333, 354, 355, 26 L. Ed. 113; Shreve v. Cheesman (C. C. A. 8) 69 Fed. 785, 787, 16 C. C. A. 413.

The petition for writ of error and draft of order of allowance seem to have been lodged with the clerk of the court in December, and thus within 6 months after judgment; and we understood a claim to be made at the argument of the instant case that issue of the writ was actually applied for during that month. As this claim involves a disputed question of fact not within the issues in the mandamus case (for the 6 months had not run when the petition and answer were filed), we shall not attempt to determine whether petitioner has preserved right to writ of error, but shall leave that question to be decided when, if ever, it becomes material.

The petition for writ of mandamus is dismissed, with costs.

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

(Circuit Court of Appeals, Sixth Circuit. June 30, 1915.)

No. 2639.

1. APPEAL AND ERROR ⊂⊃999—QUESTIONS REVIEWABLE—SUFFICIENCY OF EVIDENCE TO SUSTAIN VERDICT.
   The court, on writ of error to review a judgment for plaintiff, attacked for insufficiency of the evidence to sustain the verdict, must view the evidence most favorable to plaintiff and accept his version as true.
   [Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3912–3921, 3923, 3924; Dec. Dig. ⊂⊃999.]
2. NEGLIGENCE ⊂⊃136—PROXIMATE CAUSE—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.
   Where the testimony is conflicting, questions of proximate cause and of contributory negligence are usually for the jury.
   [Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 277–353; Dec. Dig. ⊂⊃136.]
3. CARRIERS ⊂⊃320—INJURIES TO PASSENGERS—PROXIMATE CAUSE—QUESTION FOR JURY.
   Whether the conduct of the auditor, collecting tickets and fares, toward a passenger about 14 years old, with a very limited experience in railroad travel, was the proximate cause of injury to the passenger, caused by his jumping from the train as it approached his destination, *held*, under the evidence, for the jury.
   [Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1118, 1126, 1149, 1153, 1160, 1167, 1179, 1190, 1217, 1233, 1244, 1248, 1315–1325; Dec. Dig. ⊂⊃320.]
4. CARRIERS ⊂⊃347—INJURIES TO PASSENGERS—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.
   Whether a passenger about 14 years old, jumping from a train as it approached his destination, was guilty of contributory negligence, *held*, under the evidence, for the jury.
   [Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1346, 1350–1386, 1388–1397, 1402; Dec. Dig. ⊂⊃347.]

In Error to the District Court of the United States for the Southern Division of the Eastern District of Tennessee; Edward T. Sanford, Judge.

Action by Jesse Tharp, by F. N. Tharp, as next friend, against the Cincinnati, New Orleans & Texas Pacific Railway Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

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

G. H. West, of Chattanooga, Tenn., for defendant in error.

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

SESSIONS, District Judge. This action was brought in the circuit court of Rhea county, Tenn., by the defendant in error (plaintiff) against plaintiff in error (defendant), to recover damages for injuries suffered by plaintiff while a passenger on one of defendant's trains between the stations of Spring City and Dayton, Tenn. The case was removed to the court below, where a trial resulted in verdict and

judgment in plaintiff's favor. At the close of all the evidence counsel for the railway company moved the court to direct a verdict in its favor upon the alleged grounds: (1) That the negligence of defendant was not the proximate cause of the injury sustained by plaintiff; and (2) that plaintiff was guilty of contributory negligence. The only error assigned and urged is upon the denial of the motion for a directed verdict. No exception was taken to the charge to the jury, and it is not contained in the present record.

[1] The testimony was very conflicting, but viewing it most favorably to plaintiff, and accepting his version of the affair as true, as we must upon this record, the material and essential facts may be thus stated: At the time of his injury, plaintiff was a boy between 14 and 15 years old, with a very limited knowledge of and experience in railroad travel. He then lived at Dayton, Tenn. On July 30, 1909, he accompanied a married sister from Dayton to Spring City upon a visit to another sister. Before leaving home in the morning, the boy's father gave him 80 cents. He had no other money. The regular fare between the two places, if a ticket was purchased, was 40 cents; but, if a ticket was not purchased, the cash fare on the train was 55 cents. A statute of Tennessee made it the duty of the railway company to keep its station office open for the sale of tickets at least one hour before and until the departure of each passenger train. In going to Spring City, plaintiff and his sister purchased tickets, paying 40 cents for each ticket. The trouble occurred on the return trip. Both before the arrival of the train and while it was standing at the station at Spring City, plaintiff and his sister at different times attempted to purchase tickets; but the agent was not in the office, and no tickets were or could be procured. Upon this particular train, one of defendant's auditors, and not the regular conductor, was collecting fares and tickets. The auditor first approached plaintiff's sister and asked for her fare. She handed him 40 cents and explained that she and her brother had been unable to procure tickets. The collector demanded extra fare, and, with some reluctance and hesitation, the sister paid 55 cents, which was all the money she had. When asked for his fare, plaintiff tendered the collector 40 cents, explained that he had no more money, and insisted that he ought not to be required to pay more than that amount. At first the collector refused to take the money offered him; but, after collecting fares from the other passengers upon the train, he came back and took the money, giving a receipt therefor, and telling the boy he must get off the train at Evansville—a station about six miles north of Dayton—or he would have to put him off. The auditor "talked rough" and was quite abusive to plaintiff and his sister. After the train had passed Evansville, the auditor again came to plaintiff, censured him for not getting off as directed, told him he was nothing but a "bum," threatened to put or kick him off the train and finally said he would take him to Chattanooga and "have him locked up" by the sheriff. He also threatened to kick the sister off the train if she interfered. The boy was crying and was very much frightened. At one time during the controversy he tried to raise the car window and

jump out, but was prevented from so doing by his sister. As the train reached Dayton, plaintiff went to the rear of the coach, and seeing the auditor following him, stepped out upon the rear platform, and, just as the train began to slow down, and when it was about 250 yards from the station, jumped off and was severely injured.

[2, 3] Under the evidence so stated most favorably to the plaintiff, was the trial court right in submitting to the jury for its decision the questions of the proximate cause of plaintiff's injuries and his own negligence? The answer is not difficult. A companion case to this one was brought by the father of this plaintiff against this defendant in the state court to recover damages for the loss of the services of this plaintiff resulting from the same injuries. At the trial of that case substantially the same evidence was introduced and the same questions were raised as in this one. The father recovered. Upon review, the judgment was affirmed by the Court of Civil Appeals of Tennessee, and later by the Supreme Court of that state. In a somewhat elaborate opinion, the Court of Civil Appeals overruled the contentions of defendant which are here repeated. The decision in that case is very persuasive and convincing in this one. Independently, however, of that decision, the action of the trial court was clearly right. Where the testimony is conflicting, questions relative to the proximate cause of injuries and to the contributory negligence of plaintiff must usually be determined by the jury. This plaintiff was not a trespasser and had committed no wrongful act. He was a passenger, and entitled to both protection and civility at the hands of the defendant's servants. According to his version, which the jury must have believed, he was very much frightened and was in a state almost of desperation. Because of the threats and abusive language of the auditor, who was in uniform and apparently in a position to carry his threats into execution, this boy became incapable of exercising either discretion or ordinary judgment. To him the danger of arrest and imprisonment in a strange city was real and very imminent. So great was his fear that he had once, in the presence of the auditor, tried to escape through the car window. Under such circumstances, can it be said as a matter of law that plaintiff's act in jumping from the train was so extraordinary and unnatural that it, or something like it, could not have been reasonably anticipated, or that the wrongful act of the railway company's servant was not a moving and contributing cause thereof, and thus at least one of the concurrent and direct causes of his injuries? Clearly not. If the testimony of defendant's witnesses is true, plaintiff's act in jumping from the train was the independent and intervening cause of his injuries. On the other hand, if the testimony of plaintiff and his sister is to be believed, his act was but one link in the chain of causation leading directly from the misconduct of the auditor to the injuries. The question thus presented was one of fact, and therefore for the jury. Texas & Pacific Ry. Co. v. Stewart, 228 U. S. 357, 33 Sup. Ct. 548, 57 L. Ed. 875; Texas & Pacific Ry. Co. v. Howell, 224 U. S. 577, 582, 583, 32 Sup. Ct. 601, 56 L. Ed. 892; Milwaukee, etc., Ry. Co. v. Kellogg, 94 U. S. 469, 474, 475, 24 L. Ed. 256; Munsey v. Webb,

231 U. S. 150, 34 Sup. Ct. 44, 58 L. Ed. 162; Hayes v. Railroad Co., 111 U. S. 228, 4 Sup. Ct. 369, 28 L. Ed. 410; Shugart v. A. K. & N. Ry. Co., 133 Fed. 505, 509, 510, 66 C. C. A. 379; McDonald v. Street Ry. Co., 74 Fed. 104, 20 C. C. A. 322; Erie R. Co. v. White, 187 Fed. 556, 109 C. C. A. 322; Hales v. M. C. R. Co., 200 Fed. 533, 537, 118 C. C. A. 627; Winters v. B. & O. R. Co., 177 Fed. 44, 50, 100 C. C. A. 462.

[4] The question of plaintiff's contributory negligence is of like character, and must be determined from the evidence and all the circumstances and conditions surrounding the accident. When the youth, inexperience, appearance, and mentality of the plaintiff, and his natural fear, apprehension, anxiety, and excitement, as well as the very conflicting testimony in the case, are all taken into consideration, it cannot be said that men of intelligence and sound judgment could not reasonably reach different conclusions as to whether plaintiff was guilty of negligence in jumping from the moving train. Thus tested this question was also for the jury. Warner v. B. & O. R. Co., 168 U. S. 339, 348, 18 Sup. Ct. 68, 42 L. Ed. 491, and cases there cited; Winters v. B. & O. R. Co., 177 Fed. 44, 100 C. C. A. 462; Wyman & Gordon Co. v. Poole, 200 Fed. 943, 119 C. C. A. 327.

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

J. G. WHITE & CO. v. BALL ENGINEERING CO.

(Circuit Court of Appeals, Second Circuit. April 13, 1915.)

No. 214.

1. APPEAL AND ERROR ⟸1017—REVIEW—ACTION TRIED BY REFEREE.
Where an action at law is tried by a referee, the only question reviewable by an appellate court is whether the findings of fact support the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3911, 3961, 3996–4005; Dec. Dig. ⟸1017.]

2. TROVER AND CONVERSION ⟸16— TITLE TO SUPPORT ACTION—PROPERTY PREVIOUSLY APPROPRIATED BY UNITED STATES.
A contract for the construction of a public work gave the United States in case of its annulment the right to take over and retain all material, tools, etc., in use in the prosecution of the work at a valuation to be determined by the engineer in charge. Assuming to act under such provision, the government took possession of machinery and tools owned by plaintiff, which was not the contractor, crediting their value as fixed by the engineer to the contractor. It afterward leased the same to defendant, which was the succeeding contractor. *Held* that, although the United States had no right under the contract to take the property of a third person, it had the power as sovereign to appropriate the same subject to the obligation to pay its value to the owner, and that, having taken the property and leased it to defendant, the latter could not be held liable to plaintiff for its conversion.

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. §§ 119–147; Dec. Dig. ⟸16.]

In Error to the District Court of the United States for the District of Connecticut.

For opinion below, see 212 Fed. 1009.

H. W. Reynolds, of Hartford, Conn., J. K. Bartlett, of Baltimore, Md., Lewis Sperry, of Hartford, Conn., and Stuart S. Janney, of Baltimore, Md., for plaintiff in error.

W. M. Parke, of New York City, and C. D. Lockwood, of Stamford, Conn., Thomas L. Hughes, of New York City, and S. L. Swarts, of St. Louis, Mo., for defendant in error.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

WARD, Circuit Judge. [1] This is a writ of error to a judgment in favor of the plaintiff for damages for conversion by the defendant of certain personal property specified in the complaint used by defendant in constructing Lock and Dam No. 6 on the Trinity river, Tex. The trial was before a referee, called in Connecticut a "committee," and therefore the only question before us for consideration is whether his findings of fact sustain the judgment. We can look only at the pleadings, order of reference, findings of fact, conclusions of law, and judgment of the court. We cannot consider the testimony, the exhibits (except so far as included in the findings of fact), or the refusals of the committee to find. Andes v. Slauson, 130 U. S. 435, 9 Sup. Ct. 573, 32 L. Ed. 989; David Lupton's Sons Co. v. Automobile Club, 225 U. S. 489, 32 Sup. Ct. 711, 56 L. Ed. 1177, Ann. Cas. 1914B, 699; Edenborn v. Sim, 206 Fed. 275, 124 C. C. A. 339.

[2] What seems to us to be the material facts found by the committee were substantially as follows:

July 10, 1906, the Hubbard Building & Realty Company entered into a written agreement with the United States to construct Lock and Dam No. 6 on the Trinity river, Tex.

Some time in the year 1908 a partnership composed of George A. Carden and P. D. C. Ball, trading under the name of the Ball-Carden Company, placed on the site of the lock and dam a considerable amount of property consisting of machinery, tools, and materials and used the same in constructing the lock and dam until the month of May, 1909.

In April or May, 1909, the partnership was dissolved, Carden transferring all his interest to Ball, who continued the work under the name of Ball Engineering Company until on or about September 8, 1909.

September 9, 1909, work on the lock and dam was discontinued, and October 22d the government, in accordance with its provisions, annulled the contract with the Hubbard Company.

April 2, 1910, the plaintiff, Ball Engineering Company, was incorporated under the laws of Missouri, and P. D. C. Ball transferred to it all of the property mentioned in the complaint.

June 6, 1910, the government entered into a written contract with the defendant, J. G. White Company, Inc., to complete the work.

The government took the property belonging to the plaintiff at a value of $11,578 fixed by the engineer and credited the amount in ac-

count of the Hubbard Company. It professed to act under section 33 of the contract with the Hubbard Company, which reads:

"Annulment.—In case of the annulment of this contract as conditionally provided for in the form of contract adopted and in use by the Engineering Department of the Army, the United States shall have the right to take possession of, wherever they may be, and to retain all materials, tools, buildings, tramways, cars, etc., or any part or parts of same, prepared for use or in use in the prosecution of the work, together with any or all leases, rights of way or quarry privileges, under purchase, at a valuation to be determined by the engineer officer in charge."

This property the government leased to the defendant, who used the same in completing the work and after completion returned all of it to the government except such material as had been used in construction.

As a conclusion of law, the committee found the defendant had as of July 6, 1910, unlawfully converted the property of the plaintiff mentioned in the complaint of the fair market value of $15,000, for which sum with interest at 6 per cent. from that date the plaintiff was entitled to judgment.

The district judge entered judgment in accordance with the report of the committee, and the defendant has taken this writ of error from the same.

We think the committee and the court below correctly held that the government had no right to take the property of the plaintiff, a third party, by virtue of anything contained in its contract with the Hubbard Company. All the same it did take the property with knowledge that it was claimed by the plaintiff and used it in the construction of this public work. It was as sovereign entirely competent to do this subject to the obligation of making just compensation, as required by the fifth amendment to the Constitution. It made no proprietary claim, and therefore was bound to pay the real owner for the property, whether the taking was tortious or not. It fully recognized this obligation by crediting the Hubbard Company with the value. The fact that it recognized the wrong person as owner and erroneously relied upon the contract with the Hubbard Company, by which the plaintiff was not bound, in no respect changed the material fact that it had taken the property and acquired title thereto. The defendant in its answer justified by virtue of title in the United States which was the material consideration, although it followed the erroneous theory that the government was justified in acting as against the plaintiff under the contract with the Hubbard Company. The plaintiff also relies upon a provision in the contract between the defendant and the government to the effect that:

"If so requested in writing by the contractor, the United States will exercise the right conferred by paragraph 33 of the specifications forming part of the annulled contract with the Hubbard Building & Realty Company, to take possession of and retain all materials, tools, buildings, tramways, cars, etc., or any part or parts of the same prepared for use or in use in the prosecution of the work at a valuation to be determined by the engineer officer in charge, and the contractor for the completion of the work will be permitted to use such plant and material in the prosecution of the work, for which he will be charged a fair rental or purchase value, to be determined by the engineer officer in charge. It must, however, be clearly understood that since the ownership of the above-mentioned plant and materials is not free

from doubt, the United States does not undertake to transfer title, does not guarantee peaceable possession and uninterrupted use, and will not defend any action or writ that may be instituted against the contractor concerning the same, nor be responsible for nor assume any expenses or costs in connection therewith. Nothing that may result from the exercise of the above-mentioned right shall be made the basis of a claim against the United States or its officers or agents."

We regard this provision as quite immaterial. The defendant is making no claim against the government, and the plaintiff is no more concerned with this contract than it was with the contract between the government and the Hubbard Company.

We have considered this general subject in United States v. Buffalo-Pitts Co., 193 Fed. 905, 114 C. C. A. 119, affirmed 234 U. S. 228, 34 Sup. Ct. 840, 58 L. Ed. 1290. In accordance with that decision, we think that the government took title to the property in question and leased it to the defendant, who in using it was not guilty of any conversion.

The judgment is reversed.

GLASS v. WOODMAN et al. †

(Circuit Court of Appeals, Eighth Circuit. May 3, 1915.)

No. 4377.

1. EQUITY ⟸114—PARTIES—RIGHT OF INTERVENTION.
   The right of intervention does not necessarily follow from the absence of other remedy; but an intervener should have some interest in or claim to the demand in suit, or some connection with, interest in, or lien upon the subject-matter of the litigation.
   [Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 275–279; Dec. Dig. ⟸114.]

2. MORTGAGES ⟸436—FORECLOSURE—PARTIES—INTERVENTION.
   One having an unliquidated demand against the complainants in a foreclosure suit in a federal court, who are nonresident aliens, is not, because of such fact, entitled to intervene in the suit for the purpose of litigating his claim and enforcing the same against the interest of complainants therein.
   [Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1289; Dec. Dig. ⟸436.]

3. COURTS ⟸497—PROPERTY IN CUSTODIA LEGIS.
   Mortgage bonds deposited in a federal court in a foreclosure suit are not subject to attachment or garnishment under process from a state court.
   [Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1386, 1397, 1398, 1404–1406; Dec. Dig. ⟸497.]

Appeal from the District Court of the United States for the Eastern District of Missouri; David P. Dyer, Judge.

Suit in equity by Alfred H. Woodman and others against the Williamsville, Greenville & St. Louis Railway Company and others. From an order denying his motion for leave to file intervening petition, David H. Glass appeals. Affirmed.

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

† Rehearing denied August 23, 1915.

E. H. Gamble, of Kansas City, Mo., for appellant.

Irvin V. Barth, of St. Louis, Mo. (John S. Leahy and Walter H. Saunders, both of St. Louis, Mo., on the brief), for appellees.

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

HOOK, Circuit Judge. This is an appeal from an order denying leave to intervene in a foreclosure suit. Some citizens and residents of the Dominion of Canada who held mortgage bonds of a railroad company of Missouri had brought suit in the court below to foreclose the mortgage. A receiver was appointed, the bonds were deposited with a special master of the court, and a decree of foreclosure and sale was rendered. In this situation the appellant, a citizen of Illinois, sought to intervene to assert and enforce against some of the complainants an unliquidated claim for damages for breach of contract. He averred in his proposed intervening petition that personal service of process could not be made on the complainants in the United States, and that they had no property in this country which he could subject to his claim, except their bonds in the possession of the special master and the corresponding interest in the decree of foreclosure; also that there were other creditors of the complainants who were similarly situated, for whose benefit, if they desired, his proceeding might inure. He prayed that the special master be ordered to hold the bonds in his possession subject to the decision of the issues between him and the complainants, that they be required to answer, and that he have judgment for his damages and a lien on their bonds and the proceeds, etc.; also that, if such relief be denied, he be then authorized to sue them in a state court and have foreign attachment of their property by garnishment of the special master.

[1] The appellant claims a right to intervene because he would otherwise be without remedy. He cannot maintain an independent action at law in a court of the United States, for the reason that complainants cannot be found for service, and foreign attachment, so called, is not a permissible instrument for initiating jurisdiction in those courts. Nor can he maintain an action by attachment in a state court where jurisdiction might be so acquired because the property to be reached is in custodia legis. But the right of intervention does not necessarily follow from the absence of other remedy. It is not permissible to load a case with collateral issues. An intervener should have some interest in or claim to the demand in suit, or some connection with, interest in, or lien upon the subject-matter of the litigation, and the appellant has none of these. He has no claim, legal or equitable, to the mortgage bonds, nor legal or equitable interest in or lien upon the property of the defendant company or the fund to be administered, nor is he interested as an unsecured creditor of the defendant with rights that might be affected by the foreclosure.

[2] His unliquidated claim against complainants does not even appear to have grown out of or to have relation to any phase of the cause of action or the subject-matter in the court below. It is outside of and foreign to the litigation. In effect he asks the court to

admit him to the suit to qualify him for intervention by taking cognizance of an extraneous claim ordinarily justiciable only at law and by creating for it a lien upon property of complainants in the court's possession. That would be extending the jurisdiction of a court of equity in a foreclosure suit quite beyond precedent. If that were permissible, the court could be required to entertain innumerable claims having no connection with the subject-matter, nor with the proper disposition of the cause. Some cases are so circumstanced that intervention is an absolute right; others rest in the discretion of the trial court, whose action will not be reviewed on appeal. Credits Commutation Co. v. United States, 91 Fed. 570, 34 C. C. A. 12; Id., 177 U. S. 311, 20 Sup. Ct. 636, 44 L. Ed. 782. Appellant's claim is, in respect of the subject-matter of the suit, neither with nor against any of the parties, and in a legal sense it cannot be affected by the decree. It is so remote as not to have challenged the discretion of the trial court.

In support of appellant's contention, some general expressions are cited from the opinions in Credits Commutation Co. v. United States, supra, Minot v. Mastin, 95 Fed. 734, 37 C. C. A. 234, and United States v. Philips, 107 Fed. 824, 46 C. C. A. 660. In the first of these the intervention sought was to protect a statutory right in connection with the property involved in the main suits. The denial of the application was held to be within the discretion of the trial court, and was affirmed by this court and by the Supreme Court. In Minot v. Mastin the petitioners sought possession of property in the court's custody to which they asserted a paramount right. In United States v. Philips the claim set up is not disclosed. This court merely held that, since it was sometimes difficult to distinguish between interventions of absolute right and those resting in the discretion of the court, it is better practice to grant an appeal from orders denying them. Quite clearly these cases are not warrant for an intervention here. In this connection, see United States v. Eisenbeis (D. C.) 88 Fed. 4 (Intervention of Hogg, Adm'r).

[3] We also think the court did not err in declining to authorize a garnishment of the special master to make foundation for an action in a state court. The custody of the special master was the custody of the law. The property of a litigant so held is not subject to attachment or garnishment from another jurisdiction. In re Argonaut Shoe Co., 187 Fed. 784, 109 C. C. A. 632. The doctrine is old, and its reasons rest in considerations of orderly judicial procedure. Whether the court might have waived it need not be considered. Its adherence was not erroneous from any view.

The order is affirmed.

LINES et al. v. ATLANTIC TRANSPORT CO.

(Circuit Court of Appeals, Second Circuit. April 13, 1915.)

No. 176.

SHIPPING ⊂=106—CONTRACTS OF AFFREIGHTMENT—EXEMPTIONS IN BILLS OF LADING.

A provision in bills of lading prepared by the carrier that the ship is "not accountable to any extent for bullion, specie, * * * nor for any other goods of whatever description above the value of £20 per package, unless the value be herein expressed and extra freight as may be agreed on be paid," *held* void, as ambiguous and open to the construction that it was the intention of the carrier thereby to exempt itself from any liability whatever in case of packages exceeding £20 in value, if the question should arise in a country where such exemption is sustained as valid, but which exemption under the law of the United States is void.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 225, 226, 414–419; Dec. Dig. ⊂=106.]

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 in favor of libelants. The suit was brought to recover the value of one case of merchandise short delivered by respondent's steamship. The value of the missing case was over $500. The bill of lading contained the following clause:

"Not accountable to any extent for bullion, specie, precious metals (manufactured or unmanufactured), plated articles, glass, china, jewelry, articles used for jewelry, precious stones, trinkets, watches, clocks, timepieces, mosaics, bills, banknotes of any country, orders, notes, or securities for payment of money, stamps, maps, letters, writings, title deeds, paintings, engravings, pictures, statuary, silks, furs, lace or cashmere (manufactured or unmanufactured), made up into clothes or otherwise, contained in any package or parcel, whatever may be the value of such articles, nor for any other goods of whatever description above the value of £20 per package, unless the value be herein expressed and extra freight as may be agreed on be paid."

"The shipowner is not to be liable * * * in any case for more than the invoice or declared value of the goods, whichever shall be the least. * * *"

Burlingham, Montgomery & Beecher, of New York City (N. B. Beecher and Roscoe H. Hupper, both of New York City, of counsel), for appellant.

Harrington, Bigham & Englar, of New York City (D. R. Englar, of New York City, of counsel), for appellees.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge. Manifestly there is ambiguity in this sentence. It is not the first occasion where ambiguity in a provision of this sort has come before the courts. In Calderon v. Atlas Steamship Co., 170 U. S. 272, 18 Sup. Ct. 588, 42 L. Ed. 1033, the clause was given one construction in the District and Circuit Courts and a different one in the Supreme Court. The clause in that case read as follows:

"The carrier shall not be liable for gold, silver, bullion, specie, documents, jewelry, pictures, embroideries, works of art, silks, furs, china, porcelain, watches clocks or goods of any description which are above the value of $100 per package, unless bills of lading are signed therefor, with the value therein expressed, and a special agreement is made."

Referring to this last-quoted clause the Supreme Court said:

"A party to a contract is responsible for ambiguity in his own expressions, and has no right to induce another to contract with him on the supposition that his words mean one thing, while he hopes the court will adopt a construction by which they would mean another thing more to his advantage."

"In this case the contract is one prepared by the respondent itself for the general purposes of its business. With every opportunity for a choice of language, it used a form of expression which clearly indicated a desire to exempt itself altogether from liability for goods exceeding $100 in value per package, and it has no right to complain if the courts hold it to have intended what it so plainly expressed."

With this suggestion as to the importance of the use of clear and unambiguous language by the party who prepares a document, by whose provisions both parties are to be bound, we may consider what interpretation should be given to the bill of lading clause in the case at bar. The draughtsman undertook to provide for two classes of goods:

A. Bullion, specie, watches, etc.

B. All other goods not specified in A.

As to A he unmistakably provided that there should be no liability whatever—a provision void here, but valid elsewhere.

As to B, it is asserted that he provided that in the event of loss there should be a liability not greater than £20 per package. That clause would be valid here and elsewhere. If it were merely this that the draughtsman undertook to provide, he might very easily have worded the clause so that he would have expressed that idea and that only. But we are inclined to believe that he had another object. He wished to obtain all the relief he could under the law here—in case injury to goods in class B came before our courts. He also wanted to get the broader relief which the law elsewhere entitled him to secure, if he could, and therefore phrased the clause so that if injury to goods in class B came before an English court he could argue that, if they were worth over £20 a package, the ship should not be liable at all.

We do not doubt he had the Calderon clause before him, and that he tried to phrase a double-barreled form of exemption which would give him in each country the utmost relief that the laws of each would admit of. Of course, the form was not drawn for this specific voyage. It is a general one prepared to meet all cases. Being ambiguous, and its object being to relieve a carrier from its legal obligation, we think it should be construed against the carrier. If he has not made his exception clearly and unmistakably in the form our courts recognize as valid, he has not made one he can enforce here.

We do not think that the cases cited, Hobbs v. McLean, 117 U. S. 567, 6 Sup. Ct. 870, 29 L. Ed. 940, D., L. W. v. Kutter, 147 Fed. 51, 77 C. C. A. 315, Wash. & I. R. R. v. Cœur d'Alene Ry., 160 U. S. 77, 16 Sup. Ct. 231, 40 L. Ed. 355, and A. Leschen & Sons Co. v. Mayflower G. M. & R. Co., 173 Fed. 855, 97 C. C. A. 465, 35 L. R. A. (N. S.) 1,

which hold that an ambiguous contract should be construed so as to make it a legal rather than an illegal one, apply, because the clause (even if construed to provide for total exemption) would be legal in some jurisdictions, and this ship might be called on to respond for damage claims in either place.

The decree is affirmed, with interest and costs.

NEW YORK, N. H. & H. R. CO. v. MOONEY.

(Circuit Court of Appeals, Second Circuit, April 13, 1915.)

No. 240.

MASTER AND SERVANT ⇐116—MASTER'S LIABILITY FOR INJURY TO SERVANT—DEFECTIVE "SCAFFOLDING."

Labor Law N. Y. (Consol. Laws, c. 31) § 18, which prohibits the furnishing for use of an employé unsafe, improper, or unsuitable scaffolding, etc., not so constructed as to give proper protection to the life and limb of the workman, applies although the injured workman built or helped to build the defective structure, and a plank, supported between two girders of the bridge, upon which the workman lay when painting the under side of parts of the bridge, is a "scaffolding" within the meaning of the statute.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 207; Dec. Dig. ⇐116.

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

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

This cause comes here upon appeal from a judgment in favor of defendant in error, who was plaintiff below. The action, to recover for personal injuries, was brought under the Labor Law of the state of New York, the negligence charged being the failure to furnish a safe place in which to work. Plaintiff was painting the ironwork of an unfinished bridge. In the course of his work it was necessary for him to lie down on a plank resting on portions of the iron work so as to reach the under part of a girder. The main question in the case is the construction to be given to section 18 of the Labor Law, which reads as follows:

"Section 18. Scaffolding for Use of Employés. A person employing or directing another to perform labor of any kind in the erection, repairing, altering or painting of a house, building or structure shall not furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders or other mechanical contrivances which are unsafe, unsuitable or improper, and which are not so constructed, placed and operated as to give proper protection to the life and limb of a person so employed or engaged. Scaffolding or staging swung or suspended from an overhead support, or erected with stationary supports, more than twenty feet from the ground or floor, except scaffolding wholly within the interior of a building and which covers the entire floor space of any room therein, shall have a safety rail of suitable material properly bolted, secured and braced, rising at least thirty-four inches above the floor or main portions of such scaffolding or staging and extending along the entire length of the

outside and the ends thereof, with such openings as may be necessary for the delivery of materials, and properly attached thereto, and such scaffolding or staging shall be so fastened as to prevent the same from swaying from the building or structure."

J. M. Gibbons, of New York City (J. W. Carpenter, of Brooklyn, of counsel), for plaintiff in error.

S. A. Syme, of Mt. Vernon, N. Y., for defendant in error.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

LACOMBE, Circuit Judge. The temporary platform on which plaintiff was working consisted of a plank placed between two girders. This is substantially the same structure as that which was passed upon in our decision in Steel & M. Co. v. Reilly, 210 Fed. 437, 127 C. C. A. 169 (December 9, 1913), where a plank was laid diagonally upon two trusses. That such a structure is "scaffolding" within the meaning of the New York Labor Law was settled for this circuit, by that decision. In Ford Motor Co. v. Donaldson (November 10, 1914) (C. C. A.) 218 Fed. 350, we also held that the statute applied when the injured party builds or helps to build the scaffold. We said:

"We find nothing in the statute which supports the proposition contended for and supported by several Appellate Division decisions that the section does not apply when the injured party himself builds, or helps build, the scaffold. On the contrary, it seems to be the object of the act to make the master have scaffolds built by men competent to build them properly, not by the workman who is to use them—quite frequently not himself an experienced carpenter."

These decisions dispose of the main question in the case at bar. The story of the plaintiff, which under the verdict we must take to be correct on all matters in conflict, is that when he and his partner (coworker) were putting the plank in place, he told the foreman that the plank was too short and asked for a rope to tie it with. It was Saturday afternoon, about an hour before the close of work for the day. That the foreman said there were no ropes there then—such ropes as there were were in use by other men—but that on Monday the foreman would have them there, and to do the best they could with the planks that were on hand. The evidence showed that sometimes these planks were lashed to what they rested on, which might prevent slipping or tilting; there was certainly sufficient to sustain a finding by the jury that the scaffolding erected for the performance of plaintiff's part of the work was "unsafe, unsuitable or improper" and not so constructed and placed "as to give proper protection to the life and limb of" a workman thereon.

The latter part of the section provides in the case of scaffolding more than 20 feet above the ground or floor that the same shall be so fastened as to prevent the same from swaying. In the case of such a scaffold it might be held as matter of law that the employer was negligent if it were not so fastened. But this specific requirement for scaffolding 20 feet above the ground would not preclude the finding that a scaffold less than 20 feet above the ground was not reasonably safe and suitable, when the testimony shows that it is unsafe, that lashing it would have made it safe, and that reasonable prudence and foresight would have

indicated that it should be lashed. As indicative of what reasonable prudence would suggest in this case we have these circumstances: (1) Sometimes planks placed as these were, were lashed, and there were ropes on the work which the men could use for lashings; (2) plaintiff himself asked for a rope to lash this plank with; (3) the foreman, when asked for the rope, did not say it was unnecessary, but that there would be a rope provided on Monday.

We do not find any error in the charge about the shortness of the plank. Plaintiff's theory that a longer plank would not have tilted sideways may or may not have been correct, but that is not important. The court charged, more favorably than defendant was entitled to, that defendant would not be liable if he gave the employés adequate and proper material to build the scaffold with. Plaintiff testified that there were long planks as well as short planks available; the court charged:

"If you do conclude that he could have used a longer plank because it would jam [the theory of plaintiff was that if it jammed it would not tilt]; then I cannot charge you as a matter of law that the shortness of the plank had anything to do with the injury."

Since the plaintiff's own evidence showed that there were long as well as short planks available, defendant was not prejudiced by this charge.

In view of the construction we put upon the statute, the other assignments of error need not be discussed.

Judgment affirmed.

BELL et al. v. MORLEY et al.

(Circuit Court of Appeals, Ninth Circuit. May 24, 1915.)

No. 2573.

1. FRAUD ⇐9—FRAUDULENT REPRESENTATIONS—WHAT CONSTITUTE—"ACTIONABLE FRAUD."

To constitute actionable fraud, it must appear: (1) That defendant made a material representation; (2) that it was false; (3) that when he made it he knew it was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) that he made it with the intention that it should be acted upon by plaintiff; (5) that plaintiff acted in reliance upon it; and (6) that he thereby suffered injury.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 8; Dec. Dig. ⇐9. For other definitions, see Words and Phrases, First and Second Series, Actionable Fraud.]

2. VENDOR AND PURCHASER ⇐36—FRAUDULENT REPRESENTATIONS BY VENDOR—WHAT CONSTITUTE.

Statements made by an agent for the sale of land to the purchaser as to the quantity of timber on the land, known by the purchaser to have been based on a cruise made by others some years before, and therefore merely a matter of opinion, and so far as appears made in good faith, do not amount to fraudulent representations which will constitute a defense to an action for the purchase price, even if the quantity was overestimated.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 40, 52, 53; Dec. Dig. ⇐36.]

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8. VENDOR AND PURCHASER ⊂=274—SUIT TO ENFORCE LIEN FOR PURCHASE MONEY—DEFENSES—DEFECT IN TITLE OF VENDOR.

Under the law of Washington by which the registration of a deed is not essential to its validity as between the parties nor as to others except subsequent purchasers for value without notice, the fact alone that a deed was by mistake recorded in the miscellaneous record, and that the grantor therein afterward made a conveyance to another, without any showing that the second grantee was a bona fide purchaser, or even that he claimed title, does not make out a defense of failure of title in behalf of a subsequent grantee under the first deed in a suit to enforce a lien for the purchase money.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 769–771; Dec. Dig. ⊂=274.]

On 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 Mary C. E. Morley and Fred Morley against R. C. Bell, Mary A. Bell, and the American Surety Company of New York. Decree for complainants, and defendants appeal. Affirmed.

Kollock, Zollinger & McDowall, of Portland, Or., for appellants.

Platt & Platt and Hugh Montgomery, all of Portland, Or., for appellees.

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

RUDKIN, District Judge. This is an appeal by the defendants from a decree foreclosing a purchase-money mortgage on certain timber lands in the state of Washington. The answer contains two defenses, or partial defenses: The first is that the agent who acted for the appellees in the sale of the property to the appellants for the purpose of inducing the appellants to make the purchase represented that the firm of James D. Lacey & Co., with whom he was connected, had carefully and accurately cruised the property; that there was on the property as shown by such cruise, exclusive of hemlock, 11,584,000 feet, board measure, of good merchantable timber, that the appellants purchased the property relying on these representations; that in truth and in fact there was upon the property only 7,916,919 feet of merchantable timber, exclusive of hemlock, and that the appellants were damaged thereby in the sum of $9,167.57. As a further partial defense it was averred that the title to 40 acres of the timber land had failed to the damage of the appellants in the sum of $2,500. The court below overruled both of those defenses, and upon these rulings the assignments of error are based.

[1] It is a sufficient answer to the first assignment of error to say that, on conflicting testimony of the two witnesses who conducted the negotiations leading up to the sale, the court below found against the charge of fraud, and there is nothing in the record to lead us to a different conclusion. But aside from all this; the representations, if made, were not actionable.

To constitute actionable fraud it must appear:

"(1) That defendant made a material representation; (2) that it was false; (3) that when he made it he knew that it was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) that he made it with the intention that it should be acted upon by plaintiff; (5) that plaintiff acted in reliance upon it; and (6) that he thereby suffered injury." 20 Cyc. 13.

[2] In the present case the parties had before them, pending the negotiations for the sale, certain estimates showing the quantity of timber on the land according to a cruise made some years before. This cruise was not made by the agent who represented the appellees in the negotiations for the sale of the property; he had no personal knowledge as to the quantity of timber on the land, and did not claim to have. Any statement made by him was therefore a mere matter of opinion, based on information furnished by third persons, known by the appellants to be such, and, so far as the record discloses, that opinion was expressed in the utmost good faith.

"To furnish grounds for an action of deceit the representation must be of a matter susceptible of approximately accurate knowledge, and must be in form or substance an assertion importing knowledge on the part of the speaker. A statement which by reason of its form or subject-matter amounts merely to an expression of opinion is not actionable, for it is one upon which reliance cannot safely be placed." 20 Cyc. 17.

"It is clear, however, that if the misrepresentation is made, not in the form of an unqualified assertion implying personal knowledge, but as upon information and belief, and the speaker really believes the statement to be true, he cannot be held liable, although the person to whom it is made suffers injury from acting in reliance thereon." 20 Cyc. 31.

[3] The second defense is equally without merit. It appears from the testimony that the appellees deraigned their title to 40 acres of the timber line embraced in the mortgage through mesne conveyances from Christopher William Whitford and wife. Whitford and wife conveyed the property to one Ernest Strong, Strong conveyed to the appellee, Mary E. C. Morley, and the appellees to the appellants. Through inadvertence or mistake the deed from Whitford to Strong was recorded in the Miscellaneous Records in the office of the county recorder. Subsequent to the deed to Strong the Whitfords, by a second deed, conveyed the same property to certain parties in New Mexico. The appellants contend that the registration of this deed in the Miscellaneous Records did not constitute constructive notice, and that the title of the appellants was defeated by the subsequent conveyance from the Whitfords to the parties in New Mexico. This conclusion does not follow. Under the laws of the state of Washington registration is not essential to the validity of a deed. A deed is valid without registration as between the parties, and as to all others, except bona fide purchasers and incumbrancers for value and without notice. No proof was offered here tending to show that the New Mexico parties were purchasers for value and without notice. Indeed, there was an entire absence of testimony tending to show that they even claimed an interest in the property. The defense of failure of title was therefore not established, and we deem it unnecessary to consider either the ef-

fect of the warranty contained in the deed, or of the collateral agreement entered into at the time of the conveyance.

There is no error in the record, and the judgment is affirmed.

DELAWARE, L. & W. R. CO. v. CABONI.

(Circuit Court of Appeals, Second Circuit. April 13, 1915.)

No. 205.

1. COURTS ⟸406—REVIEW—ACTION TRIED BEFORE REFEREE.
   Where an action at law was by stipulation tried before a referee, the only question reviewable by an appellate court is whether the conclusions of law are supported by the findings of fact.
   [Ed. Note.—For other cases, see Courts, Cent. Dig. § 1103; Dec. Dig. ⟸406; Appeal and Error, Cent. Dig. §§ 3385, 3387–3391, 3393.]

2. MASTER AND SERVANT ⟸137—MASTER'S LIABILITY FOR INJURY TO SERVANT —NEGLIGENCE OF TRAIN ENGINEER.
   A train engineer *held* not chargeable with negligence for failing to give proper warning of his approach to a gang of track workmen, where he blew the whistle when half a mile distant.
   [Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 269, 270, 273, 274, 277, 278; Dec. Dig. ⟸137.]

3. MASTER AND SERVANT ⟸137—MASTER'S LIABILITY FOR INJURY TO SERVANT —FAILURE TO MAINTAIN LOOKOUT FOR TRACK WORKMEN.
   A finding that a railroad company was negligent in failing to station a watchman or lookout to give warning of the approach of trains to laborers working on the track *held* supported by findings of fact that there were some 30 or 40 workmen in different gangs, and that when at work some of them could not well see approaching trains.
   [Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 269, 270, 273, 274, 277, 278; Dec. Dig. ⟸137.]

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

This cause comes here upon writ of error to review a judgment in favor of defendant in error who was plaintiff below. The action was brought to recover damages for the death of Salvatore Orsini, who was killed by being run over by a train on defendant's railroad. The action was brought under the federal Employers' Act of 1908 (Act April 22, 1908, c. 149, 35 Stat. 65 [Comp. St. 1913, §§ 8657–8665]).

E. Hollister and Rogers, Locke & Babcock, all of Buffalo, N. Y., for plaintiff in error.

Lanza & Miceli, of Buffalo, N. Y., for defendant in error.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

LACOMBE, Circuit Judge. [1] This cause was tried before a referee; the only questions open to us are whether the conclusions of law are supported by the findings of fact. We cannot pass upon alleged errors in finding or in refusing to find; nor can we supplement the findings by reference to the testimony. Campbell v. Boyreau, 21 How. 223, 16 L. Ed. 96; Andes v. Slauson, 130 U. S. 435,

9 Sup. Ct. 573, 32 L. Ed. 989; David Lupton's Sons Co. v. Automobile Co., 225 U. S. 489, 32 Sup. Ct. 711, 56 L. Ed. 1177, Ann. Cas. 1914A, 699; Edenborn v. Sim, 206 Fed. 275, 124 C. C. A 339.

The findings are inartificially drawn, conclusions of law being in some instances embodied in what purport to be findings of fact. Redistributing them the facts are as follows:

Plaintiff's intestate was a track laborer in the employ of defendant, working with a pick, loosening dirt between the ties of the westbound track of defendant's railroad near Owego station; five other workmen were engaged in the same gang at that place. He was struck by a west-bound work train of defendant, receiving injuries from which he died. The work in which he was engaged was of a nature which required him to work in a bent and inclined position. The defendant had not stationed near these six workmen any person to be on the lookout and to give them warning of the approach of trains. The train in question consisted of an engine, 15 ballast cars, and a caboose; the engine was at the westerly end of the string of cars, runing backwards, with its tender first, drawing the cars behind it. The engine whistle was blown half a mile from the place of the accident, and the train was in plain sight from that point up to the point where the accident occurred. After the engine whistled and while it was approaching the track gangs, the foreman and two assistant foremen blew their hand whistles as notice to all of the men to keep clear of both tracks while the train passed.

There is no finding as to how many gangs there were, nor as to the location of defendant's gang relatively to the others.

It is further found that deceased must have heard the engine whistle blow one-half mile away.

As conclusions of law from these facts it was found that:

(1) The engineer was negligent in not giving proper and sufficient warning of the approach of the train.

(2) That defendant was negligent in not stationing near deceased's gang any person to be on the lookout and to give them warning of the approach of trains.

(3) That deceased should have exercised more care when he heard the engine whistle blow, and that he thus contributed somewhat to the accident.

(4) That plaintiff is entitled to judgment for $2,500.

The third conclusion is clearly supported by the findings. There is no finding as to the speed of the train; certainly, if it had been going at any unusual or extraordinary speed, some such finding would have been made. Moreover, even if it were going at the speed of 60 miles an hour—a most unreasonable hypothesis in the absence of any proof in its support—the deceased had 30 seconds after the whistle blew to take care of himself; two or three steps would have put him in a place of safety.

[2] The first conclusion is not supported by the findings. The engine whistle, indicating the approach of this work train, was blown a half mile off from the place where the deceased was working; it gave him ample warning to protect himself if he heard and heeded

it. The conclusion that the engineer was negligent is not warranted by the findings.

[3] As to the second conclusion we think that reasonable prudence required the stationing of some one to look out for the approach of trains and to warn the workmen when such approach was seen. The men were in a position where, some of them at least, could not see an approaching train; they were engrossed in their occupation, and conditions of wind and weather might be expected to prevent the engine whistle from attracting their attention. Since it is found as a fact that no one was so stationed to look out for and warn this body of workmen—there were some 30 or 40 of them in the different gangs—we are satisfied that the second conclusion was a proper one.

The fourth conclusion naturally follows as an inference from the second and third; $2,500 is a very moderate award for the death of Orsini, even though his own negligence contributed.

Judgment affirmed.

HOME BANK FOR SAVINGS v. LOHM.

(Circuit Court of Appeals, Fourth Circuit. May 25, 1915.)

No. 1339.

BANKRUPTCY ⊂⊃440—REVIEW—APPEAL OR REVISION AS PROPER REMEDY.

Bankr. Act July 1, 1898, c. 541, § 24b, 30 Stat. 553 (Comp. St. 1913, § 9608), gives the Circuit Courts of Appeals jurisdiction to superintend and revise in matters of law the proceedings of the bankruptcy courts. Section 25a (3) authorizes appeals from judgments allowing or rejecting debts or claims of $500 or more. *Held* that, where a claim of $3,500 was presented for allowance as a preferred claim, the claim of preference being based upon an attachment levy within four months before bankruptcy, a decree denying the claim of preference should have been reviewed by appeal, and not by petition to revise.

[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.]

Petition to Superintend and Revise, in Matter of Law, Proceedings of the District Court of the United States for the Northern District of West Virginia, at Clarksburg, in Bankruptcy; Alston G. Dayton, Judge.

In the matter of Wilhelmina Wittigschlager, bankrupt; A. L. Lohm, trustee. On petition by the Home Bank for Savings to superintend and revise. Petition dismissed.

Homer W. Williams, of Clarksburg, W. Va., for petitioner.

R. R. Wilson, of Clarksburg, W. Va., for respondent.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

PRITCHARD, Circuit Judge. This is a petition to superintend and revise, in matter of law, proceedings in the District Court of the United States for the Northern District of West Virginia. It appears

that on the 21st day of May, 1913, the Home Bank for Savings instituted a suit in debt in the circuit court of Harrison county, W. Va., against Wilhelmina Wittigschlager, and on the 22d day of May, 1913, the bank procured an attachment in such action, which was duly levied upon the goods of Wilhelmina Wittigschlager. Thereafter, on the 12th day of August, 1913, on the petition of three creditors, Wilhelmina Wittigschlager was adjudged a bankrupt.

Among other things, the Home Bank for Savings proved a debt of $3,500, with interest, as a preferred claim against the property upon which the levy was made; the preference being based upon the levy and creation of the lien while Wilhelmina Wittigschlager was solvent. The question was referred to the referee, who, after hearing the testimony, discovered that he was interested in the litigation to such an extent as to disqualify him, which fact was reported to the District Judge; whereupon the District Judge, after considering the various pleadings, petitions, and orders, entered the following memorandum:

"The Circuit Court of Appeals for the Ninth Circuit, in Cook v. Robinson, 194 Fed. 785, 114 C. C. A. 505, has distinctly decided the question here involved. So, substantially, has the Circuit Court of Appeals for the Seventh Circuit (In re Richards, 96 Fed. 935, 37 C. C. A. 634)—both holding section 67f of the Bankruptcy Act to take precedence over section 67c; that under 67f all legal proceedings, including attachments, instituted within four months of the filing of bankruptcy petition, are vacated in case an adjudication in bankruptcy follows and that such adjudication is conclusive determination of the insolvency of the debtor within such period. I am in full accord with these rulings, and believe them to be based upon sound principles and correct construction of the Bankruptcy Act. I will therefore sustain the trustee's objection to the claim for preference made by the Home Bank for Savings, and counsel for trustee may prepare a decree accordingly."

The petitioner excepted to the decree entered pursuant to the foregoing memorandum, and, as we have stated, is here with a petition to superintend and revise in matter of law the proceedings of the lower court.

It is insisted by counsel for respondent that the petition should be dismissed, in that it appears that the decree of the lower court relates to the validity of a lien contested on a claim presented to the referee. The Supreme Court, in the case of Coder, Trustee, v. Arts, 213 U. S. 223, 29 Sup. Ct. 436, 53 L. Ed. 772, 16 Ann. Cas. 1008, has ruled directly on this point. That portion of the opinion which is pertinent is as follows:

"Under the circumstances of this case it seems to us that the petition (asserting the lien) was incident to the claim, * * * and was a bankruptcy proceeding under section 2, clause 7, within the meaning of section 25, regulating appeals in bankruptcy proceedings, and that the decree upon it was not 'a judgment allowing or rejecting a debt or claim of five hundred dollars or over,' within section 25a(3), and was not an independent ground of appeal. * * * The contest in the Otis Case, as in this, was over the claim presented, and, incidentally, to establish a lien upon the bankrupt's estate.

"It is insisted, however, that inasmuch as the trustee in the case at bar made no objection to the amount found due upon the notes by the District Court, and only sought by his appeal to further contest the right to the security asserted by Arts, that his sole remedy was, under section 24b, to have a revision in the Circuit Court of Appeals by a petition filed for that purpose, and that the Circuit Court of Appeals should have dismissed the attempted

appeal. But we are of opinion that the character of the proceeding must be determined by the nature of the claim set up against the trustee in bankruptcy, and, as section 25b gives an appeal to the Circuit Court of Appeals from a judgment allowing or rejecting a debt or claim of $500 or over, that the appeal was properly allowed in this case, and brought before the Circuit Court of Appeals the validity of the claim and the lien * * * securing the debt."

That the petitioner presented its claim for allowance or rejection is admitted. The evidence relating to the validity of this claim is incorporated in the record, and certain other documents relating to matters that transpired before the referee are incorporated in a document entitled "Respondent's Addendum to Transcript of Record." Thus it will be seen that this cause falls clearly within the rule announced in Coder, Trustee, v. Arts, supra, and that petitioner's remedy in this instance was by an appeal in pursuance to section 25a(3).

For the reasons stated therein, the petition to superintend and revise is dismissed.

PACK et al. v. THOMPSON.

(Circuit Court of Appeals, Ninth Circuit. May 24, 1915.)

No. 2535.

MINES AND MINERALS ⟸23—MINING CLAIMS—FORFEITURE OF INTEREST TO CO-OWNER FOR NONCONTRIBUTION TO ASSESSMENT WORK.

To entitle a part owner of a mining claim to forfeit the interest of another part owner, under Rev. St. § 2324 (Comp. St. 1913, § 4620), which requires $100 worth of assessment work to be done on each claim annually until patented, and provides that, if any part owner shall fail or refuse to contribute his proportion, his interest may, on notice, be forfeited to his co-owners "who have made the required expenditures," it must appear that the one claiming the forfeiture has done the requisite amount of work to protect the title to the claim.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 51–59, 114; Dec. Dig. ⟸23.]

Appeal from the District Court of the United States for the Southern Division of the Southern District of California; Benjamin F. Bledsoe, Judge.

Suit in equity by E. Thompson against Thomas W. Pack, Stella Schuler, and Joseph K. Hutchinson. From an order granting a preliminary injunction, defendants appeal. Affirmed.

Suit in equity by the appellee, plaintiff in the court below, for a decree preventing a forfeiture by the appellants, defendants in the court below, of the appellee's interest in and to 175 certain placer mining claims, situate upon Searles Borax Lake, San Bernardino county, Cal., for an accounting, and for an injunction pendente lite restraining the appellants from taking any steps to perfect or establish a forfeiture of the appellee's interest in and to such claims. The appellee, E. Thompson, plaintiff in the court below, will be referred to as the plaintiff. The appellants, Thomas W. Pack, Stella Schuler, and Joseph E. Hutchinson, defendants in the court below, will be referred to as the defendants. The plaintiff, a citizen and resident of the state of New Jersey, filed his bill against the defendants, citizens and residents of the state of California, in the court below, on November 24, 1914. The allegations thereof, so far as material on this appeal, are as follows:

That during the year 1910 the plaintiff, together with the defendant Thomas W. Pack and others, duly located and recorded 175 certain placer mining claims, designated particularly as the "Soda No. 1 Placer Mining Claim" to and including the "Soda No. 152 Placer Mining Claim" and the "Soda No. 196 Placer Mining Claim" to and including the "Soda No. 218 Placer Mining Claim," situate upon Searles Borax Lake, county of San Bernardino, state of California; that the plaintiff ever since the date of the locations has been, and was at the time of the filing of the bill of complaint, the owner and holder of an undivided one-eighth interest in and to each of such mining claims. It was further alleged that during the month of September, 1914, the defendants caused to be served upon the plaintiff a certain notice, denominated a "Notice of Forfeiture." The notice was annexd as an exhibit to the complaint. It is dated September 14, 1914, and by its terms the plaintiff was notified that the defendant Thomas W. Pack had expended during the years 1911 and 1912 the sum of $5,600 for labor and improvements upon the placer mining claims set forth in the bill of complaint, for the purpose of complying with the requirements of section 2324 of the Revised Statutes of the United States, and the amendments thereto, concerning the performance of annual labor upon mining claims, and that such sum was the only money expended by any of the owners during those years on such claims for the purpose of complying with the statute. The plaintiff was further notified that during the years 1911 and 1912 the defendant Pack was a co-owner with the plaintiff, being the owner of an undivided one-eighth interest in the claims; that subsequent to the making of the expenditure of $5,600 the defendant transferred his one-eighth interest in the claims to the defendant Stella Schuler, and that the latter had transferred the one-eighth interest to the defendant Joseph K. Hutchinson, who was at the time of the giving of the notice the owner thereof. The plaintiff was further notified that the defendants had received no contribution from the plaintiff for his proportion (one-eighth) of such expenditure, and that demand was thereby made upon him for such proportion, amounting to the sum of $700, and, if such payment or contribution was not made within 90 days from service of the notice upon the plaintiff, the interest of the plaintiff in the mining claims would become the property of the defendants.

It is further set forth in the bill that by the alleged notice of forfeiture it is claimed that the defendants expended the sum of $5,600 for assessment work for the years 1911 and 1912 on the claims; that the statutes of the United States and the statutes of the state of California require that $100 in labor or improvements be expended upon each separate claim for each year; that the sum of $35,000 would be required to fully represent each and all of said 175 mining claims for the years 1911 and 1912; that it cannot be ascertained from the alleged notice of forfeiture upon which separate placer mining claim or claims out of the 175 claims the defendant Pack, or the other defendants, claim to have expended money for labor or improvements for the years 1911 and 1912. It is alleged in the complaint that, if the defendants were allowed to proceed under the alleged notice of forfeiture, they would, at the expiration of 90 days from the date of the service of the same, file and record a copy of the notice of forfeiture and an affidavit of service with the county recorder of San Bernardino county, Cal., and claim and assert that all of the right, title, and interest of the plaintiff in and to the claims, and each of them, had been duly and legally forfeited and extinguished; that by means thereof a cloud would be cast upon the title and interest of the plaintiff in the mining claims, and the plaintiff would be compelled to institute and prosecute a great number of suits, at great expense, to remove such cloud; that the plaintiff has no plain, speedy, or adequate remedy at law in the premises, and, unless the defendants were restrained from proceding to forfeit the title and interest of the plaintiff in the claims, the plaintiff would be irrevocably and irreparably damaged and injured, and would be defrauded and deprived of all his right, title, and interest in and to the claims and each of them.

The plaintiff prayed for a decree preventing a forfeiture of the interest owned by him in the mining claims, for an accounting for all moneys belonging to Pack and used and expended by him for annual assessment work

for the years 1911 and 1912 upon the claims, and that the court ascertain and determine the amount, if any, due from the plaintiff to the defendants as his proportionate share of the cost of such assessment work, and for an injunction during the pendency of this suit restraining the defendants and their agents and attorneys from taking any steps to perfect a forfeiture of the plaintiff's interest in the claims, and from taking any steps to cast a cloud upon the title of the plaintiff therein.

Upon the filing of the bill a restraining order and an order to show cause were issued by the court below, and on December 15, 1914, after hearing, an injunction pendente lite was granted, restraining and enjoining the defendants, and each of them, and their attorneys, agents, and servants, from in any way or manner taking any steps towards forfeiting or declaring a forfeiture of the plaintiff's right, title, and interest in and to the mining claims set forth in the complaint, pursuant to or in accordance with the alleged notice of forfeiture annexed to the complaint, until the final hearing and determination of the suit, or until the further order of the court. This appeal is from the order granting the injunction pendente lite, and the granting of that injunction by the court below constitutes the sole assignment of error.

Charles W. Slack and Joseph K. Hutchinson, both of San Francisco, Cal., for appellants.

R. P. Henshall, H. L. Clayberg, John B. Clayberg, and Welles Whitmore, all of San Francisco, Cal., for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge (after stating the facts as above). Section 2324 of the Revised Statutes of the United States provides, among other things, that:

"On each claim located after the tenth day of May, eighteen hundred and seventy-two, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year. * * * Upon the failure of any one of several co-owners to contribute his proportion of the expenditures required hereby, the co-owners who have performed the labor or made the improvements may, at the expiration of the year, give such delinquent co-owner personal notice in writing or notice by publication in the newspaper published nearest the claim, for at least once a week for ninety days, and if at the expiration of ninety days after such notice in writing or by publication such delinquent should fail or refuse to contribute his proportion of the expenditure required by this section, his interest in the claim shall become the property of his co-owners who have made the required expenditures."

The notice served by Thomas W. Pack, for himself and his successors in interest, informed his co-owner, Thompson, that he (Pack) had expended during the years 1911 and 1912 the sum of $5,600 for labor and improvements upon 175 mining claims designated in the notice. The expenditure required by the statute for 175 mining claims for one year was $17,500, and for two years $35,000. The expenditure of $5,600 upon the mining claims designated in the notice was not the expenditure required by the statute, and was therefore clearly not sufficient to entitle Pack or his successor in interest to a forfeiture to himself or to them of the interest of the delinquent, Thompson, in the claims mentioned in the notice, upon the failure of such delinquent to pay to Pack or his successor in interest his proportion of the sum of $5,600, namely, $700, for a one-eighth interest in the 175 claims. The only labor or improvement required by the statute which will entitle a co-owner doing the work or making the improvement to

forfeiture from a delinquent co-owner of his interest is the expenditure of the full sum required by the statute, namely, not less than $100 for each claim. In order that the interest of a delinquent co-owner may be forfeited, it is essential that the entire work shall be performed by one or more of the co-owners claiming the forfeiture. Lindley on Mines, § 646, page 1622; The Golden and Cord Lode Mining Claims, 31 Land Dec. Dept. Int. 178, 181. The notice did not claim that the entire work required by the statute had been performed for the years 1911 and 1912. On the contrary, it conclusively appears from the notice that only a small proportion of the work required had been performed, and if the amount stated in the notice was all the work that had been performed on all of the claims, and it is so stated in the notice, they were then all subject to relocation, and no interest was saved by a partial compliance with the statute.

The notice being insufficient on its face to entitle the defendants to claim a forfeiture of the plaintiff's interest in the mining claims mentioned therein, and this also appearing by direct and positive allegations of the complaint, the court below was right in issuing its temporary injunction suspending defendants' forfeiture proceedings until the actual facts can be ascertained and the questions involved determined upon the merits.

The decree of the court below is affirmed.

PACK et al. v. CARTER.

(Circuit Court of Appeals, Ninth Circuit. May 24, 1915.)

No. 2538.

1. INJUNCTION ⊜180—FEDERAL COURTS—TEMPORARY RESTRAINING ORDER.

A temporary restraining order, granted under Judicial Code (Act March 3, 1911, c. 231) § 263, 36 Stat. 1162 (Comp. St. 1913, § 1240), which provides that, "whenever notice is given of a motion for an injunction out of a District Court, the court or judge thereof may, if there appears to be danger of irreparable injury from delay, grant an order restraining the act sought to be enjoined until the decision upon the motion," ceases to be effective without further order of the court on the hearing of the motion for the temporary injunction.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 392; Dec. Dig. ⊜180.]

2. APPEAL AND ERROR ⊜100—TEMPORARY RESTRAINING ORDER—REFUSAL—RIGHT OF APPEAL.

No appeal lies from an order refusing to dissolve a temporary restraining order.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 670–680; Dec. Dig. ⊜100.]

Appeal from the District Court of the United States for the Southern Division of the Southern District of California; Benjamin F. Bledsoe, Judge.

Suit in equity by Cecil C. Carter against Thomas W. Pack, Stella Schuler, and Joseph K. Hutchinson. From an order denying a mo-

tion for vacation of a temporary restraining order, defendants appeal. Reversed.

Charles W. Slack and Joseph K. Hutchinson, both of San Francisco, Cal., for appellants.

R. P. Henshall, H. L. Clayberg, John B. Clayberg, and Welles Whitmore, all of San Francisco, Cal., for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge. It is alleged in the complaint filed by the plaintiff in this case that he is the owner and holder of an undivided one-eighth interest in and to 175 certain placer mining claims, particularly set forth and described in the complaint. The claims described in the body of the complaint are the identical claims involved in case No. 2535, 223 Fed. 635, —— C. C. A. ——, just decided. The plaintiff alleges that he derived title thereto, by mesne conveyance, from one O. Perkins and Sylvia Perkins, his wife. The complaint is based upon an alleged notice of forfeiture, dated September 14, 1914, served upon the plaintiff's predecessor in interest by the defendants, wherein the latter claim to have expended the sum of $4,400 for assessment work on certain described claims for the year 1912, and a demand is by the alleged notice made upon the plaintiff's predecessor in interest for the payment by him to them of a contribution for such assessment work on the claims alleged to amount to the sum of $550. The plaintiff prayed for an injunction pendente lite restraining the defendants from forfeiting his interest in and to the claims in suit. The notice of forfeiture served upon the plaintiff by the defendant Pack and his successors in interest, a copy of which is attached to the complaint, designates for the claim of forfeiture 42 of the 175 mining claims in which the plaintiff claims an undivided one-eighth interest. It satisfactorily appears that there is an omission of two claims in the copy of the notice attached to the complaint as printed in the record, and that the original notice referred to 44 claims. The notice is that:

"I, the undersigned, T. W. Pack, expended during the year 1912 the sum of forty-four hundred dollars ($4,400), in amounts of one hundred dollars ($100), for labor and improvements upon each of the forty-four (44) following described placer mining claims."

Then followed a description of 42 claims, but we assume that 44 claims were described in the original notice. This case differs from case No. 2535, just decided, in this respect: In this case the defendant Pack and his successors in interest have described in their notice 44 claims upon which they claim Pack expended $4,400 during the year 1912. It sufficiently appears that the $4,400 here claimed as an expenditure by Pack on the 44 claims for the year 1912 is part of the $5,600 claimed by Pack as having been expended by him on the 175 claims described in the notice attached to the complaint in case No. 2535, where such expenditure is claimed to have been made for the years 1911 and 1912. It appears, further, that said 175 claims included the 44 claims involved in this case. The manifest inconsistency of the notices in the two cases, which also appears by direct and positive allegations of the complaint herein, is sufficient to discredit the notice

in this case, and justifies this court in holding that the proceedings initiated by Pack and his successors in interest to forfeit the interest of the plaintiff in the claims mentioned, under section 2324 of the Revised Statutes, should be suspended by a temporary injunction until the actual facts can be ascertained and the questions determined upon the merits.

[1] But there is in the record a question of procedure which we cannot overlook. Upon the filing of the verified bill of complaint the court below issued ex parte a temporary restraining order, to continue until the hearing of the application of the plaintiff for an injunction pendente lite. The complaint was filed on December 15, 1914, and the temporary restraining order was issued on that date. On December 16, 1914, the defendants gave notice that on December 18, 1914, they would move the court for an order dissolving the temporary restraining order. This motion was in accordance with the provisions of equity rule 73 (198 Fed. xxxix, 115 C. C. A. xxxix). On December 18, 1914, the court on its own motion continued the hearing on this order to December 21, 1914, the day upon which the hearing was to be had upon the order to show cause why a temporary injunction should not issue. On December 21, 1914, a hearing was had on defendants' motion to dissolve the temporary restraining order, but no hearing appears to have been had upon the order to show cause why a temporary injunction should not issue as prayed for by the plaintiff.

A temporary restraining order is authorized by section 263 of the Judicial Code. This section was formerly section 718 of the Revised Statutes. The section provides as follows:

"Whenever notice is given of a motion for an injunction out of a District Court, the court or judge thereof may, if there appears to be danger of irreparable injury from delay, grant an order restraining the act sought to be enjoined until the decision upon the motion; and such order may be granted with or without security, in the discretion of the court or judge."

The Supreme Court in Houghton v. Meyer, 208 U. S. 149, 156, 28 Sup. Ct. 234, 236, 52 L. Ed. 432, held that this section does not deal with temporary injunctions, concerning which power is given in other sections of the statutes. The court said:

"While the statutory restraining order is a species of temporary injunction, it is only authorized, as section 718 imports by its terms, until the pending motion for a temporary injunction can be heard and decided."

[2] By section 129 of the Judicial Code (section 7 of Act March 3, 1891, c. 517, 26 Stat. 828, as amended by Act Feb. 18, 1895, c. 96, 28 Stat. 666, Act June 6, 1900, c. 803, 31 Stat. 660, and Act April 14, 1906, c. 1627, 34 Stat. 116), no appeal is provided from an order refusing to dissolve a temporary restraining order. The reason is obvious. The order, when granted without notice, is granted until a hearing, and the matter is made returnable at the earliest possible time, and in no event more than ten days from the date of the order. As said by the Supreme Court in Houghton v. Meyer, supra, quoting from High on Injunctions, par. 3:

"'A temporary restraining order is distinguished from an interlocutory injunction, in that it is ordinarily granted merely pending the hearing of a

motion for a temporary injunction, and its life ceases with the disposition of that motion and without further order of the court, while, as we have seen, an interlocutory injunction is usually granted until the coming in of the answer or until the final hearing of the cause, and stands as a binding restraint until rescinded by the further action of the court.'"

See, also, Wetzstein v. B. & M. Co., 25 Mont. 135, 63 Pac. 1043; Maloney v. King, 25 Mont. 256, 64 Pac. 668; Pleasants v. Vevay, etc., Co., 42 Ind. 391.

The order of the court below, denying the motion of the defendants for an order vacating and dissolving the temporary restraining order, is reversed, with instructions to take up and consider the application of the plaintiff for a temporary injunction.

PACK et al. v. THOMPSON.

(Circuit Court of Appeals, Ninth Circuit. May 24, 1915.)

No. 2536.

MINES AND MINERALS ⇐38—MINING CLAIMS—PROCEEDING TO FORFEIT INTEREST OF CO-OWNER—INJUNCTION.

Where a part owner of a number of placer mining claims served notices of forfeiture on the other part owners under Rev. St. § 2324 (Comp. St. 1913, § 4620), some relating to all of the claims, and some to less than all, and which notices were inconsistent with respect to the assessment work claimed to have been done, a temporary injunction was properly granted to restrain such forfeiture until a hearing on the merits of a suit brought by one of the part owners whose interest was sought to be forfeited.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 87½–113; Dec. Dig. ⇐38.]

Appeal from the District Court of the United States for the Southern Division of the Southern District of California; Benjamin F. Bledsoe, Judge.

Suit in equity by E. Thompson against Thomas W. Pack, Stella Schuler, and Joseph K. Hutchinson. From an order granting a preliminary injunction, defendants appeal. Affirmed.

Charles W. Slack and Joseph K. Hutchinson, both of San Francisco, Cal., for appellants.

R. P. Henshall, H. L. Clayberg, John B. Clayberg, and Welles Whitmore, all of San Francisco, Cal., for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge. In the present suit the plaintiff prayed for and obtained an injunction pendente lite restraining and enjoining the defendants from in any manner taking any steps towards forfeiting the plaintiff's right, title, and interest in and to 12 certain placer mining claims, particularly set forth and described in the complaint as claims Nos. 68 to 72, inclusive, 87 to 91, inclusive, 111, and 112, situate upon Searles Borax Lake, San Bernardino county, Cal.

All of such claims are included in the 175 claims involved in case No. 2535, 223 Fed. 635, —— C. C. A. ——. The complaint is based

upon an alleged notice of forfeiture, dated September 14, 1914, and served by the defendants upon the plaintiff, wherein they claim to have expended the sum of $1,200 for assessment work upon the claims for the year 1911, and they demand the payment by him to them of a contribution to such assessment work on the claims alleged to amount to the sum of $150. It sufficiently appears that the $1,200 here claimed as an expenditure by Pack on the 12 claims for the year 1911 is part of the $5,600 claimed by Pack as having been expended by him on the 175 claims described in the notice attached to the complaint in case No. 2535, 223 Fed. 635, —— C. C. A. ——, where such expenditure is claimed to have been made for the years 1911 and 1912. It appears further that said 175 claims included the 12 claims involved in this case. The inconsistency of these notices, which also appears by direct and positive allegations of the complaint, is sufficient to discredit the notice in this case, and justifies this court in holding that the proceedings initiated by Pack and his successors in interest to forfeit the interest of the plaintiff in the claims mentioned, under section 2324 of the Revised Statutes, be suspended by a temporary injunction until the actual facts can be ascertained and the questions involved determined upon the merits.

The decree of the court below is affirmed.

PACK et al. v. THOMPSON.

(Circuit Court of Appeals, Ninth Circuit. May 24, 1915.)

No. 2539.

MINES AND MINERALS ⊂=38—MINING CLAIMS—PROCEEDING TO FORFEIT INTEREST OF CO-OWNER—INJUNCTION.

A preliminary injunction *held* properly granted to restrain forfeiture of the interest of a part owner of mining claims, under Rev. St. § 2324 (Comp. St. 1913, § 4620).

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 87½–113; Dec. Dig. ⊂=38.]

Appeal from the District Court of the United States for the Southern Division of the Southern District of California; Benjamin F. Bledsoe, Judge.

Suit in equity by E. Thompson against Thomas W. Pack, Stella Schuler, and Joseph K. Hutchinson. From an order denying a motion to dissolve a preliminary injunction, defendants appeal. Affirmed.

Charles W. Slack and Joseph K. Hutchinson, both of San Francisco, Cal., for appellants.

R. P. Henshall, H. L. Clayberg, John B. Clayberg, and Welles Whitmore, all of San Francisco, Cal., for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge. In this suit the plaintiff prayed for and obtained an injunction pendente lite restraining and enjoining

the defendants from in any manner taking any steps towards forfeiting the plaintiff's right, title, and interest in and to 12 certain placer mining claims, particularly set forth and described in the complaint as claims Nos. 68 to 72, inclusive; 87 to 91, inclusive, 111 and 112, situate upon Searles Borax Lake, San Bernardino county, Cal.

All of such claims are included in the 175 claims involved in case No. 2535, 223 Fed. 635, —— C. C. A. ——, all thereof in case No. 2536, 223 Fed. 641, —— C. C. A. ——, one thereof (claim No. 70) in case No. 2537, 223 Fed. 645, —— C. C. A. ——, and all thereof in case No. 2538, 223 Fed. 638, —— C. C. A. ——. The complaint is based upon an alleged notice of forfeiture dated September 14, 1914, and served by the defendants upon the plaintiff, wherein they claim to have expended the sum of $1,200 for assessment work upon the claims for the year 1911, and they demand payment by him to them of a contribution for such assessment work on the claims alleged to amount to the sum of $150. After the granting of the injunction pendente lite, a motion was made by the defendants for an order vacating and dissolving the injunctive order. The motion was based upon affidavits of the defendants in which some of the material allegations of the complaint were denied, but there was no denial as to the terms and conditions of the notice of forfeiture.

The appeal in this case is from an order of the court below refusing to dissolve the injunction pendente lite. It sufficiently appears that the $1,200 here claimed as an expenditure by Pack on 12 claims for the year 1911 is part of the $5,600 claimed by Pack as having been expended by him on the 175 claims described in the notice attached to the complaint in case No. 2535, 223 Fed. 635, —— C. C. A. ——, where such expenditure is claimed to have been made for the years 1911 and 1912. It appears, further, that said 175 claims included the 12 claims involved in this case. The inconsistency of these notices, which also appears by direct and positive allegations of the complaint, is sufficient to discredit the notice in this case, and justifies this court in holding that the proceedings initiated by Pack and his successors in interest to forfeit the interest of the plaintiff in the claims mentioned, under section 2324 of the Revised Statutes, be suspended by a temporary injunction until the actual facts can be ascertained and the questions involved determined upon the merits.

The decree of the court below is affirmed.

PACK et al. v. THOMPSON.

(Circuit Court of Appeals, Ninth Circuit. May 24, 1915.)

No. 2540.

MINES AND MINERALS ⊜38—MINING CLAIMS—PROCEEDINGS TO FORFEIT INTEREST OF CO-OWNER—INJUNCTION.

A preliminary injunction *held* properly granted to restrain forfeiture of the interest of a part owner of mining claims, under Rev. St. § 2324 (Comp. St. 1913, § 4620).

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 87½–113; Dec. Dig. ⊜38.]

⊜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 Southern Division of the Southern District of California; Benjamin F. Bledsoe, Judge.

Suit in equity by E. Thompson against Thomas W. Pack, Stella Schuler, and Joseph K. Hutchinson. From an order denying a motion to dissolve a preliminary injunction, defendants appeal. Affirmed.

Charles W. Slack, and Joseph K. Hutchinson, both of San Francisco, Cal., for appellants.

R. P. Henshall, H. L. Clayberg, John B. Clayberg, and Welles Whitmore, all of San Francisco, Cal., for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge. In this suit the plaintiff prayed for and obtained an injunction pendente lite restraining and enjoining the defendants from in any manner taking any steps towards forfeiting the plaintiff's right, title, and interest in and to 44 certain placer mining claims, particularly set forth and described in the complaint as claims Nos. 1 to 31, inclusive, 48 to 50, inclusive, 67, 70, 73, 86, 92, 113, 114, 130, and 218, situate upon Searles Borax Lake, San Bernardino county, Cal.

All of such claims are included in the 175 claims involved in case No. 2535, 223 Fed. 635, —— C. C. A. ——, one thereof (claim No. 70) is included in case No. 2536, 223 Fed. 641, —— C. C. A. ——, all thereof are included in case No. 2537, 223 Fed. 645, —— C. C. A. ——, all thereof are included in case No. 2538, 223 Fed. 638, —— C. C. A. ——, and one thereof (claim No. 70) is included in case No. 2539, 223 Fed. 642, —— C. C. A. ——. The complaint is based upon an alleged notice of forfeiture, dated September 14, 1914, and served by the defendants upon the plaintiff, wherein they claim to have expended the sum of $4,400 for assessment work upon the claims for the year 1912, and they demand payment by him to them of a contribution for such assessment work on the claims, alleged to amount to the sum of $550. After the granting of the injunction pendente lite, a motion was made by the defendants for an order vacating and dissolving the injunctive order. The motion was based upon affidavits of the defendants, in which some of the material allegations of the complaint were denied, but there was no denial as to the terms and conditions of the notice of forfeiture.

The appeal in this case is from an order of the court below refusing to dissolve the injunction pendente lite. The allegations of the complaint are in all material respects similar to the allegations of the complaint filed in case No. 2537. For the reasons set forth in the opinion filed in that case (223 Fed. 645, —— C. C. A. ——), we are of opinion that the injunction was properly granted.

The decree of the court below is affirmed.

PACK et al. v. THOMPSON.

(Circuit Court of Appeals, Ninth Circuit. May 24, 1915.)

No. 2537.

MINES AND MINERALS ⊂=38—MINING CLAIMS—PROCEEDINGS TO FORFEIT INTEREST OF CO-OWNER—INJUNCTION.

A preliminary injunction *held* properly granted to restrain forfeiture of the interest of a part owner of mining claims, under Rev. St. § 2324 (Comp. St. 1913, § 4620).

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 87½–113; Dec. Dig. ⊂=38.]

Appeal from the District Court of the United States for the Southern Division of the Southern District of California; Benjamin F. Bledsoe, Judge.

Suit in equity by E. Thompson against Thomas W. Pack, Stella Schuler, and Joseph K. Hutchinson. From an order denying a motion to dissolve a preliminary injunction, defendants appeal. Affirmed.

Charles W. Slack and Joseph K. Hutchinson, both of San Francisco, Cal., for appellants.

R. P. Henshall, H. L. Clayberg, John B. Clayberg, and Welles Whitmore, all of San Francisco, Cal., for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge. In the present suit the plaintiff prayed for and obtained an injunction pendente lite restraining and enjoining the defendants from in any manner taking any steps towards forfeiting the plaintiff's right, title, and interest in and to 44 certain placer mining claims, particularly set forth and described in the complaint as claims Nos. 1 to 31, inclusive, 48 to 50, inclusive, 67, 70, 73, 86, 92, 93, 113, 114, 130, and 218, situate upon Searles Borax Lake, San Bernardino county, Cal.

All of such claims are included in the 175 claims involved in case No. 2535, 223 Fed. 635, —— C. C. A. ——, and one thereof (claim No. 70) is involved in case No. 2536, 223 Fed. 641, —— C. C. A. ——. The complaint is based upon an alleged notice of forfeiture, dated September 14, 1914, and served by the defendants upon the plaintiff, wherein they claim to have expended the sum of $4,400 for assessment work upon the claims for the year 1912, and they demand the payment by the plaintiff to them of a contribution to the assessment work on the claims alleged to amount to the sum of $550. The allegations of the complaint are in all material respects similar to the allegations of the complaint in case No. 2536, 223 Fed. 641, —— C. C. A. ——, just decided.

For the reasons set forth in the opinion filed in that case, the decree of the court below is affirmed.

In re INTERBOROUGH REALTY CO.

Petition of WOLFE.

(Circuit Court of Appeals, Second Circuit. April 21, 1915.)

No. 199.

BANKRUPTCY ⊂=311—PROVABLE DEBTS—BONDS OF CORPORATION.

A provision in bonds of a bankrupt corporation that at maturity of the bonds, if after the corporation shall have paid its debts and 5 per cent. annual dividends on its stock, there shall remain a surplus, it shall be divided between the bondholders and stockholders, does not operate to defeat the right of bondholders to prove their claims as general creditors.

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

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

This cause comes here upon appeal from an order denying the application of Wolfe to be given preference in payment over the claims of bondholders. He is the holder of a note of the bankrupt for $4,500 which recites the deposit with him, as collateral security for its payment, of 150 shares of the capital stock of the company.

E. M. Otterbourg, of New York City, for petitioner.

D. B. Simpson, of New York City, for respondent.

Hamilton, Gregory & Freeman, of New York City (William H. Hamilton and Norman C. Conklin, both of New York City, of counsel), for bankrupt.

Before LACOMBE, COXE, and WARD, Circuit Judges.

PER CURIAM. All the other creditors—some of them bondholders, others contract creditors—proved their claims as general creditors. The bonds contain a provision for sharing at maturity in the net profits, and it is contended that in consequence they are to be treated as stock.

Appellant relies on Cass v. Realty Securities, 148 App. Div. 96, 132 N. Y. Supp. 1074; Id., 206 N. Y. 649, 99 N. E. 1105, approved by us in Re Fechheimer-Fishel Company, 212 Fed. 357, 129 C. C. A. 33. These decisions do not cover the case at bar. The bondholders are promised only repayment of the amount of money loaned, with interest; it being further provided that at maturity, if after the corporation shall have paid all its debts and also 5 per cent. per annum on the stock, there shall be any surplus left, such surplus shall be divided between the stockholders and the bondholders. Such a provision does not operate to defeat the bondholders' claim to prove as general creditors for principal and interest.

Order affirmed.

MIEHLE PRINTING PRESS & MFG. CO. v. WHITLOCK PRINTING PRESS & MFG. CO.

(Circuit Court of Appeals, Second Circuit. April 13, 1915.)

No. 224.

1. PATENTS ⟸328—VALIDITY AND INFRINGEMENT—MECHANICAL MOVEMENT.
The Hodgman patent, No. 664,151, for a mechanical movement designed for use on a Miehle printing press, covers a patentable improvement, and discloses invention; also *held* infringed.

2. PATENTS ⟸37—"PATENTABLE NOVELTY"—IMPROVEMENT OF EXISTING STRUCTURE.
"Patentable novelty" is sometimes found in discovering what is the difficulty with an existing structure, and what change in its elements will correct the difficulty, even though the means for introducing that element into the combination are old, and their adaptation to the new purpose involves no patentable novelty.
[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 41–44; Dec. Dig. ⟸37.
For other definitions, see Words and Phrases, First and Second Series, Novelty.]

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

This cause comes here on appeal from a decree of the District Court, Southern District of New York, dismissing the bill. The suit was brought for infringement of United States patent No. 664,151, granted December 18, 1900 (application filed January 21, 1898), to Willis K. Hodgman for a mechanical movement.

C. C. Linthicum, of Chicago, Ill., and Frederick L. Emery, of Boston, Mass., for appellant.

G. D. Seymour, of New Haven, Conn., O. E. Edwards, Jr., and Louis W. Southgate, both of New York City, and Chas. T. Hawley, of Holden, Mass., for appellee.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

LACOMBE, Circuit Judge. [1] Although the patented device is entitled broadly as a "mechanical movement," the specification states that it is particularly adapted for use in a certain type of printing press; it can be sustained only as an improvement on the mechanism of that type of printing press, as the actual movement of the part of the mechanism with which it is concerned is effected by means well known in the mechanic art.

The gist of the invention, as the patentee states, consists essentially in the use of a plane-faced actuating-block and means for maintaining it in proper position relative to the devices with which it intermittently co-operates.

The type of printing press referred to is the Miehle press, United States patent No. 322,309, July 14, 1885. The invention of this press was a great advance in the art. It involved the motion back and forth of the bed of the press—a very heavy part—at high speed. The move-

ment of the bed was accomplished by a toothed wheel, which always moved clockwise and engaged alternately with racks in the bed, above and below the wheel. The heavy bed acquired momentum which had to be gradually reduced, stopped, and the direction of movement reversed. This was accomplished by a stud on the toothed wheel, called a reversing member, which engaged alternately with guideways at each end of the machine. These guideways were vertical; when the stud was in one of them it bore against one side of the guideway, gradually checking the movement of the bed to which the guideway was attached and finally initiating a movement of the same in a reverse direction, just as the teeth of the gear wheel engaged with the rack to continue the reverse motion. As no question arises as to operation of the Miehle press itself, further details of its structure seem unnecessary. The claim of the patent in suit, on which complainant relies reads as follows:

"3. In a reversing mechanism, a reciprocating member, relatively movable shoes carried thereby to form a guideway, a reversing member movable in a circular path and having *parallel plane bearing-faces*, to enter said guideway intermittently and co-operate with the shoes, *means to position the bearing-faces* of said reversing member to enter the guideway and means to effect relative movement of the shoes to permit the entrance to and departure of the reversing member from the guideway."

Some of the elements of this claim are Miehle's; such of them as indicate Hodgman's improvement we have italicized. Every one agrees that Miehle made a highly meritorious invention; it revolutionized the art and has stood the test of time. Like every such invention involving a complicated structure it was, of course, susceptible of improvement; whether any particular improvement would itself constitute patentable invention is an open question, to be decided upon consideration of such improvement.

Miehle secured reversal of motion of heavy parts, without jar or disturbance, by means of a stud on the gear wheel, the wheel which alternately meshed with upper and lower rack. That stud (during a half-revolution of the wheel) passed through a guideway; it then (during two revolutions) passed unguided through the air and entered another guideway through which it passed (during a half revolution).

Miehle's stud was round and had a cylindrical sleeve on it to reduce friction. This had defects; or perhaps, as it may better be expressed, it was not as efficient as it might be. Because stud and sleeve were cylindrical, the sleeve made line contact only with the guide with which it engaged. This increased wear and tear; not only would the roller itself wear, but it tended to wear the guides. This necessitated the very best workmanship and materials. Moreover, any jarring of the press would cause the roller to jump across from one guide to the other, which was undesirable.

Hodgman, while retaining the Miehle stud with its two guideways and a flight through the air between one guideway and the other, has substituted for the cylindrical sleeve a square side block, presenting long parallel sides to travel in contact with the walls of the guideways. Thus guides and block will wear longer—the block can be made of softer material and more cheaply than a roller. We do not understand

that any one contends that the Miehle press is not at all improved by the use of a square-sided block; certainly defendant, which uses such a block, cannot so contend. Inasmuch as the block is constantly leaving one guideway and entering another, it must always—especially when in the air and not controlled by guides—be maintained in position, top side up, without any rotative motion whatsoever about its own axis.

No one disputes the proposition that it was common knowledge that a square-sided engagement with a guide would have the advantages above pointed out.

The defendant contends that it was "obvious" that the frictional roller of Miehle did not provide satisfactory wearing surfaces; that it was "obvious" that this was a defect which should be eliminated; that it was "obvious" that it would be eliminated if a square-sided block were substituted for the roller, the stud and guideways remaining substantially the same as before.

If this be so then Judge Mayer was correct, and it is not necessary to add anything to his discussion of the mechanics of the case, because the only thing left for Hodgman to do with these "obvious" suggestions before him would be to secure right-side-up position for his squared block and two well-known mechanical devices (the "planetary gear" and the "parallel links") were available to secure it; given the appreciation of the defect and the realization that the square-sided block would remedy it, the details of the structure would seem to be within the range of the ordinary skilled mechanic, who would use either the planetary gear, as Hodgman did, or the parallel links, as defendant does.

We must admit that, looking at the situation as laymen, unskilled in mechanics, and enlightened by the situation as it is *after* the event, we would be inclined to agree with defendant in its statement of what was obvious before Hodgman appeared. But in our opinion the record does not indicate that this is all there is to Hodgman's improvement. Past experience has shown us that what may seem obvious after disclosure was not obvious before, even to persons skilled in the art. Brunswick Balke Co. v. Thum, 111 Fed. 904, 50 C. C. A. 61; Schenck v. Singer Mfg. Co., 77 Fed. 841, 23 C. C. A. 494.

If the defect of line engagement in the Miehle press were so obvious, it must have been perceived soon after his presses began to be used. It must be assumed that defects of that sort, when they can be rectified without much expense, are corrected by improvements whenever the method of improving them is obvious. One would suppose that, soon after the Miehle press got into use, its defect of line engagement would be apparent, and that the skilled persons who had devised it and were operating it would be prompt to improve it.

But this is not what happened; Miehle's patent was issued in 1885, but Hodgman's substitute of the square-sided block on the Miehle stud, moving sometimes in guideways, sometimes free, does not appear until his application is filed in 1898. Why was it that the art waited 14 years before it modified the Miehle engaging stud by covering it with a square block, instead of a roller? Two modifications appeared during that period, Wood in 1892, Huson in 1896; but, although both used

a square block, in neither did the block leave and enter successive guideways; in both the block, or what is its equivalent, is always in a guideway. Their devices depart further from Miehle than does Hodgman. They may be better or worse than Hodgman's change. Hodgman's change is the simpler, and if it were as obvious, as defendant contends, why did the more complicated changes of Wood and Huson first appear? The record indicates, as it did in the cases of the sewing machine treadle and the bowling alley ball return way, that there is something about the improvement of Hodgman which marks it as an expedient—simple, no doubt—but not naturally suggesting itself to the man skilled in the art.

[2] Patentable novelty is sometimes found in discovering what is the difficulty with an existing structure and what change in its elements will correct the difficulty, even though the *means* for introducing that element into the combination are old and their adaptation to the new purpose involves no patentable novelty. So in this case, if Hodgman was the first one to perceive that the roller sleeve would handicap the Miehle structure and that a block sleeve on the crank pin entering and leaving guideways would relieve the handicap, if it took him years to find this out, and if in the meantime skilled persons who wanted to make Miehle's structure a success suggested neither the difficulty nor the remedy, we are inclined to think that for his particular improvement Hodgman was entitled to a patent.

It is contended that this argument is without weight, because the Miehle Company, which has owned the Hodgman patent for some time, does not incorporate his improvement in the machines which it makes and sells. The Hodgman patent became the property first of the Huber Company, and afterwards of its successor, the Huber-Hodgman Company. During the period of their ownership between 400 and 500 printing presses involving Hodgman's invention were made and sold, a gross business of about $1,500,000, covering a period of 10 years. Then the Miehle Company bought out the Huber-Hodgman Company's business, taking this patent and others with the rest of the assets. What business reasons have influenced the Miehle Company since then to make and market its presses without incorporating the Hodgman squared block we do not know. Possibly some other changes in the old structure are found to be more economical or more efficient; that art may have progressed far beyond Miehle and Hodgman; as to that the record is silent. But it is significant that defendant does not use the round sleeve of Miehle, nor the continuous guiding of Wood or Huson, but the identical square-sided block of Hodgman, moving partly in guideways, partly not so moving, and held always in proper position for ingress into a guideway. Miehle's patent has expired; the cylindrical sleeve on the round stud is free for defendant to use; if Hodgman's device is not an improvement of Miehle's there is no apparent reason why defendant should use it; Miehle's will answer every purpose. Nevertheless defendant does use Hodgman's device, and has been willing to go to the expense of a lawsuit to maintain its right to do so, when it would have cost it nothing to use the old device of Miehle's expired patent.

In our opinion, Hodgman's change was an improvement, and, for the reasons above indicated, it was a patentable improvement. Infringement is plain; the claim does not confine the patentee to any particular "means" for maintaining the square-sided block in position.

The decree is reversed, with costs of this appeal, and cause remanded, with instructions to decree in conformity with this opinion.

HILDRETH v. AUERBACH et al.

(Circuit Court of Appeals, Second Circuit. March 9, 1915.)

No. 166.

1. PATENTS ⇐328—INFRINGEMENT—CANDY-PULLING MACHINE.
The Hildreth patent, No. 832,384, for a candy-pulling machine, *held* not infringed.

2. PATENTS ⇐328—VALIDITY AND INFRINGEMENT—CANDY-PULLING MACHINE.
The Thibodeau patent, No. 857,770, for a candy-pulling machine, *held* valid and infringed.

3. PATENTS ⇐198—ASSIGNMENT—FORM OF ACKNOWLEDGMENT.
The acknowledgment to the assignment of a patent, required by Rev. St. § 4898 (Comp. St. 1913, § 9444), is sufficient, if in a form good at common law.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 277; Dec. Dig. ⇐198.]

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. The suit was brought for alleged infringement of two patents, both owned by complainant—No. 832,384, granted October 2, 1906, to complainant for a candy-pulling machine, and No. 857,770, granted June 25, 1907, to Charles Thibodeau, assignor, for a candy-pulling machine. The District Judge, following the Court of Appeals for the Fourth Circuit, held that the earlier of these patents was invalid; he found infringement of claims 1, 8, 18, and 19 of the Thibodeau patent. Judge Hand's opinion will be found in 223 Fed. 545.

Paul Armitage, of New York City (Macleod, Calver, Copeland & Dike and George P. Dike, all of Boston, Mass., of counsel), for complainant.

J. L. Levy, of New York City, for defendants.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

LACOMBE, Circuit Judge. [1] Judge Hand followed the earlier opinions of Judge Rose and of the Court of Appeals for the Fourth Circuit, but evidently with considerable doubt. We are of the opinion that in these earlier opinions too broad a construction was given to the earlier Dickinson patent, which was found to negative invention in Hildreth. Dickinson first showed the "in and out" or "figure 8" mo-

tion of the pulling parts, and claimed it distinctively; but he showed no means for supporting the candy, except the trough in which it lies. He repeatedly refers to the trough as the "candy support," as a "receptacle for supporting the candy," the "object of said trough being merely to receive and support the batch of candy." He says, however:

"I have shown a trough for supporting the candy; but any suitable support may be used which has the capacity for supporting the candy while it is being operated upon."

Since he made this general suggestion as to supporting the candy, and since he was a pioneer in providing the "figure 8" motion, a meritorious improvement in the art, infringement of his patent might be found in the Hildreth device, which uses the "figure 8 motion" and supports the candy otherwise than by the trough. But it by no means follows that Hildreth, who was apparently the first to support the candy above the trough, table, or chamber bottom, also a meritorious improvement, was not entitled to a patent for the new method of supporting which he showed. It is, however, unnecessary to discuss this branch of the case, because the state of the art would preclude Hildreth from obtaining any broad construction of his claim, which we are satisfied is not infringed by defendant's device, where the supports are arranged horizontally instead of vertically. The result on either view of the case would be an affirmance of so much of the decree as dismisses the bill for infringement of the Hildreth patent.

[2, 3] As to the Thibodeau patent, we concur fully with Judge Hand's reasoning and conclusion. The form of acknowledgment to the eighth assignment, which was excepted to on the trial, reads:

"Then personally appeared Leo Piel, trustee, by me personally known, who acknowledged the foregoing instrument by him subscribed to be his free act and deed."

This is a sufficient acknowledgment at common law. We are satisfied that all that section 4898, Rev. Stat. U. S., requires is an acknowledgment good at common law, not one which shall conform to some special regulations as to acknowledgments which may be from time to time enacted in one or other of the different states.

The decree is affirmed, without costs to either party.

In re FINEMAN.

(District Court, E. D. Pennsylvania. March 12, 1915.)

No. 5293.

1. BANKRUPTCY ⟸81—PETITION—SUFFERING PREFERENCE—"ACT OF BANKRUPTCY."

Under Bankr. Act July 1, 1898, c. 541, § 3a, 30 Stat. 546 (Comp. St. 1913, § 9587), making it an "act of bankruptcy" for a person when insolvent to permit a creditor to obtain a preference and to fail to have the preference vacated at least five days before a final sale or other dis-

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

position of the property, a petition which alleges the insolvency of the alleged bankrupt and that he suffered and permitted certain creditors to obtain a preference by suffering a judgment to be rendered against him and an attachment and execution issued thereon against the garnishee, and that judgment had been obtained against the garnishee, is sufficient, since the rendering of the judgment against the garnishee is as final a disposition of the property as a sale under execution.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 59, 113–118, 125; Dec. Dig. ⊂⊃81.

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

2. BANKRUPTCY ⊂⊃81—PETITION—SUFFERING PREFERENCE.

The averment that a preference was obtained by that procedure, and that judgment and execution and attachment had been issued, and judgment entered against the garnishee, is necessarily an averment that the debt garnisheed was the property of the defendant.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 59, 113–118, 125; Dec. Dig. ⊂⊃81.]

3. BANKRUPTCY ⊂⊃95—HEARING—PETITION AND ANSWER.

The alleged bankrupt cannot have the case set down for hearing on petition and answer, since in such a hearing the averments of the answer are to be taken as true.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 132, 140, 145; Dec. Dig. ⊂⊃95.]

In Bankruptcy. Proceedings against Samuel Fineman. On motion to dismiss the petition. Motion denied.

Meyer Sack, of Philadelphia, Pa., for petitioning creditors.
Abraham Wernick, of Philadelphia, Pa., for alleged bankrupt.

DICKINSON, District Judge. [1] A statement of the record facts in this case is necessary to bring out the question involved. On November 7, 1914, a petition in an involuntary proceeding was filed. The act of bankruptcy intended to be averred was the third of those set forth in section 3a of the act. The ground of bankruptcy is that usually referred to as an act of "preference." It may be noted here that three things together constitute the act of bankruptcy. The alleged bankrupt must have been insolvent; he must have suffered or permitted a creditor to obtain a preference through legal proceedings; and he must have failed to have had such preference vacated at least five days before a final sale or other disposition of the property affected by such preference. The averments of the petition by means of which the insolvent is to be made subject to the provisions of the Bankruptcy Act are that the alleged bankrupt is insolvent and has suffered and permitted certain of his creditors to obtain a preference through legal proceedings. The preference set forth is the suffering of a judgment and an attachment in execution to be issued thereon against an insurance company as garnishee, and that judgment had been obtained against the garnishee in the proceedings, the amount of which is about to be paid over to the creditor thus preferred. There is a further averment of the failure of the alleged bankrupt to have the preference thus obtained vacated. No other ground of bankruptcy is suggested.

It is evident that no decree of adjudication can be entered unless the above averments bring the proceeding within the quoted section of the Bankruptcy Law. It is equally clear that the securing by a creditor of the amount of his claim through attachment in execution proceedings is a "final disposition of property affected by such preference" as effectually as if he had received payment from the proceeds of a sale under a writ of fieri facias or venditioni exponas. There is no necessity or excuse even for discussing the question, as it has been set at rest in a number of adjudications. In re Harper (D. C.) 105 Fed. 900. Essentially the same question was disposed of in Re Goldie Fisher (D. C.) 219 Fed. 638. The difference of views expressed by the respective counsel is due to the overlooking by counsel for the bankrupt of the distinction between cases in which the attachment in execution proceedings have gone no further than the issuance of the writ and those in which they have progressed beyond the point of a judgment against the garnishee. It is to be observed that the distinction is analogous to that between cases in which a judgment has been recovered, but no sale or other disposition of the property of the alleged bankrupt threatened, and those in which a sale through execution process is impending.

[2] It seems to be an extremely technical view (although there is some sanction for it in judicial expressions) to take of a petition that, because there is no averment of the fact that the debt attached is the property of the defendant in the judgment, there is therefore no averment that any property of the alleged bankrupt is affected "by a preference." In the first place, the averments are of the fact of the preference; and in the second place, the averment of a judgment and issuing of an attachment in execution upon that judgment, and following this a judgment against the garnishee, necessarily carries a statement of the fact that there was property of the defendant out of which the preference was obtained.

The motion to dismiss the petition is therefore disallowed.

[3] In order to dispose of the above question, we have, at the request of counsel, treated the proceeding before us as a motion to dismiss. The record fact, however, is that an answer was filed. This answer raises questions of fact which must be disposed of. The respondent cannot set down the proceedings for hearing on petition and answer, because the necessity of such a hearing is that the averments of the answer be accepted as verity. The petitioners, if they deem themselves entitled to a decree of adjudication notwithstanding the answer, might so set down the case; but for obvious reasons the respondent cannot do so. The proceeding must take its regular course, and its progress may be expedited by any of the parties interested.

The petition of certain creditors to intervene may be filed, and the prayer of the petition is granted.

In re SEDGWICK.

(District Court, D. Massachusetts. April 20, 1915.)

No. 20435.

1. DOMICILE ⟸10—EVIDENCE—SUFFICIENCY.
On motion to dismiss a voluntary petition in bankruptcy, evidence *held* not to show that the bankrupt had established a domicile within the territorial jurisdiction of the court.
[Ed. Note.—For other cases, see Domicile, Cent. Dig. § 39; Dec. Dig. ⟸10.]

2. DOMICILE ⟸4—REQUISITES—ACTS.
Intention alone is not sufficient to establish a domicile, which is a man's permanent home, as distinguished from transitory residences; but such intention must be supported by acts to become effective.
[Ed. Note.—For other cases, see Domicile, Cent. Dig. §§ 5–23; Dec. Dig. ⟸4.
For other definitions, see Words and Phrases, First and Second Series, Domicile.]

3. DOMICILE ⟸10—EVIDENCE—REGISTRATION.
The acts of town authorities in registering a man as a voter and assessing a poll tax against him are evidence of his domicile, but are not judicial determinations, conclusively establishing his status.
[Ed. Note.—For other cases, see Domicile, Cent. Dig. § 39; Dec. Dig. ⟸10.]

In Bankruptcy. Voluntary proceedings by Robert Sedgwick. On motion to dismiss the petition for lack of jurisdiction. Motion granted.

Otto B. Schmidt, of New York City, for creditors.
Augustus H. Skillin, of New York City, for bankrupt.

MORTON, District Judge. This is a motion to dismiss a voluntary petition in bankruptcy for lack of jurisdiction. The act confers jurisdiction in respect to such persons as "have had their principal place of business, resided, or had their domicile" within the district where the petition is filed. It is clear that the petitioner had no place of business in this district, and he did not reside here; and no contention is made that this court has jurisdiction upon either of those grounds. The only question is whether the petitioner was domiciled here at the time when this petition was filed on January 31, 1914. He contends that at that time his domicile was in Lenox, Mass.; the objecting creditors contend that it was either in Newport, R. I., or in New York, N. Y.

[1] In 1908 the petitioner was domiciled in Newport, R. I., where he voted and was a candidate for elective office. The Newport domicile was apparently based on a summer residence there. For many years the winter residence of the petitioner had been in New York City, generally in some hotel. His place of business was and is there. He testifies that his wife's domicile has been for a number of years and still is New York City. They live together, and he receives an allowance from her. Such household goods and effects as he himself owns were and are kept at the New York residence. Aside from

personal and traveling effects, he has owned no property in Lenox since 1908, except a burial lot.

Under these circumstances, in March, 1910, the petitioner went to Lenox and had himself registered as a voter there. He had not been in Lenox for months previous, and he stayed only a few days at that time, either visiting relatives or stopping at the hotel. He had no intention of removing to Lenox, nor of making that his real place of abode, nor of establishing an actual residence there, and he never afterwards did any of those things. He spent the following summer in Europe with his family. The following autumn he had his name removed from the Newport voting list and voted in Lenox. He has ever since been assessed a poll tax there and kept on the voting list. He has visited Lenox, as he says, "most of the years" since 1910, staying either with relatives or at the hotel; but such visits were casual and of short duration. The Sedgwick family, to which the petitioner belongs, is what would ordinarily be referred to as a Stockbridge or Lenox family. His father resided there many years, and the respondent's boyhood was passed there. Many of his ancestors and relatives have lived in Lenox or in Stockbridge. On this account Mr. Sedgwick has regarded Lenox as—in his own words—his "sentimental home." He intended in entire good faith and with no ulterior motive whatever to establish his domicile there in 1910.

[2] If domicile were only a matter of intent, I should have no hesitation in agreeing with the learned referee that domicile in Lenox was proved. But domicile is more than a mere matter of intention. It is a man's permanent home, as distinguished from transitory residences. Mitchell v. U. S., 21 Wall. 350, 352, 22 L. Ed. 584. A person cannot, simply by choosing and intending in good faith to make a certain place his domicile, effect that result. The intent to change domicile is ineffective, unless supported by adequate facts; there must be an actual removal animo manendi. "The change cannot be made, except facto et animo. Both alike are necessary. Either without the other is insufficient." White, J., Sun Printing Co. v. Edwards, 194 U. S. 383, 24 Sup. Ct. 696, 48 L. Ed. 1027. Citizenship as between the various states depends upon domicile; and there are many decisions holding with some strictness that a bona fide intention to become a citizen of another state failed because the facts were not sufficient to carry it out. See Simpson v. Phillipsdale Co. (D. C., Mass., Jan. 5, 1915) 223 Fed. 661.

[3] The acts of the town authorities in Lenox in registering Mr. Sedgwick as a voter, and in assessing a poll tax on him, were not judicial determinations establishing his status; they are evidence, but not conclusive. Mr. Sedgwick desired Lenox to be his domicile, but he did not intend to establish his home, or even a residence, there. His principal residence, and his real home, as much as he had one, remained in New York. It seems to me that what Mr. Sedgwick did was not sufficient to give him a domicile in Lenox; and I so find and rule. It follows that the decision of the referee must be reversed, and the motion to dismiss must be allowed.

So ordered.

In re E. & G. THEATRE CO.

(District Court, D. Massachusetts. May 11, 1915.)

No. 19833.

BANKRUPTCY ⊂=14—JURISDICTION—PRINCIPAL PLACE OF BUSINESS.

A Rhode Island corporation had an office in that state as required by its statutes, but its only property had been a leasehold on a theater building in Massachusetts, a sum on deposit with the landlord to secure the performance of the lease, and the personal property in the building, and its only business had been the conducting of a theater therein. The landlord had re-entered the premises for nonpayment of rent, and the corporation had brought an action in the Massachusetts state court to recover possession, in which action a receiver was appointed to conduct the business. A judgment was rendered in that action, restoring possession to the corporation on condition that it make certain payments, which it was unable to make, and thereafter a petition in bankruptcy was filed against it in Massachusetts. *Held*, that the corporation's activities in attempting to regain possession of its property constituted its business, and, since that was the only business of the corporation at that time, Massachusetts was its principal place of business, and the District Court of Massachusetts had jurisdiction over the bankruptcy proceedings.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 20; Dec. Dig. ⊂=14.]

In Bankruptcy. Proceedings against the E. & G. Theatre Company. On review of the referee's rulings and findings. Report of referee confirmed, and adjudication ordered.

Alfred G. Chaffee, of Providence, R. I., for petitioning creditors.

Harry F. R. Dolan, of Boston, Mass., for bankrupt.

Arthur S. Phillips, of Fall River, Mass., for objecting creditors.

MORTON, District Judge. This is an involuntary petition in bankruptcy against a Rhode Island corporation. A creditor has intervened and answered, setting up lack of jurisdiction and other defenses. Mr. Referee Sherman, to whom the case was referred, reports in favor of adjudication, and the case is here on review of his findings and rulings. The petition was filed on August 26, 1913; and the first question is whether, for the greater part of the preceding six months, the principal place of business of the respondent was in this district.

The respondent was organized in Rhode Island in December, 1912, and carried on the theatrical business. In accordance with Rhode Island law, it apparently maintained a nominal office in that state, where some, at least, if not all, of its officers resided, and where the meetings of its stockholders and directors were held. It never owned any substantial property in that state. It acquired a lease of a theater in Fall River, Mass. In connection with this lease it made a deposit of $5,000 with the lessor, who resided in Fall River, to secure performance of its covenants in the lease, and it acquired and installed in its theater there certain chattel property used in its business of giving theatrical performances. It never had any substantial prop-

erty other than that just referred to, which was all located in Fall River; and it never had any office from which its business was conducted, except that connected with its theater there.

Up to about April 22, 1913, it operated the theater in the usual manner. On May 8th the landlord re-entered upon the theater premises and retook possession of the same, with the chattel property therein, for alleged nonpayment of rent. By a bill in equity filed in the state court on May 24th, the respondent instituted legal proceedings against the landlord to recover its leasehold and its chattel property in the theater. In this suit a receiver was appointed, under whose direction and control the theater was operated until about July 27, 1913. By an interlocutory decree of the state court, entered on August 1, 1913, it was adjudged that the respondent was entitled to be relieved of the forfeiture of its leasehold upon making certain payments prescribed in said decree within the time therein limited, which finally expired on August 18, 1913. The respondent did not make these payments, and on the last named date a final decree was entered dismissing its bill. It took an appeal to the Supreme Judicial Court, by which the final decree was affirmed. E. & G. Theatre Co. v. Greene, 216 Mass. 171, 103 N. E. 301.

Up to May 8, 1913, it is clear that the respondent had its principal place of business in Fall River. Thereafter, having been dispossessed of its theater and office, it had no place where it was transacting the theatrical business. It was, however, until August 18th, engaged in litigation here in an effort to recover its place of business. All its property was in this district, in the hands of a receiver appointed by the superior court to conserve it, pending the litigation in regard to the ownership thereof. This litigation established that the plaintiff had a right to its property upon making certain payments. The affairs of the respondent were not in liquidation by foreign receivers, as was the case in Re Perry-Aldrich Co. (D. C.) 165 Fed. 249. The respondent was endeavoring to regain its theater and to resume business here. It also had an interest in the $5,000 deposited by it with the lessor, which it was endeavoring to protect. It seems to me that its activities constituted "business," as that word is generally understood, which was being done in this district. As the respondent was engaged in no business whatever elsewhere, and had no office elsewhere, it seems to me that its principal place of business was within this jurisdiction.

Upon the other points in the case, the learned referee's rulings and findings were, upon the record before me, plainly right. Report of the referee confirmed; adjudication ordered.

In re YOUNG et al.

(District Court, D. Massachusetts. April 2, 1915.)

No. 21420.

1. BANKRUPTCY ⊂=149—PARTNERSHIP—DISSOLUTION OF FIRM—RIGHTS OF CREDITORS.
Where a firm is dissolved, and a partner sells his interest therein to the copartner, who is adjudged a bankrupt, the firm creditors may, as against individual creditors, have the firm property applied in the first instance to the payment of their debts in the settlement of the estate of the bankrupt.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 229; Dec. Dig. ⊂=149.]

2. BANKRUPTCY ⊂=62—ADJUDICATION OF PARTNERSHIP AS BANKRUPT.
A partnership cannot, after its dissolution and so long as there is a solvent former partner, be adjudicated a bankrupt, even under Bankr. Act July 1, 1898, c. 541, § 5a, 30 Stat. 547 (Comp. St. 1913, § 9589).
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 57; Dec. Dig. ⊂=62.]

3. BANKRUPTCY ⊂=84—INVOLUNTARY PETITION—AMENDMENTS—ALLOWANCE.
A petition in involuntary bankruptcy against a firm and the partners may, on it appearing that the firm had been dissolved and that a partner had transferred his interest therein to a copartner, be amended by striking out the firm and the partner, so that proceedings to adjudicate the copartner a bankrupt may be had, as against the objection of the partner having claims against the copartner coming into existence after the filing of the original petition.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 126–129; Dec. Dig. ⊂=84.]

In Bankruptcy. In the matter of Edward O. Young and others, alleged bankrupts. Adjudication of bankruptcy ordered against one Hyde.

Thomas F. Dolan and John J. Cummings, both of Boston, for petitioning creditors.

Stewart & Rand, of Boston, for respondent Young.

MORTON, District Judge. [1, 2] After the firm had been dissolved and Young had transferred his interest in its property to Hyde, the latter became the sole owner of what had formerly been the partnership property. As between his individual creditors and the partnership creditors, the right of the latter to have the partnership property applied in the first instance to the payment of their debts, was thereafter to be worked out in Hyde's estate. In re Suprenant (D. C.) 217 Fed. 470. I do not think that in this district a partnership can be adjudicated bankrupt, even under section 5a of the Bankruptcy Act, and after its dissolution, as long as there is a solvent partner, or former partner. There can therefore be no adjudication against the firm.

[3] The question, then, is whether this petition shall be dismissed, or whether the petitioners shall be allowed to amend by striking out the firm and Young as respondents and proceeding to adjudication

against Hyde alone. Hyde consents to the latter course; nobody objects to it, except Young. The court has power to allow such an amendment, and exercised it against objection in a somewhat similar case. Re Richardson (D. C. Mass.) 192 Fed. 50.

The ground of Young's opposition is that he has claims against Hyde which have come into existence after the date of this petition, and therefore, it is feared, cannot be proved in this bankruptcy. When Young sold out to Hyde, in August, 1914, the consideration which he received was Hyde's agreement to pay for Young's interest such sum as should be fixed upon an appraisal thereof, and to assume the firm debts. Subsequently Young and Hyde got into litigation concerning this amount in the state courts, as a result of which Hyde has paid to Young half of the $15,000 which was found to be due and has given notes for the balance. He has also executed an agreement to indemnify Young against the firm debts. These notes and the agreement were made after the date of the present petition, and are the reason for Young's objection to Hyde's adjudication on it. On the other hand, the petitioning creditors will be decidedly worse off, if the petition be dismissed, than if it be amended and adjudication ordered aganst Hyde.

If the petitioning creditors had, in the first instance, proceeded against Hyde alone, they would presumably have obtained an adjudication. It was by no means clear to them, at the time when the petition was filed, what was the proper course to pursue. They were in doubt about the law, and perhaps, also, to some extent, about the facts. They acted in entire good faith, and their uncertainty as to the law was not without excuse. As soon as the true situation was made evident, they offered to drop the proceedings against the firm and Young, by amendment to that effect, before the completion of the hearing before the referee. Young at that time objected, and insisted on his right to have the case heard and the petition dismissed on the merits as to him. His position was sustained, the hearings were completed, and the referee now reports that as to Young and the firm the petition should be dismissed. Owing to the imperfect manner in which the case was tried before the referee, his statement of facts is meager and incomplete. As I construe it, sufficient appears to support an adjudication against Hyde.

Under all the circumstances, it seems to me proper to conserve the interests of the petitioners, rather than of Young.

The petition is dismissed as to Young and the firm. It is retained as against Hyde alone, and may be amended by striking out the names of the firm and of Young. Upon such amendment, adjudication is ordered against Hyde.

SIMPSON v. PHILLIPSDALE PAPER MILL CO.

(District Court, D. Massachusetts. January 5, 1915.)

No. 544.

1. COURTS ⟸307—UNITED STATES COURTS—JURISDICTION—DIVERSITY OF CITIZENSHIP.

An unmarried man, having an office and lodgings in Boston, gave up his lodgings there and removed his personal effects to Providence, where he engaged lodgings, for the express purpose of obtaining a residence there, in order that he might sue a Massachusetts corporation in the federal courts, and with the intention of doing everything necessary for that purpose. He retained his office in Boston, and, though having no regular lodgings there, spent more nights in Boston than in Providence, and spent comparatively little time in Providence. His work required him to travel a considerable part of his time, and he customarily registered as from Boston. He had his name taken off the Boston voting list, and asked to have it placed on the Providence voting list, but learned that a personal application was necessary, which he did not make. He received all his mail at his Boston office, and paid therefrom the bills for his Providence lodgings. *Held*, that while, had he in fact changed his domicile, his reason for doing so would be immaterial, the facts showed that there was no actual change of domicile, and that he was still a resident of Massachusetts.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 850–854; Dec. Dig. ⟸307.]

2. COURTS ⟸323—UNITED STATES COURTS—JURISDICTION—DIVERSITY OF CITIZENSHIP—EVIDENCE.

Judicial Code (Act March 3, 1911, c. 231) § 37, 36 Stat. 1098 (Comp. St. 1913, § 1019), provides that if, in any suit commenced in a District Court, it shall appear to the satisfaction of such court that such suit does not really and substantially involve a dispute or controversy properly within its jurisdiction, it shall dismiss the suit. In an action in which diversity of citizenship was the only ground of jurisdiction relied upon, a plea in abatement denying plaintiff's claimed residence in another state was seasonably filed. *Held* that, assuming that the burden of proof is on the party denying jurisdiction, defendant was only required to establish such lack of jurisdiction by a fair preponderance of the evidence, and if a requested ruling that the burden was on defendant to convince the court to a legal certainty of its lack of jurisdiction required anything more than a fair preponderance of the evidence, it would not be given.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 885, 886; Dec. Dig. ⟸323.]

At Law. Action by Erastus R. Simpson against the Phillipsdale Paper Mill Company. On plea in abatement. Plea adjudged good.

Whipple, Sears & Ogden, of Boston, Mass., for plaintiff.
Sawyer, Hardy & Stone, of Boston, Mass., for defendant.

MORTON, District Judge. This is an action at law, originally brought by the plaintiff in this court by a writ dated May 18, 1914. The only ground on which it is contended that this court has jurisdiction of the controversy is an alleged diversity of citizenship. In the writ the plaintiff is described as "of Providence, in the state of Rhode

Island," and the defendant as a Massachusetts corporation. If these allegations are true, jurisdiction is established. The defendant has filed a plea in abatement, alleging that in fact the plaintiff is not a citizen of Rhode Island, but of Massachusetts, that there is no diversity of citizenship, and that consequently this court has no jurisdiction.

[1] I find the material facts to be as follows:

The plaintiff is an efficiency engineer. Prior to March 8, 1914, he had been a resident of Boston and a citizen of Massachusetts. He is unmarried, has no family, and lived in lodgings in Boston, where his office was and is.

Some time prior to March 8, 1914, he had done some work at the defendant's manufacturing plant, in the course of which he had received physical injuries, which he contends were caused by the negligence of the defendant, and he had brought an action to recover damages therefor in the Massachusetts court. That action had been discontinued by him prior to March 8, 1914. On that date he sent the property which he had at his lodgings, namely, a trunk and some bags, containing clothes, books, and personal effects, to Providence, R. I., and went there and engaged lodgings, and he gave up his lodgings in Boston. But he retained his office in Boston, and has never made any change in that. He has never had any office in Providence, and no business in Rhode Island since March 8, 1914. He had no family in Providence. The only reason why he removed there was, as he admits, in order to obtain a residence in Rhode Island for the purpose of bringing this action in the federal court. Since his alleged change of residence, he has spent comparatively little time in Providence. Occasionally he has been there for a few days at a time, occasionally he has spent week ends there, and on one occasion he was there for three or four weeks continuously. While the evidence is not entirely clear, I infer that he has spent more nights in Boston since March 8th than in Providence. A considerable part of the time his work has required him to travel, or to be temporarily stationed at various places where he was for the time being engaged in his professional work. When so traveling he customarily registered as of Boston. Under date of April 18, 1914, he wrote to the registrars of voters of Boston, asking to have his name taken off the voting list of Boston, on the ground that he had become a resident of Providence on March 9, 1914; and under the same date he wrote to the registrar of voters of Providence, asking to have his name placed on the voting list of that city. In reply to this last letter he was informed that he must apply in person to the board of canvassers and registration in Providence, and he never did so. All his mail comes to his Boston office, and he pays therefrom the bills for his lodging in Providence. In endeavoring to change his residence, he acted under the advice of counsel, and intended to do whatever was necessary to secure a residence in Rhode Island, in order that he might thereby acquire the right to sue in the federal court. After March 8, 1914, he kept no regular lodging in Boston. When he stayed overnight in Boston, he customarily took a room either at the place where he had formerly lodged or at another lodging house where he was known; but such hiring

was from day to day only. I infer that he will give up his Providence lodging and return to Boston as soon as this litigation is terminated.

If the plaintiff has in fact changed his domicile, his reason for doing so is immaterial. Morris v. Gilmer, 129 U. S. 315, 328, 9 Sup. Ct. 289, 32 L. Ed. 690. The question is whether, upon the facts stated, with such inferences as are properly to be drawn therefrom, a real change of domicile has been established. In Ennis, Adm'r, v. Smith, 14 How. (N. S.) 400, 423, 14 L. Ed. 472, it is said in reference to a change of domicile:

"But there must be, to constitute it, actual residence in the place, with the intention that it is to be a principal and permanent residence. * * * A removal which does not contemplate an absence from the former domicile for an indefinite and uncertain time is not a change of it."

In Morris v. Gilmer, supra, it is said:

"There must be an actual, not pretended, change of domicile; in other words, the removal must be 'a real one, animo manendi, and not merely ostensible.'"

The facts in Morris v. Gilmer seem to me to have been stronger in favor of the plaintiff than those here, but it was held that there had been no change of domicile. The present case resembles pretty closely Andrews, Adm'x, v. Andrews, 176 Mass. 92, 57 N. E. 333, where it was held that a domicile had not been acquired in Dakota. See, too, 1 Foster Fed. Pr. (4th Ed.) § 19, p. 5.

[2] The plaintiff has filed three requests for rulings, copies of which are annexed. The first is refused; the third is given. The second request is as follows:

"The burden is on the defendant to convince the court to a legal certainty of its lack of jurisdiction."

The expression "to a legal certainty," in this connection, seems to have originated in Barry v. Edmunds, 116 U. S. 550, 559, 6 Sup. Ct. 501, 29 L. Ed. 729, where it was used with reference to a plea in abatement based upon an allegation that the amount in controversy was in fact less than the jurisdictional amount, although a greater sum was claimed by the plaintiff as damages for an alleged assault upon him by the defendant. The same expression was approved in Deputron v. Young, 134 U. S. 241, 252, 10 Sup. Ct. 539, 33 L. Ed. 923, where it was used with reference to a petition to dismiss for lack of diversity of citizenship, which was not filed until after the case had been tried on its merits and a verdict had been returned against the petitioner. The facts on which these two decisions rest seem to me essentially different from those of the present case. In Barry v. Edmunds the court was called upon by the plea in abatement to speculate as to the utmost verdict which a jury was likely to return for the assault. In Deputron v. Young many months had gone by since the case was at issue, and it had been tried on the merits and decided against the petitioner before the petition to dismiss was filed. Obviously, under such circumstances, every doubt as to the jurisdiction ought to be resolved in favor thereof.

In this case, on the other hand, the plea in abatement was seasonably filed within the time for appearance. At the very beginning of

the litigation the defendant has challenged specially and in an appropriate manner the jurisdiction of the court. Apart from statute, the jurisdictional allegations would have to be proved by the plaintiff to the same extent as any other allegation essential to the plaintiff's case. It is contended, however, that under Judicial Code, § 37, the burden of proof is shifted, and that it devolves upon the party attacking the jurisdiction to establish lack of jurisdiction "to the satisfaction of the court," which, it is argued in Hill v. Walker, 167 Fed. 241, 92 C. C. A. 633, means "to a legal certainty." I do not find it necessary to decide whether the Code puts the burden of proof on the party denying jurisdiction, because, even if the burden of proof is upon the defendant here to establish by a fair preponderance of the evidence that the court has no jurisdiction, I am of opinion—and I find—that it has sustained such burden. I do not think that the defendant, in order to make good its plea, is bound to establish lack of jurisdiction beyond a fair preponderance of the evidence. If, in the request quoted, the words "to a legal certainty" mean proof beyond a fair preponderance of the evidence, the request is refused; if not, it is given.

I find and rule that the plaintiff was not, at the time when this action was brought, a resident of Rhode Island, that he was at that time a resident of Massachusetts, that there is no diversity of citizenship, and that this court is without jurisdiction. The plea in abatement is adjudged good.

In re SIMON HOTEL CO.

(District Court, N. D. Alabama, S. D. May 31, 1915.)

No. 13935.

1. LANDLORD AND TENANT ⇐242—LIEN FOR RENT—EFFECT OF EVICTION.
S., one of the lessees of property which they leased to a subtenant, a hotel company, directed that an attorney be employed to close the hotel company up by the issuance of an attachment. The deputy sheriff levied the writ by not only locking the stockroom of the bar, but also locking up one bar and acquiescing in the placing of a sign over another bar that it was closed, by directing the hotel clerk to receive no more guests, and by taking charge of the hotel employés, without any disapproval by S.'s attorney, who was present immediately after the levy. Subtenants of the hotel company, operating a lunch stand, barber shop, etc., were not interfered with; but it did not appear that they were in default in their rent. The hotel company's only managing officer, upon hearing of the levy, stated that he would have nothing more to do with the premises. He filed a voluntary petition in bankruptcy, and an involuntary petition was also filed, upon which a receiver was appointed; the application for the appointment being made under both petitions. The receiver took possession and operated the hotel, as did the trustee upon his appointment. *Held*, that there was a partial eviction of the hotel company, followed by an abandonment of the premises by it, which defeated the original landlord's lien on the hotel company's property for rent subsequently accruing, under the law of Alabama.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 976, 979–981; Dec. Dig. ⇐242.]

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2. LANDLORD AND TENANT ⟸242—LIEN FOR RENT—EFFECT OF EVICTION.
The original lessees had no lien on the hotel company's property for the rent for the month in which the company was evicted, as they could not apportion their wrong and collect pro tanto for the part of the month during which the company actually occupied the premises.
[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 976, 979–981; Dec. Dig. ⟸242.]

In Bankruptcy. In the matter of the Simon Hotel Company, bankrupt. On petitions to review an order of the referee disallowing claims for liens for rent. Petitions denied.

M. M. Ullman, of Birmingham, Ala., for petitioner Adler.
George Bush and Morris Loveman, both of Birmingham, Ala., for petitioners Simon and Campbell.
Beddow & Oberdorfer and Arthur L. Brown, all of Birmingham, Ala., for trustee in bankruptcy.

GRUBB, District Judge. The petitions for review of Ike Adler, the original landlord, and of Edwin I. Simon, Al E. Campbell, and C. D. Odum, tenants of Adler, and landlords of the Simon Hotel Company, the subtenant, for allowance of lien for rent—that of Simon, Campbell, and Odum for the past-due rent for the month of January, 1915, which they had paid to their landlord, but which had not been paid them by the subtenant; and that of the landlord for the balance of the rent due for the unexpired term of the lease, by virtue of the Alabama statute creating a lien in favor of the original landlord on the property of the subtenant for the rent due for the term of the subtenant—are submitted for decision. The petitions were denied by the referee because of his finding of fact that the subtenant had been partially evicted by the act of his landlords, the tenants of the original landlord, and had thereafter surrendered the premises to their landlord; that this eviction occurred during the month of January, for which Simon, Campbell, and Odum, its landlords, claimed a lien for rent past due, and so excused the payment of rent for that month.

[1, 2] The claimed partial eviction arises from the action of Simon, not shown to have been unauthorized by the other two lessees, in causing to have issued and levied by the sheriff an attachment on the property of the bankrupt in the leased building and the manner the levy was executed by the sheriff with the authority of Simon and his attorney. I think the evidence justified the referee's finding that there was a partial eviction of the bankrupt, the Simon Hotel Company, from the leased premises. If no more was done by Simon than attach for past-due rent the personal property of his tenant, the bankrupt, on the leased premises, as he had a right to do, no eviction or partial eviction could be predicated on such act. The evidence, however, shows that Simon directed his brother to get an attorney and close the bankrupt up by the issuance of an attachment against it, and stated that since Stowers, the manager of the bankrupt, would not consent to a voluntary bankruptcy, this was the only way to close it up. The writ was levied by the deputy sheriff by locking the stockroom of

the bar, which he probably had a right to do, as it was merely a taking possession of the personal property levied upon. However, he also locked up the colored bar, acquiesced in the placing of a sign over the white bar that it was closed, directed the clerk of the hotel to receive no more guests, and seems to have taken charge of the hotel employés during the time between the levy and the taking charge by the receiver in bankruptcy. The attorney for Simon was present immediately after the levy was made, and did not express disapproval of the method in which it was made, and did confer with the deputy sheriff on the premises. These and other facts set out in the record were sufficient to justify the inference drawn by the referee that the purpose of the levy was to close up the bar and the hotel in the possession of the bankrupt and dispossess the bankrupt of the leased premises actually in its occupancy. It is true the lunch stand, hat shop, barber shop, and produce store were not interfered with; but these were occupied by subtenants of the bankrupt, who are not shown to have been in default for nonpayment of rent, and it is consistent that Simon, Campbell, and Odum were willing to let them stay on, as long as they paid rent, and that their purpose was only to dispossess the bankrupt, which was in default, of the part of the premises which it actually occupied. I think the directions and instructions given by Simon, and the subsequent acts and declarations of the deputy sheriff, and the acquiescence of Simon's attorney, warranted the referee in finding that there had been a partial eviction of the bankrupt. It was more than a temporary trespass, since the purpose of Simon may well have been inferred to have been to permanently close up and oust the tenant from possession. Warren v. Wagner, 75 Ala. 188, 51 Am. Rep. 446.

The parties agree upon the legal effect of a partial eviction under the decisions in Alabama. It operates to abate the rent pro tanto only, unless the tenant subsequently abandons or surrenders the entire possession of the leased premises to his evicting landlord. One Stowers was the only managing officer of the bankrupt at the time of the levy. He was not present when the levy was made, and the evidence tends to show that upon hearing of it, soon after, he stated that he would have nothing more to do with the hotel premises, and did not, in fact, in any way interfere with them. The clerks and employés seem to have taken such instructions as they had, after the levy, from the deputy sheriff, who made it, until the receiver in bankruptcy took charge. The bankrupt abandoned possession and control of the leased premises actually occupied by it, after the levy was made, and did not collect any rents from the tenants who occupied the lunch counter, barber shop, hat shop, and produce store, after the levy of the attachment. I think the referee was justified in finding that there was an abandonment of the leased premises by the bankrupt, immediately after the levy of the attachment by the deputy sheriff.

It is said that the subsequent filing by Stowers for the bankrupt of a voluntary petition in bankruptcy, and the subsequent proceedings and adjudication, contradict the finding of an abandonment. An involuntary petition was also filed by certain creditors. The two petitions were consolidated, and an adjudication had in the consolidated cause.

An application for the appointment of a receiver was probably made under both petitions. The receiver was appointed upon the petition in the involuntary cause, and was authorized to operate the business of the bankrupt. The receiver took possession and did operate the hotel and bar, as did the trustee upon his appointment. It seems clear that temporary operation of the business by the receiver and trustee as officers of the court, and not as agents of the bankrupt corporation, and under an order of the bankrupt court, could not avail to defeat the effect of the previous partial eviction of the bankrupt corporation, if there was one. The receiver's and trustee's obligation to the owner during such possession would be for use and occupation, and not for rent under the bankrupt's lease.

If there was a partial eviction of the bankrupt from the leased premises, and a subsequent abandonment of them entirely by the bankrupt, it is conceded that the lien for rent would totally fail. The lien against the property of the subtenant in favor of the original landlord is created by the Alabama statute, and has been construed to extend only to the term of the subtenant. Gans & Co. v. Tyson, 170 Ala. 513–519, 54 South. 237. If the term of the subtenant is terminated by the partial eviction of the subtenant by his immediate landlord, followed by the subtenant's abandonment of possession, it is clear the original landlord has no lien for rent on the property of the subtenant beyond the expiration of the subtenant's term so terminated. The claim of the original landlord, Ike Adler, for payment of future rent, fails for these reasons.

The claim of the mediate landlords, Simon, Campbell, and Odum, for past-due rent for the month of January, also fails, since the wrongful eviction of their tenant occurred on January 25th, and that month's rent is indivisible by the terms of the lease. The landlords, not being entitled to the full month's rent, are entitled to none. Having wrongfully evicted their subtenant, the bankrupt, during the month of January, they are not permitted to apportion their wrong and collect pro tanto, under the lease, for the part of the month during which their tenant actually occupied the premises. Roll v. Howell, 9 Ala. App. 171, 62 South. 463. The referee also correctly disallowed the petition of Simon, Campbell, and Odum.

The petitions for review are denied, at the cost of petitioners.

In re COMMONWEALTH LUMBER CO.

(District Court, W. D. Washington, N. D. June 2, 1915.)

No. 5447.

1. BANKRUPTCY ⟸60—ACT OF BANKRUPTCY—APPOINTMENT BY STATE COURT OF RECEIVER—EFFECT.

The appointment by a Washington state court, under Rem. & Bal. Code, § 741, of a receiver of a corporation, is not, in the absence of testimony, a conclusive showing of the insolvency of the corporation, within Bankr.

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

Act, July 1, 1898, c. 541, § 1, subd. 15, 30 Stat. 544 (Comp. St. 1913, § 9585).

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 80; Dec. Dig. ⊂=60.]

2. BANKRUPTCY ⊂=54—CORPORATIONS—UNPAID STOCK SUBSCRIPTIONS—"ASSETS."

Unpaid subscriptions of stock of a corporation are "assets" of the corporation, in determining whether it is insolvent, within Bankr. Act, § 1, subd. 15, where a stipulation has practically been effected whereby the subscribers would contribute any deficiency to satisfy claims, though there is testimony that the stockholders will contest liability.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 54, 84, 85; Dec. Dig. ⊂=54.]

3. BANKRUPTCY ⊂=20—RIGHTS OF CREDITORS—ELECTION OF REMEDIES.

Where a receiver of a corporation was appointed in a state court, the creditors could pursue their remedies in the state courts or proceed under the Bankruptcy Act; and where they induce acts or proceedings in the state court under the receivership, they could not subsequently remove the matter to the bankruptcy court.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 23; Dec. Dig. ⊂=20.]

4. BANKRUPTCY ⊂=20—RIGHTS OF CREDITORS—ELECTION OF REMEDIES.

A state court appointed, after hearing, a receiver of a corporation. Soon thereafter claims of creditors were filed. Thereafter a creditors' committee was appointed to examine into the condition of the corporation and report to the creditors. The committee reported that it was for the best interests of the creditors that the state court should retain jurisdiction. Claims filed were passed on by the receiver. Chattels of a corporation were sold by the receiver under order of court, with knowledge of the creditors' committee. *Held*, that the creditors participating in the proceedings or acting as members of the committee could not maintain a petition in bankruptcy against the corporation.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 23; Dec. Dig. ⊂=20.]

In Bankruptcy. In the matter of proceedings against the Commonwealth Lumber Company, a corporation, an alleged bankrupt. Petition for adjudication dismissed.

Vince H. Faben, of Seattle, Wash., for petitioners.
S. G. Climenson, of Seattle, Wash., for trustee.
Kerr & McCord, of Seattle, Wash., for bankrupt.

NETERER, District Judge. Petition for adjudication in bankruptcy was filed by the Washington Cedar & Fir Products Company, Kent Lumber Company, and Fred A. England, claiming to be creditors in the sums of $641.50, $625.95, and $111.70, respectively. Thereafter the Union Lumber Company and the McCaughey Mill Company filed intervening petitions. It was alleged in the petition as an act of bankruptcy:

That "said Commonwealth Lumber Company, a corporation, is insolvent, and that within four months next preceding the date of this petition the said Commonwealth Lumber Company committed an act of bankruptcy, in that heretofore, to wit, on the 10th day of December, 1914, because of insolvency, a receiver has been put in charge of the property of the said Commonwealth Lumber Company, under the laws of the state of Washington."

On motion and affidavit a temporary restraining order was issued, and by agreement this was continued until final hearing. An amended petition was filed by the petitioners, in which it was further alleged that the petitioners have not participated in the receivership proceedings, except to file their claims with the receiver, and make other allegations with relation to the administration of the trust in the state court. The receiver filed an answer, in which he alleges that the capital stock of the Commonwealth Lumber Company is $150,000, of which $94,000 has been subscribed; denies indebtedness to the Washington Cedar & Fir Company; denies the insolvency of the Commonwealth Lumber Company within the Bankruptcy Act; denies it was insolvent within such act at the time of appointment of the receiver; alleges that at the time the receiver was appointed the Commonwealth Lumber Company had actual, visible, and tangible assets to the extent of $74,411.74 over and above its admitted indebtedness, that by reason of the inactivity of the lumber market it was unable to meet its indebtedness as it matured, that the receiver, subsequent to his appointment, paid claims having priority to the extent of $387.50, paid secured claims to the amount of $23,864.50, and now has on hand the sum of $3,164.02, and the indebtedness of the company is only $19,280.95; denies that the petitioners did not participate in the receivership proceedings other than to file their claims; alleges various acts and conduct of the creditors with relation to the receivership; and further alleges that practically all of the expenses of the receivership to date have been paid, and that the receiver had applied to the state court for an order directing the payment of a 15 per cent. dividend to the common creditors, and that the proceedings in bankruptcy were not instituted in good faith.

A hearing on the merits was had, and from the evidence presented it appeared that the petitioning creditors did file their claims with the receiver, and likewise co-operated through a committee of creditors with relation to the receivership proceedings, and did call upon one of the presiding judges of the state court with certain requests in the administration of the estate through the receivership; that a controversy developed between the creditors' committee and the receiver and his attorney, which continued until on the 29th of March, 1915, when the petition in bankruptcy was filed. It further appeared that the indebtedness of the Commonwealth Lumber Company at this time is less than $20,000, and that in addition to the cash and book accounts there are unpaid stock subscriptions which are collectible in the aggregate of approximately $68,000.

It is contended on the part of the respondent that the Commonwealth Lumber Company is not insolvent within the meaning of the Bankruptcy Act; that at no time was the property of the Commonwealth Lumber Company in "the aggregate, * * * at a fair valuation, insufficient in amount to pay its debts." Section 1, subd. 15, Bankr. Act. It is further contended that the creditors, having participated in the receivership, are estopped from instituting this proceeding.

[1] The act of bankruptcy alleged in the petition is putting the corporation in charge of a receiver by the state court. Section 3 (a) of the Bankruptcy Act, as amended, provides:

"Acts of bankruptcy by a person shall consist of his having * * * (4) made a general assignment for the benefit of his creditors, or, being insolvent, applied for a receiver or trustee for his property or because of insolvency a receiver or trustee has been put in charge of his property under the laws of a state, of a territory, or of the United States. * * *"

The petitioners contend that the state court having appointed a receiver "for the reason that said corporation is utterly insolvent and unable to meet or pay its obligations" is a finding which is conclusive, and adjudication must now follow. There is no doubt that a receiver may be appointed in the state court for a corporation in financial depression, when bankruptcy proceedings could not be entertained. The statute of Washington authorizes the appointment of a receiver when a corporation is in *imminent danger* of insolvency (section 741, Rem. & Bal. Washington Code), and the state court holds that a corporation is insolvent when it is unable to meet its obligations as they mature in the ordinary course of business (State ex rel. v. Superior Court, 20 Wash. 575, 59 Pac. 483; Nixon v. Hendy Machine Works, 51 Wash. 419, 99 Pac. 11); while under the Bankruptcy Act, when the assets at a fair valuation do not equal the liabilities, a corporation is insolvent (section 1, subd. 15, Bankr. Act). Petitioners rely on In re Maplecroft Mills (D. C.) 218 Fed. 661, in which the District Court of the Fourth District held the appointment of a receiver under the South Carolina code provision that a receiver may be appointed when a corporation is "in imminent danger" of insolvency, and at page 673, the court says:

"Under the evidence in the case now before the court it is found that the only ground upon which the state court, to wit, the court of common pleas for Pickens county, could possibly have made the order of appointment of a receiver and taken possession of, to operate and eventually liquidate and marshal and distribute, the assets of the Maplecroft Mills, under the allegations of the complaint, was because of insolvency. The Supreme Court of the state of South Carolina has approved, for the state courts of the state of South Carolina, the same definition of insolvency as that given in the Bankruptcy Act (citing case). Where the court of common pleas for Pickens county appointed a receiver because of insolvency, it must be presumed that it found under the laws of South Carolina it was such an insolvency as is defined to be insolvency in the Bankruptcy Act, and that it adjudicated that question as against the Maplecroft Mills, so as to determine it as well for these proceedings as for those in the state court."

The Circuit Court of Appeals of the First Circuit (In Re Wm. S. Butler & Co., Inc., 207 Fed. 705, 125 C. C. A. 223), Judge Putnam dissenting, held that the appointment of a receiver to assume control of the business and conduct the affairs of a corporation until further ordered, on a complaint, answer, and decree, for the reason that the corporation was unable to meet its obligations as they matured in the ordinary course of business, in the absence of an allegation that the corporation's property, at a fair valuation, was insufficient to pay its debts, was not a finding of insolvency within the act of bankruptcy.

The Supreme Court of Washington recognizes a distinction between insolvency under the Bankruptcy Act and state statute. State ex rel. v. Superior Court, supra. I do not think that the finding of the state court upon the allegations of the complaint, in the absence of testimony, is conclusive of the insolvency of the corporation in issue, under the Bankruptcy Act, in this proceeding.

[2] Whether the corporation is in fact insolvent under the Bankruptcy Act depends upon the enforceability of the stock subscriptions and whether this liability can be considered an asset. Petitioners, to sustain their contention that unpaid stock subscriptions are not assets, rely on Wilkes-Barre First National Bank v. Wyoming Valley Ice Co. (D. C.) 136 Fed. 466. I do not think this case sustains their contention. The court, at page 469, says:

"Neither is anything to be made out, on the other side of the account, of what is claimed to be due from the holders of bonus stock. It is no doubt true that the parties who accepted this stock were well aware of its origin, having assisted as directors in issuing it to Mr. Young, in consideration of the contracts and options which he turned over to the company. But even though this be the case, and although it should be determined in the end that they are severally liable, to the extent of their holdings, as for stock which remains unpaid, the liability amounts to nothing as an asset to be reckoned with at this time. If ever secured, it will only be at the end of a lawsuit, all the parties expressly declaring that they should contest their liability, and no possible value can therefor be ascribed to it here."

In the instant case there was testimony that the stock subscribers would contest liability. There was also testimony that a stipulation had practically been effected whereby the subscribers would contribute any deficiency to satisfy claims. I think the overwhelming weight of authority, as well as sound reason, make unpaid stock subscriptions an asset. In Republic Iron & Steel Co. v. Carlton (C. C.) 189 Fed. 126, the court, at page 131, says:

"The plaintiff in the case at bar says the defendant has never fully paid for his stock. The defendant, therefor, at common law and independent of statute, is liable to the company for the unpaid balance of his subscription. The right to recover such balance is an asset of the company. It is an asset which does pass to a receiver or to a trustee in bankruptcy. Colton v. Mayer, 90 Md. 712, 45 Atl. 874 [47 L. R. A. 617, 78 Am. St. Rep. 456]; Scovill v. Thayer, 105 U. S. 143 [26 L. Ed. 968]; In re Remington Automobile Co., 153 Fed. 345 [82 C. C. A. 421]."

In Richardson's Executor v. Green, 133 U. S. 30, at page 46, 10 Sup. Ct. 280, at page 285, 33 L. Ed. 516, the court says:

"The principle underlying all of the decisions which we have cited upon this point is that the capital stock of a corporation, when it becomes insolvent, is in law assets of the corporation to be appropriated to the payment of its debts."

There is a difference in the status of liability for unpaid stock subscriptions and a stockholder's statutory liability. The liability of a stockholder, fixed by the statutes of many states for the purpose of paying indebtedness of a corporation, is a contingent liability, while the liability for unpaid stock subscriptions is primary. The primary liability is an asset, while the contingent liability may not be; but the right to enforce it is inherent in the corporation, and upon insolvency

passes to the trustee for recovery. Unpaid stock subscriptions being an asset, the corporation is not insolvent within the Bankruptcy Act.

[3, 4] I think the relation of the petitioners in this case to the receivership is fatal to this proceeding. When the receivership was inaugurated in the state court, the creditors had a right to select the forum in which to administer the estate of the concern, and, having once selected, cannot, after having induced any acts or proceedings in the state court, repudiate the proceedings and remove the matter to the bankruptcy court. It appears from the record, and the testimony upon the hearing, that the application for appointment of a receiver was made, and a receiver appointed, on December 10, 1914, and soon thereafter the claims of the petitioners were filed. At a meeting of creditors, held December 21st, following, a committee was appointed to inquire into the condition and affairs of the Commonwealth Lumber Company, and report to the creditors, advising as to the future policy in settling the estate. Two members of the committee of four were the president and vice president, respectively, of two of the petitioners in this proceeding. In a letter to the creditors, signed by the committee, dated December 23, 1914, it is said:

"In the opinion of the committee the present receiver is fully qualified to handle the affairs of the estate, and we consider that it is for our best interest that he be retained in the superior court as such receiver, and that we would look with disfavor on the matter being taken in the federal court in bankruptcy."

Some of the claims had been filed, and others were filed a few days later. The claims were passed upon by the receiver, and the claim of one petitioner was disallowed. Further correspondence was had with relation to the administration of the estate, and an assessment of 4 per cent. upon the creditor's claims, for the purpose of employing counsel to assist the attorney for the receiver to bring suit against stockholders on the unpaid stock subscriptions, was made, and paid by at least some of the creditors. No order was granted by the state court, permitting the receiver to sue at the time upon the stock subscriptions, and further correspondence and conferences resulted in the statement that, unless certain lines of procedure were adopted by the receiver and the state court, the creditors would remove the matter to the bankruptcy court. It further appears that office furniture, fixtures, and certain tangible personal property was sold by the receiver under the order of court, all of which was known to the creditors' committee; some of the petitioners being present at the sale and bidding upon the property. There can be no question, from the record and testimony in this case, that the creditors' committee, who represented the petitioners, did, after the appointment of the receiver by the state court, so act with relation to such receivership, and gave such encouragement to the state court proceedings, as to inspire others to act with relation to such receivership, and that this court should not, after such conduct and inspiration, permit the parties to invoke the jurisdiction of this court, after a period of nearly four months. I think the court should hold that the conduct of the petitioners was an election, and that, having elected, they are bound by such election. I think this

conclusion is sustained by sound reason and authority. Simonson v. Sinsheimer, 95 Fed. 948, 37 C. C. A. 337; Lowenstein v. McShane Mfg. Co. (D. C.) 130 Fed. 1007.

Petitioners cite Leidigh Carriage Co. v. Stengel, 95 Fed. 637, 37 C. C. A. 210, and In re Salmon & Salmon (D. C.) 143 Fed. 395. The first case was tried before Circuit Judge Taft, of the Sixth Circuit, at about the time of the Simonson Case, supra. In this case it appears that the assignment was made some time prior to the enactment of the Bankruptcy Act of 1898, and immediately upon the Bankruptcy Act becoming effective the petitioner promptly invoked its aid, and it was held he could not be estopped, since he had no election prior to the time that the Bankruptcy Act took effect. In the Salmon Case it was held that the creditors of an insolvent partnership are not estopped to maintain proceedings to have the debtors adjudged involuntary bankrupts because of filing and proving their claims in a suit prosecuted in the state court under a state statute for winding up the affairs of a bank owned by the partnership, instituted after the filing of the petition in bankruptcy, where the alleged act of bankruptcy was the conveyance of property not employed in the banking business nor involved in the state suit.

I think the petition should be dismissed. An order may be presented.

BOWRON v. GEORGIA CASUALTY CO.

(District Court, N. D. Alabama, S. D. April 30, 1915.)

No. 2012.

1. INSURANCE ⇐435—INDEMNITY INSURANCE—LIABILITY.

Defendant issued a policy insuring a trustee in bankruptcy carrying on the bankrupt's business against loss from injuries to employés. The trustee, under an order of the court, sold the bankrupt's property to purchasers, who, under the order, assumed the trustee's liability to employés for injuries, and who conveyed the property to the G. Co. Between the confirmation of the sale and the delivery of title, while the business was being conducted at the purchaser's risk, the policy was treated as subsisting. An employé recovered judgment against the trustee for injuries sustained while the trustee was operating the business, and the trustee paid such judgment with a voucher check of the G. Co. It being conceded that the policy insured against loss, and not against liability, defendant contended that the bankrupt estate had suffered no loss and that it was not liable. *Held* that, while the payment by the G. Co. could not be treated as a loan which the trustee was obligated to repay, and while it was immaterial that, if payment of such judgment had not otherwise been provided for, the creditors would have been required to refund a part of their dividends, the insurer was nevertheless liable, since the requirement that the purchaser assume the liability to employés would induce the bidder to reduce its bid, while, if the purchasers, relying on the indemnity, bid without deduction for the liability assumed, they suffered the loss, and were entitled to be subrogated to the rights of the estate.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1144; Dec. Dig. ⇐435.]

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2. INSURANCE ⊂=512—INDEMNITY INSURANCE—AMOUNT OF RECOVERY.
Under a policy insuring against loss on account of injuries to employés, the amount recoverable was limited to the face of the policy, with costs, paid by insured, and legal interest on such amounts from the date of payment; interest accruing pending an appeal in excess of the face of the policy not being recoverable.
[Ed. Note.—For other cases, see Insurance, Dec. Dig. ⊂=512.]

At Law. Action by James Bowron, trustee in bankruptcy of the Southern Iron & Steel Company, against the Georgia Casualty Company. Judgment for plaintiff.

Percy, Benners & Burr, of Birmingham, Ala., for plaintiff.
Cabaniss & Bowie, of Birmingham, Ala., for defendant.

GRUBB, District Judge. [1] This is a suit by the trustee in bankruptcy of the Southern Iron & Steel Company against the Georgia Casualty Company upon a policy of insurance, issued by that company to the trustee to indemnify him against accidents to the employés of the trustee during his operation of the plant of the bankrupt under the orders of the bankruptcy court. A judgment by an employé, one Sibert, was rendered against him, the trustee, for $5,000, which was paid by him, with interest, amounting in all to $5,315.02. The plaintiff sues to recover reimbursement for the amount paid to satisfy the judgment.

The assets of the bankruptcy estate have been sold by the trustee, first, to two individual purchasers, whose bid was assigned to the Standard Steel Company, to which company the trustee made a deed. The Standard Steel Company thereafter conveyed the property to the Gulf States Steel Company. There was an assumption by the purchasers of the trustee's liability to employés for injuries received during the course of employment, which was guaranteed by the National Surety Company. This assumption followed the parties to whom the assets were subsequently transferred, and was a binding one upon the Gulf States Steel Company at the time of the payment of the judgment. The judgment in favor of Sibert, the injured employé, against the trustee, was paid by the trustee with a voucher check of the Gulf States Steel Company, payable to the trustee and indorsed by him to the clerk of this court.

The defendant's contention is that the policy was one of indemnity against actual loss sustained by the insured, and not one of insurance against a mere liability; that there was no loss to the bankrupt estate, represented by the trustee, since the judgment was paid by the transferee of the purchasers of the assets of the bankrupt estate, under an agreement, which was part of the consideration of the purchase, that it would assume such liability of the trustee; that the loss occasioned by the payment of the judgment was consequently that of the Gulf States Steel Company, which furnished the money, and not that of the bankrupt estate; that, while the action was brought in the name of the trustee, the trustee, as plaintiff, represented the Gulf States Steel Company, and not the creditors of the bankrupt; and that payment was

made by that company, and not by the plaintiff. The plaintiff concedes the policy to have been one of indemnity against loss sustained by the insured, and not an insurance against a liability. He asserts that the bankrupt estate suffered a loss by the accident to Sibert and the payment of the judgment, which was based on it, in these ways. In the first place, he asserts that the requirement of the purchasers to assume the obligations of the trustee, as part of the consideration for the purchase, was an injury to the creditors of the bankrupt estate, in that it caused the purchasers to bid less for the assets than they would have done, if the transfer had been free from any such requirement. He also asserts that the creditors would have been injured by being required to refund part of their dividends already received, in the event payment of the Sibert judgment had not been otherwise provided. He also contends that the transaction between the trustee and the Gulf States Steel Company was, in effect, an advance to the trustee for the purpose of putting him in funds to satisfy the judgment, and that the liability of the trustee to repay the amount so advanced was as binding, as would have been his liability to repay a loan made from a bank for the like purpose.

Considering these claims in the inverse order: The Gulf States Steel Company was under an obligation, as between it and the trustee, to furnish the money with which to satisfy the judgment in favor of Sibert, when it did furnish it. This liability was assumed by it, as part of the contract of purchase. For this reason it seems to me the transaction cannot be construed to be a loan or advance by it, repayment of which could be required from the trustee, but as a compliance with the purchaser's obligation for the doing of which it had, therefore, no recourse against the trustee and was entitled to no reimbursement from him.

Whatever may be the rule as to the right of the trustee to recover back from creditors, who have received dividends, in excess of what would have been paid them by reason of the failure to take into account an administration expense, the amount of such excess, the rule, it seems to me, can have no application to the facts in this case, since there can be no occasion to resort to the creditors to refund any part of their dividends received to satisfy the Sibert judgment; it having already been satisfied by the Gulf States Steel Company, and on the view I have taken of it, with no recourse on the trustee for the amount paid by it, because of its agreement with the trustee to assume the payment of the judgment.

This leaves the inquiry as to whether the bankrupt estate sustained a loss by reason of the accident that resulted in the injury to Sibert, in that, it being stipulated in the order of sale that the purchaser should assume the liability of the trustee for injuries received by his employés during his operation of the plant, a less sum was received by the trustee for distribution among the creditors for the assets sold by him than would have been received in the absence of such a stipulation in the order of sale.

It seems clear that the tendency of such a stipulation would be to induce the bidder to bid less because of it. Nor does it seem that the

exact amount of the liability assumed would have to be known to the purchasers at the time of their bid to make the principle applicable, though, if it were not ascertained, it might be difficult or impossible to show the extent to which the assumption affected the bid. Loss to the creditors would be presumed from an onerous stipulation imposed on the bidders. If a final dividend had not at that time been paid the creditors, and if the recovery by the trustee in this suit was to be distributed to them in the way of dividends, there would be a showing of loss sustained by the trustee, as the representative of the creditors, of a kind sufficient to sustain this action on the policy. However, it is conceded that the amount of the recovery by the trustee, if any, will go, not to the creditor, as an additional dividend, but to the Gulf States Steel Company to reimburse it for the amount furnished the trustee to satisfy the judgment.

It is therefore contended by the defendant that if injury was sustained by the creditors, because a less sum was realized at the trustee's sale for distribution among creditors, by reason of the assumption exacted of the purchaser by the order of sale, than would otherwise have been received, the purpose of this suit is still not to indemnify the creditors for such loss, since no part of the recovery, if any, is to go to them. In this case, however, there was an outstanding indemnity against loss from injury to employés of the trustee during operation, at the time the purchasers bought the assets; i. e., the policy issued to the trustee by the defendant, on which this suit is brought. The purchasers were, therefore, when bidding, confronted on the one hand with the liability they were required to assume, and, as against it, the indemnity held by the trustee as against a loss on that account. In making their bid they would be affected by the nature of the liability, and also by the character of the indemnity against it, if they considered the indemnity available to them, as I think the record shows they were justified in doing. The creditors of the bankrupt estate would have suffered a loss, if the bidders had considered the liability—aside from the indemnity—in the reduction in amount of the purchase price. This loss would have sustained a recovery by the trustee from the defendant on the policy. If the purchasers, relying on indemnity, bid without deduction for the liability assumed, the loss will be theirs, instead of that of the bankrupt estate, unless the are entitled to recoup their loss by resort to the indemnity. The same loss would have been sustained by the creditors, but for the existence of the indemnity, and the reliance of the purchasers on their ability to profit by it, and in that case the trustee could have recovered the loss from the defendant on the policy.

As I see it, the loss is not eliminated by the order of sale, but is merely transferred from the trustee to the purchasers. The defendant's agreement was to indemnify against loss on account of the accident, and, as long as the loss remains, it would seem to be immaterial to the defendant whether the loss was paid to the plaintiff for the use of the creditors, or for the use of the Gulf States Steel Company, as the successor of the purchasers who had assumed it. It cannot be presumed that the court, by its order, intended to separate the indem-

nity from the loss, and so make it totally unavailable, though the loss still remained unsatisfied. The presumption would rather be that the court intended the right to avail of the indemnity to follow the loss, and so, by its tendency to increase the bid, to preserve its value to the estate, which had paid the premium for the protection afforded by it. This would be accomplished by subrogating the Gulf States Steel Company to the rights of the trustee under the policy after it had paid the judgment. That this was the intention of the court and the parties seems reasonably clear from the orders of the court set out in the record, and is also shown by the fact that the policy issued by the defendant to the trustee was treated as still subsisting in favor of operations during the period intervening the order of confirmation of the sale and the delivery of instruments of title, when the operations were conducted for the benefit and at the risk of the purchasers.

For this reason it seems to me that the original purchasers, having presumably saved the estate a loss in the price realized for the assets by the trustee at the sale by bidding without deduction for the assumption exacted of them, in reliance of being accorded the benefit of the protection afforded by the indemnity held by the trustee against the assumed liability, ought to be subrogated to the right of the trustee to claim a loss sustained by the accident to Sibert, and which they had assumed, in a sense that would sustain this action by the trustee against the defendant, though the recovery be, and I have no doubt is, for the benefit of the Gulf States Steel Company.

The judgment having been paid in fact directly by the trustee to the clerk of this court, in view of the conclusion I have reached, it is immaterial whether the money was furnished the trustee by the Gulf States Steel Company as a loan or under its obligation to take care of the judgment.

[2] This conclusion results in a judgment for the plaintiff for the limit imposed on the policy of $5,000, together with the costs paid by the plaintiff, amounting to $148.10, with legal interest from date of payment, December 4, 1914, to the date of judgment in this cause. According to the weight of authority, interest accruing pending appeal in excess of $5,000 is not recoverable.

UNITED STATES v. LINTON et al.

(District Court, W. D. Washington, N. D. April 20, 1915.)

No. 2951.

CONSPIRACY ⊂=27, 43—CRIMINAL OFFENSE—STATUTORY PROVISIONS—OVERT ACTS.

Criminal Code (Act March 4, 1909, c. 321) § 37, 35 Stat. 1096 (Comp. St. 1913, § 10201), providing that where two or more persons conspire to commit an offense against the United States, and one or more of them does any act to effect the object of the conspiracy, all parties thereto shall be liable to punishment, modifies the common-law offense of conspiracy, which was complete when the unlawful conspiracy was formed,

and provides that there must not only be an unlawful conspiracy, but an overt act; and an indictment alleging that defendants at Vancouver feloniously conspired to violate the White Slave Traffic Act, and that it was their purpose to feloniously transport, and aid and assist in obtaining transportation for, a female in foreign commerce from Vancouver to Seattle, in the Northern division of the Western district of Washington, for immoral purposes, in violation of the White Slave Traffic Act, and which sets forth overt acts done to effect the object of the conspiracy in such district, charges an offense within the jurisdiction of the court, notwithstanding Const. Amend. 6, declaring that all criminal prosecutions must be had in the district wherein the crime shall have been committed.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 38, 39, 79, 80, 84–99; Dec. Dig. ⇐27, 43.]

S. G. Linton and Alta Smith were indicted for a conspiracy to violate the White Slave Act. Demurrer to indictment overruled.

Clay Allen, U. S. Dist. Atty., and Winter S. Martin, Asst. U. S. Dist. Atty., both of Seattle, Wash., for the United States.

Griffin & Griffin, of Seattle, Wash., for defendants.

NETERER, District Judge. The indictment in this case charges a conspiracy to violate the White Slave Act (Act June 25, 1910, c. 395, 36 Stat. 825 [Comp. St. 1913, §§ 8812–8819]). It consists of two counts. Count 1 charges that the defendants—

"at Vancouver, in the province of British Columbia, in the Dominion of Canada, on the first day of January, A. D. one thousand nine hundred and thirteen, then and there being, did willfully, knowingly, feloniously, unlawfully, wickedly, and maliciously conspire, combine, confederate, and agree together, and together and with divers other persons to said grand jurors unknown, to commit an offense against the United States, to wit, to violate the 'White Slave Traffic Act' of June 25, 1910 (36 Statutes at Large, 825), in the following manner and particulars; that is to say: It was the purpose and object of the said conspirators, and each of them to willfully, knowingly, and feloniously transport and cause to be transported, and aid and assist in obtaining transportation for, and in transporting, a woman, to wit, the said Alta Smith, alias as aforesaid, in foreign commerce from the city of Vancouver, in the said province of British Columbia, to the city of Seattle, in the Northern division of the Western district of Washington, in the United States of America, for the purposes of prostitution, debauchery, concubinage, and other immoral purposes, all in violation of the White Slave Traffic Act as aforesaid. * * *"

Count 2 charges the violation of the same act in somewhat different language. The indictment then sets out overt acts of the defendant which were done to effect the object of such conspiracy in this district and division. A demurrer has been filed to the indictment, based upon insufficiency of facts in the indictment, and that the court is without jurisdiction.

It is contended by the defendants that the conspiracy charged is the gist of the action, and that under the Sixth amendment to the Constitution all criminal prosecutions must be had in the "district wherein the crime shall have been committed"; that the conspiracy, as charged, if any, took place in the province of British Columbia, and that this court has no jurisdiction of the action. Dealy v. U. S., 152 U. S. 539,

14 Sup. Ct. 680, 38 L. Ed. 545, Hyde v. Shine, 199 U. S. 76, 25 Sup. Ct. 760, 50 L. Ed. 90, and Palliser v. U. S., 136 U. S. 268, 10 Sup. Ct. 1034, 34 L. Ed. 514, are cited.

Section 37 of the Criminal Code (section 5440, Rev. Stat.) provides:

"If two or more persons conspire either to commit any offense against the United States or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all * * * parties to such conspiracy shall be liable to a penalty of not more than ten thousand dollars, or to imprisonment for not more than two years, or * * * both fine and imprisonment, in the discretion of the court."

It is true that the gravamen of the offense is the conspiracy, and that at common law the offense was complete when the unlawful conspiracy was formed; but in the consideration of the charge of this indictment effect must be given to the change in the ancient law brought about by section 37, Criminal Code (section 5440, Rev. Stat.), which goes beyond the original abstraction and provides that, not only must the unlawful conspiracy be entered into, but as a necessary element to give vitality to the unlawful act some one of the conspirators must do some overt act to effect the object of such conspiracy, to complete the offense. The conspiracy alone is no offense under this section, but requires the overt act to give it vitality. The overt act, then, becomes a necessary element of the offense, and a part of it, and "as the act gives jurisdiction for trial, it is not essential where the conspiracy is formed, so far as the jurisdiction of the court in which the indictment is found and tried are concerned." Hyde v. U. S., 225 U. S. at page 367, 32 Sup. Ct. 793, 56 L. Ed. 1114, Ann. Cas. 1914A, 614. The unlawful confederation or conspiracy of the parties must continue until the performance of an overt act to effect the object of the conspiracy, to be an offense. If either of the parties should withdraw from the conspiracy during the locus pœnitentiæ, or before the overt act, such party would be released from the consequences of such act and the prior agreement. The unlawful conspiracy, being entered into in British Columbia to commit an offense against the United States, continued with the parties on entering the jurisdiction of this court, and the doing of the overt act in furtherance of this conspiracy, within this district, vitalizes the conspiracy in this jurisdiction as fully as though it had originally been entered into here. Justice McKenna, in Brown v. Elliott, 225 U. S. 393, at page 401, 32 Sup. Ct. 812, 56 L. Ed. 1136, speaking for the court, says:

"As the place of the overt act may be the place of jurisdiction, it follows that the exact place where the conspiracy was formed need not be alleged. This case illustrates the evil which a contrary ruling would cause. The place where the conspiracy was formed was unknown to the grand jurors (and might be so in many cases), but it was intended to be executed in a number of states of the Union, and yet, under the rigor of the contention of appellants, the conspirators could not be tried in any of them. In other words, not the place of the activities of the conspiracy and where it incurs guilt, but the place of its formation, which no one may know or can find out, is the place of the jurisdiction of its trial. And what compels this? It is answered: The sixth amendment of the Constitution of the United States. We have determined otherwise in Hyde v. United States, 225 U. S. 347 [32 Sup. Ct. 793, 56 L. Ed. 1114, Ann. Cas. 1914A, 614]."

These parties cannot be prosecuted in British Columbia. Can it be said that parties living on the border line of the United States could go across into Canada or Mexico and enter into a conspiracy to defraud the United States, and then come into the United States and proceed to carry out the unlawful confederation, and not be subject to the jurisdiction of the courts of the United States? The courts will not subscribe to such a doctrine.

I am not unmindful of the language used by Justice Brewer in Dealy v. U. S., supra, nor the cases cited by counsel; but they can all be readily distinguished and have no application to the facts charged in this indictment. Justice McKenna, in Hyde v. U. S., 225 U. S. 349, at page 359, 32 Sup. Ct. 793, 56 L. Ed. 1114, Ann. Cas. 1914A, 614, says:

"Indeed, it must be said that the cases abound with statements that the conspiracy is the 'gist' of the offense, or the 'gravamen' of it, and we realize the strength of the argument based upon them. But we think the argument insists too exactly on the ancient law of conspiracy, and does not give effect to the change made in it by section 5440, supra. It is true that the conspiracy, the unlawful combination, has been said to be the crime, and that at common law it was not necessary to aver or prove an overt act; but section 5440 has gone beyond such rigid abstraction, and prescribes, as necessary to the offense, not only the unlawful conspiracy, but that one or more of the parties must do an 'act to effect' its object, and provides that when such act is done 'all the parties to such conspiracy' become liable. Interpreting the provision, it was decided in Hyde v. Shine, 199 U. S. 62, 76 [25 Sup. Ct. 760, 50 L. Ed. 90], that an overt act is necessary to complete the offense. And so it was said in United States v. Hirsch, 100 U. S. 33 [25 L. Ed. 539], recognizing that, while the combination of minds in an unlawful purpose was the foundation of the offense, an overt act was necessary to complete it. It seems like a contradiction to say that a thing is necessary to complete another thing, and yet that other thing is complete without it. It seems like a paradox to say that anything, to quote the solicitor general, 'can be a crime of which no court can take cognizance.' The conspiracy, therefore, cannot alone constitute the offense. It needs the addition of the overt act. Such act is something more, therefore, than evidence of a conspiracy. It constitutes the execution or part execution of the conspiracy, and all incur guilt by it, or rather complete their guilt by it, consummating a crime by it cognizable then by the judicial tribunals; such tribunals only then acquiring jurisdiction."

The demurrer is overruled.

ROSS v. WESTERN LAND & IRRIGATION CO. et al.

(District Court, S. D. Iowa, C. D. May 20, 1915.)

CORPORATIONS ⇐507—OFFICERS—SERVICE OF PROCESS.

An officer of a corporation, elected under by-laws providing that he shall hold office for one year and until his successor is elected and qualified, remains an officer on whom service of process against the corporation may be had, though he has tendered his resignation, which has not been acted on by the corporation, directors, or stockholders.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1971–1974, 1976–2000; Dec. Dig. ⇐507.]

At Law. Action by George A. Ross against the Western Land & Irrigation Company and another. On motion to quash service of summons and dismiss. Overruled.

Strock & Wallace, of Des Moines, Iowa, for plaintiff.
Clark, Byers & Hutchinson, of Des Moines, Iowa, for defendants.

WADE, District Judge. In this action, the principal defendant, a Wyoming corporation, was served with original notice or summons by service upon W. H. Harwood, designated in the return of the officer as secretary of said company. Service was made in the city of Des Moines, Iowa, where the company prior to March, 1913, had an office and transacted most of its business; substantially all its officers residing in the city of Des Moines. Defendant files a motion to quash and dismiss, supported by affidavits, claiming that at the time of said service the said W. H. Harwood was not the secretary of the corporation.

It appears without dispute that Harwood was elected secretary of the corporation September 11, 1912; the records of the corporation showing:

"On motion made and carried, W. H. Harwood was elected secretary-treasurer for the ensuing year and until his successor is elected and qualified."

The by-laws of the corporation expressly provide that the officers shall be elected "for one year, and until their successors are elected and qualified." There is no record showing that the secretary ever resigned, no record showing that any resignation was ever presented to the directors, and no claim that any one was elected as his successor.

It appears that in March, 1913, the corporation made a deal with parties in Chicago, by which they agreed to transfer all properties of the corporation, together with the stock of the corporation, and it was contemplated that, when the transfer was fully executed, the Chicago parties should be substituted as stockholders and officers of the corporation. The contract was made and placed in escrow, covering the details of the transaction, and at a meeting of the stockholders some of the directors resigned, and persons representing the Chicago parties were elected in their place, and one of them was elected president.

It is claimed that the resignation of the directors, and the election of the directors and president, were conditional only, and made in contemplation of the final execution of the contract between the parties, which contract is still unexecuted. As to this, it is not necessary to consider it, in the view I take of the transaction, relating to the alleged resignation of the secretary. The resignation of the secretary, as testified by Hamberg, with whom the Chicago deal was made, is expressed as follows in his deposition taken for use upon this motion:

"I remember one. I remember also that Mr. Harwood had his resignation, and I begged him at present to keep it; and afterwards I got a letter from Harwood wherein some deal he was making on this land, and told him to go ahead and sign it as secretary, and he wrote me back that he refused to do that—that he had no stock and did not consider himself secretary any way. If he could help me out in any way, but he could not sign any papers. That letter I have got, but I haven't been able to find it."

Affidavits are filed by Harwood, showing that he had tendered his resignation, and to the effect that he had refused to further serve. Accepting what is presented in his affidavit and in the testimony of Mr.

Hamberg as true, I hold that he was still secretary of the corporation so far as this plaintiff was concerned, for the purpose of service at the time the original notice was served upon him.

Where an officer of a corporation is elected under by-laws providing that he shall serve until his successor is elected and qualified, I hold that, so far as the public is concerned, a resignation tendered before the election of his successor, and not acted upon by the corporation, its stockholders, or board of directors, has no effect. The public has the right to treat him as an officer of the corporation. This is certainly true for the purpose of service upon the corporation, and may be true for many other purposes.

In the case of Evarts v. Killingworth Mfg. Co., 20 Conn. 447, the defendant corporation, established for manufacturing purposes, passed a by-law providing that a president, secretary, and treasurer should be chosen annually, and should hold their offices until others should be chosen in their stead. The corporation carried on its business in the town of K. for some time, when, being unsuccessful, it disposed of all its property and closed its business, without the intention of resuming it, except for the purpose of collecting and paying out moneys, and holding a meeting of the stockholders. At a meeting subsequently held, all of the stockholders transferred their shares of stock to G., and all the officers, including N., the secretary, resigned their offices, which resignations were accepted. A writ against such corporation was soon afterwards served on N., the secretary. The court held the service valid, and that it had jurisdiction of the defendant corporation. It said it was impossible to allow such acts to possess any efficacy whatever. If such a flimsy device were to receive the sanction of the court, it would be lending aid to insolvent corporations to secrete their effects from creditors. The court further said that, however effectual the resignation might have been between N. and the company, it was ineffectual as against third persons to their prejudice. By being incorporated, the defendants had assumed an artificial existence, which continued until legally dissolved; and if they cannot dissolve themselves directly, they cannot do so indirectly, by accepting the resignation of all its officers and living representatives, and refusing to appoint others, thus reducing itself to a mere impalpability and creature of the imagination.

The following is the holding of the court in the case of Colorado Corp. v. Lombard, 66 Kan. 251, 71 Pac. 584, 97 Am. St. Rep. 373:

> Where the by-laws provide that an officer shall continue to hold office until his successor is elected and qualifies, an officer does not cease to be an officer by a mere resignation, and hence service of process may still be made upon him as such officer.

The rule in New York is that, for the purpose of service of process, an officer's resignation is not effective until a successor is appointed. Yorkville Bank v. Zeltner Brewing Co., 80 App. Div. 578, 8 N. Y. Supp. 839; Sturgis v. Crescent Jute Mfg. Co., 57 Hun, 587, 10 N. Y. Supp. 470; Noble v. Euler, 20 App. Div. 548, 47 N. Y. Supp. 302; Wilson v. Brentwood Hotel Co., 16 Misc. Rep. 48, 37 N. Y. Supp. 655; Carnaghan v. Exporters' Oil Co., 57 Hun, 588, 11 N. Y. Supp.

172; Timolat v. Held & Co., 17 Misc. Rep. 556, 40 N. Y. Supp. 692. In the last case above cited the court said:

"There is no question here of personal liability of the resigning director to the creditors of the company, but only a question between such creditors and the company, under its own by-laws, and for its own neglect to terminate its official relations with the director by electing his successor. When, by its by-law, it declares that he shall serve until his successor is chosen, it constitutes him its officer until that event, with the same effect, so far as the corporation is concerned, as if he were serving in the term for which he was elected and had not resigned. It was in the power of the company to terminate his agency at any time by electing a successor, and if it chose rather to continue such agency, he must be treated, in actions against the company, as its duly constituted officer."

Under similar circumstances service may be had on an officer of a municipal corporation who has resigned, notwithstanding the fact that there has been a formal acceptance of his resignation by the municipality. So held in Badger v. United States, 93 U. S. 599, 23 L. Ed. 991. Quoting from 1 Morawetz on Corporations, § 563:

"It seems clear that directors cannot terminate their agency, or accept the resignation of others, if the immediate consequence would be to leave the interests of the company without proper care and protection."

In the case of Venner v. Denver Union Water Co., 40 Colo. 212, on page 225, 90 Pac. 623, on page 627 (122 Am. St. Rep. 1036), the court said:

"Whether or not a director or other officer of a corporation has resigned is a question of fact, to be determined from the circumstances of each case, and which, to some extent, it appears, may depend upon the parties who raise the question. In the present case Mr. Sullivan tendered his resignation to the proper authorities, but it was never acted upon. He continued in the control of the affairs of the company the same as though his resignation had never been offered. * * * The parties who commenced the foreclosure suits * * * had no knowledge that he had ever tendered his resignation to the company. In such circumstances the company will not be permitted to claim that he had resigned prior to the service of process upon him by merely tendering his resignation. The company could have terminated his relationship at any time by electing a successor as provided in its by-laws; and by failing to act he must be treated in actions against the company, in so far as service of process is concerned, as its duly constituted agent."

Mere expressions of an intention to resign if certain contingencies arise, or loose statements of intention, do not amount to a resignation, particularly where the party continues to act. Union Nat. Bank of Troy v. Scott, 53 App. Div. 65, 66 N. Y. Supp. 145. Under the foregoing and other decisions, service in this case is held to be valid.

The motion to quash and dismiss is overruled. The defendant the Western Land & Irrigation Company excepts.

In re MAYTAG-MASON MOTOR CO.

(District Court, N. D. Iowa, E. D. June 22, 1915.)

No. 744.

BANKRUPTCY ⟸387—COMPOSITION—CONFIRMATION—EFFECT.

Under Bankr. Act July 1, 1898, c. 541, § 12e, 30 Stat. 549 (Comp. St. 1913, § 9596), providing that on the confirmation of a composition the consideration shall be distributed as the judge shall direct, and the case dismissed, and section 13, authorizing the judge, on application within 6 months after confirmation, to set the same aside and reinstate the case, and section 63b, providing for the liquidation of unliquidated claims against the bankrupt as the court shall direct, and section 57n, providing that claims liquidated by litigation within 30 days before or after one year after adjudication in bankruptcy shall be proved within 60 days after judgment, and section 70f, providing that on the confirmation of a composition the title to the bankrupt's property shall revest in him, the confirmation of a composition not set aside nor challenged operates, under section 14c, as a discharge of the bankrupt from all debts other than those he has agreed to pay under the composition, and a judgment liquidating a claim rendered in a suit pending at the time of the filing of the petition in bankruptcy, not filed and proved within the statutory time, cannot thereafter be proved as against the bankrupt estate, and the bankrupt is, as against the judgment, entitled to a return of the bonds deposited as security for the payment of debts made a part of the composition confirmed by the court.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 603–605, 607–616; Dec. Dig. ⟸387.]

In Bankruptcy. In the matter of the Maytag-Mason Motor Company, alleged bankrupt. Submitted on petition of the bankrupt for an order for the return to it of $6,000 of its first mortgage bonds, deposited by it with the Black Hawk National Bank of Waterloo, a depository for bankruptcy funds, by order of the court, as security for the payment of certain notes of the bankrupt, made as part of an offer of composition, upon the alleged ground that said notes have been paid by it. F. L. Maytag also filed a cross-petition. Cross-petition denied, and bankrupt's petition granted.

E. R. Mason, of Des Moines, Iowa, for alleged bankrupt.

Haffenberg, Friedman & Haffenberg, of Chicago, Ill., for objectors thereto.

REED, District Judge. It appears from the pleadings and records in this case that an involuntary petition in bankruptcy was filed against the alleged bankrupt in September, 1911. In due time (and before the adjudication, under the amendment of June 25, 1910) the bankrupt offered terms of composition to its creditors, which offer was duly accepted by the requisite number of creditors at a meeting of creditors called for that purpose, and upon notice to the creditors and a hearing thereon was confirmed without opposition thereto by the judge, and the consideration ordered by him to be distributed, which was later done, but no formal order of dismissal of the bankruptcy case was entered.

The American Ball-Bearing Company, of Cleveland, Ohio, filed an

unliquidated claim against the bankrupt for $102,430.58, which has been scheduled by the bankrupt, but as to which it alleged in the schedules that it was not indebted to the Ball-Bearing Company in any sum upon such claim, but, on the contrary, that the Ball-Bearing Company was indebted to it in a large sum. When the petition was filed, a suit was pending in the Circuit Court of the United States for this district by said Ball-Bearing Company against the bankrupt upon such claim. The bankruptcy court, upon application of the Ball-Bearing Company, made an order that said claim be liquidated in the suit so pending. In May, 1913, said suit was tried in this court as the successor of said Circuit Court, and judgment was rendered therein in favor of the Ball-Bearing Company against the alleged bankrupt and F. L. Maytag and one William Galloway, who were parties defendant to that suit, for $60,267, from which no appeal or writ of error was ever taken, and such judgment became final as of the date thereof. That judgment was never proved or filed against the bankrupt in the bankruptcy court.

The petition for the return of the bonds was filed in this court January 13, 1915, and due notice thereof was served upon the Ball-Bearing Company to appear on May 11, 1915, the first day of the May, 1915, term of this court, at Waterloo, and show cause, if any it had, why the petition of the bankrupt should not be granted. On that day the Ball-Bearing Company appeared by attorneys and objected to the granting of the petition, upon the ground, as alleged, that the judgment had never been paid, though the composition and confirmation thereof, and the liquidation of the claim by judgment, as stated, were admitted. The matter, after argument, was submitted to the court, with leave to counsel of the Ball-Bearing Company to file a brief in support of its objections to the granting of the petition. On May 18, 1915, counsel who appeared for the Ball-Bearing Company filed what is labeled "an answer and cross-petition of F. L. Maytag, assignee of the judgment of the American Ball-Bearing Company against the bankrupt," which alleges the assignment to Maytag of that judgment, and contains proof of a claim in behalf of said Maytag against the bankrupt upon such assignment to him of the judgment of May 27, 1913, and asks that it be allowed as a claim against the bankrupt estate nunc pro tunc as of November 14, 1911, in lieu of the unliquidated claim of the Ball-Bearing Company against the bankrupt, and that the petition of the bankrupt for the return of the bonds be denied. The confirmation of the composition is admitted, and its validity is not challenged in any way.

The applicable provisions of the Bankruptcy Act are:

Sec. 12e. "Upon the confirmation of a composition, the consideration shall be distributed as the judge shall direct, and the case dismissed. Whenever a composition is not confirmed, the estate shall be administered in bankruptcy as herein provided."

Sec. 13. "The judge may, upon * * * application of parties in interest filed at any time within six months after a composition has been confirmed, set the same aside and reinstate the case" (for the reasons stated in the section).

Sec. 63b. "Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against the estate."

Sec. 57n. "Claims shall not be proved against a bankrupt estate subsequent to one year after the adjudication; or if they are liquidated by litigation, and the final judgment therein is rendered within thirty days before or after the expiration of such time, then within sixty days after the rendition of such judgment. * * *"

Sec. 70f. "Upon the confirmation of a composition offered by a bankrupt, the title to his property shall thereupon revest in him."

There is neither allegation nor proof by either the Ball-Bearing Company or Maytag why the judgment liquidating the claim of the Ball-Bearing Company was not filed and proved within 60 days after the rendition of such judgment, as provided in section 57n. It is urged, however, in behalf of Maytag, that inasmuch as there was no adjudication in bankruptcy, the time within which the creditors can make such proof is not limited. But under section 12e of the Bankruptcy Act, upon confirmation of the composition and the distribution of the consideration, the case is dismissed without adjudication, and the bankruptcy case is at an end.

In this case the Ball-Bearing Company effected in some manner a settlement of its judgment with Maytag, one of the defendants therein, and assigned the judgment to him; and it may fairly be inferred that, having thus relied and realized upon its judgment, the Ball-Bearing Company was no longer interested in the bankruptcy proceeding or the judgment, and did not therefore prove or attempt to prove the judgment against the bankrupt estate. The confirmation of the composition has never been set aside, and its validity is not now and never has been challenged. The case in bankruptcy is therefore at an end, except for the collection of unpaid costs, if any, and the closing of the record, and no order can now rightly be made allowing any further claim against the bankrupt estate. In fact, the confirmation of the composition is a discharge of the bankrupt from all its debts other than those it agreed to pay by the terms of the composition, which are not affected by the discharge. Section 14c of the Bankruptcy Act. Upon confirmation of the composition, the title of the bankrupt to all its property revests in it, and if the consideration for the composition has not for any reason been paid by it, the remedy of the creditor for the recovery thereof is against it as upon a new cause of action, which is not affected by the discharge. See, as having some bearing upon the questions involved herein, the recent decision in the case of Cumberland Glass Manufacturing Co. v. De Witt, 237 U. S. 447, 35 Sup. Ct. 636, 59 L. Ed. ——, decided by the Supreme Court May 10, 1915.

The judgment liquidating the claim of the Ball-Bearing Company not having been proved and filed within 60 days after it became final, such judgment is barred by section 57n of the Bankruptcy Act; and the bankrupt is entitled to the return of the bonds deposited with the Black Hawk National Bank. It is therefore ordered that the prayer of the cross-petition of F. L. Maytag be and hereby is denied; that the petition of the bankrupt for the return of the bonds in the Black Hawk National Bank of Waterloo be granted; that said bank, upon delivery to it of a certified copy of this order, deliver to the clerk of this court the said $6,000 of bonds of the bankrupt, taking the clerk's

receipt therefor, and the clerk will then return said bonds to the bankrupt, taking its receipt therefor.

The certified copy of this order shall not be issued or made by the clerk until after 30 days from the filing of this opinion. It is ordered accordingly.

In re ROELLICH.

(District Court, D. Oregon. April 26, 1915.)

No. 3157.

BANKRUPTCY ⇐140—PROPERTY PASSING TO TRUSTEE—"CONDITIONAL SALE."

Where goods were consigned to a merchant under a contract by which he was to pay the freight thereon, insure and store the goods, and be responsible for all damages while they were in his possession, and to sell the goods as fast as possible for cash or on six months' time on notes which he was to guarantee, and on settlement he was to receive a commission, the amount of which was not specified, the contract was a conditional sale, which was void as against the creditors of the merchant on his becoming a bankrupt, not a consignment for sale on commission, and the trustee in bankruptcy is entitled to the goods as against the sellers.

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

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

In Bankruptcy. Proceeding against one Roellich. On motion to review an order of the referee denying the petitions of certain creditors for goods claimed to have been delivered to the bankrupt on consignment. Order of the referee confirmed.

Sidney Teiser, of Portland, Or., for trustee.

Dolph, Mallory, Simon & Gearin and H. S. Lusk, all of Portland, Or., for Studebaker Co.

George W. Stapleton, of Portland, Or., for Mitchell, Lewis & Staver Co.

BEAN, District Judge. This matter was submitted on a motion to review an order of the referee in bankruptcy denying the petitions of Mitchell, Lewis & Staver Company and the Studebaker Company for reclamation of certain goods, which they claimed to have delivered to the bankrupt on consignment. The question involves the construction of the contracts between the petitioners and the bankrupt.

The Mitchell, Lewis & Staver Company contract is probably the strongest in favor of the petitioners' claims, and presents the question for decision more distinctly than the other. By its terms the Mitchell, Lewis & Staver Company agree to furnish Roellich, who was engaged in the retail business, certain goods from time to time. Roellich was to receive the goods, pay all the freight, insurance, and other charges, store them free, and be responsible for all damage to them while in his possession, and to keep the goods fully insured. He was to sell them

as far as possible for cash, or on notes, six months' time, keep the money and notes separate from his other business, was to indorse and guarantee the payment of the notes, and forward them to Mitchell, Lewis & Staver Company. Upon final settlement the bankrupt was to receive a commission, not specified, for handling the goods. It was further provided that, if the Mitchell, Lewis & Staver Company so elected, they might charge all the goods remaining unsold on a certain date to Roellich and require him to pay for them. The question presented is whether the agreement constituted a consignment or such a conditional sale as under the laws of Oregon is void as to creditors.

The rule in this court, as announced by Judge Bellinger in the Rasmussen Case (D. C.) 136 Fed. 704, is that where property is delivered to the vendee for sale in the usual course of business as a merchant, and the various provisions relating to the ownership and possession are mere contrivances to secure the purchase price to the vendor, the transactions are fraudulent in law as against other creditors of the vendee. There are many decisions to be found in the books construing so-called consignment contracts, and the decisions are apparently not uniform; but I take it the doctrine of the Rasmussen Case is the rule of this court and should be adhered to.

Applying that rule, it is quite apparent the contracts in suit are void as to creditors. There is no difficulty in framing contracts of this character in such language that there can be no controversy as to the legal effect, and where goods are delivered to a retail merchant, to be sold by him in the ordinary course of business under a contract that is ambiguous, and with as many contradictory provisions as these have, I think it is but fair to hold that, if the merchant subsequently becomes bankrupt, the vendor cannot be permitted to reclaim the goods, because he could make the contract perfectly clear, if he desired to do so.

In this case the vendors seem to have intended to place themselves in a position so that the contract might be considered a sale or consignment as their subsequent interests might suggest. The judgment of the referee is therefore confirmed.

The same order will be made on the Studebaker petition, because that contract is not so strong in its terms as the Mitchell, Lewis & Staver Company contract.

BALTIMORE & O. R. CO. v. REED.

(Circuit Court of Appeals, Sixth Circuit. June 17, 1915.)

No. 2515.

1. LIMITATION OF ACTIONS ⟸169—ACTIONS FOR INJURIES TO PASSENGERS—APPLICABILITY OF STATUTE—"CAUSE OF ACTION."

Where a Maryland railroad company, operating a railroad from Chicago to New York, sold in Chicago a ticket for carriage from Chicago to New York, and the passenger boarded the train at Chicago, and was injured by derailment of the train in Indiana, the law of Indiana governing limitation of actions was applicable to an action by the passenger, brought in a state court in Ohio and transferred to the federal court, for a cause of action within Rev. St. Ohio 1890, § 4990, declaring that, where by the laws of the state where the cause of action arose the action is barred, it is also barred in Ohio, comes into being only when a right possessed by one has been infringed by another.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 655; Dec. Dig. ⟸169.

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

2. LIMITATION OF ACTIONS ⟸31—ACTIONS FOR INJURIES TO PERSON.

Burns' Ann. St. Ind. 1894, § 294, fixing two-year limitation for actions for injuries to person or character, covers causes of action involving injuries to the person, whether arising on contract or in tort, and includes an action for injuries to a passenger, whether recovery is sought on contract or in tort.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 142; Dec. Dig. ⟸31.]

3. EVIDENCE ⟸29—JUDICIAL NOTICE—LAWS OF STATES.

The United States Circuit Court of Appeals takes judicial notice of the laws of a state.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 36, 37, 39, 43–46, 48; Dec. Dig. ⟸29.]

4. EVIDENCE ⟸5—JUDICIAL NOTICE—FACTS OF COMMON KNOWLEDGE.

The United States Circuit Court of Appeals takes judicial notice of the character and importance of the Baltimore & Ohio Railroad Company, and of the fact that it is a common carrier, and will presume that it does business in Indiana.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 4; Dec. Dig. ⟸5.]

5. CARRIERS ⟸312—INJURIES TO PASSENGERS—RIGHT OF ACTION—JURISDICTION.

Under Burns' Ann. St. Ind. 1894, §§ 312, 315, 318, authorizing an action against a railroad company for injury to a person on its railroad, may be brought in any county into which the railroad passes, and summons served in any county, and providing that actions may be brought against a foreign corporation in any county within the state where any property, money, credits, or effects belonging to it may be found, and providing for the service of summons in actions against a foreign corporation, a passenger of a Maryland corporation, sustaining an injury by the derailment of the train of the corporation in Indiana, while running between Chicago and New York, may sue the corporation in Indiana.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. ⟸312.]

6. LIMITATION OF ACTIONS ⟸88—STATUTORY PROVISIONS—NONRESIDENCE.
A Maryland corporation, operating a road between Chicago and New York, through Indiana, and doing business in Indiana, is not a nonresident of Indiana, within Burns' Ann. St. 1894, § 298, providing that the period of absence shall not be computed in any of the periods of limitations.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 463; Dec. Dig. ⟸88.]

In Error to the District Court of the United States for the Western Division of the Southern District of Ohio; Howard C. Hollister, Judge.

Action by Lillie W. Reed against the Baltimore & Ohio Railroad Company. There was a judgment for plaintiff, and defendant brings error. Reversed, and new trial awarded.

Judson Harmon, of Cincinnati, Ohio, for plaintiff in error.
C. W. Baker, of Cincinnati, Ohio, for defendant in error.

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

KILLITS, District Judge. August 6, 1901, at the office of the plaintiff in error in Chicago, the husband of the defendant in error purchased tickets for himself, wife, and daughter over the railroad of plaintiff in error from Chicago to New York. Immediately thereafter the family boarded the train in Chicago, and on the afternoon of the same day, within the confines of the state of Indiana, the train was derailed, and defendant in error as a consequence received personal injuries.

The amended petition averred the railroad company to be a corporation organized in and having its main offices in the state of Maryland, and operating a line of railroad from Chicago, through the states of Illinois, Indiana, Ohio, West Virginia, and Maryland, to Baltimore, and thence to New York. June 8, 1905, an action was brought by defendant in error in the superior court of Cincinnati to recover her damages by reason of the injury in question. The case subsequently was removed to the Circuit Court of the United States for the Southern District of Ohio.

To the amended petition the defendant below set up three defenses; the second, the only one of consequence for the purposes of this decision, being a plea of the statute of limitations in Indiana. The reply denied application of the Indiana statute to the cause of action set out in plaintiff's petition. Trial being had, defendant in error recovered a judgment. On the overruling of the motions of defendant below for judgment non obstante veredicto and in arrest of judgment and for a new trial, error was prosecuted.

At the time of the commencement of the action, section 4990, Revised Statutes of Ohio (now, with some amendments, section 11234, General Code), read:

"If, by the laws of the state or country where the cause of action arose, the action is barred, it is also barred in this state."

At the same time, and also when the accident occurred, section 294,[1] Burns' Annotated Statutes of Indiana read as follows:

"The following actions shall be commenced within the periods herein prescribed, after the cause of action has accrued, and not afterward: First, For injuries to person or character, and for a forfeiture or penalty given by statute, within two years. * * *"

[1] In our judgment, the proper action of this court turns upon a consideration of the effect of this statute of limitations; wherefore it will be unnecessary to pass upon other assignments of error.

We encounter little difficulty in determining that the law of Indiana respecting limitations of actions controls this case, whether we consider the present case one ex contractu or ex delicto. The fact that the contract of transportation, if defendant in error may be said to have made one, was entered upon in Illinois, does not affect the situation, although counsel for defendant in error argues earnestly for the applicability of the law of Illinois. In our judgment, the cause of action, as that term is used in the Ohio statute quoted above, arose and accrued in Indiana. We offer no original definition for the term in suggesting that a cause of action comes into being only when a right enjoyed by one has been infringed by another, and not at the time when merely a right was secured to require performance of a duty from the obligor to the obligee. In the case at bar, assuming that Mrs. Reed enjoyed contractual relations with the railroad company, the obligation of the company to her was transitory through the several states over which her ticket read. No cause of action could arise until the obligation was dishonored, for essential to it was the concurrence of the obligation and a breach thereof which resulted in the obligee's damage. This is undoubtedly the sense in which the term is used in the Ohio statute. Clark v. Eddy, 10 Ohio Dec. 539, 544; Railroad Company v. Larwill, 83 Ohio St. 108, 115, 93 N. E. 619, 34 L. R. A. (N. S.) 1195. The elements of a judicial action, according to Pomeroy's Remedies, § 453, are:

"A primary right possessed by the plaintiff and a corresponding primary duty devolving upon the defendant; a delict or wrong done by the defendant which consisted in a breach of such primary right and duty; a remedial right in favor of the plaintiff, and a remedial duty resting on the defendant springing from this delict, and finally the remedy or relief itself. Every action, however complicated or however simple, must contain these essential elements. Of these elements, the primary right and duty and the delict or wrong combined constitute the cause of action in the legal sense of the term, and as it is used in the codes of the several states. They are the legal cause or foundation whence the right of action springs. * * * The cause of action, as it appears in the complaint, when properly pleaded, will therefore always be the foundation from which the plaintiff's primary right and the defendant's corresponding primary duty have arisen, together with the facts which constitute the defendant's delict or act of wrong."

See, also, Veeder v. Baker, 83 N. Y. 156, 160; Post v. Campau, 42 Mich. 90, 3 N. W. 272; Bradford v. Southern Railway Company, 195 U. S. 243, 248, 25 Sup. Ct. 55, 49 L. Ed. 178.

[1] Section numbers, Burns' Statutes, wherever used in this opinion, are those used in the Revision of 1894, in force in 1901.

In the Bradford Case the court states that a cause of action comprises every fact a plaintiff is obliged to prove in order to obtain judgment, or, conversely, every fact the defendant would have the right to traverse. It follows from these definitions, of course, that a cause of action can arise or accrue only at the place where the facts transpire which ripen it.

The decision in the case of Doughty v. Funk, 15 Okl. 643, 84 Pac. 484, 4 L. R. A. (N. S.) 1029, upon which counsel for defendant in error so strongly relies as to this particular question, turns very largely upon the peculiarities of the Oklahoma practice, as the opinion itself shows, and otherwise is out of harmony with the current of opinion elsewhere, as may be seen by an examination of the annotations thereto in 4 L. R. A. (N. S.). Besides, as observed by counsel for plaintiff in error, there is a manifest distinction between causes of action on absolute obligations and those which arise because of the happening of a mere contingency affecting a contractual duty.

[2] Touching the claim that a bar by limitation existed when this action was brought, defendant in error insists: First, that the Indiana statute quoted above refers to injuries to the person not arising because of a breach of a contractual relation, and that, this being an action on a contract of carriage, section 293, Burns' Statutes, applies, making a six-year limitation "on accounts and contracts not in writing." Secondly, it is urged that, the plaintiff in error being a foreign corporation, the operation of the statutes of limitation of Indiana is suspended, section 298 providing that:

"The time during which the defendant is a nonresident of the state or absent on public business shall not be computed in any of the periods of limitation."

Respecting the first proposition, we are concerned only with the interpretation to be made of section 294, providing for a two-year limitation in actions brought "for injuries to person or character." If that law covers all causes of action involving injuries to the person, whether arising on contract or in tort, we need not go into an analysis whether the action sounds in contract or in tort, upon which Indiana authorities differ. De Hart v. Haun, 126 Ind. 378, 26 N. E. 61; Lane v. Boicourt, 128 Ind. 420, 27 N. E. 1111, 25 Am. St. Rep. 442. The defendant in error, as well as the court below, relied very largely upon the cases of Staley v. Jameson, 46 Ind. 159, 15 Am. Rep. 285, and Kansas Pacific Railway Company v. Kunkel, 17 Kan. 145.

Staley v. Jameson was a suit against physicians and surgeons, in which it was alleged that for a special consideration they undertook to attend and care for the plaintiff in the setting and healing of a fracture, and that they so negligently and unskillfully conducted themselves in performing their contractual duty in that respect as to impair and destroy the efficiency of plaintiff's arm, wherefore they were sued for damages. The case specifically raises the question involved here. The second paragraph of the answer pleaded that the cause of action set forth in the complaint did not accrue within two years next before the commencement of suit. A demurrer to this second paragraph was overruled by the trial judge, whereupon judgment was entered against

the plaintiff. The Supreme Court of Indiana say (46 Ind. 160 [15 Am. Rep. 285]):

"The appellees insist that the action is for a personal injury to the appellant, resulting from the alleged unskillfulness and negligence of the appellees. The opinion of the court below in general term is copied into the transcript. From that we learn that its ruling was based upon the theory that the gravamen of the action was the personal injuries resulting to the appellant from the omission of the appellees to exercise the care and use the skill in the discharge of their undertaking to care for his broken arm, which the law required of them upon the facts of the case, and not on a contract to properly treat the arm as surgeons. * * *"

Also (46 Ind. 165 [15 Am. Rep. 285]):

"We think the action was upon the contract. That a breach of the contract should result in impairing and destroying the efficiency of the appellant's arm does not show that the gravamen of the action is an injury to his person within the meaning of section 211, 2 G. & H. 158" (section 294, Burns' Statutes 1901).

The court below was reversed for error in overruling the demurrer to the second paragraph of the answer. This case was followed under similar circumstances and to the same result by the court in Burns, Executor, v. Barenfield et al., 84 Ind. 43.

It appears from the opinion of the court below in the instant case that it had the advantage of no other decisions on this subject in Indiana than these. However, subsequent holdings by that court very materially narrow their scope and destroy them as authority here. In Boor v. Lowrey, 103 Ind. 468, 3 N. E. 151, 53 Am. Rep. 519, being again an action wherein the plaintiff sued physicians for negligent and unskillful treatment of a fracture, it was held that an action for damages to the person caused by malpractice of a physician does not survive his death, no matter whether it be brought on contract or in tort. The particular statute involved (section 283, Burns) provided that "a cause of action arising out of an injury to the person dies with the person of either party," etc. The court recognized that Staley v. Jameson and Burns v. Barenfield, supra, were necessary to be considered, wherefore they were distinguished and limited in this language:

"These were cases against surgeons for malpractice, and both turned upon the statute which requires actions for injuries to the person to be commenced within two years. In each it was held that the action was in form ex contractu, and that the statute limiting the time for the commencement of actions for injury to the person did not apply. What the paricular damages were which were claimed as the subject of the actions, respectively, does not clearly appear from the statement of the complaint in either case. It must be assumed, however, that the actions were for the recovery of special damages, which had relation to property. They were not, therefore, actions to recover for injuries to the person. If they were, the conclusions reached could not be maintained. This assumption would seem to be justified by an examination of the authorities upon which the decisions are made to rest. Those which support the conclusion reached are cases involving injury to personal property. Dale v. Hall, 1 Wils. 281; Burnett v. Lynch, 5 Barn. & C. 589. It may be that actions ex contractu are maintainable for the recovery of special damages resulting from a breach of duty founded on contract, even though injury to the person results. The action thus maintainable, however, is not and cannot be predicated upon the personal injury, nor to recover damages resulting from injuries to the person. The action must involve injury

to the estate, and not to the person. Where the primary cause of action is an injury to the person, and the damages sought to be recovered relate primarily to such personal injury, the statute which provides that actions to recover damages for injuries to the person die with the person of either party cannot be abrogated by the mere form in which the action is brought."

A review of this case was had under the title of Hess v. Lowrey, 122 Ind. 226, 23 N. E. 156, 7 L. R. A. 90, 17 Am. St. Rep. 355, in which the position formerly taken was adhered to. A still later case on this subject, and one which, we understand, states the present judicial construction in Indiana, is that of Feary v. Hamilton, 140 Ind. 45, 39 N. E. 516. This was also an action involving the interpretation of section 283 (formerly section 282), Burns, providing that a cause of action arising out of an injury to the person dies with the person of either party. There the holding is that, no matter whether the suit sounds in contract or in tort, the statute applies and the action abates. The court says:

"It is settled law that actions arising out of contracts, express or implied, will not survive, where the damages sustained by such breach are for injuries to the person, as mental anguish, pain of body, or injury to character. * * * It is true, as a general proposition, that actions in form ex contractu survive; but this is due rather to the substance of the action than its form."

The force of these decisions compels us to believe that, if the precise question involved in Staley v. Jameson were again before the Indiana court, it would be held that, unless the action counted primarily upon the damage to personal estate resulting from the accident, the two-year limitation in section 294, Burns, would apply, for we are clear that the phraseology of the section under consideration in Staley v. Jameson and Burns v. Barenfield, as well as here, requires the same construction as that placed by the three cases just considered upon the language of section 283, Burns' Statutes.

This interpretation not only seems to us to be highly reasonable, for there is a manifest objection to the consideration that by merely changing the form of the action the injured person may extend the time for its commencement when we have regard to the purpose of fixing a short term of limitation for actions arising for personal injuries—that the infirmities of testimony weakened by lapse of time may be as far as possible avoided (Hanna v. Jeffersonville Railroad Co., 32 Ind. 113, 114)—but it is in harmony with the course of statutory construction in other jurisdictions. In Webber v. Herkimer & M. St. R. Co., 109 N. Y. 311, 16 N. E. 358, under a statute providing that actions for personal injury resulting from negligence shall be brought within three years, it was held that injuries received by a passenger occurring because of the negligence of the conductor constitute an action in tort, and not upon the contract of carriage, and must therefore be brought within three years. To the same effect is Maxson v. Delaware, L. & W. R. Co., 112 N. Y. 559, 20 N. E. 544, where there were under consideration two statutes, one providing a limit of six years for "an action to recover damages for * * * a personal injury, except in a case where a different period is expressly prescribed in this chapter," and the other prescribing a limit of three years for "an action to recover for personal injuries resulting from negligence." Here it was

held, under circumstances almost precisely like those in the case at bar, that the action was within the three-year limitation. Griffin v. Woodhead, 30 R. I. 204, 74 Atl. 417, was an action for malpractice by a physician. The case turned on the interpretation of sections 248, 249 and 250, Statutes of Rhode Island (Court and Practice Act 1905), which read:

"Sec. 248. Actions for injuries to the person shall be commenced and sued within two years next after the cause of action shall accrue, and not after.

"Sec. 249. Actions of trespass, except for injuries to the person, shall be commenced and sued within four years next after the cause of action shall accrue and not after.

"Sec. 250. * * * All actions of debt founded upon any contract without specialty * * * shall be commenced and sued within six years next after the cause of action shall accrue, and not after."

The plaintiff claimed that her declaration sounded in contract and hence was favored by the six-year limitation; the action having been brought more than two years after the treatment. The court held that it was within the shorter limitation, and consequently barred.

Nor is the conclusion we reach necessarily in conflict with the case of Kansas Pacific Railway Co. v. Kunkel, 17 Kan. 145, upon which counsel for defendant in error relies. The case was for injuries received while the plaintiff was a passenger. The holding of the court was that the action was one ex contractu and was governed, therefore, by the limitations placed by the Kansas law upon actions on contract. This decision loses importance in this case when we refer to the Kansas statutes of limitation then in force. Section 18 of the act of 1868 (Gen. St. 1868, c. 80). Section 4095, Code of Civil Procedure, in force at the time of the decision of the Kunkel Case, provided:

"Civil actions, other than for the recovery of real property, can only be brought within the following periods, after the cause of action shall have accrued, and not afterwards: * * * 2. Within three years: An action upon a contract, not in writing, express or implied. * * * 3. Within two years: * * * An action * * * to the rights of another, not arising on contract, and not hereinafter enumerated."

The action was brought within three years, and more than two years after the injury. The significant difference in language between the Indiana and Kansas statutes of limitation deprives this decision of Judge Brewer of much of the force which counsel for defendant in error seeks to give it, and leaves it with little application to this case, except that it decides the action to sound in contract; but we have seen, by a consideration of Feary v. Hamilton, supra, that in Indiana it makes no difference whether the action be held to sound in contract or in tort, if it is brought primarily to recover for injuries to the person and injury to property is merely an incident. The allegations of the complaint in Feary v. Hamilton are fully as favorable to the theory that the action was to some extent for injuries to property as those contained in the instant case, and it is there held that the plaintiff's allegations of "loss of time and inability to attend to and manage her store, and the expense incurred for the services of a physician, were all caused by the personal injury alleged, and would not have been sustained but for such personal injury," and hence it was held that the

primary cause of action was for personal injuries to the person. In this connection the cases of Blackwell v. Railroad, 124 Tenn. 516, 137 S. W. 486, and Sharkey v. Skilton, 83 Conn. 503, 77 Atl. 950, may be referred to for the perhaps unnecessary reasoning that the word "for" in the Indiana statute under consideration in the expression "for injuries to person" means "on account of or because of."

It will be observed, in considering section 293, Burns, providing for a six-year limitation of actions under certain circumstances, that the causes of action within its favor are carefully classified to be, among others, "for injuries to property," and "for relief against frauds," as well as actions "on contracts not in writing." It is therefore clear that many actions for torts come under the favor of this statute, and that the origin of the action, whether in contract or in tort, cannot be the criterion which determines whether the six-year or the two-year limitation should be applied. Here, again, is a difference between the Indiana law and that of Kansas, in that the former does not, as the latter does, make the distinction depend upon whether the action does or does not arise upon contract.

Defendant in error has also an apparent authority in Patterson v. Augusta Railroad Co., 94 Ga. 140, 21 S. E. 283, followed and approved in Rushin v. Railroad Co., 128 Ga. 726, 58 S. E. 357, where it is held that:

"A passenger injured while on the cars in the progress of his journey by the negligence of the carrier has two remedies, one an action for the breach of contract, and the other an action on the case for the wrong, and he may elect which remedy he will pursue."

This was held, and the action upheld, although section 3060, Georgia Code of 1882, provided that "actions for injuries done to the person shall be brought within two years," and the declaration in the case, sounding in contract, was filed more than two years after the cause of action accrued. We are unable to judge how far the court of Georgia may have been controlled in its interpretation of its own statutes by the arrangement of the Georgia Code, but it may be that the fact was influential that the section just cited is found under chapter IV, "Of Defenses," as part of title VIII, "Of Torts," while the statute making the longer limitation and held applicable to the circumstances of that case, section 2923, was found under chapter IX, "Limitations of Actions on Contracts," as part of title VII, "Of Contracts," and included "all other actions upon contract." At any rate, we can give no force to this Georgia decision in this case, because of the holding in Feary v. Hamilton, supra, whose interpretation of the Indiana law must control here.

[3-5] We come now to the last argument of defendant in error, which is thus stated in the opinion of the court below:

"The plaintiff claims that in any event the statute of limitations is not available to the defendant as a defense, because of the failure of the defendant to show that it could have been sued in Indiana. The argument is that, the defendant being a citizen of Maryland, the court will not take judicial notice that the defendant did local business in Indiana and complied with statutory provisions in that state requiring nonresident corporations to designate some method of service of summons upon them in that state. Plain-

tiff's counsel cite Judge Munger's decision in Taylor v. Railroad Co. (C. C.) 123 Fed. 155. That case is directly in point. A consideration of that case, and the authorities cited in it, and the cases to which those authorities refer, lead one to agree with Judge Munger."

But we cannot follow Taylor v. Railroad Company. It is not in harmony with McCabe v. Illinois Central Railroad (C. C.) 13 Fed. 827, Southern Railway Co. v. Mayes, 113 Fed. 84, 51 C. C. A. 70, and Tiller v. St. Louis & Santa Fé Railroad Co. (C. C.) 189 Fed. 994. Besides, we take judicial notice, without pleading or proof, of the laws of Indiana. Lamar v. Micou, 114 U. S. 218, 223, 5 Sup. Ct. 857, 29 L. Ed. 94. Section 312, Burns, provides that an action against a railroad for an injury to person or property upon the railroad may be brought in any county through or into which such railroad passes and the summons may be served in any county in the state. Section 315 provides that actions may be brought against a foreign corporation in any county within the state where any property, moneys, credits, or effects belonging to the corporation may be found. Section 318 provides that if none of the specified officers of a foreign corporation may be found within the state, then service may be had upon any person authorized to transact business in the name of the corporation. Service upon a local freight agent would be good. Railway v. Owen, 43 Ind. 405. The amended petition alleges that the road of the defendant below runs through Indiana and many other states, wherefore it is obvious that it had property within the state. We may take judicial notice of the character and importance of this railroad and that it was at that time a common carrier. Railroad Company v. State, 72 Tex. 404, 10 S. W. 81, 1 L. R. A. 849, 13 Am. St. Rep. 815; Bank v. Fitzgerald, 168 Ill. App. 240. We may, therefore, presume that it did business in Indiana, and, consequently, that there was some one within the state authorized to transact business for it. "A presumption is an inference as to the existence of a fact not actually known arising from its usual connection with another which is known." Insurance Company v. Weide, 78 U. S. (11 Wall.) 438, 441, 20 L. Ed. 197.

[6] The conclusion is inevitable that it was competent at all times for the plaintiff below to have sued the company in Indiana, and that, on the authority of McCabe v. Illinois Central Railroad Co., Southern Railway Company v. Mayes, and Tiller v. St. Louis & Santa Fé Railroad Co., supra, the defendant below was not a nonresident, as that term is used in section 298, Burns, providing that the period of absence "shall not be computed in any of the periods of limitation."

The judgment below must be reversed, and a new trial awarded.

LIPSCHITZ v. NAPA FRUIT CO.

(Circuit Court of Appeals, Second Circuit. April 13, 1915.)

No. 194.

1. COURTS ⟹312—JURISDICTION OF FEDERAL COURTS—SUITS BY ASSIGNEES.
Under Judicial Code (Act March 3, 1911, c. 231) § 24 (1), 36 Stat. 1091 (Comp. St. 1913, § 991), which provides that no District Court shall have cognizance of any suit (except upon foreign bills of exchange) to recover on a promissory note or other chose in action in favor of an assignee "unless such suit might have been prosecuted in such court to recover upon such note or other chose in action if no assignment had been made," where the requisite diversity of citizenship exists between the parties to such a suit, jurisdiction depends on whether it could have been maintained in that court as between the original parties to the instrument, and the citizenship of intermediate assignees is immaterial.
[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 865–875; Dec. Dig. ⟹312.]

2. TRIAL ⟹236—INSTRUCTIONS—FACTS IMPEACHING PARTY AS WITNESS.
Where a defendant in his verified answer explicitly denied allegations of the complaint which he admitted on the trial, among others the execution of the contract sued on, and defendant was a witness in his own behalf, it was not error for the court in its charge to call the attention of the jury to such fact.
[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 531–533; Dec. Dig. ⟹236.]

3. CONTRACTS ⟹163—CONSTRUCTION—CONFLICT BETWEEN WRITTEN AND PRINTED CLAUSES.
Where there are inconsistent provisions in a contract, one being written in, and the other part of a printed form, the written provisions (certainly in the absence of any proof of the contrary) will be assumed to express the intent of the parties.
[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 745; Dec. Dig. ⟹163.]

4. SALES ⟹350—REMEDIES OF SELLER—ACTION FOR PURCHASE PRICE.
Plaintiff contracted to sell to defendant 1,500 boxes of prunes, to be shipped by water from California to New York. Payment was to be made by defendant 10 days after shipment, on presentation of draft with bill of lading, etc., attached. The parties knew that the prunes could not arrive inside of 3 weeks. *Held* that, under Sales of Goods Act (Laws N. Y. 1911, c. 571) § 144, subds. 1, 2, which provides that "where, under a contract to sell or a sale, the price is payable on a day certain, irrespective of delivery or of transfer of title, and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price, although the property in the goods has not passed, and the goods have not been appropriated to the contract," on defendant's refusal to pay the draft when duly presented, plaintiff could maintain an action for the price, although it was named as consignee in the bill of lading and the title to the goods had therefore not passed.
[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 988–992; Dec. Dig. ⟹350.]

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

This cause comes here on a judgment entered on May 11, 1914, in favor of the defendant in error for the sum of $3,760.13. The plaintiff in error was defendant below, and is hereinafter referred to as defend-

ant. The defendant in error was plaintiff below, and is hereinafter referred to as plaintiff.

Boudin & Liebman, of New York City (Louis B. Boudin, of New York City, of counsel), for plaintiff in error.

Allen C. Bragaw, of New York City (Albert W. Meisel, of New York City, of counsel), for defendant in error.

Before LACOMBE, WARD, and ROGERS, Circuit Judges

ROGERS, Circuit Judge. This is an action upon a contract for the sale of prunes. The plaintiff sold to defendant 4,500 boxes of Clover Blossom prunes, which were to be shipped in accordance with the terms of a certain contract. It was denied in the answer, but admitted at the trial, that 3,000 of these boxes were delivered to defendant, and accepted and paid for by him, in accordance with the terms of the agreement. But the claim of plaintiff as to the remaining 1,500 boxes was that it tendered them to defendant on various occasions in New York in accordance with the terms of the contract, and that defendant in violation of the contract refused to accept the same, and thereupon plaintiff stored them in a warehouse in New York, subject to defendant's order, and brought this action to recover the sum of $3,234.36, with interest from January 10, 1912.

The evidence showed that in the sale of California dried fruits two forms of contract were used, which differed in their terms. One provided for shipment by rail and the other by water. The form used in rail shipments provided as follows:

"If shipment is not accepted or disapproved within three full business days after arrival, and goods are subject to buyer's privilege of examination, contract shall be considered fully complied with on seller's part, and invoice, if unpaid, becomes immediately due and payable. (Note: In the event of the shipment being inaccessible on arrival seller or seller's agent should be notified within said three days.)"

And the form used in water shipments provided as follows:

"In view of the recognized increased hazard of water shipment, due to climate and other conditions, buyer hereby expressly assumes all risks after examination by an official inspector of the Dried Fruit Association of California, and issuance by him of an Association certificate as to quality (and in the case of prunes count), and issuance by seller of a sworn certificate of weight. Cost of inspection to be paid by seller."

The contract under which the transaction in question was entered upon was a water shipment contract containing the provision last quoted, although defendant urged upon the court that, if there existed a contract at all, it was a rail shipment contract which contained the first of the above-quoted provisions. Under a contract for water shipment the prunes were accepted in California and were to be paid for on presentation of the draft within 10 days from date of shipment, which was about 3 weeks previous to the arrival of the goods under ordinary conditions. The certificate of inspection on the coast was made, as seen in the provision cited, a final acceptance of the goods.

The plaintiff forwarded for collection to the Chase National Bank of New York a draft drawn by it on defendant for the sum of $3,167.67. This draft was dated December 27, 1911, and was payable 10

days after date to the order of the First National Bank of Napa, and had marked thereon "Invoice No. 1540." The head of the collection department of the bank testified that the draft was presented to defendant for payment and payment was refused. Under the contract the draft should have been accompanied by the bill of lading, a certificate of weight, and a certificate of inspection. The bank messenger who presented the draft testified that these documents were attached to the draft when he presented it for payment. The fruit broker who had charge of the matter for plaintiff states that between March and August, 1912, he had a good many conversations with defendant about the payment of the draft. He testified:

"I repeatedly asked him when he would pay the draft, and he kept saying that he couldn't pay it at that time, because he didn't have the money, but just as soon as he got rid of some of the goods he had in warehouse he would take up the drafts. That was the only reason he gave for not wanting to pay that draft. I had conversations with him every week; in fact, almost every day or so. Our offices are in the same district, right across the street from his. I would meet him on the street 15 times a day, or in our office, and this was a very natural topic of conversation."

He also testified that the bank, after defendant refused payment of the draft and the prunes were released to his firm, turned over at the same time the draft, and the certificate of weight, the certificate of count, and the certificate of inspection.

The defendant claims that the complaint should have been dismissed because: (1) The court had no jurisdiction; (2) because plaintiff failed to prove that attached to the draft was a sworn certificate of weight; (3) that there was no proof of a contract definite in terms; (4) that under the Uniform Sales Act, which is part of the law of the state of New York and of this jurisdiction, the only form of action the plaintiff could bring was an action for damages and not for the purchase price.

[1] As the jurisdiction of the court is challenged, that question must be first determined. The plaintiff is a California corporation, and the defendant is a citizen of the state of New York. This diversity of citizenship gives the court jurisdiction, unless the circumstances of the case are such as to take it out of the general rule. It appears that prior to the commencement of this action the plaintiff assigned the cause of action to one Oskar Bergh, a citizen of the state of New York. Thereupon Bergh sued defendant on this cause of action in one of the courts of the state of New York. This action subsequently was discontinued by stipulation, and it was stated therein that the action was discontinued without prejudice to the right to maintain the action in another court. Bergh thereafter reassigned the claim to plaintiff. It is undisputed that Bergh could not have brought the suit in the federal courts, he and the defendant both being citizens of the state of New York. The defendant therefore insists that, as the plaintiff's assignor could not have maintained the suit in the federal court, the assignee is equally precluded. The provision specifically precluding such assignees bringing their suits in the federal courts was included in the first Judiciary Act enacted in 1789, and has been the

law of the land ever since. The provision is part of section 24 of the Judicial Code now in force and reads as follows:

"No District Court shall have cognizance of any suit (except upon foreign bills of exchange) to recover upon any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer * * * *unless such* suit might have been prosecuted in such court to recover upon said note or other chose in action if no assignment had been made." Judicial Code (Act March 3, 1911), § 24, subd. 1.

The intent of the statute was to prevent citizens of the same state from creating a diversity of citizenship by assignment, and from thereby conferring upon the assignee by indirection a right to sue in the courts of the United States which otherwise he would not have possessed. The jurisdictional requirements under the statute seem to be two:

(1) The original parties to the chose in action sued upon must have been citizens of different states, so that an action might have been maintained in the federal courts had the chose in action never been assigned.

(2) The diversity of citizenship of the original parties to the chose in action must exist at the time the jurisdiction of the court attaches, which is the time when the action is commenced.

In Wilson v. Fisher, Baldw. 133, 30 Fed. Cas. 122, Case No. 17,803 (1830), the facts were these: A citizen of New York had obtained a judgment in a Pennsylvania court against a citizen of Pennsylvania. Before the commencement of the action upon the judgment the New York citizen assigned the judgment to a citizen of Pennsylvania, and the latter's executors assigned it to the complainant. It was argued that, because of the intermediate assignment to the citizen of Pennsylvania, the original diversity of citizenship was lost, and the court lost its jurisdiction. The court thought not, and in the course of its opinion said:

"The question is thus presented whether the assignment mentioned in the act of Congress has reference to that under which the plaintiff claims directly, or to that by which the right was divested out of the party originally entitled to it. The suit cannot be maintained here unless it might have been prosecuted here, if no assignment had been made; that is, as we understand it, if it had remained with the original parties to the transaction, contract or cause of action. The law does not declare that no assignee shall prosecute his suit in this court unless his assignor might have done so; but, unless a recovery of the right claimed might have been had in this court if no assignment of it had been made, and of course in every case in which a recovery might have been prosecuted in the courts of the United States if no assignment had been made, it may be so prosecuted after such assignment to a party competent to sue here."

In Milledollar v. Bell, 17 Fed. Cas. 290, Case No. 9,549, 2 Wall. Jr. 334 (1852), the facts were as follows: This was a foreclosure of a mortgage by a citizen of New York, the mortgagor being a citizen of New Jersey. The plaintiff had title to the mortgage through several intermediate assignments, and the citizenship of none of the assignors was alleged. The court overruled the demurrer to the complaint, and said, through Judge Grier, then a Circuit Judge and afterwards Mr. Justice Grier of the Supreme Court:

"The statute does not take from the assignee of a chose in action his right to sue in the courts of the United States, unless his immediate assignor could have sustained such action; but only in case the court could have had no jurisdiction as between the original parties to the instrument, if no assignment had been made. The situation or rights of temporary intermediate assignees, holders, or indorsers enter not into the conditions of the case. * * * We are of opinion, therefore, that as this bill shows that the complainant is a citizen of New York, and the defendants citizens of New Jersey, at the time the bill was filed, and that the original contractor or mortgagee is a citizen of the same state, and could therefore have sued these defendants, at the time this bill was filed, in the circuit court of New Jersey, 'if no assignment had been made,' this court has jurisdiction of the case, and the citizenship of the intermediate holders, owners, or assignees is immaterial, and need not be averred."

In Montalet v. Murray, 4 Cranch, 46, 2 L. Ed. 545 (1807), an action had been brought in the Circuit Court of the United States for the District of Georgia by a citizen of New York against one Murray to recover upon a promissory note payable to one Cardeaux de la Caye, whose citizenship did not appear in the declaration. The Supreme Court, through Chief Justice Marshall, said that if it did not appear upon the record "that the character of the original parties would support the jurisdiction the objection was fatal under the uniform decisions of the court."

[2] We come now to defendant's second objection, which is that he is not in default because he was entitled to have had presented to him a sworn certificate of weight before he could be required to pay for the goods, and that the evidence does not disclose that such a certificate has ever been presented. There was an issue of fact as to whether the draft, when presented for payment, was accompanied with the sworn certificate of weights, together with the inspector's certificate of quality, as the contract required. In order to maintain the action it was necessary to show that the certificates accompanied the draft. The defendant denied that they accompanied it, and admitted that if they did accompany it there was full performance of the contract on the plaintiff's part. The plaintiff insisted that the certificates were attached at the time the draft was presented for payment, and claimed that the weight certificate had been lost prior to trial. The testimony on the subject was conflicting; but there was testimony presented from which the jury had a right to conclude that these certificates were attached to the draft as the contract required. The jury credited plaintiff's witnesses and discredited the defendant, which, upon perusal of the record as a whole, we do not find surprising. There was evidence of conduct as well as admissions on defendant's part inconsistent with his story that he refused to accept and pay the draft because it was not accompanied by sufficient documents. The court below was not quite accurate in what it said as to a waiver. But we think that what was said on that point was harmless error. The real question was whether defendant's story on the witness stand was a truthful one, and that was for the jury to decide.

The defendant interposed an answer under oath, in which it denied separately, paragraph by paragraph, every averment in the complaint, except the one that plaintiff was a citizen and resident of New York.

It even denied the execution of the contract. The complaint expressly averred that defendant accepted and paid for part of the merchandise covered by the contract. The sworn answer denied this positively and not merely upon information and belief. Nevertheless the trial had just begun when defendant, by his counsel, conceded that he had received two car loads of the prunes shipped according to the contract and had paid for them. The trial judge alluded to this in his charge to the jury and said:

"There is one thing more, Mr. Foreman, that my attention has been called to in looking ever these papers, which you are at liberty to consider as bearing upon these questions of fact that I have submitted, and that is the defendant's answer under oath, in which he denies everything."

The defendant assigns as one of the errors of the case the use of this language in the court's charge, and declares that it undoubtedly created great prejudice in the minds of the jury against the defendant, "as it practically branded the defendant as a perjurer, and thereby deprived him of his chance to a fair trial at the hands of this jury." We fail to see why the jury were not entitled to take this matter into consideration, or why the court was not entitled to call it to the jury's attention. The circumstance certainly threw some light on defendant's conception of the obligation of an oath, and was helpful, no doubt, towards the conclusion which the jury reached on the matter of his credibility. When a defendant in his sworn answer denies everything, including facts about the truth of which he cannot have been at all ignorant, he has no reason to complain if a court directs the attention of the jury to it.

We think defendant's objection is untenable that the evidence fails to disclose that the parties made a contract definite in terms and which could be enforced in a court of law. We have found no reason to think that the minds of these parties did not meet, or that an agreement was not reached which was definite and certain.

[3] The contract was made in New York City by a broker representing the plaintiff, and the prunes were to be shipped from California to New York. There had been a number of prior transactions between the parties, and defendant had become familiar with plaintiff's form of contract. The contracts were printed (with blanks) each on a single sheet of paper. On one side of the sheet was the contract proper, to be signed by the parties. It contained the statement that the sale was "on terms and conditions stated on the reverse side of this contract." The signature sides of these two forms were substantially alike, and the differences were in the "conditions" on the reverse side. Thus the rail shipment form contained the provision first above quoted, while the water shipment form contained the second of the provisions quoted.

When plaintiff's local broker filled out the form of the contract in suit, he was temporarily out of water shipment forms, so he used one of the rail shipment forms, writing on it immediately above the signatures the words: "All other conditions to be those embodied in regular water contract, etc." He neglected, however, to strike out of the

printed form the reference to terms and conditions stated on the reverse side. Defendant has argued at great length that in consequence there was either no contract proved, or that the contract was one which included only the rail shipment provisions. We discover no difficulty in construing the document. On its face it is a water shipment contract, for it calls for routing by "American Hawaiian Line—two steamers." Where there are inconsistent provisions in a contract, one provision being written in, the other being part of a printed form, the written provisions (certainly in the absence of any proof to the contrary) will be assumed to express the intent of the parties. Sturm v. Boker, 150 U. S. 312, 326, 327, 14 Sup. Ct. 99, 37 L. Ed. 1093 (1893); Chadsey v. Guion, 97 N. Y. 333 (1884); Loveless v. Thomas, 152 Ill. 479, 38 N. E. 907 (1894); Russell v. Bondie, 51 Mich. 76, 16 N. W. 239 (1883). In the Chadsey Case Chief Judge Ruger said:

"It scarcely needs the citation of authority to support the long-established rule that the printed portions of a contract, when repugnant, must be subordinated to those which are written, and that the latter are presumed, from the circumstance of their special and deliberate insertion by the parties, to embrace the real intent and meaning. Leeds v. Mech. Ins. Co., 8 N. Y. 351; Harper v. Alb. Mut. Ins. Co., 17 N. Y. 194; Harper v. New York City Ins. Co., 22 N. Y. 441."

So, in the case at bar, the conditions which are brought into the contract by the written clause will control whenever they conflict with the conditions which are in the printed form. Moreover the evidence shows that the parties gave this common-sense construction to the document, because two separate shipments under it were forwarded, received, and paid for upon presentation of draft, certificate, and sworn statement of weights.

[4] We come now to consider the last of the more serious objections which defendant has raised in this court, and that is that the plaintiff had no right to sue for the purchase price of the goods. The courts have assumed, in the absence of ground for a contrary supposition, that payment of the purchase price and delivery of the goods are intended to be concurrent acts, and that the obligation of each party to perform is dependent upon the simultaneous performance by the other party. Haskins v. Warren, 115 Mass. 514, 533 (1874); Merrill Furniture Co. v. Hill, 87 Me. 17, 32 Atl. 712 (1894); Lamont v. La Fevre, 96 Mich. 175, 55 N. W. 687 (1893); Chapman v. Lathrop, 6 Cow. (N. Y.) 110, 16 Am. Dec. 433 (1826). But in the case at bar payment was by express provision of the contract to be made ten days after the shipment of the goods, and the parties knew that the merchandise could not arrive until three weeks after shipment. And the general rule undoubtedly is that, if different times are fixed for the payment of the price and the delivery of the goods, the act which is by the contract to be performed first is absolutely due on that day, while the performance which is to take place on a later day is not due unless as a condition precedent the prior performance has been rendered. The rule seems to have been adopted from Lord Holt's opinion in Thorpe v. Thorpe, 12 Mod. 455 (1694). See Harvard Law Review 1906–07, p. 375.

The plaintiff has sued for the purchase price of a car load of prunes. The defendant insists that, assuming plaintiff has a remedy, which he denies, he has brought the wrong action. His argument is that title to the prunes never vested in him, and no delivery of the prunes was ever made to him. Therefore no action for goods sold and delivered can be maintained against him. The action should have been one for breach of contract. He calls attention to the following facts upon which his argument is based: That under the contract the goods were delivered in New York to plaintiff's own order; that the bill of lading was never delivered to the defendant, its delivery being conditional upon the acceptance by the defendant of the draft for the purchase price, and was therefore retained by the bank to which it was sent, subject to the plaintiff's order; that it was subsequently delivered, upon plaintiff's order, to its own agents, who thereupon took the goods in possession, and continued in possession of the same until the trial of the action; and that under such circumstances title never passed.

The bill of lading was issued by the American-Hawaiian Steamship Company to Napa Fruit Company for 1,500 boxes of prunes shipped to the Napa Fruit Company as consignee at New York; and it was marked "Notify S. Lipschitz." Now it is undoubtedly a common-law rule that, if a seller takes a bill of lading in which he is named as consignee, the carrier is a bailee for the seller, not the buyer, and the title is retained. The practice of taking bills of lading in this form has been common for centuries in order to preserve to the seller a hold upon the goods during transit. See Williston on Sales (1909) p. 414, where the cases are collected. The seller, by taking the bill of lading in his own name, was regarded as reserving the jus disponendi, or right of disposal of the goods, which was in fact title.

In North Pennsylvania Railroad Co. v. Commercial Bank of Chicago, 123 U. S. 727, 8 Sup. Ct. 266, 31 L. Ed. 287 (1887), the bill of lading stated that the live stock "consigned to order P. M.," who was the shipper, and it was marked "Notify J. B." at point of destination. And the Supreme Court held that the carrier was liable for delivering the live stock to J. B.

But the form of the bill of lading is not in all cases conclusive. In Williston on Sales it is said, in section 284:

"It is to be observed that, though the form in which the bill of lading is taken is indicative of the title to the goods shipped, in the nature of the case, it cannot always be conclusive. * * * If it be supposed, however, that the circumstances are such that, were it not for the form of the bill of lading, the property would have passed, but the seller is named as consignee in the bill, an interesting situation is presented. The object of the seller in reserving the property is, it may safely be assumed, simply to secure himself in regard to the performance by the buyer of the latter's obligations. By shipping the goods the seller has lost all use of them and has definitely appropriated them to his bargain with the buyer. If the shipper could be perfectly sure that the buyer would fulfill his obligation, it can hardly be doubted that he would have made a straight consignment to the latter. The effect of naming himself as consignee in the bill of lading should not be greater than is necessary to effectuate the purpose of the parties. This purpose is to reserve the property for security only—the same purpose that the seller of goods under a conditional sale has; the same purpose that a mortgagee who takes title under a common-law mortgage has."

And in Burdick on Sales (3d Ed.) 1913, § 111, p. 81, that writer states the law as follows:

"The inference of the reservation of title from the form of the bill of lading is not conclusive, but may be rebutted by other evidence. Accordingly, if the seller indorses such bill of lading as above described and sends it to the purchaser, or if he takes the bill of lading in this form for some collateral purpose, such as protecting himself in case the purchaser does not accept the goods, * * * title may pass to the purchaser notwithstanding the form of the bill of lading."

But we need not consider whether at the common law the title to the goods under this bill of lading was reserved to the seller for purposes of security only, so that the buyer had a kind of equitable title, and could be sued for the purchase price, or could maintain an action for the recovery of the possession. No such question or questions are involved.

The case has been argued upon both sides upon the assumption that whatever contract existed between these parties was subject to the New York Sales of Goods Act, which went into effect on September 1, 1911 (Laws 1911, c. 248). We shall therefore decide the questions involved upon the theory that the contract is a New York contract. The defendant directs attention to article 7, section 226, subdivision "b," of the act, which reads that:

"Where the goods are shipped," and by the bill of lading "the goods are deliverable to the seller or his agent, or to the order of the seller or his agent, the seller thereby reserves the property in the goods."

And he deduces from this that, as the property was thus reserved to the seller, the only cause of action the plaintiff could possibly have upon defendant's refusal to accept and pay for the goods was one for breach of contract. The plaintiff, however, relies upon the remainder of subdivision "b," which reads as follows:

"But if, except for the form of the bill, the property would have passed to the buyer on shipment of the goods, the seller's property in the goods shall be deemed to be only for the purpose of securing performance by the buyer of his obligations under the contract."

And he calls attention to section 144 of the act (Laws 1911, c. 571), subdivision 2 which reads as follows:

"Where, under a contract to sell or a sale, the price is payable on a day certain, irrespective of delivery or of transfer of title, and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price, although the property in the goods has not passed, and the goods have not been appropriated to the contract. But it shall be a defense to such an action that the seller at any time before judgment in such action has manifested an inability to perform the contract or the sale on his part or an intention not to perform it."

A consideration of the provisions of the act satisfies us that, while the title to the goods in question remained in the seller, the reservation was solely for the purpose of securing performance by the buyer of his obligations, and that the act gives to the seller the right to maintain an action for the price, although the property in the goods had not passed.

There are a number of other assignments of error, but we do not deem it necessary to enter upon a discussion of them. We think the

case was fairly tried, and that there is nothing in the record which justly entitles the defendant to have the judgment reversed.

Judgment affirmed.

HARTFORD FIRE INS. CO. OF CITY OF HARTFORD, CONN., v. DOWNEY.

(Circuit Court of Appeals, Fourth Circuit. May 4, 1915.)

No. 1268.

INSURANCE ⊂⊃330—FIRE INSURANCE—"INCUMBRANCE" BY CHATTEL MORTGAGE.

A corporation, indebted on two notes amounting to $22,000, one of which was secured by bonds secured by a deed of trust on its real estate, executed a $22,000 note and issued new bonds, secured by a new deed of trust on all its property. The deed was approved and recorded, and the bonds were certified by the trustee and handed over to the creditor. The original notes and security were retained pending payment by the corporation of accrued interest. *Held* that, though the new note was not accepted, and was not to be accepted until the accrued interest on the old notes had been paid and they were surrendered, the new deed of trust was an "incumbrance," within a fire policy on the property of the corporation, declaring that it should be void on the property becoming incumbered by a chattel mortgage.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 829–839; Dec. Dig. ⊂⊃330.

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

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

Action by William W. Downey, receiver of the Stewart Vehicle Company, against the Hartford Fire Insurance Company of the City of Hartford, Conn. Judgment for plaintiff, and defendant brings error. Reversed.

John W. Davis, of Clarksburg, W. Va., and W. Calvin Chestnut, of Baltimore, Md. (Allen B. Noll, of Martinsburg, W. Va., on the brief), for plaintiff in error.

Malcolm Jackson, of Charleston, W. Va., and J. O. Henson, of Martinsburg, W. Va., for defendant in error.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

KNAPP, Circuit Judge. The defendant in error (plaintiff below) recovered a judgment, entered upon the verdict of a jury, in an action upon a fire insurance policy issued to the Stewart Vehicle Company, a West Virginia corporation, which carried on business at Martinsburg, in that state. The assignments of error are based upon exceptions to certain instructions given to the jury by the judge presiding at the trial, and to his refusal of certain instructions requested by the defendant, including the direction of a verdict in its favor. The

policy in question is of the New York standard form, prescribed also by the laws of West Virginia, and contains the following provision:

"This entire policy shall be void if * * * the subject of insurance be personal property and be or become incumbered by a chattel mortgage."

The property insured, which consisted of the merchandise in stock of the Vehicle Company, was totally destroyed by fire on the 15th of September, 1912, while the policy was in force; but the insurance company denies liability on the ground that the property had become incumbered with a chattel mortgage. The facts in this regard appear to be these:

At the time of the fire the Vehicle Company was indebted to the Maryland Surety & Trust Company, of Hagerstown, to the amount of approximately $30,000, evidenced by three notes described as follows:

(a) Demand note for $10,000, dated December 30, 1911, for which the Trust Company held as collateral the same amount of first mortgage bonds of the Vehicle Company secured by deed of trust covering its real estate only. This note contained the following provision:

"We agree that the above-named securities, and any others added to or substituted for them, all cash at any time to the credit of our account, and all notes and drafts deposited by us for collection in said bank, may be held as collateral security for all the obligations and liabilities of the undersigned, both individual and partnership, and the indorsers hereof, due to the said Maryland Surety & Trust Company, or to become due, or that may hereafter be contracted."

(b) Demand note for $12,000, dated December 30, 1911, for which the Trust Company held no specific security.

(c) Thirty-day note, dated January 13, 1912, for $7,220, secured by invoices or open accounts due the Vehicle Company from its customers, to the amount of about $10,000, which had been assigned to the Trust Company, presumably when the note was discounted, with the agreement that the Vehicle Company should collect the money on these invoices and pay it over to the Trust Company in discharge of the obligation; and this arrangement appears to have been carried out to the extent of payments amounting to about $2,300.

In the transactions involved in this suit the Trust Company was represented by Mr. John M. Lane, its secretary and assistant treasurer, and it is evident that early in the year 1912 Mr. Lane became anxious about the indebtedness of the Vehicle Company and desired to reduce the amount or get additional security for its payment. There is no room for doubt that the Vehicle Company at this time was more or less embarrassed. It may not have been actually insolvent, or its business unpromising; but it was seriously hampered, to say the least, by lack of working capital. Mr. Lane was uneasy, if not apprehensive, about the situation, and sought actively to diminish the risk which this loan involved. He had frequent conferences with the general manager of the Vehicle Company, in which the situation was discussed with the view of reducing the line of discount or otherwise protecting his company.

To meet its financial difficulties and comply with the demand of the Trust Company for additional security, the Vehicle Company,

with the full knowledge and approval of Lane, decided upon a bond issue of $50,000, secured by deed of trust on all its real and personal property, which should be used in the first instance to provide the Trust Company with further collateral and then sold to the public from time to time, the proceeds to be applied to the payment of the Trust Company's debt until it was extinguished, and the balance utilized for additional capital. It was further understood that the Vehicle Company should enter into a contract with the Takoma Investment Company of Chicago, as the fiscal or selling agent of the bonds, which were to be placed in the hands of the Trust Company, and that as sales were made to investors the bonds would be forwarded by the Trust Company with sight draft attached, the proceeds to be received by the Trust Company and credited upon its loan until it was fully liquidated.

As the new bonds were to be a first lien on all the property of the Vehicle Company, and so sold to the public, it was, of course, necessary for the Vehicle Company to procure a surrender of the prior issue of bonds, then held by the Trust Company, as above stated, and a release of the trust deed on the real estate by which those bonds were secured. Steps were accordingly taken to carry out this plan, but there was considerable delay in bringing it to consummation; and it was not until the 16th of August that the trust deed was executed and acknowledged. On the 19th of August the officers of the Vehicle Company, namely, Claude Stewart, its vice president and general manager, C. H. Harris, its secretary and treasurer, and William W. Downey, its counsel and the trustee named in the deed of trust, took the papers to Hagerstown. The bonds were delivered to the Trust Company, or at least placed in its possession, and the trust deed left with Mr. Lane for approval by the counsel of his company. It was arranged at the same time that the two notes for $10,000 and $12,000, respectively, which the Trust Company then held, should be replaced by a new note for $22,000. A memorandum was made of the accrued interest on the old notes, amounting to $183.34, which was to be paid by the Vehicle Company, and a demand note for $22,000 drawn up and given to Mr. Harris for execution by that company.

The deed of trust was duly approved by the counsel of the Trust Company, but it was found upon examination that the bonds had not been signed by the officers of the Vehicle Company, although they were properly certified by Downey, the trustee. Thereupon, on the 20th of August, Lane returned the deed of trust to the Vehicle Company, with a letter stating that it would be necessary for the president and secretary of that company to come over and execute the bonds under its corporate seal. Accordingly these officers went to Hagerstown a few days later, where they signed the bonds and affixed the corporate seal. For some reason there was delay on the part of the officers of the Vehicle Company in executing and returning the new note, paying the accrued interest on the old notes, and getting the deed of trust recorded, and they were repeatedly urged by Lane to complete these details of the arrangement. He testifies that he telephoned them a number of times to the effect that he could not

understand the delay in recording the deed of trust, or see any reason why the transaction was not concluded. On the 7th of September he wrote the Vehicle Company as follows:

"We have not as yet received new note for $22,000, which was given you some time ago to take up your old notes for $10,000 and $12,000 respectively, nor have we been advised by you that the new deed of trust, that secured an issue of $50,000 in bonds, has been recorded. If this has not been done, kindly advise us early Monday morning over the telephone the cause for the delay."

On September 9th the Vehicle Company made the following answer:

"We received your letter of the 7th instant, and note what you say relative to note and recording of deed of trust. We are inclosing herewith note, and will say that deed of trust has been given to Mr. Downey. We tried to get him this morning to see if he had put same on record; we presume he has. He will be home to night, when we will take the matter up with him, and see that it is attended to promptly."

To this Lane replied the next day as follows:

"We have your letter of the 9th, inclosing new note for $22,000. You neglected to inclose check for accrued interest on the old notes, amounting to $183.34, which kindly forward, and upon receipt of advice that the new deed of trust has been filed for record we will return the old bonds for cancellation, so that the old deed of trust can be released. Kindly give the matter of having the new deed of trust recorded your immediate attention."

This letter appears to have had the desired effect, for the new deed of trust was recorded on the 12th of September, and the record office receipt therefor mailed to and received by Lane prior to the fire, which occurred, as above stated, on the 15th of September, 1912. In this connection it may be mentioned that the total loss was adjusted at $105,849.42, with aggregate insurance of $107,500. Of this amount of insurance $80,500 was on the stock, which was less than its adjusted value. The policy in suit was for $10,000, and covered the stock only, and it is conceded that the defendant, if liable at all, is liable for the full amount of its policy and interest.

When the fire occurred it became apparent to the officers of the Vehicle Company that a receivership was desirable and immediate steps were accordingly taken. On the night of the 16th of September a bill in equity was prepared for the appointment of a receiver; the plaintiffs named in this bill including Downey, Claude Stewart, R. N. Stewart, his father, who was president of the company, and Harris, its secretary and treasurer. In paragraph 10 of this bill is recited the original bond issue of $10,000, and in paragraph 11 the new bond issue of $50,000, secured by the deed of trust in question. In paragraph 12 is the following allegation:

"Plaintiffs aver that the bonds mentioned in paragraphs 10 and 11 hereof were regularly issued, but plaintiffs are informed and believe that none of said bonds have been sold, but they are informed and believe, and therefore charge, that all of said bonds have been deposited with the said defendant, the Maryland Surety & Trust Company, a corporation, as collateral security for a loan made by it to the said Stewart Vehicle Company, which your plaintiffs are informed amounts to about the sum of $22,000. Your plaintiffs further aver that a sale of the said bonds so placed as collateral would necessarily be at a sacrifice, and a sale of the same by the said bailee would be

of irreparable injury to the said The Stewart Vehicle Company and to your plaintiffs as stockholders therein."

The bill was sworn to by Harris on the morning of the 17th, filed that day, and Downey thereupon appointed sole receiver. The order of appointment also enjoined the Trust Company "from selling or otherwise disposing of certain bonds of the said company amounting to the sum of $60,000, secured by two deeds of trust upon the assets of said company placed with said bank as collateral for a loan by it."

The insurance companies were promptly notified of the fire and sent their representatives to investigate and adjust the loss. The receiver also employed adjusters to represent him in the matter of the insurance, and they prepared formal proofs of loss, which were signed and sworn to by him as receiver, and also by Claude Stewart as vice president of the Vehicle Company. Each of these proofs of loss, about 40 in number, one for each policy, contained substantially the following statement:

"Except as noted below, the property described belonged, at the time of said fire, to assured in fee simple (not held under lease), and no other person or persons had any interest therein; no assignment, or transfer, or incumbrance of said property has been made, and no change in the title, use, occupation, location, or possession of said property has occurred since the issuance of said policy, except bonded indebtedness of $60,000, bonds owned by assured, but hypothecated with Maryland Surety & Trust Company to secure a commercial paper loan of $22,000."

Although the adjusters for the insurance companies at once took the position that the policies were invalidated by the deed of trust, and refused to proceed until a proper waiver was executed, the Trust Company retained the bonds and the $22,000 note for some months afterwards, claiming the right to hold them as security for the debt of the Vehicle Company. Meanwhile, in November, 1912, counsel for the insurance companies wrote to Mr. J. Clarence Lane, the attorney of the Trust Company, and the uncle of John M. Lane, for information concerning the claim of the Trust Company to these bonds, and he replied on the 13th of that month, after consultation with his nephew, in a letter of some length from which the following is quoted:

"I learned from the Maryland Surety & Trust Company that three or four years ago they loaned the Vehicle Company $10,000 and received as security therefor $10,000 of bonds secured by deed of trust as a first lien on the property. Subsequently they made additional loans, which were secured by various notes. Then the company came with a proposition for the surrender of the bonds and the substitution of the bonds under a new deed of trust for $50,000, stating that a finance company in Chicago could sell the bonds for them. The bank agreed to this arrangement, and stated that upon the execution of the deed of trust, and the delivery of the entire issue of $50,000 of bonds, they would surrender the old bonds and release the old deed of trust, and would hold the new bonds as collateral security for the obligations due the bank, and would deliver them as sold, and credit the proceeds upon the obligations until the indebtedness was liquidated. The $50,000 of bonds were delivered to the Maryland Surety & Trust Company, and were duly certified by Mr. Downey as trustee. The bank now holds both sets of bonds as security for the debts due."

Nothing further appears to have transpired until December 10, 1912, when the receiver wrote to the defendant company, calling attention

to the fact that more than 60 days had elapsed since the proofs of loss were furnished, making demand for payment, and stating further as follows:

"In this connection you are also notified that the attempted hypothecation of certain bonds owned by the insured by certain employés of the said Stewart Vehicle Company was not in fact an hypothecation thereof."

It will be noted that this letter contains no denial that the officers of the Vehicle Company intended to hypothecate the bonds and states no reason for claiming that their hypothecation had not been effected; nor is there any suggestion that the Trust Company had not accepted the bonds as additional security for its debt. Indeed, it appears that the receiver made no demand for a return of the bonds until the 18th of March, 1913. And the demand then made was not at once complied with, for the bank continued to retain the bonds, still claiming to hold them as security for the indebtedness of the Vehicle Company, until it became satisfied that they were valueless for that purpose. Lane himself testifies:

"We held them until we found out that we couldn't. Just as long as we could. * * * We held them until we found out they were no good to us, and we couldn't get any money out of them."

It is evident that Lane finally discovered, or was advised, that the retention of the bonds under claim of holding them as collateral security would have the effect of invalidating the insurance policies because of the chattel mortgage provision which they contained. It was only when convinced of this that he surrendered the bonds and the $22,000 note. Shortly afterwards the receiver brought suits against the insurance companies.

Upon consideration of the foregoing facts, which appear to be wholly undisputed, we are constrained to hold as a matter of law that at the time of the fire the insured property had "become incumbered by a chattel mortgage," which avoided the policy, and the reasons for that conclusion will be indicated in a brief review of the opposing contentions. It is conceded that the action must fail if the bonds were actually hypothecated, for then they would be outstanding, and the case therefore turns upon the question whether their hypothecation had been effected. The plaintiff argues that a valid pledge of the bonds cannot be claimed, because the arrangement with the Vehicle Company was not fully consummated. But the deed of trust had been executed by the proper officers of the company, acting upon authority of its stockholders and directors, submitted to and approved by the Trust Company's counsel, and duly recorded in the clerk's office. The bonds likewise were signed by the president and secretary, certified by the trustee, and handed over to the Trust Company. We are unable to see that anything whatever remained to be done by the Vehicle Company to make the deed of trust a lien upon its property, so far as the instrument itself was concerned, or to complete the possession and control of the new bonds by the Trust Company. It seems clear to us that this accomplished an unconditional delivery of the securities to the bank for the purposes contemplated by the arrangement, and that nothing else can be made of it. The right of the Trust

Company to hold the bonds as security for the debt of the Vehicle Company was conferred without reserve by the unequivocal acts of the parties, and there is no reasonable doubt that both of them so regarded the transaction.

But the plaintiff insists that this view is erroneous, because the bonds were pledged, or were to be pledged, only as security for the $22,000 note, and that there was no completed or valid pledge, because this note had not been formally accepted by the Trust Company. It appears that it was the practice of the bank to place serial numbers upon discounted notes when they were entered in its books, and that the note in question had not been numbered or entered. Apparently this was because the bank was retaining the old notes to await payment of the accrued interest before charging them out and entering the new note which represented the same indebtedness. However this may be, the question whether the new note had been accepted by the bank was presumably regarded by the trial judge as a question of fact, and one of almost controlling importance, because he gave the jury the following instruction:

"The court instructs the jury that unless said bonds were at the time of said fire held by the Maryland Surety & Trust Company as collateral security for the payment of the $22,000 note dated August 19, 1912, said bonds were not issued and outstanding at the time of said fire, and that said bonds could not be held as such collateral security unless the Maryland Surety & Trust Company was at the time of said fire the owner of said $22,000 note."

But, admitting that the new note had not been accepted, and was not to be accepted until interest was paid on the old notes and they were surrendered or canceled, it does not follow that there was not a complete and valid hypothecation of the new bonds as security for the existing indebtedness. It was the long standing debt of the Vehicle Company and its precarious financial condition which caused the apprehension of Lane and led to his persistent efforts to get more adequate security. Leaving out of view the note of $7,220, which was apparently expected to be paid from the proceeds of the assigned accounts, more than half of the amount loaned to the Vehicle Company was wholly unsecured, and it was obviously Lane's desire, as well as the evident purpose of the arrangement which he approved and encouraged, to get a first lien upon all the property of the debtor for the protection of his bank. The debt was created when the money was loaned, and the notes then given were merely the evidence of that debt. The substitution of a new note would not affect the debt, but merely change the character of the written evidence. And it was the debt that was to be secured, whether represented by the old notes or by a new one of the same aggregate amount. This was the plain intention of the parties at the time, and this they asserted, after the fire occurred, was what they had accomplished. The owners of the Vehicle Company so declared when they alleged in the bill for the appointment of a receiver that the bonds described had been deposited with the Trust Company "as collateral security for a loan made by it," and the attorney for the Trust Company was equally explicit when he wrote, two months after the fire, that "the bank holds both sets of bonds as security for the debts due." It would be difficult to express

more plainly the common understanding of both parties as to what they had done, and it seems almost trivial to contend that the pledge of new bonds was incomplete, or revocable by the Vehicle Company, because the $22,000 note, which the bank called for and got, had not been entered upon its books. The transaction must be judged by its substance and manifest purpose, and not by its form in some minor and unessential detail. The giving of a new note, which had no consideration except the existing debt, was a mere matter of banking convenience. The object of the Trust Company was fully attained when it got possession of the bonds and was advised that the instrument which secured them, previously examined and approved, had been duly recorded. If the bank then acquired the right to hold the bonds as security for its debt, which appears to us not open to question, that right would not have been in the least impaired if the Vehicle Company had never signed or sent the consolidated note.

It is also argued with much earnestness that there was no valid pledge of the new bonds because the old bonds were not surrendered before the fire occurred, and because the Vehicle Company had neglected to pay a small amount of accrued interest on the original notes. In other words, the theory is advanced that the acceptance of the new bonds was conditioned upon the return of the old issue. But this seems to us an untenable position. We are clearly of opinion that these circumstances, which are now relied upon to repudiate the transaction, were wholly without effect upon the right of the bank to take and hold the new bonds as security for its debt. It is of course true that the old bonds were to be returned, and undoubtedly they would have been surrendered if the fire had not occurred; but the neglect or failure of the bank to return them immediately upon being advised of the recording of the trust deed, which was only two or three days before the fire, did not serve to invalidate the pledge of the new bonds or render them any less completely delivered to and accepted by the bank as security for its debt. Stated in another way, the conditions here referred to obviously related to the return of the old bonds and not at all to the retention of the new issue. Whatever remained to be done to get the old bonds back, and nothing appears except the nonpayment of a hundred and eighty odd dollars of accrued interest, did not affect the title of the bank to the new bonds or its right to hold them as against the Vehicle Company. To say otherwise is to say that the Vehicle Company had the power to postpone indefinitely a binding pledge of the new bonds by simply neglecting to comply with the conditions, if any there were, upon which the old bonds would be surrendered. In short, there is no sustainable basis for the contention that the bank had not acquired the right to hold the new securities merely because when the fire occurred the old bonds happened to remain in its possession. The Vehicle Company was entitled to their return, certainly upon payment of the small item of accrued interest, and the circumstance that it had not taken them up, in the brief period before the property was destroyed, cannot be held to support the belated claim of the Trust Company that the new bonds had not been hypothecated. Moreover, the contention here reviewed is inconsistent

with the demand of the Trust Company for further security, inconsistent with the intention of the parties at the time, as manifested by their acts, and inconsistent with their subsequent declarations.

The force of these considerations is not weakened in our judgment by the evidence of plaintiff's witnesses. Downey says that he did not know, when the bill for a receiver was drawn and when he swore to the proofs of loss, that the Trust Company had not accepted the new note. Stewart avers that he did not read the proofs of loss which he verified; and Harris, who swore to the bill for a receiver, pleads inadvertence of mind because he was "wrought up over the situation to a considerable extent." But these witnesses made no attempt to show any lack of authority or intention on their part to secure the bank by a pledge of the new bonds, nor did they give any explanation of their previous statements under oath, except to say or imply that when those statements were made the nonacceptance of the $22,000 note was unknown to them.

This is the position taken by Lane, with the added contention, by inference and argument rather than the statement of any fact, that the arrangement for securing the bank was not completed, when the fire occurred, because the old bonds had not been surrendered. This contention is covered by what has already been said, and the discussion need not be repeated. True, he says that he knew at the time that it would be necessary to have the consent of the insurance companies in order to keep the insurance in force, but it does not appear from his testimony that this subject was mentioned in any interview with the officers of the Vehicle Company, nor did he refer to it any way in the letters urging them to send the new note and get the trust deed recorded. And it is certainly difficult to reconcile what he says upon this point, when examined as a witness at the trial, with the retention of the bonds for more than six months after the fire, all the while claiming to hold them as security for the Vehicle Company's debt. Indeed, it is impossible for us to read his lengthy testimony without being convinced that he simply overlooked the fact that the insurance would be invalidated unless the companies consented to the execution of the deed of trust. Nor can we avoid the belief that, if the fire had not occurred, or if the policies had not contained the chattel mortgage provision, the bank would have resisted to the utmost any claim that these bonds were not held as a valid and unconditional pledge; and the contrary attitude now assumed seems clearly born of the after-acquired knowledge that the insurance companies would be relieved of liability, and the bonds thereby rendered practically worthless, if the bank continued to claim the right to hold them as collateral security.

For these reasons we are of opinion, upon this record, that a verdict should have been directed for the defendant, and it follows that the judgment must be reversed.

GILCHRIST TRANSP. CO. v. BOSTON INS. CO. et al.

(Circuit Court of Appeals, Sixth Circuit. June 8, 1915.)

No. 2637.

1. SHIPPING ⟸125—LIABILITY FOR DAMAGE TO CARGO—COMMENCEMENT OF VOYAGE.

A steamship, which after loading a cargo of grain from an elevator in April moved from her berth to a place in Duluth harbor seven miles distant, where she was made fast to another vessel and remained several days and until a storm occurred, during which her cargo was damaged, *held* not to have commenced her voyage, where she was obliged to leave her loading berth to permit another vessel to load at the elevator, and where she had not been inspected and was not ready to sail, and the lake was not sufficiently clear of ice to make her departure prudent, so as to make her liable for deviation from her proper course.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 459, 460, 466; Dec. Dig. ⟸125.]

2. SHIPPING ⟸138—LIABILITY FOR DAMAGE TO CARGO—HARTER ACT.

Harter Act Feb. 13, 1893, c. 105, § 3, 27 Stat. 445 (Comp. St. 1913, § 8031), which exempts a vessel and owner in certain circumstances from liability for loss or damage to cargo resulting from faults or errors in navigation or in the management of the vessel, does not apply until the vessel has commenced her voyage.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 492; Dec. Dig. ⟸138.

Limitation of owner's liability, see note to The Longfellow, 45 C. C. A. 387.]

3. SHIPPING ⟸141—LIABILITY FOR DAMAGE TO CARGO—EXEMPTIONS IN BILLS OF LADING.

A bill of lading cannot exempt a vessel from liability for damage to cargo due to the negligence of the carrier or its servants.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 493, 497–499; Dec. Dig. ⟸141.]

4. SHIPPING ⟸124—LIABILITY FOR DAMAGE TO CARGO—NEGLIGENT MANAGEMENT OF VESSEL BEFORE COMMENCEMENT OF VOYAGE.

The steamship Schuck, after loading with grain and while waiting in Duluth harbor for navigation to open, was made fast to another loaded vessel of the same owner, starboard to starboard, the Schuck headed toward the northwest. Warning was given in the evening by the signal station of the coming of a storm from the northeast with a velocity of not less than 40 miles an hour. Both vessels were of steel, and were more than 400 feet in length. Neither had steam up, and no precautions were taken against the storm, which before morning caused their anchors to drag and drove them broadside across the harbor and against the shore, where the rubbing of the other vessel cut the rivets on the side of the Schuck which let in water and damaged her cargo. *Held*, that her master was negligent in not placing her under steam when warned of the storm and separating her from the other vessel, so that she could swing with the wind, and that she was liable for the cargo loss.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 458, 466; Dec. Dig. ⟸124.]

Appeal from the District Court of the United States for the Eastern District of Michigan; Arthur J. Tuttle, Judge.

Suit in admiralty by the Boston Insurance Company and others

against the steamer R. E. Schuck, the Gilchrist Transportation Company claimant. Decree for libelants, and claimant appeals. Affirmed.

H. A. Kelley and A. J. Gilchrist, both of Cleveland, Ohio, for appellant.

F. H. Canfield, of Detroit, Mich., for appellees.

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

EVANS, District Judge. Certain insurance companies issued to various shippers of large quantities of wheat and barley on the steamer R. E. Schuck certificates of insurance at and from Duluth to Buffalo, the loss, if any, payable to the order of the assured. Each of the certificates was dated April 13, 1909, on which date, or within a few days thereafter, the grain was loaded on the Schuck at Itaska elevator at the port of Allouez, Wis. She was the property of the Gilchrist Transportation Company, and until on or about April 26, 1909, remained moored at the elevator pier. To enable the elevator to load a similar cargo upon the George W. Peavy, the Schuck was required to leave, and accordingly she went to anchorage in Duluth harbor at a point about seven miles distant.[1]

She there anchored alongside the P. G. Walker, another ship owned by the respondent company, which, though it had also been loaded with grain at the Itaska elevator, had not been fitted out for a voyage, and to her the Schuck was made fast. Some days afterwards, and while the two ships were thus situated, a damage and loss to the cargo of the Schuck occurred, which, when the amount of it was accurately ascertained, was paid by the insurance companies. Assignments of the certificates were taken by the insurers, who were thereby subrogated to the rights of the assured (Liverpool Steam Co. v. Phœnix Ins. Co., 129 U. S. 462, 9 Sup. Ct. 469, 32 L. Ed. 788), and they filed the libel which began this action to enforce against the ship claims for damages equal to the amount of insurance paid. They base the right to recover upon two grounds; the first being that after the Schuck left the port of Allouez, instead of proceeding on her proper course to Buffalo, she wrongfully deviated therefrom and went into the harbor of Duluth, and the second, that the damage to the cargo was the result of the fault, negligence, and want of care of the owners of the Schuck and the persons in charge of her, the details being stated as follows:

"(a) In anchoring said steamer in the harbor of Duluth in a dangerous and exposed situation and alongside of the said steamer Walker, and in making her fast to the said steamer, and in allowing the steam in the boilers of said steamer to run down, so that she was without power to protect herself.

"(b) In not keeping proper watch of the indications of the weather, so as to guard against danger of approaching storm.

"(c) In anchoring said steamer in a negligent and unseamanlike manner, and in making her fast alongside of said steamer Walker, and in not getting

[1] NOTE.—By a clause of the Rivers and Harbors Act of June 3, 1896, c. 314 (29 Stat. 212), provision was made for "improving the harbor at Duluth, Minnesota, and Superior, Wisconsin, at the west end of Lake Superior," the practical result of which was to make Duluth harbor basin the only harbor in that vicinity for the anchorage of vessels.

said steamers apart and away from each other, so that they would not be injured by rolling and pounding against each other, whereby the steamer R. E. Schuck was caused to leak and her cargo damaged, as aforesaid.

"(d) In allowing said steamer Schuck to go aground, and while aground to be pounded and injured by said steamer Walker."

The libelants also charge that when the Schuck left the port of Allouez she was not in a seaworthy condition, mainly because she was not properly and adequately manned, being at the time short a second mate and two or more seamen.

The Gilchrist Transportation Company, through receivers who had been put in charge of its property and affairs by the orders of the United States Circuit Court for the Northern District of Ohio, in due form made claim to the ship and filed an answer to the libel, in which, denying all charges of unseaworthiness and of fault, negligence, or want of care upon the part of the owner of the ship, or those in charge of her, it was alleged that the Schuck was entirely seaworthy when, with the consent of the owners of the cargo and for other reasons stated in the answer, she was moved from the Itaska elevator to a point opposite the Pittsburg Coal Company dock No. 1 in Duluth harbor basin and alongside the P. G. Walker, to which she was properly made, and afterwards continued to be, fast, all of which was claimed to be good management and skillful seamanship under the circumstances then existing.

The answer showed, further, that each shipper of part of the grain which made up the cargo of the Schuck for the voyage was given a bill of lading, one of which (all being substantially alike) will be hereafter set forth. The respondent also insisted that the voyage from Duluth to Buffalo had begun when the Schuck left the port of Allouez, and in any event claimed the benefits of the provisions of the third section of the Harter Act.

[1] 1. It seems to us from the testimony, and we find the fact to be, that when the Schuck moved from the Itaska elevator in Allouez Bay, she did not do so for the purpose nor with the intention of then commencing her voyage to Buffalo. Her purpose was altogether different. She changed her location for several reasons disclosed by the testimony, the first of which was that another ship was to be loaded at the Itaska elevator, and she moved away to afford an opportunity for that to be done. Besides, she was not ready to sail, and had not been inspected by the United States authorities, though at the time under notice to prepare for that requirement, and, furthermore, it appears quite certain that navigation had not opened, and that the exits from Duluth harbor to the open lake were not at the time so clear and free of ice as to make her departure prudent. Upon these facts we hold that her voyage had not commenced, and consequently that there was no deviation from her proper course.

[2] 2. When the loss occurred, the Schuck, as we have found, had not commenced her voyage. True, two weeks before she was loaded; but she was not ready to sail, because she had not received the inspection for which she had applied, and because navigation had not opened in the Great Lakes. For these reasons she remained at anchor in the harbor from which her voyage was to begin. In these circumstances is

section 3 of the Harter Act [2] (which is set forth in the margin) available for the relief of the respondent? This question was answered in the negative by the Circuit Court of Appeals of the Second Circuit in Ralli v. New York, etc., Co., 154 Fed. 287, 83 C. C. A. 290, where Judge Lacombe, speaking for the court, said:

"We are of the opinion that respondent cannot claim the benefit of the section above quoted [section 3 of the Harter Act], for the reason that the voyage had not commenced, the cargo was not yet all on board, nor the vessel ready to sail. We find no authority either way on this proposition. The citations on the appellee's brief deal with different questions; but the language of the section so clearly contemplates a distinction between the preparation for a voyage, and the management of the same after it is begun, that, in the absence of adverse authority, we feel no hesitation in adopting this construction."

And Judge Gilbert, in delivering the opinion of the Circuit Court of Appeals of the Ninth Circuit in Steamship Wellesley Co. v. C. A. Hooper Co., 185 Fed. at page 738, 108 C. C. A. 71, referring to Ralli v. New York, etc., Co., said:

"In that case the court held that the language of section 3 of the Harter Act clearly contemplates a distinction between the preparation for a voyage and the management of the same after it is begun, and that the voyage does not commence until the cargo is on board and the vessel ready to sail. The doctrine of that decision is not discredited, but is to some extent supported by the language of the opinion in The Germanic, 196 U. S. 589 [25 Sup. Ct. 317, 49 L. Ed. 610]."

The court below had taken that view, and accordingly its judgment was affirmed. The essential proposition upon which the two cases last cited were decided was that the ship's voyage had not, in fact, commenced when the loss occurred, and for that reason section 3 of the Harter Act did not apply. That, in our view, was the proper construction, and it cannot be important whether one obstacle or another caused the ship to remain in the port of departure. The Schuck had been loaded for a fortnight, but could not commence her voyage until inspected and until navigation opened. Awaiting these events, she remained at anchor in Duluth harbor lashed to an inert sister ship, and therefore her case does not come within the provisions of the section.

3. The Schuck and the Perry G. Walker, both owned by the respondent, were laid up at Itaska elevator during the winter of 1908–09, where they were given a free dock because the operators of the elevator wanted ships available when they should get ready to charter in the

[2] NOTE.—Sec. 3. That if the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel, nor shall the vessel, her owner or owners, charterers, agent, or master be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service.

spring. A "vessel agent" on March 18, 1909, by telegraph, arranged a charter—or probably more properly a contract of affreightment—for both ships for cargoes of grain to be carried, either to Chicago, Georgian Bay, or Buffalo at shipper's option. The Walker had loaded first. The charter required that the vessels should sail within ten days after the opening of navigation, and meanwhile, but at different times, they moved to Duluth harbor, the only place of anchorage in the vicinity of Duluth and Superior. The cargo of the Schuck was made up of seven separate lots of grain owned by as many different persons. To each the carrier gave a separate bill of lading, and, excepting as to name of shipper and quantity of grain, the bills of lading were precisely alike. One of them, omitting parts not now essential, was as follows:

"No..... Duluth, Minn., April 13, 1909.

"Shipped in good order and condition by Ames Brooks Co., as agents and forwarders for account and risk of whom may it concern, on board the Str. R. E. Schuck now in the port of Duluth and bound for Buffalo, N. Y., the following articles as here marked and described, to be delivered in like good order and condition, as addressed on the margin, or to his or their assigns or assignees, upon paying the freight and charges as noted below. All deficiency in cargo to be paid for by the carrier and deducted from the freight, and any excess in cargo to be paid for to the carrier by the consignee. In case grain becomes heated while in transit, the carrier shall deliver his entire cargo and pay only for all deficiency exceeding five bushels for each 1,000 bushels. (The dangers of navigation, fire, and collision excepted.)"

Upon this state of case, whether the Schuck was a common carrier within the definition of the Supreme Court in Liverpool Steam Co. v. Phœnix Insurance Co., 129 U. S. 437, 9 Sup. Ct. 469, 32 L. Ed. 788, and in Story on Bailments, § 495, is a question which we need not decide, especially as the testimony as to the previous history of the ship and her usual course of business is neither definite nor satisfactory. But she at least was an ordinary bailee for hire and subject to the general rules of law governing that relation.

[3] Speaking generally, the bills of lading evidenced the contracts between the Schuck and the shippers, to whose rights the libelants succeeded. The bills of lading certainly provided against liability for losses from dangers of navigation, fire, and collision; but they did not, and could not consistently, either with section 1 of the Harter Act or with public policy or general principles of maritime law, stipulate for exemption from liability for losses resulting from the negligence of the owner or its servants. In Liverpool Steam Co. v. Phœnix Ins. Co., 129 U. S. at page 438, 9 Sup. Ct. 469, at page 471, 32 L. Ed. 788, Mr. Justice Gray, delivering the opinion of the court, said:

"But the ordinary contract of a carrier does involve an obligation on his part to use due care and skill in navigating the vessel and carrying the goods; and, as is everywhere held, an exception, in the bill of lading, of perils of the sea, or other specified perils does not excuse him from that obligation, or exempt him from liability for loss or damage from one of those perils, to which the negligence of himself or his servants has contributed."

Several cases were cited by the court, and many others might be noted here, if necessary, to show the general rule which embraces all carriers.

[4] It remains to be determined whether the fault, negligence, or want of care of those in charge of the Schuck at the time of the injuries complained of contributed to the damages then done to the cargo. Undoubtedly the storm which then prevailed was one of the factors of trouble, as well as one of the perils of navigation sought to be provided against in the bills of lading; but that provision, under principles of public policy, was subject to the exception or condition respecting the negligence of the carrier to which the opinion of the Supreme Court last cited referred. Notwithstanding the clause in the bill of lading, the ship and those in charge of her are bound to use at least ordinary and reasonable care and diligence, such as prudent men would exert, to prevent damage to a cargo even in case of storm.

The Schuck was a steel vessel 416 feet long, 50 feet beam, 28 feet in depth, and of 4,713 gross tons. The P. G. Walker was approximately of the same dimensions and also of steel construction. Both vessels were owned by the respondent. In considering the question of negligence, these facts are important. The trial court found that when, on April 26, 1909, the Schuck reached her last location in Duluth harbor, she found the Walker there and made fast to her, that the two steamers were lashed together starboard and starboard, with two anchors out from the bows of each, the Schuck heading towards the northwest and the Walker towards the southeast; that the Walker was not yet fitted out, had no steam, and only an engineer's crew and a man and wife to cook; that the Schuck had some steam on when she made fast to the Walker, but that about noon of April 28th her master ordered the engineer to let it go down in order to have the boilers cool for inspection on the next day; that the fires were banked accordingly; that during the afternoon of the 28th indications of an approaching storm were present; that about 10 o'clock in the evening of that day the weather office in Duluth displayed signals warning that a storm was coming from the northeast with a velocity of not less than 40 miles an hour; that the Schuck had ample notice of this situation; that at this time both steamers lay lashed together without steam; that the captain of the Walker had gone on board the Schuck, and all hands had turned in excepting the two captains; that no preparations for the storm were made; that about 2 o'clock in the morning of the 29th the wind was blowing heavily from the northeast at a rate stated by the master of the Schuck to be 50 miles an hour, and the steamers lay together broadside to this storm; that about 2:30 o'clock the steamers began to drag their anchors, and except for a short interval, while the anchors held, continued to drift to the same position until about 5 o'clock in the morning, when they had crossed the harbor, a distance of about a mile, and brought up against the southeast bank; that the Schuck then lay against the bank, with the Walker rolling against her on the outside; that by this time a heavy sea was running, and the Walker, still lashed to the Schuck, rubbed against her side, cutting the rivets in her plates and breaking her walestrake, so that water entered into her hold and wet the grain; that on the morning of the 30th the Schuck backed off, and the Walker was towed away by a tug; that the Schuck did not use the requisite care, nor that prudence which required that she should

have been placed under steam as soon as the signal of the approaching northeast gale was given, and that the two steamers should have been separated, in order that they might swing with the wind when it changed from northwest to northeast; that when it was discovered that the two steamers so lashed together were drifting, and their anchors failing to hold, good seamanship and prudence required that they should be separated, so that the Schuck could swing with the wind, have a better chance for her anchors to hold, and ampler opportunity to use her own steam for the protection of her cargo and herself, and in case she should go on the bank that she would not be pounded by the Walker, and by rolling against her cause further damage; that ordinary care and seamanship required a timely separation of the vessels, and that the failure to do so was negligence; that it was also negligence on the part of the Schuck to omit these precautions, and to permit the two steamers to drift broadside to the storm entirely across the harbor and upon the bank, and then permit them to lie there together, pounding one another, until the wind subsided; that it was the Schuck's duty to use due care and prudence for the safety of the cargo, as well as the ship; that the conduct of the master of the Schuck was influenced and is explained by the fact that the master of the Walker was also on board the Schuck; that a lack of proper and timely precaution at the outset, coupled with fear for the Walker at a later period, explained the unfortunate results; that the Schuck did not exercise that degree of care, caution, prudence, and good seamanship as an individual ship, without reference to the necessities of the Walker, which the law requires of a ship loaded with grain while at anchor preparing to commence her voyage; and, generally, that the Schuck was guilty of negligence as charged in the libel.

A very careful consideration of the testimony has led us to the conclusion that the Schuck and those in charge of her were negligent and in fault in the respects found by the trial court, and that that fault and negligence contributed to and in large measure caused the damage and injury complained of in the libel.

The final decree awarded the libelants $15,578.46 in damages, with interest thereon from the date of filing the libel to the date of the decree, and objection is made both to the amount of damages and the allowing of interest thereon. We think the testimony justifies the finding of the court in this respect also. While the second assignment of error complains of the allowance of interest, the objection was not argued either at the hearing or in the brief, and under our settled practice it was waived.

We find no substantial error in the record, and the decree is affirmed, with costs.

CARROLL v. STERN et al.

(Circuit Court of Appeals, Sixth Circuit. June 8, 1915.)

No. 2613.

1. BANKRUPTCY ⟸467—FINDINGS OF REFEREE AND DISTRICT JUDGE—CONCLUSIVENESS.

The Circuit Court of Appeals will not set aside the concurrent findings of fact of the referee in bankruptcy and the District Judge, except in a clear case.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 929; Dec. Dig. ⟸467.]

2. BANKRUPTCY ⟸312—CLAIMS—ESTABLISHMENT—"ESTOPPEL."

K. Co., the stockholder of D. Co., was adjudged bankrupt. Pending the adjudication, creditors filed a petition alleging that D. Co. was a mere department of K. Co., and that the goods of the two were intermingled and confused. A seller of goods to K. Co. shipped goods to D. Co., pursuant to orders solicited from the store occupied by D. Co. The transactions were entered in the seller's order book and the other primary records as sales to D. Co., but were posted in the ledger account of K. Co. with the identifying initial "D." The seller testified that he understood that the K. Co. had purchased the D. Co., and was running it as a retail department. D. Co., considered separately, was solvent. *Held*, that the seller was not estopped from establishing a claim against the proceeds of the D. Co.; the element of misleading, whereby one who has relied on former action would be prejudiced if the position were shifted, not existing.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 496–500; Dec. Dig. ⟸312.

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

3. ELECTION OF REMEDIES ⟸3—BANKRUPTCY—REMEDIES OF CREDITORS.

The seller had not elected to hold the K. Co. liable, for an election implied that the seller had a debt which could be asserted against either D. Co. or K. Co., at will, for his claim was against the party which was in fact the real buyer, and to constitute a binding election there must be a choice of two inconsistent things, not shown by a prior assertion by the seller of a personal claim against K. Co. and a subsequent reliance on a right to procure payment out of the proceeds of the D. Co.

[Ed. Note.—For other cases, see Election of Remedies, Cent. Dig. §§ 3, 4; Dec. Dig. ⟸3.]

4. BANKRUPTCY ⟸308—MANAGEMENT OF ESTATE—ORDERS.

Where K. Co., owning the stock of D. Co., was adjudicated a bankrupt, and a receiver took possession of the assets of the D. Co., an order providing that the D. Co. assets should be used to pay those creditors who had dealt with that company in good faith authorized a seller, delivering goods to D. Co. pursuant to orders solicited from the store occupied by D. Co., to establish his claim against the proceeds of the D. Co. property.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 496–507; Dec. Dig. ⟸308.]

Appeal from the District Court of the United States for the Western Division of the Southern District of Ohio, in Bankruptcy; John E. Sater, Judge.

Petition by Leopold Stern and another, partners doing business as Stern Bros. & Co., against Robert De V. Carroll, trustee in bankruptcy

of the Herman Keck Manufacturing Company, for the allowance of a claim. From an order confirming the findings of the referee and directing the trustee to pay the claim, the trustee appeals. Affirmed.

The Keck Company, an Ohio corporation, was adjudged an involuntary bankrupt. The Duhme Company was also an Ohio corporation, and, for the purposes of the present controversy, it should be assumed that all of its capital stock, save qualifying shares, was owned by the Keck Company. Pending the adjudication in the matter of the Keck Company, creditors filed a petition alleging that the Duhme Company "is in fact a mere department and adjunct of said Keck Manufacturing Company"; that the Duhme Company was operated as the retail department of the Keck Company, under common management; and that the merchandise of the two companies was intermingled and confused. Thereupon the District Court in bankruptcy (then held by the late Judge Thompson) appointed a receiver for the Duhme Company, and he took possession of the assets. At a considerably later time, and when it was supposed that each of the corporations was insolvent in about the same degree, the District Court made an order that the receiver of the Duhme Company—who was also trustee in bankruptcy of the Keck Company—should "turn over to himself, as trustee in bankruptcy of the bankrupt herein, all of the property and assets, including cash now in his hands as such receiver, and that he keep an account thereof, separate and distinct from his account of the balance of the property of said bankrupt." By a simultaneous opinion, the District Court directed that the bankruptcy trustee should receive these effects from the receiver, and, if there was any unsold property coming from that source, should convert it into cash, and that he should "apply the funds and the proceeds of property yet to be sold to the satisfaction of debts due those who dealt in good faith with that company [the Duhme Company]."

Stern Bros. had been selling goods for years to the Keck Company, and carried a ledger account of such sales. Later their salesman solicited orders from the store occupied by the Duhme Company, reported to Stern Bros. these orders as sales to the Duhme Company, the goods were shipped to and received by the Duhme Company, and they or their proceeds or substitutes must be presumed to form part of the assets which went to the receiver. These transactions were entered in Stern Bros.' order book and other primary records as if sales to the Duhme Company, but were posted in the ledger account of the Keck Company, with the identifying initial "D." One of Stern Bros. testifies that he understood the Keck Company had bought out the Duhme Company and was running it as a retail department, so he supposed there was a liability against the Keck Company. For the total of such later indebtedness, Stern Bros. accepted the Keck Company notes—upon which nothing was ever paid—and they also appeared as creditors of the Keck Company in negotiations, extensions, etc., which were had in the unsuccessful effort to avoid bankruptcy. It finally developed that the Duhme Company, considered separately, was solvent, and claims which could be established against the proceeds of the Duhme stock could be paid in full. Stern Bros. then filed a petition to have their claim allowed as of this class, and an issue was made and a trial had before the referee. The parties and the referee seem to have regarded the controlling question to be, "To which company was credit given?" Balancing all the facts, the referee found that Stern Bros. were creditors of the Duhme Company, not of the Keck Company. On petition for review, the District Judge, in a careful opinion, confirmed this conclusion and directed the trustee to pay the claim. The trustee appeals.

Robert A. Taft, of Cincinnati, Ohio, for appellant.

C. P. Johnson, of Cincinnati, Ohio, for appellees.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

DENISON, Circuit Judge (after stating the facts as above). [1] Under our settled practice not to set aside the concurrent fact findings

of the referee and the District Judge, except in a clear case (Wabash Ry. v. Compton, 172 Fed. 17, 21, 96 C. C. A. 603; Naylon & Co. v. Christiansen, 158 Fed. 290, 292, 85 C. C. A. 522; Constam v. Haley, 206 Fed. 260, 261, 124 C. C. A. 128), this order could not be reversed, unless we were thoroughly satisfied that the credit was given solely to the Keck Company; yet we are not inclined to dispose of the case under this rule, because we think the controversy should be decided upon somewhat broader grounds than the mere existence of the debtor and creditor relationship.

[2, 3] The trustee puts particular dependence upon the act of Stern Bros. in taking notes from the Keck Company for this debt, and in participating as a creditor of the Keck Company in the above-recited ineffective dealings. These things constitute evidence of intention, and are of importance so far as the question of intention itself would be important; but they do not amount either to an estoppel or an election which will of itself bar Stern Bros. from the remedy they now seek. The element of misleading, whereby some one who has relied upon the former action would be prejudiced if the position were shifted—and which element is essential to an estoppel—is quite lacking. Neither can an effective election be deduced from the facts. Such election would imply that Stern Bros. had a debt which could be successfully asserted against either the Duhme Company or the Keck Company at the will of the creditors. This does not seem to be the situation. Their claim was against whichever party might be in truth the real purchaser, and any position which they took on this subject, before knowing all the facts, should be classed as a mistake—"not an election, but an hypothesis." Northern Co. v. Grand Co., 203 U. S. 106, 108, 27 Sup. Ct. 27, 51 L. Ed. 109; Bierce v. Hutchins, 205 U. S. 340, 346, 27 Sup. Ct. 524, 51 L. Ed. 828.

Another requisite of a binding election is that the two things between which choice is made should be inconsistent with each other. We do not find such inconsistency between the earlier mere assertion of a personal claim against the Keck Company and the present reliance upon the right to get payment out of a particular fund; and this leads us to what we think the controlling feature.

[4] The first order of the District Court, which is now in the course of execution, and which provided that the Duhme assets should be used to pay those creditors who had dealt with that company in good faith, should be interpreted according to the purpose and effect which would have been most rightful, and which are consistent with its language. The result by which the assets of a separate—and, as the event proved, solvent—corporation were brought for administration into the estate of another and certainly bankrupt corporation, was an unusual result. It has been acquiesced in and cannot be questioned; but the bankrupt estate, which has thus presumptively profited from the exercise of such a power, should do equity to the fullest extent. The bankruptcy trustee was ultimately entitled only to the surplus which should remain out of the Duhme assets after the payment of all debts which properly attached to those assets. Thus this property came to the trustee charged with a prior trust, and it was this prior

trust which the first order and opinion of the District Court undertook to declare. We see no reason for excluding from their language creditors who had dealt with the Duhme Company as Stern Bros. had. Their right to be beneficiaries of the trust was of no less rank than that of other creditors who might have dealt with and known the Duhme Company only, but whose dealings had not operated to create the trust fund. Creditors who received an order from the Duhme Company, and shipped their goods to the Duhme Company, and so contributed to the fund to be distributed, must be regarded as among "those who dealt in good faith with that company," even though they might have supposed that the debt would be paid by the chief stockholder.

Because we regard this as the proper interpretation of the order, and because the action appealed from was in full accord with that interpretation, we think it unnecessary to decide the other questions argued; and the order of the court below is affirmed, with costs.

BELDEN et al. v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. May 26, 1915.)

No. 2517.

1. POST OFFICE ⟸48—"USING MAILS TO DEFRAUD"—SUFFICIENCY OF INDICTMENT.

To constitute the offense of using the mails in executing a scheme to defraud, under Criminal Code (Act March 4, 1909, c. 321) § 215, 35 Stat. 1130 (Comp. St. 1913, § 10385), but two elements are necessary and need be charged in the indictment: (1) The devising or intending to devise a scheme or artifice to defraud; and (2) the placing of a letter, etc., in the mails for the purpose of carrying into execution such scheme—the latter being the gist of the offense. It is not necessary to allege a conspiracy, although two or more may be jointly charged.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 67–80; Dec. Dig. ⟸48.

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

2. CRIMINAL LAW ⟸622—USING MAILS TO DEFRAUD—JOINT INDICTMENT—SEPARATE TRIALS.

Where an indictment sufficiently charges the joint participation of two or more in using the mails in the execution of a scheme to defraud, it is not error to deny the defendants separate trials.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1380–1383, 1385, 1386, 1388–1390; Dec. Dig. ⟸622.]

3. POST OFFICE ⟸50—PROSECUTION FOR USING MAILS TO DEFRAUD—INSTRUCTIONS.

The question of the guilt or innocence of defendants, charged with using the mails in furtherance of a scheme to defraud, *held* properly submitted to the jury and by proper instructions.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 87–89; Dec. Dig. ⟸50.

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

In Error to the District Court of the United States for the Northern Division of the Eastern District of Washington; Frank H. Rudkin, Judge.

Criminal prosecution by the United States against Russell G. Belden and A. Eugene Wayland. Judgment of conviction, and defendants bring error. Affirmed.

The indictment charges Russell G. Belden and A. Eugene Wayland with having, prior to January 18, 1911, devised, and intending to devise, a scheme and artifice to defraud one John Neiderer, and divers other persons to the grand jury unknown, which said scheme and artifice to defraud was to be effected by the use and misuse of the United States post office establishment, with intent to incite and induce such persons so intended to be defrauded to open correspondence with them, by means of printed circulars, letters, and reports distributed through the mail, deposited and caused to be deposited in said United States mail for mailing and delivery to such divers persons intended to be defrauded, which said scheme and artifice to defraud so devised and intended to be devised by said defendants, and each of them, was substantially as follows:

That defendants would cause to be organized a corporation to be styled the International Development Company, to be controlled and managed by defendants, and each of them, the purpose of the corporation being to act as the fiscal agent for certain other corporations and firms thereafter to be incorporated and organized by said defendants as a part of the scheme to defraud; that defendants would, by themselves and through the Development Company, cause to be procured and obtained certain coal claims, having little or no value, situated in British Columbia, Dominion of Canada, and would cause to be organized a corporation to be styled the Michel Coal Mines, Limited, with a capital stock of 1,500,000 shares, of the par value of $1 each, said claims to be transferred to said Michel Coal Mines, Limited, in consideration that the said Michel Company would issue to defendants and the Development Company a large majority of its capital stock, fully paid up; that defendants would thereafter procure and cause to be procured other claims adjoining the aforesaid claims, and would thereafter cause to be organized another corporation to be styled the Crown Coal & Coke Company, with a capital stock of 2,000,000 shares, of the par value of $1 each, for the purpose of taking over said coal claims, and that in consideration therefor the Crown Coal & Coke Company would issue to defendants and the Development Company a large amount of the capital stock of said Crown Company, fully paid up; that defendants would cause to be procured other claims, and cause to be organized another corporation, to be styled the Empire Coal & Coke Company, with a capital stock of 1,500,000 shares, of the par value of $1 each, for the purpose of taking over said claims, in consideration that said Empire Company would transfer to defendants and the Development Company a large majority of the stock of said corporation, fully paid up; that defendants would cause to be procured a charter for the construction and operation of a railroad, ostensibly to furnish transportation facilities for the product of the alleged coal mines, and to be operated in connection therewith, and would cause to be organized a corporation to be styled the Crows' Nest & Northern Railway Company, with a capital stock of 20,000 shares, of the par value of $100 each, the said charter to be transferred to the said Railway Company in consideration of the transfer by said Railway Company to defendants and the Development Company of a large amount of its capital stock; that the balance of the capital stock of each of the aforesaid corporations, namely, the Michel Company, the Crown Company, the Empire Company, and the Railway Company should and would become the treasury stock of each of said corporations, respectively; that defendants would from time to time dispose of large amounts of the capital stock of the various corporations which had been transferred to them and the Development Company; that by means of stock ownership in the Development Company defendants would procure and maintain the management and control of the Development Company, and through said ownership, and by manipulation of the stock and books on account of

the various corporations, said defendants would obtain and maintain control of all such corporations with intent and purpose to defraud said divers persons.

It was further a part of the scheme that defendants, in their own names and in the name of the Development Company, by means of letters, notices, reports, circulars, and a prospectus sent and to be sent through the United States post office establishment, would induce persons to purchase shares of the capital stock of the aforesaid various corporations; and, in pursuance of such scheme, defendants did represent and state that the properties owned by said corporations, and the capital stock thereof, were and would become of great value, whereas in truth and in fact, as defendants well knew, the properties had no value, except that the claims of the Crown Coal & Coke Company contained valuable deposits of coal, which fact was fraudulently used by the defendants and the Development Company to aid them in the sale of the worthless stock of the aforesaid various corporations so held individually by defendants and the Development Company, and did falsely and fraudulently represent and pretend that the claims of the Michel Company and the Empire Company contained valuable deposits of a very high quality of coal, all of which was false, as defendants well knew, and did further falsely represent that the Railway Company had acquired a right of way for the construction of a railroad a distance of 15 miles, that they would construct and operate said road in connection with the mines, and that the proceeds to be derived from sales of stock would be used to build and equip said railroad and develop and equip said coal mines, whereas in truth and in fact, as defendants well knew, the Railway Company had not acquired a right of way, and the proceeds derived from the sale of said stock would not be, and the same were not, used to equip and develop the respective properties of said corporation, or to build said railroad, but that a large sum realized from such stock was diverted to the use of the defendants, all with the intent and purpose to defraud said divers persons.

And it was further a part of the scheme to represent to intending purchasers of stock in the Empire Company that with each $500 purchase there would be given a share of stock in the Railway Company, that of the proceeds received by the Empire Company $100 would be used by that company in the purchase of one share in the Railway Company, and that the $100 so expended would be placed in the treasury of the Railway Company to be used in the construction of said road, whereas in truth and in fact, as the defendants well knew, no part of said $100 would be placed in the treasury of said Railway Company, or used for the construction of said railroad, but would be and was appropriated by defendants to their own use and benefit. And it was a further part of the scheme that defendants would represent and pretend that the stock of the various corporations to be offered for sale would be treasury stock of the various corporations, and that the proceeds derived from the sale of such stock would be used for the equipment and development of the properties, whereas, in truth and in fact, as defendants well knew, the stock so sold was not treasury stock, but was, with but few exceptions, the individual stock of defendants and the Development Company, and all the real property and a large amount of the money derived from the sales of such stock were appropriated by defendants and the Development Company to their own use and benefit, it being the intent and purpose of the defendants thus to divert the vast amount of property and large amount of money so obtained to their own use and benefit and that of the Development Company, with intent and purpose to defraud the said John Neiderer and said divers other persons.

And the said defendants, on or about January 21, 1911, for the purpose of executing said scheme and artifice, and attempting so to do, knowingly, willfully, and feloniously placed and caused to be placed in the post office of the United States at Spokane, Wash., for mailing and delivery, a certain letter addressed to Mr. John Neiderer, Summerville, Ore. Then follows a copy of the letter, signed "International Development Co., per R. G. Belden."

The remaining two counts are practically the same, except that different letters are charged as having been mailed.

At the close of the trial the court instructed the jury to find a verdict of

not guilty as to the third count, but upon the first two counts both defendants were convicted, and from the judgment rendered the defendant Belden is prosecuting a writ of error to this court.

Fred C. Robertson and Fred Miller, both of Spokane, Wash., for plaintiff in error Belden.

Francis A. Garrecht, U. S. Atty., of Spokane, Wash., for the United States.

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

WOLVERTON, District Judge (after stating the facts as above). [1] The first and twenty-first assignments of error challenge the sufficiency of the indictment. The statute under which the indictment is drawn provides that:

"Whoever, having devised or intending to devise any scheme or artifice to defraud, * * * 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," etc., "in any post office * * * of the United States, * * * to be sent or delivered by the post office establishment of the United States, * * * shall be fined," etc.

The simple elements of the offense consist in having devised or intending to devise a scheme to defraud, and in executing or carrying into effect such scheme or artifice by placing or attempting to place a letter, postal card, etc., in the post office to be sent or delivered through the post office establishment of the United States. It is said that the misuse of the mails is the gist of the offense, or, as expressed by another court, is the "material thing" or "substance of the offense," while, of course, it must be in execution or attempted execution of a scheme or artifice to defraud. Both elements must be present, while it is the misuse of the mails for the execution of such a scheme that is denounced. Marrin v. United States, 167 Fed. 951, 955, 93 C. C. A. 351; Gould v. United States, 209 Fed. 730, 733, 734, 126 C. C. A. 454.

Under the old section 5480, R. S., it was requisite that three matters of fact be charged in the indictment, namely: (1) That the person charged had devised a scheme or artifice to defraud; (2) that he intended to effect the scheme by opening or intending to open correspondence through the post office establishment, or by inciting other persons to open communication with him; and (3) that in carrying out such scheme such person had either deposited a letter or packet in the post office, or taken or received one therefrom. Stokes v. United States, 157 U. S. 187, 15 Sup. Ct. 617, 39 L. Ed. 667.

But the present statute, section 215 of the Code, seems to have eliminated the element that the persons devising the scheme must have intended to effectuate the same by opening or intending to open correspondence through the post office establishment, and all that is now essential is that, for the purpose of carrying into execution the scheme or artifice, a letter or other writing be sent through or taken from the post office establishment. Hence the offense as now defined consists of but two elements, whereas previously it consisted of three, as analyzed in the Stokes Case.

Now it needs but an inspection of the indictment to determine its sufficiency. What is stated as to the scheme or artifice devised or intended to be devised is quite ample to show, not only that it amounted to a scheme or artifice, but that it was designed, intended, and calculated by its very nature to defraud, and indeed it is set out with abundant particularity, so that the indictment must be held to be sufficient.

One or two or more persons may devise a scheme or artifice to defraud, and the statute does not contemplate that, if two or more persons so devise such a scheme or artifice, they shall be proceeded against as for a conspiracy to commit the offense denounced. While the government may prosecute for such a conspiracy if it sees fit (Stokes v. United States, supra; Wilson v. United States, 190 Fed. 427, 111 C. C. A. 231), yet it need not do so, and may prosecute for the simple offense denounced. In a prosecution for the simple offense, no overt act, as the term is understood in connection with the offense of conspiracy, is essential to be set up, but it must be made to appear that a letter or card, etc., has been mailed for the purpose of carrying into execution the scheme or artifice devised. In the one case the conspiracy is the gist of the offense, while in the other the misuse of the mails is the material thing denounced.

Nor is it essential, in offering proof respecting the existence of a conspiracy with relation to a scheme to defraud, and the use of the mails in furtherance thereof, that such conspiracy be alleged in the indictment. It is a common thing to have the question arise whether one defendant is bound by the statements and acts of another, or of persons not even connected by indictment with the offense charged, and the constant ruling has been that, if there has been a joint contrivance, or joint participation, with a common purpose, the acts and statements of the one, while engaged in carrying into effect the common purpose, are evidence against the other, and this without the necessity of alleging conspiracy in the commission of the offense. Fitzpatrick v. United States, 178 U. S. 304, 20 Sup. Ct. 944, 44 L. Ed. 1078, is illustrative. That was a case where three persons were jointly indicted for murder, and there was no accompanying charge that the defendants conspired to commit the act.

[2] By assignment 2 the question is presented whether the trial court should have granted separate trials. An inspection of the indictment shows the joint participation of the defendants in the offense charged, and this is sufficient reason for denying the motion.

Assignment of error No. 3, as we are informed by counsel's brief, relates to the action of the court in admitting in evidence plaintiff's Exhibit 7. On reference to the record, we find that the assignment is there numbered 4. The whole of the assignment reads:

"The court erred in admitting in evidence the agreement between J. H. Hemphill, Russell G. Belden, and S. W. O'Brien forming Inland Surety Company."

This is all that is given for the court's enlightenment as to how the question arose, or as to what were the accompanying facts and testimony, so as to show its relevancy or pertinency, or we may say its irrelevancy and incompetency as a piece of testimony to prove the guilt

of the defendants. It cannot be expected that by such a showing the court is going to grope through the record (and all of the testimony is here, with objections and exceptions as made and entered during the progress of the trial), to determine whether the defendants have a case for a valid exception or not. The purpose of the bill of exceptions is to show in tangible and feasible form the exceptions relied upon. For this reason the purported exception will not be further considered.

The fourth is even a worse assignment than the third, for on reference to the record we look in vain for any assignment of error at all relating to the admission of Exhibits 8 and 9.

So of assignments 6, 7, and 8. We refer to the assignments as numbered and stated in counsel's argument in their brief, for it is difficult to trace out the corresponding assignments in the record. They are of such a nature that the court will not examine into them for reasons above stated.

[3] Assignment 9 relates to a motion at the close of the testimony for an instructed verdict. It would be a work of supererogation to review the testimony for the purpose of determining whether there was sufficient evidence adduced to carry the case to the jury. It is sufficient that even a cursory review of the testimony will satisfy any candid mind that there was ample testimony to support every material allegation of the two counts of the indictment submitted to the jury.

There was a controversy during the trial as to the effect and value of certain representations made by defendants, whether they were assertions of opinion merely, or the statement of matters designed to be believed as existing facts; but as to this the jury was fully and clearly instructed, and no error was committed in allowing the case to go to the jury upon the testimony.

Assignment 10 relates to the court's instruction defining the terms "fraudulent pretenses, representations, or promises." We refer again to the assignment as numbered in counsel's argument in their brief, for if attempt be made to trace out any such assignment in the record it will be found to be very confusing. It seems to be thought that false pretenses have no part nor parcel in the offense with which the defendants were charged. But the court was defining the terms of the statute, and the scheme or artifice to defraud was a bundle—and a large one at that—of false representations, if anything. If the representations could not be so characterized, then there was no scheme to defraud, for it depended for its fraudulent character on the falsity of the representations. The jury was properly instructed in this particular.

Assignments 11 and 12: Counsel's argument in their brief is answered by what has been heretofore said respecting the indictment. It was not essential that it contain allegations of conspiracy, but it was altogether proper to charge the jury respecting the subject, if the evidence offered tended to show that a conspiracy really existed in relation to operations to defraud.

Assignment 13 is answered by what has been said respecting the motion for a directed verdict.

As to assignments 14, 15, 16, 17, 18, and 19, we have examined them closely and critically, and find no merit in any of them.

Judgment affirmed.

MARK YICK HEE et al. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. April 13, 1915.)

No. 190.

1. INDICTMENT AND INFORMATION ⟸65—SUFFICIENCY OF AVERMENT—ELEMENTS AND INCIDENTS OF OFFENSE.

While all the elements of the crime charged or facts necessary to make out the offense must be fully and clearly set out in an indictment, it is not necessary to allege matters in the nature of evidence, or to set out the means by which the crime was accomplished.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 187; Dec. Dig. ⟸65.]

2. CRIMINAL LAW ⟸1036—APPELLATE PROCEEDINGS—REVIEW OF EVIDENCE.

It is the general rule that appellate courts will not consider the sufficiency of evidence to sustain a verdict, in the absence of a request after the close of the evidence for a peremptory instruction, but in criminal cases the courts of the United States, in the exercise of a sound discretion, may take notice of so grave an error as a conviction without evidence to support it, even though counsel failed at the trial to properly raise the question.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1631–1640, 2639–2641; Dec. Dig. ⟸1036.]

3. CRIMINAL LAW ⟸510—EVIDENCE—TESTIMONY OF ACCOMPLICE.

There is no common-law rule which forbids a conviction on the uncorroborated testimony of an accomplice which satisfies the jury beyond a reasonable doubt of the guilt of the accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1124–1126; Dec. Dig. ⟸510.]

4. CRIMINAL LAW ⟸511—EVIDENCE—TESTIMONY OF ACCOMPLICE—CORROBORATION.

Evidence *held* to sufficiently corroborate the testimony of an accomplice to sustain a verdict of conviction under proper instructions by the court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1128–1137; Dec. Dig. ⟸511.]

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

This cause comes here on writ of error to the United States District Court for the Southern District of New York to review a judgment entered upon a verdict of guilt rendered July 7, 1914. The plaintiffs in error are hereinafter referred to as the defendants.

Hardie B. Walmsley, of New York City (Francis L. Kohlman, of New York City, of counsel), for plaintiffs in error.

H. Snowden Marshall, U. S. Atty., of New York City, and Frank Morse Roosa, Asst. U. S. Atty., of New York City.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge. The defendants are accused of a violation of two statutes of the United States, and there are two counts in the indictment. The indictment in the first count charged the defendants with a violation of section 11 of the act of Congress of May 6, 1882, known as the Chinese Exclusion Act, as amended and added to by the act of July 5, 1884 (22 Stat. p. 58; 23 Stat. p. 115). That section reads as follows:

"Sec. 11. That any person who shall knowingly bring into or cause to be brought into the United States by land, or who shall aid or abet the same, or aid or abet the landing in the United States from any vessel, of any Chinese person not lawfully entitled to enter the United States, shall be deemed guilty of a misdemeanor, and shall on conviction thereof, be fined in a sum not exceeding one thousand dollars, and imprisoned for a term not exceeding one year." Comp. St. 1913, § 4298.

The first count charged that there arrived at the port of New York on the 17th day of June, 1914, from a foreign country, on board the steam vessel Tagus two Chinese persons, one of whom was Chin Woo; that the name of the other was unknown, and that they were not lawfully entitled to enter the United States; that they unlawfully landed in the United States from the said vessel, and that the defendants—

"within the jurisdiction of this court did knowingly, unlawfully, and willfully aid and abet the landing in the United States from said steam vessel Tagus of the said Chinese persons."

The indictment in the second court charged the defendants with a violation of section 37 of the United States Criminal Code, and of section 8 of the act of Congress of February 20, 1907. Section 37 of the Criminal Code reads as follows:

"Sec. 37. 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." Comp. St. 1913, § 10201.

The act of February 20, 1907 (34 Stat. part 1, pp. 898, 906) is an act to regulate the immigration of aliens into the United States, and section 8 of the act provides as follows:

"Sec. 8. That any person, including the master, agent, owner, or consignee of any vessel, who shall bring into or land in the United States, by vessel or otherwise, or who shall attempt, by himself or through another, to bring into or land in the United States, by vessel or otherwise, any alien not duly admitted by an immigrant inspector or not lawfully entitled to enter the United States shall be deemed guilty of a misdemeanor, and shall, on conviction, be punished by a fine not exceeding one thousand dollars, or by imprisonment for a term not exceeding two years, or by both such fine and imprisonment for each and every alien so landed or brought in or attempted to be landed or brought in." Comp. St. 1913, § 4253.

The second count charged that the defendants did knowingly, unlawfully, willfully and feloniously conspire to bring into and land in the United States by the steam vessel Tagus one Chin Woo, not lawfully entitled to enter.

The jury found the defendant Mark Yick Hee guilty on both counts. The defendant Lee Chung Ho was found guilty on the first count with

a recommendation to mercy, and not guilty on the second count. One Ernest Webster was indicted with the defendants but pleaded guilty, and testified as a witness for the government.

[1] It is claimed that the first count of the indictment is fatally defective, in that it does not state the facts upon which it is based. There is nothing in this contention.

Under the Constitution of the United States a person accused of a criminal offense is entitled to be informed of the nature and cause of the accusation against him. There must therefore be such particularity of allegation in an indictment as will enable the accused to understand the charge which is preferred and to prepare his defense. But the principle is well established that while all the elements of the crime charged, or facts necessary to make out the offense, must be fully and clearly set out, it is not necessary to allege matters in the nature of evidence, or to set out the means by which the crime is accomplished, unless the act is one which may be criminal or not according to the circumstances under which it is done. The indictment in this case sets forth fully and clearly every essential fact and informs of the nature and cause of the accusation.

[2] As respects Lee Chung Ho, who was found guilty of aiding and abetting the entry into the United States of two Chinese persons not lawfully entitled to enter, it is assigned as error that the trial court did not direct a verdict for him, on the ground that the undisputed evidence showed that he was not guilty of any crime. And it is said that the refusal of that court to set the verdict aside constitutes reversible error. It appears from the record that no request for the direction of a verdict was made after the evidence was in. The general and conceded rule is that the courts will not review the existence of evidence to sustain a verdict in the absence of a request after the close of the evidence for a peremptory instruction. But an exception undoubtedly exists to the rule. In criminal cases the courts of the United States, in the exercise of a sound discretion, may take notice of so grave an error as a conviction without evidence to support it, even though counsel failed at the trial to raise the question by a request or an exception. In the case of Wiborg v. United States, 163 U. S. 632, 658, 16 Sup. Ct. 1127, 1137, 41 L. Ed. 289 (1896), the Supreme Court said:

"No motion or request was made that the jury be instructed to find for defendants, or either of them. Where an exception to the denial of such a motion or request is duly saved, it is open to the court to consider whether there is any evidence to sustain the verdict, though not to pass upon its weight or sufficiency. And although this question was not properly raised, yet if a plain error was committed in a matter * * * absolutely vital to defendants, we feel ourselves at liberty to correct it."

The Supreme Court has adhered to this doctrine in subsequent cases. Clyatt v. United States, 197 U. S. 221, 25 Sup. Ct. 429, 49 L. Ed. 726 (1905); Crawford v. United States, 212 U. S. 194, 29 Sup. Ct. 260, 53 L. Ed. 465, 15 Ann. Cas. 392 (1909); Weems v. United States, 217 U. S. 349, 362, 30 Sup. Ct. 544, 54 L. Ed. 793, 19 Ann. Cas. 705 (1910).

If in this case a conviction was obtained of Lee Chung Ho, without any evidence to support it, we should feel it to be our right and duty in the exercise of a sound discretion to set it aside. But our examination of the record has satisfied us that there is in the record evidence which, if the jury believed it, justified his conviction.

[3] His counsel asserted in his argument in this court that the only evidence in the record connecting Lee Chung Ho with the transactions which led to his indictment is that given by his accomplice, Webster, and that a conviction cannot be sustained which rests upon the uncorroborated evidence of an accomplice. There is no common-law rule which forbids a conviction upon the uncorroborated testimony of an accomplice whose evidence satisfies the jury beyond a reasonable doubt of the guilt of the accused. In Holmgren v. United States, 217 U. S. 509, 523, 524, 30 Sup. Ct. 588, 592, 54 L. Ed. 861, 19 Ann. Cas. 778 (1910), the Supreme Court said:

"It is undoubtedly the better practice for courts to caution juries against too much reliance upon the testimony of accomplices, and to require corroborating testimony before giving credence to them. But no such charge was asked to be presented to the jury by any proper request in the case, and the refusal to grant the one asked for was not error."

[4] Counsel for defendants prior to the charge in the case at bar handed to the trial judge certain requests to charge, but no request was presented as to the testimony of an accomplice and the necessity of corroborating testimony. The court, however, when it came to instruct the jury upon its own initiative charged them upon the subject as follows:

"As I said, Webster's testimony uncorroborated would be insufficient to convict, in view of the fact that he is an admitted accomplice of the two Chinese defendants, * * * the rule of law being that the testimony of an accomplice, uncorroborated, is not sufficient to convict. That would be true of Webster's testimony had it received no corroboration from other testimony in the case. Probably there is no corroboration as to what transpired on June 17th, so far as connecting the two Chinese defendants with the case is concerned. I don't think there is any testimony but that Webster went alone to the two Chinese defendants at Mott street on June 17th, so that his testimony has no corroboration so far as the transactions of that day are concerned. But on the 18th of June, after Webster had been detected and apprehended in assisting these two Chinamen to land, the evidence tends to show that he and Morrison and, I believe, Wiley, went to this neighborhood of 11 Mott street, and that Webster and Morrison went into the premises, and you have heard what took place at that visit, with relation to Morrison and Webster on the one side and the two Chinese defendants, Mark and Lee, on the other side; and of course if you believe the evidence of Morrison as to what transpired there and in particular the evidence of Wiley, I believe it was, then that is corroboration of Webster's story as to the payment of money and the purpose for which the money was paid."

The defendant Lee Chung Ho has no ground to complain of this statement of the law. Neither can he claim that there was no testimony corroborating that given by the accomplice. In the opinion of the trial judge and in our opinion there was such corroborative testimony in the case. We find no error.

Judgment affirmed.

FLIASHNICK v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. May 12, 1915.)

No. 310.

1. POST OFFICE ⊂=49—OFFENSES—DETENTION OF MAIL MATTER—ELEMENTS OF OFFENSE.

Criminal Code (Act March 4, 1909, c. 321) § 195, 35 Stat. 1125 (Comp. St. 1913, § 10365), provides that whoever, being a person employed in the postal service, shall unlawfully detain or delay any letter coming into his hands, shall be punished as therein provided. *Held* that, to support a conviction, though the evidence may be circumstantial and depend upon presumptions, there must be some proof that defendant acted unlawfully and with a guilty intent.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 84–86; Dec. Dig. ⊂=49.]

2. POST OFFICE ⊂=49—OFFENSES—DETENTION OF MAIL MATTER—SUFFICIENCY OF EVIDENCE.

On the trial of a letter carrier for detaining a decoy letter, which was found in the box in which it was deposited after he had collected the mail from such box, evidence *held* insufficient to support a conviction.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 84–86; Dec. Dig. ⊂=49.]

3. POST OFFICE ⊂=50—OFFENSES—DETENTION OF MAIL MATTER—QUESTIONS FOR JURY.

Where, after a letter carrier had collected the mail from a letter box in which a decoy letter containing money had been deposited, such letter was found with other letters in a different box, whether the carrier placed it there knowingly and with intent to delay its delivery was a question for the jury.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 87–89; Dec. Dig. ⊂=50.]

4. CRIMINAL LAW ⊂=1169—POST OFFICE ⊂=49—DETENTION OF MAIL MATTER—APPEAL—HARMLESS ERROR—EVIDENCE.

The proof of intent with respect to such letter being evenly balanced, the admission of evidence concerning the disappearance of another letter, with which such carrier was not sufficiently connected by the evidence, was reversible error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 754, 3088, 3130, 3137–3143; Dec. Dig. ⊂=1169; Post Office, Cent. Dig. §§ 84–86; Dec. Dig. ⊂=49.]

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

The defendant was indicted for having feloniously detained and delayed two letters intrusted to his care as letter carrier. The indictment was found under section 195 of the United States Criminal Code, which is as follows:

"Whoever, being a postmaster or other person employed in any department of the postal service, shall unlawfully detain, delay, or open any letter, postal card, package, bag, or mail intrusted to him or which shall come into his possession, and which was intended to be conveyed by mail, or carried or delivered by any carrier, messenger, agent, or other person employed in any department of the postal service, or forwarded through or delivered from any postoffice or station thereof established by authority of the Postmaster-General; or shall secrete, embezzle, or destroy any such letter, postal

card, package, bag, or mail; or * * * steal, abstract, or remove from any such letter, package, bag, or mail, any article or thing contained therein, shall be fined not more than five hundred dollars, or imprisoned not more than five years, or both."

The first count of the indictment charges that the defendant, on the 18th day of February, 1914, being employed in the postal service of the United States as a letter carrier, in a branch post office, in the city of New York, did then and there detain and delay a sealed letter intrusted to him and which had come into his possession as such letter carrier, which letter was addressed to the New York Telephone Company, Local Contract and Collection Office, 40 South Fifth Avenue, Mt. Vernon, N. Y.

The second count, mutatis mutandis, charges the defendant with having detained a letter addressed to Messrs. Ludwig Bauman & Co., 500 to 514 Eighth Avenue, New York. He was convicted on both counts.

Pratt, Koehler & Boyle, of New York City (John Neville Boyle, of New York City, of counsel), for plaintiff in error.

H. Snowden Marshall, U. S. Atty., and Frank Morse Roosa, Asst. U. S. Atty., both of New York City, for the United States.

Before LACOMBE, COXE, and WARD, Circuit Judges.

COXE, Circuit Judge. The two letters in question were decoy, or test, letters prepared by Inspectors Jacobs and James and mailed by them in letter boxes located, respectively, at the corner of Convent avenue and 133d street and at the corner of Amsterdam avenue and 133d street. The letter mailed at the latter place contained a half dollar silver piece. The inspectors saw the defendant collect the letters from these boxes and, after waiting for his next trip, found that he had not returned the letters to the station. They then apprehended the defendant and found that he did not have in his possession the letters or the contents thereof. The inspectors looked through his mail bag and locker and found no mail there or on his person.

Inspector Jacobs testified:

"I saw the defendant collect the mail from the box, look it over and throw the majority of it in the bag. A manila colored envelope together with another piece of mail the defendant placed in his bag in that fashion (illustrating), the other he threw in."

Inspector James corroborates Inspector Jacobs in the important parts of his testimony. Maurice Schlewger, a substitute letter carrier, was told by the assistant superintendent to collect route 3, and look for the missing letters. When he reached the box at Convent avenue and 133d street he found the missing letter addressed to the Telephone Company face up and close up against the back of the box; there were no other letters in the box. He did not find the other letter addressed to Ludwig Bauman & Co. until he reached the box at 131st street and Amsterdam avenue; there were about 20 letters in the box besides the Bauman letter. His testimony is corroborated by Vath, a substitute letter carrier. There was also testimony that in November, 1913, about three months prior to the transactions in question, a letter

addressed to the Pease Piano Company, West Forty-Second Street, New York, and containing a coin and a bill, was mailed about 2:30 p. m. on November 14th at a letter box at 121st street and Mt. Morris Park West. This letter should have been received at Times Square station about 4:15. The mail on the carriers' desk was searched but the letter was not found.

The defendant was sworn and denied all knowledge of the letters referred to in the two counts of the indictment and of the letter addressed to the Pease Piano Company. He made no objection to being searched and a thorough search was made, but nothing was discovered having any tendency to incriminate him. Evidence was introduced to show his good character in the community in which he lives.

[1, 2] The case presented by the government rests at best upon inconclusive testimony. The defendant is charged with delaying and detaining two letters. The mere fact of detention is insufficient to constitute the crime as it must be accompanied by proof that the letter was detained by the defendant for some unlawful purpose. The evidence may be circumstantial, it may depend upon presumptions, but there must be some proof from which the jury can draw the conclusion that the defendant acted unlawfully and with guilty intent. The proof here is that after the defendant had collected the mail from the boxes where the decoys were placed, these boxes were examined and the letter which is the subject of the first count was found in the box where it was deposited, lying face up on the bottom of the box and as near the back of the box as possible. There were no other letters in this box.

The prosecution was only permitted to prove one similar transaction which occurred about three months before. The proof, however, was wholly insufficient to connect the defendant with the transaction. A letter addressed to the Pease Piano Company was mailed at one of the boxes on the defendant's route; it should have been delivered at Station J and should have arrived at the Times Square station in the usual course. It did not arrive there. Such proof, assuming that a single instance is sufficient to establish intent, was wholly inconsequential for the reason that it failed to connect the defendant with the transaction. No one saw him collect the mail from the box in question or embezzle it or delay its delivery. It may have been stolen or lost at the distributing office, the evidence being that the Times Square station is one of the largest and most busy stations in the city. There being, then, no competent proof of a similar transaction and no predominating proof that the Telephone Company letter was unlawfully delayed by the defendant, the conviction upon that count must be reversed. The fact that the letter was found in the box where it was deposited offers no conclusive presumption of guilt. Its presence in the box may have resulted from inadvertence, carelessness or mistake. Surely it cannot be said that a carrier who leaves a letter which he should have collected in a letter box is guilty of a crime, beyond a reasonable doubt.

[3, 4] The testimony regarding the letter which is the subject of the second count is somewhat stronger for the government for the reason that the letter was not found in the box in which it had been deposited, but in the box at 131st street and Amsterdam avenue, with

about 20 other letters. Assuming that the defendant placed the Ludwig Bauman letter in the box, it is difficult to understand what illegal purpose he sought to accomplish by doing so. However, the jury may have found that he placed it there knowingly and with intent to delay its delivery within the meaning of the statute. In reaching this conclusion they may have been influenced by the testimony offered to establish proof of a similar transaction relating to the Pease Piano Company letter, which, as we have seen, wholly failed to connect the defendant with any unlawful act or purpose. In a case where the proof of intent is evenly balanced such testimony as this may have misled the jury.

The judgment is reversed.

TRINITY GOLD DREDGING & HYDRAULIC CO. v. BEAUDRY.

(Circuit Court of Appeals, Ninth Circuit. May 24, 1915.)

No. 2478.

1. MINES AND MINERALS ⇐54—OPTIONS—CONSTRUCTION—RESCISSION.

B. gave W. an option to purchase certain mines and mining claims, of which some were described as patented, others as unpatented, and still others as having receiver's receipts issued. The agreement recited that B. was the sole owner and in possession of certain gravel mines, including such mining claims, and provided that W. would take possession, expend a specified sum in improvements, and pay all expenses for prospecting and examining the mines, and that on proper demand B. would make a good and sufficient deed for all of the properties free from incumbrances. The form of deed was agreed upon, and the executed instrument placed in escrow; but it did not appear whether it was a quitclaim or a warranty deed. A supplemental agreement extending the time for payment provided that W. should pay all expenses in connection with contests then pending in the land office, and perform all assessment work necessary to hold and maintain the possessory right and title to the unpatented claims. Patents to certain of the claims were denied on contests, on the ground that the claims were of no value for mineral purposes, because the minerals had become exhausted, and W.'s successor in interest claimed that this was a breach of the agreement, entitling it to rescind. *Held*, that the possessory title alone was being dealt with, and B.'s obligation extended only to a conveyance of his possessory title, and not to a fee simple or ultimate title, and the failure to acquire patents, because the minerals had been exhausted, did not constitute a breach for which rescission might be had, as a mining claim is possessory only in character, when held by location, and the performance of the necessary annual work, and is distinct and apart from a fee-simple or absolute title, and is so considered and treated by those dealing therewith.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 149–152; Dec. Dig. ⇐54.]

2. MINES AND MINERALS ⇐29—NATURE OF MINING CLAIMS.

When an individual, entitled to the benefit of the statute relative to the acquisition of mining claims, has made a location in accordance therewith, and gone into possession, such claim, when perfected, is property in the highest sense of that term, which may be bought, sold, and conveyed, and will pass by descent.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 66–72; Dec. Dig. ⇐29.]

Appeal from the District Court of the United States for the Second Division of the Northern District of California; Wm. C. Van Fleet, Judge.

Action by the Trinity Gold Dredging & Hydraulic Company against Angele Beaudry, individually and as executrix of Frederic Beaudry, deceased. Judgment for defendant, and complainant appeals. Affirmed.

On July 21, 1906, Fred Beaudry, of the first part, and George H. Whitelaw, of the second part, entered into an agreement whereby Beaudry, in consideration of $250,000, to be paid in specified installments, granted to Whitelaw an option to purchase certain mines and mining claims, 21 in number, designated by name, of which 8 were described as patented, 8 as unpatented, and 5 as having receiver's receipts issued. By way of inducement to the agreement, it is recited that Beaudry was "the sole owner and in possession of certain gravel mines," including the mining claims and properties described in the option. Among other stipulations, the second party agreed to enter into possession of the mines and properties (except a certain house, barn, and yard), to expend not less than $10,000 in improvements in a designated manner, and to pay all expenses for prospecting and examining the mines and the title of said properties; the party of the first part reserving the right to one Theodore Ebendorf to prospect on the property until $62,500 of the purchase price should be paid, and agreeing, on proper demand, to make to the second party "a good and sufficient deed for all of said properties, free from all incumbrances." By supplemental agreements and modifications of the option, the time was extended for payment, making the last installment of $52,500, with interest at 8 per cent. per annum from January 10, 1911, to fall due April 10, 1911. It was further provided that the second party should pay to the first party, on October 10, 1910, $700 advanced in the matter of securing patents to the Long Gulch and the Mule Creek Ridge placer mining claims; that the second party should pay all expenses, fees, charges, and costs in connection with contests in the United States land office, and upon appeal to the Commissioner General and the Secretary of the Interior, and perform all assessment work necessary to be done in order to hold and maintain the possessory right and title to the unpatented claims. Time was made of the essence of the contract, and forfeiture provided for in case of default in payment of any of the amounts specified. The last modification agreement bears date December 11, 1909. On December 11, 1911, Beaudry gave formal notice to the second party that he would insist upon exact payment of all sums remaining due upon the agreement, aggregating $82,207.05, by January 1, 1913, $32,207.05 thereof to be paid January 1, 1912, and that in case of default a forfeiture would be declared.

The Trinity Gold Dredging & Hydraulic Company has succeeded to the interest of Whitelaw in said agreement, and, Beaudry having died, his widow, Angele Beaudry, has been duly appointed executrix of his last will and testament. It appears from the bill of complaint that Angele Beaudry, both in her representative and in her individual capacity, on December 1, 1912, caused to be served upon the Trinity Company another notice requiring payment in full by January 1, 1913, on condition of terminating and exacting forfeiture should the demand not be complied with. It is further alleged that the Trinity Company, the complainant, on December 31, 1912, rescinded the contract, and caused to be served upon the executrix a notice of such rescission, on the ground that, after contest and hearing before the Land Department, the department had refused to issue patents to some of the unpatented claims because the same were of no value for mineral purposes on account of having become exhausted for such purposes, and as to others, involving claims upon which receiver's receipts had issued, that the contests had not been concluded.

The facts appear to be that, at the date of entering into the original agreement, Beaudry had applied to the register and receiver of the land office for patents upon all the contested claims: that during the months of August, September, and October, 1908, the government entered contests against the

applications on the ground that the applicant sought to acquire title because of the value of the timber contained on said claims, and not for the mineral deposits; that, as to the Long Gulch claim, unpatented, the register and receiver, on May 25, 1910, decided against the applicant; that on appeal to the Commissioner General the decision was affirmed April 17, 1911, and on further appeal that the decision of the Commissioner General was affirmed by the Secretary of the Interior May 23, 1912, and Beaudry was denied patent; that the Mule Creek Ridge mining claim, unpatented, took practically the same course, varying only as to the dates of adjudication in the Land Department, and patent was denied by the Secretary of the Interior September 13, 1912; that as to several other claims, including the Greenhorn group, for which receiver's certificates had issued, contest is still pending in the Department of the Interior.

The bill of complaint was challenged by motion to dismiss, which motion was sustained, and decree entered accordingly. The Trinity Company appeals.

Edward J. McCutchen, Warren Olney, Jr., Charles W. Willard, and J. M. Mannon, Jr., all of San Francisco, Cal., for appellant.

Thomas B. Dozier, of San Francisco, Cal., for appellee.

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

WOLVERTON, District Judge. [1] As to the patented claims there is, and can be, no controversy. But it is contended by appellant, based upon the recitation in the agreement that Beaudry was "the sole owner and in possession of" the mining claims, and the stipulation that Beaudry should make "a good and sufficient deed for all said properties, free from all incumbrances," that he contracted to convey a perfect patent or fee simple title to all of said mining claims, whether designated as patented or unpatented, or as being held by receiver's certificate, and that, by reason of the failure of Beaudry or of the defendant to secure the patents to a portion of said claims, they had breached the contract, for which complainant was entitled to rescind. This depends upon the nature of that species of real property commonly known as mining claims.

[2] Congress has provided how a mining claim can be acquired. In general, it may be acquired by a discovery of mineral, particularly of gold, silver, or copper, and the like, upon the public lands, and by staking the same off or marking it upon the ground, so that the boundaries may be plainly designated and readily ascertained. The right of continuous occupation may be maintained by keeping up the assessment work prescribed by law, and this without incurring the obligation towards the government of buying and paying for the land. When an individual entitled to the benefit of the statute has made location in accordance therewith, and gone into possession, he is said to be the owner and in possession of the mining claim thus located. Such a claim, when perfected, is declared to be "property in the highest sense of that term, which may be bought, sold, and conveyed, and will pass by descent." Sullivan v. Iron Silver Mining Co., 143 U. S. 431, 434, 12 Sup. Ct. 555, 556 [36 L. Ed. 214]. The usual mode of conveyance is by deed. In its accepted significance, a mining claim relates to—

"that portion of the public mineral lands, which the miner takes up and holds in accordance with mining laws, local and statutory, for mining purposes."

Mt. Diablo Mill & Mining Co. v. Callison et al., 17 Fed. Cas. No. 9,886; Morse v. DeAdro, 107 Cal. 622, 40 Pac. 1018.

It is so recognized by Congress. Forbes v. Gracey, 94 U. S. 762, 766, 24 L. Ed. 313. It is separable from the fee, for Congress has provided for the existence of an exclusive right to the possession, while the paramount title to the land remains in the United States. Belk v. Meagher, 104 U. S. 279, 283, 26 L. Ed. 735.

"When a location is perfected, it has the effect of a grant by the United States of the right of present and exclusive possession." Manuel v. Wulff, 152 U. S. 505, 511, 14 Sup. Ct. 651, 653 (38 L. Ed. 532).

It has been held, further, that the words "mining ground," used in a deed, have a technical meaning, and refer to that interest which a mere occupant of the mine has in the same. Hale & Norcross Gold and Silver Mining Co. v. Storey County et al., 1 Nev. 104. And that a purchaser of a mining claim only acquires such right or title from his vendor as the latter had at the time of purchase. Waring v. Crow, 11 Cal. 367. A mining claim is therefore possessory only in character, where held by location simply, and the performance of the annual work necessary to entitle the locator to continue in possession. It is distinct and apart from a fee-simple or absolute title to the land, and is so considered and treated by those who have occasion to deal therewith.

In entering into the agreement for the option, and in all subsequent modifications thereof, the parties manifestly dealt with all unpatented mining claims specified therein in the light of this understanding of the significance of a mining claim. The agreement not only designated these mining claims as unpatented, or held by receiver's certificate, as the case might be, but required the second party to pay all expenses for prospecting and examining the mines and the title to said properties. And in the modification of date December 11, 1909, the second party further agreed to pay all expenses, fees, charges, and costs in connection with the contests in the United States Land Office, and to perform on each and every and all unpatented placer mining claims the annual assessment work, labor, and improvements required by law and the rules and regulations of the Department of the Interior to be done to maintain the possessory right and title thereto. Thus it appears that they were dealing with the possessory right and title to the claims, and not with the ultimate and fee-simple title to the land upon which the claims were located, and when it was stipulated that the final conveyance should be by deed, it was intended that the conveyance should be of the mining claims, and not of the ultimate title to the land, which was known to the parties to rest in the general government.

This conclusion is all the more apparent in consideration of the fact that the unpatented claims, including those standing at receiver's receipt, were in actual contest by the government, when the latter modification was made and entered into. And, again, the payment of the final installment of the consideration, or any installment thereof, was in no way made dependent upon the outcome of the government's contest. If it had been considered that such outcome was at all vital

to the contractual relations of the parties, it is singular, to say the least, that no stipulation should have been made touching it at the time the plaintiff obligated itself to bear the expenses of the contests to protect the claims. The form of the deed was agreed upon, and the executed instrument was placed in escrow, and so remains for delivery when the plaintiff shall have complied with the agreement; but what the form is, whether quitclaim or warranty, is left without mention in the pleadings or elsewhere. This is a pertinent fact, with a bearing respecting the intendment of the parties, and we may reasonably assume that, if the deed in escrow were in form a warranty of title in fee, the plaintiff would have so stated in its bill of complaint. Furthermore, the bill nowhere alleges that the unpatented claims were not located upon mineral lands belonging to the government, and that such locations were not made in accordance with the laws and rules and regulations of the Department of the Interior. But it does show that the contest of the government was based upon the contention that the claims were of no value for mineral purposes because such minerals had become exhausted. The plaintiff had been in possession for a number of years, operating the mines, and, for all that appears, it may have exhausted them of their minerals, and thus been the instrument in defeating the issuance of the patents.

Upon the whole, we conclude that it was the intendment of the parties with respect to the unpatented claims that the possessory title alone was being dealt with, and that Beaudry's obligation extended only to a conveyance of his possessory title in such claims, and not to a fee simple or ultimate title, and that failure to acquire the patents because the minerals had been exhausted does not constitute a breach of the agreement for which a rescission may be had.

Affirmed.

CLINCHFIELD COAL CORPORATION v. STEINMAN.

CLINCHFIELD COAL CO. v. SAME.

(Circuit Court of Appeals, Fourth Circuit. May 6, 1915.)

Nos. 1266, 1267.

1. ACKNOWLEDGMENT ⟸36—EVIDENCE ⟸83—CONTENTS OF CERTIFICATE—STATUTORY PROVISIONS.

Code Va. 1887, § 2500, authorizing the clerk of court to take in his office acknowledgments of deeds, does not require that the acknowledgment shall recite that it was taken in the clerk's office, and where an acknowledgment does not affirmatively show that fact, it will be presumed that the clerk did his duty and took the acknowledgment in his office.

[Ed. Note.—For other cases, see Acknowledgment, Cent. Dig. §§ 181, 182, 184–198, 221–223; Dec. Dig. ⟸36; Evidence, Cent. Dig. § 105; Dec. Dig. ⟸83.]

2. ACKNOWLEDGMENT ⟸56—CONTENTS OF CERTIFICATE—IMPEACHMENT—EVIDENCE.

An acknowledgment taken by a clerk of court, as authorized by Code Va. 1887, § 2500, but not affirmatively showing that it was taken by him

in his office, cannot be impeached by his testimony that he sometimes took acknowledgments out of his office.

[Ed. Note.—For other cases, see Acknowledgment, Cent. Dig. §§ 301, 302, 315; Dec. Dig. ⟸56.]

3. EJECTMENT ⟸95—COMMON SOURCE OF TITLE—EVIDENCE—LEGAL AND EQUITABLE TITLE.

In ejectment, plaintiff showed a legal title under a deed executed by P. in 1874, and showed that subsequent thereto P. made a contract of sale to S. who assigned it to R., before P. purchased the land at a judicial sale in 1878. R. entered under P., and obtained a conveyance pursuant to the directions of P. Defendant claimed under R. *Held*, that since P. was estopped, in equity and in ejectment, under Code Va. § 2741, from setting up title against R. or his grantee, and since R. claimed an equitable title from P. by virtue of the contract of sale, there was a showing by plaintiff that he and defendant claimed under a common source, which may rest, not only on a legal, but on an equitable, title, and plaintiff, showing a prior legal title from the common source, was entitled to recover.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 280–295; Dec. Dig. ⟸95.]

4. EVIDENCE ⟸158—BEST EVIDENCE—PLEADING.

Under Code Va. § 2741, providing that, where there is a writing evidencing a sale, the vendor may not recover in a legal action from the purchaser land sold, the existence of a writing may be proved by the best evidence available, and may be established by pleadings of the parties in a court of record, and by reference in the record to a contract as a document filed in the court.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 472, 473, 474½–504, 506–526; Dec. Dig. ⟸158.]

5. EJECTMENT ⟸25—TITLE—EVIDENCE FOR DEFENDANT.

In ejectment, defendant may not, to defeat the action, show title in another, independent of the common source of title, without connecting himself with the independent title.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 99–106; Dec. Dig. ⟸25.]

6. EJECTMENT ⟸50—PARTIES IN INTEREST.

Where, in ejectment, defendant, a corporation, entered and was working the land under conveyances to it, and not under any lease from another entirely separate corporation, the latter corporation had no interest in the litigation, and its petition to be made a party defendant was properly refused.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 139, 145; Dec. Dig. ⟸50.]

In Error to the District Court of the United States for the Western District of Virginia, at Big Stone Gap; Henry Clay McDowell, Judge.

Action by A. J. Steinman against the Clinchfield Coal Corporation, in which the Clinchfield Coal Company petitioned to be made a party. There was a judgment for plaintiff against defendant, and a denial of the petition of the Clinchfield Coal Company, and it and defendant separately bring error. Affirmed.

W. H. Rouse, of Clintwood, Va., and E. M. Fulton, of Wise, Va. (H. G. Morison, of Johnson City, Tenn., on the brief), for plaintiffs in error.

R. T. Irvine, of Big Stone Gap, Va. (J. F. Bullitt, of Big Stone Gap, Va., J. H. Steinman, of Lancaster, Pa., and A. C. Anderson, of Wise, Va., on the brief), for defendant in error.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

WOODS, Circuit Judge. In this action of ejectment, brought by A. J. Steinman against the Clinchfield Coal Corporation for the coal, iron ore, and other minerals and fire clay on a tract of land of 100 acres, the District Judge directed a verdict for the plaintiff on the ground that the parties claimed title from a common source and that the plaintiff had shown the older conveyance. The questions are somewhat different as to the two parcels known as the "Barrett Tract" and the "Redwine Tract," which together make up the land described in the declaration.

The plaintiff, Steinman, introduced as his claim of title covering both tracts: (1) Deed from Jeremiah Powers to Wm. A. Powers, dated December 29, 1869. (2) Deeds from Wm. A. Powers to J. D. Price and A. J. Steinman, December 24, 1874, and from Price to Steinman of his interest, October 5, 1875. To show a common source of title the plaintiff undertook to trace the defendant's title to the Barrett tract back to Wm. A. Powers by introducing: (1) A contract from Wm. A. Powers to O. Barrett for the sale of the mineral rights, dated August 23, 1887; (2) deeds from Barrett through intermediate grantees to the Clinchfield Coal Corporation. The Redwine tract was embraced in the deed from Jeremiah Powers to Wm. A. Powers of December 29, 1869. But as to this tract the claim of a common source depends on the record in a chancery suit brought by Jack Carter and C. D. Carter against Wm. A. Powers and the heirs of Dale Carter, from which these facts appear: Dale Carter claimed the entire tract of 350 acres embracing the Redwine tract now in dispute, and Wm. A. Powers purchased it from him on December 10, 1878, for $175. The purpose of the suit was to require Powers to pay the purchase money, and to have title made to him by the court because of the disability of some of the heirs of Carter. At a sale made under the order of the court in this proceeding Powers purchased. This sale was not complied with for some time in consequence, it seems, of a dispute between Powers and R. B. Redwine; one of the claims of Redwine being that Powers, while in possession of the land, had before the equity proceedings were instituted sold to him the 50 acres now in dispute and received from him the purchase money. This dispute was finally settled by an agreement under which, by order of the court, a deed was made by the commissioner to Redwine for the tract of 50 acres now in dispute. The commissioner's deed, dated April 14, 1896, purported to convey the right, title, and interest "which the heirs of Dale Carter" have in and to the land, without specifically referring to the interest of Wm. A. Powers. In this statement the effort has been made to eliminate the many details which do not affect the points at issue.

[1, 2] Objection was made to the introduction of the deed from W. A. Powers to J. D. Price and A. J. Steinman, that the acknowledg-

ment did not affirmatively show that it was taken by the clerk in his office, as required by section 2500 of the Code of 1887. The statute does not require that the acknowledgment should contain the statement that it was taken in the clerk's office, and the presumption is that the officer did his duty and took it in his office. Hassler's Lessee v. King, 9 Grat. (Va.) 115; Peyton v. Carr's Ex'r, 85 Va. 456, 7 S. E. 848. Testimony of the clerk that he sometimes took acknowledgments out of his office was clearly inadmissible. Property rights should not be imperiled by the mere possibility that the titles were not executed as required by law. Besides, in Virginia an officer is not allowed to impeach his own certificate. Hockman v. McClanahan, 87 Va. 39, 12 S. E. 230.

[3] The most serious point and that most earnestly pressed is that the plaintiff failed to show that the defendant derived title to the Redwine tract from Wm. A. Powers as a common source, because the equity proceedings above recited show only an equitable title in Wm. A. Powers, and that Redwine, through whom defendant derived title, got his legal title, not through Powers, but directly from the heirs of Dale Carter, since the commissioner's deed conveyed only their interest to him. Looking at the facts before us, there can be no doubt that the substance of the matter was that Redwine entered under Powers and acquired the title which the defendant derived from him by virtue of a written instrument and the payment of the purchase money before the equity suit was instituted, and that in that suit the commissioner's deed was made to him in pursuance of a contract by Powers, the purchaser at the judicial sale, that the conveyance should be so made. It is clear, therefore, that the defendant's claim from Redwine rests on Redwine's contracts with Powers and his assignor, Salyer, by force of which the title was made to him. At least one of these contracts was in writing, executed by Powers to Salyer, and by him assigned to Redwine, before the purchase from Dale Carter by Powers. Both contracts were expressed and put into effect by the court in a cause to which Redwine, defendant's grantor, was a party and under which he derived title, and to which Powers was also a party actively participating in the proceedings leading up to the execution of the deed to Redwine. Under these conditions there can be no doubt that Powers would be estopped in equity from setting up title against Redwine or his grantees, and also estopped in the legal action of ejectment under section 2741 of the Virginia Code. Nor can it be doubted that Redwine claimed an equitable title from Powers by virtue of the contract of sale made by Powers to Salyer, and by him assigned to Redwine, before Powers purchased from Carter.

It seems evident, therefore, that the plaintiff has shown a common source, unless the law requires that the common source must rest on a legal and not an equitable title. In Marback v. Holmes, 105 Va. 178, 52 S. E. 828, the rule of common source was applied where it was shown by the record of a suit to which the defendant was a party that he had set up the equitable claim of specific performance against his father, from whom the plaintiff derived title. The defendant, however, relies upon the later case of Hurley v. Charles, 110 Va. 27, 65

S. E. 468, as overruling the earlier case, and holding that the rule of common source does not apply where the defendant claims under an equitable title. We do not think the decision bears that construction. The main fact in the case was that the testimony relied on to prove the common source was altogether parol. The legal conclusion was that parol evidence alone was not sufficient to show the common source, because the Virginia statute requires a writing, and excludes parol testimony as proof of such an equitable title as would defeat an action by a vendor or one holding the legal title under him. This we venture to think is the plain limitation of the decision. Nothing short of the clearest language would warrant this court in concluding that the Virginia court intended to overrule its former decisions and establish a new rule inconsistent with precedent and reason. The rule contended for by the defendant would mean that, if A. bought from B., he could not recover from C., who had subsequently entered under a contract to purchase the land from B., without tracing B.'s title back to the state.

[4] In the present case, as we have pointed out, the derivation of the defendant's title from the common source was not shown by parol, but by a written contract set up by Redwine and carried out by the decrees of a court of record to which both Redwine and Powers were parties. Section 2741 of the Virginia Code, providing that "where there is a writing" evidencing the sale, etc., the vendor cannot recover in a legal action from the vendee land sold to him, does not admit of the construction that the writing must in all cases be produced. The existence of the writing may be proved by the best evidence available; and in this case the written contract to sell was so established by the pleadings of the parties in a court of record, and by the reference in the record to the contract as a document filed in the court. The case of Davis v. Teays, 3 Grat. (Va.) 283, holding that the writing itself must be produced, construed the statute when it required of the vendee for his protection that he should "have plain written evidence." The amendment to the statute giving the vendee protection "where there is a writing," etc., does not require the actual having of the writing. The point was not involved in Hurley v. Charles, supra, for in that case there was no evidence of any kind of a writing.

[5] The defendant next insists that, even if the conclusions above stated be correct, it should have been allowed, nevertheless, to prove that the Clinchfield Coal Company, a separate corporation, held a perfect independent title traced from the state. In support of this position it was contended, first, that in an action of ejectment the defendant may show title in another independent of the common source without connecting itself with such independent title. There are authorities supporting this position, but we think it is opposed to the weight of reason and precedent and that it has been so decided in Virginia. Obviously such a rule would greatly impair the doctrine of common source, which has been promotive of justice and the stability of land titles. Without review of the many authorities, it seems sufficient to cite Bolling v. Teel, 76 Va. 487, Robertson v. Pickrell, 109 U. S. 608, 3 Sup. Ct. 407, 27 L. Ed. 1049, and Cooke v. Avery, 147 U. S. 375,

13 Sup. Ct. 340, 37 L. Ed. 209. The reasons for the contrary rule are stated with force in the note to Rice v. St. Louis, etc., Ry. Co., 47 Am. St. Rep. 72, but the authority above cited is controlling in this forum.

[6] The defendant failed to connect itself with the title of the Clinchfield Coal Company. The evidence on this point is that there is a very good understanding between the two corporations, but that they are entirely separate, and that the defendant corporation entered and was working the lands under conveyances to it, and not under any lease, either verbal or written, from the Clinchfield Coal Company. On the same reasoning the District Court properly refused the petition of the Clinchfield Coal Company to be made a party defendant. This litigation can in no wise affect the issue of title between the plaintiff and the Clinchfield Coal Company, claiming under a separate title.

Affirmed.

VIRGINIAN RY. CO. v. UNITED STATES.

(Circuit Court of Appeals, Fourth Circuit. May 4, 1915.)

No. 1287.

RAILROADS ⊂=229—SAFETY APPLIANCE ACT—CONSTRUCTION.

The intention of Congress in enacting Safety Appliance Act March 2, 1893, c. 196, 27 Stat. 531, as amended (Comp. St. 1913, §§ 8605–8650), making it unlawful for any interstate carrier by railroad to use on its line any locomotive engine not equipped with a power driving wheel brake and appliances for operating the train brake system, is to require the control of trains in ordinary line movement by the train brakes prescribed, and to make unlawful the use of hand brakes for that purpose, and the act is mandatory and absolute, and a railroad company, which cannot move an interstate train of 100 cars at a slow speed and keep the same under control with the use of the prescribed power brake only, but which can operate trains of fewer cars with safety without the use of hand brakes, cannot justify the use of hand brakes on trains of 100 cars.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 743; Dec. Dig. ⊂=229.

Duty of railroad companies to furnish safe appliances, see note to Felton v. Bullard, 37 C. C. A. 8.]

In Error to the District Court of the United States for the Western District of Virginia, at Lynchburg; Henry Clay McDowell, Judge.

Action by the United States against the Virginian Railway Company. Judgment for the United States, and defendant brings error. Affirmed.

H. T. Hall, of Roanoke, Va., and G. A. Wingfield, of Norfolk, Va., for plaintiff in error.

Philip J. Doherty, Sp. Asst. U. S. Atty., of Washington, D. C. (R. E. Byrd, U. S. Atty., of Richmond, Va., on the brief), for the United States.

Before KNAPP and WOODS, Circuit Judges, and WADDILL, District Judge.

KNAPP, Circuit Judge. The writ of error in this case seeks to reverse a judgment obtained by the United States in an action, tried by the court without a jury, to recover penalties for alleged violations of the Safety Appliance Laws, so called. The violations in question are predicated upon the use of hand brakes, which is claimed to be forbidden, in the operation of certain trains on a section of defendant's road, and it is conceded that hand brakes were used, in the manner and to the extent hereinafter described, on the occasions specified in the government's declaration. The undisputed facts which are deemed material may be summarized as follows:

The Virginian Railway was constructed primarily for the transportation of coal at low cost from the mining districts of West Virginia to a tidewater terminal near the city of Norfolk, Va., and unusual expense was incurred to secure favorable grades and other conditions which would permit the hauling of this traffic in trains of great length. It appears to be a common practice to operate trains of 100 cars, each carrying approximately 54 tons. These trains are said to exceed in tonnage, if not in number of cars, the trains in ordinary use on any other road in the country.

The section of track on which the alleged violations occurred, in July, 1912, extends from Goodview to Huddleston, in the state of Virginia, a distance of about 13 miles. It has throughout a descending grade to the east, which is the direction of the loaded movement, varying from nearly level to a maximum of 31.68 feet per mile, with heavy cuts and fills and numerous curves. At the time mentioned the roadbed was not firmly settled, and more or less trouble was experienced from the unstable condition of the fills and the sliding of earth and rocks in the cuts. On this account trains were limited by order to a speed of 5 miles an hour at one point and 10 miles an hour at other points. It was found, however, that these very long trains could not be operated safely, at the slow rate of speed required on this grade, when air brakes only were used for their control. This was because air brakes could not be applied with needed effect, if at all, without exerting a pressure which would stop the train, or, if released before the train came to a standstill, would cause such a jerking and surging of the train as to break the cars apart, and accidents of this kind were of frequent occurrence. To avoid this danger the company decided upon the use of hand brakes, and accordingly, in May, 1912, promulgated the following order:

"In order to avoid breaking knuckles, pins, and couplers in east-bound 100-car trains coming down the six-tenths grade between Goodview Tunnel and Huddleston, these trains will be held with hand brakes and the independent engine brake.

"As a general proposition hand brakes should be set about as follows: Goodview Tunnel to Westgate, 15 brakes; Westgate to Moneta, about 5 brakes; Moneta to Huddleston, about 20 brakes.

"If these brakes do not hold the train sufficiently, additional hand brakes will be set up, or the independent engine brake used.

"The automatic air brakes will be used if it is seen that the hand brakes are not holding properly, to make a quick stop on account of being flagged, or in other cases of emergency."

Referring to the two trains described in the declaration, it is sufficient to say, without specifying when hand brakes were applied or released, or how many were used, that they were operated under this order and substantially according to its requirements. In a stipulation between the parties introduced in evidence the following facts were admitted:

"The engines on each of said trains were equipped with a power driving wheel brake, and appliances for operating the train brake system, and all of the cars in each of said trains were equipped with power or train brakes, so that the engineer on each of said engines could control the speed of the trains without requiring brakemen to use a common hand brake for the purpose. All of said cars in each of said trains were also equipped with hand brakes."

It appears to be conceded by defendant, and the fact is clearly established by the testimony, that trains of a smaller number of cars could be safely operated on this section of road, even at the slow rate of speed stated, by using only the air brakes and the locomotive power brake. Just how many cars could be handled without the use of hand brakes is not altogether certain, but apparently there was no difficulty with trains of 50 cars, or even more than that number. In short, the alleged necessity for requiring hand brakes to be used resulted wholly from the extreme length of the trains, coupled with the low rate of speed at which they were moved. Shorter trains could be operated with entire safety, as respects control of speed and otherwise, without the aid of hand brakes.

The situation, then, was this: All the appliances contemplated by the statute were fully provided, were of proper construction, and in good working order. Trains of say 50 cars, probably more, could be safely operated without the aid of hand brakes; but for trains of greater length, certainly for those of 80 to 100 cars, it was necessary, in order to avoid the risk of accident, to make use of hand brakes as provided in the quoted order. Was the use of hand brakes under such circumstances a violation of the federal statute?

The original act, approved March 2, 1893, provides as follows:

"That from and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving wheel brake and appliances for operating the train-brake system, or to run any train in such traffic after said date that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose."

The sixth section, as amended in 1896 (Act April 1, 1896, c. 87, 29 Stat. 85), contains the following:

"That any such common carrier using any locomotive engine, running any train, or hauling or permitting to be hauled or used on its line any car in violation of any of the provisions of this act, shall be liable to a penalty of one hundred dollars for each and every such violation," etc.

The later amendment of 1903 (Act March 2, 1903, c. 976, § 2, 32 Stat. 943), includes this provision:

"That whenever, as provided in said act, any train is operated with power or train brakes, not less than fifty per centum of the cars in such train

shall have their brakes used and operated by the engineer of the locomotive drawing such train; and all power-braked cars in such train which are associated together with said fifty per centum shall have their brakes so used and operated," etc.

The question asked above must be answered in the affirmative. In our judgment the legislation here considered manifests the plain intention of Congress to require the control of trains in ordinary line movement by the train brakes prescribed, and to make unlawful the use of hand brakes for that purpose. True, the use of hand brakes is not in express terms prohibited; but this is the necessary implication of the language used, and it admits of no other reasonable construction. It was the evident purpose of the train brake provision to prevent the danger resulting from the operation of hand brakes on the tops of cars in moving trains. Just as the object of the automatic coupler is to keep employés from going between cars, so the object of the train brake is to keep employés from going on top of cars to set and release the hand brakes. The purpose of the law is the guide to its interpretation, as the courts have repeatedly said. For example, in Erie R. R. Co. v. U. S., 197 Fed. 287, 116 C. C. A. 649, where it was held that the train brake requirement does not apply to switching movements in railroad yards, the court took occasion to say of the act:

"Its purpose was to compel railroads to equip trains in interstate transit with air brakes, thereby contributing not only to the safety of passengers and crews, but saving brakemen, so far as possible, from the dangers incurred in manipulating hand brakes."

The whole argument of plaintiff in error rests upon the proposition that, since the statute requires that all cars be equipped with hand brakes, and does not expressly forbid their use for controlling the speed of trains, there is left to—

"the judgment or discretion of the men operating the trains the decision as to when and under what circumstances the power brake should be used, and as to when and under what circumstances the hand brake should be used."

The proposition is also stated in this form:

"The object of Congress was evidently that the automatic power brakes should be used to control the speed of the train at all times when good railroad practice would require the use of such brakes, and to permit the use of hand brakes under such circumstances as, in the judgment of the people in charge of the operation of the trains, would promote the safety of the operation."

It is obvious that such a construction would practically nullify the train brake requirement, and take all effective meaning from the provision which makes it unlawful to run "any train" unless the locomotive and cars are so equipped that the engineer can control its speed "without requiring the brakeman to use the common hand brake for that purpose." The contention must be rejected as clearly unsound. It is impossible to believe that the Congress compelled the equipment of locomotives and cars with the appliances specified in the act, for the declared purpose of doing away with the dangerous operation of hand brakes, and then left it to the carriers themselves

to decide when and under what circumstances those appliances should be used.

On the contrary, we deem it beyond doubt that the duty imposed by the provision here considered is mandatory and absolute. There is no express or implied qualification, which in any way relates to the question at issue, and it is not for the courts to introduce an exception which the Congress did not see fit to make. The peculiar and unusual conditions which existed on this section of defendant's road cannot be permitted to excuse an avoidance of the positive requirements of the act. Moreover, those conditions disclose no emergency or extraordinary difficulty. They simply show that the defendant, for the sake of convenience or economy, deliberately ordered the use of hand brakes in the daily and customary operation of its trains.

The justification set up is that trains of 100 cars cannot be moved on this stretch of track, at the slow speed of 10 miles an hour or less, and kept under safe control with the use only of the prescribed power brake. But those operating conditions, which occasioned the need of hand brakes, are evidently of defendant's own creation. All it has to do to comply with the law is to make up trains of such smaller number of cars as can be safely and properly handled without resorting to the use of hand brakes. In short, the mandate of the Congress is disregarded in this instance, not because compliance involves any physical difficulty which is inherent or practically serious, but merely because it involves some increase of expense. It is too plain for argument that no such reason can serve to condone disobedience to the command of the statute. As is said in U. S. v. Pere Marquette R. R. Co. (D. C.) 211 Fed. 220, with reference to the first section of the original act:

"It must be construed in connection with the other sections of the same statute, and particularly in connection with, and with reference to, the modifying and explanatory act of March 2, 1903. In and by the latter act Congress has removed whatever doubt, uncertainty, or ambiguity existed in the former one, and has said plainly and unequivocally that the provisions and requirements of the earlier act 'shall be held to apply to all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce.' The legislative intent so plainly expressed must be respected. The beneficial and remedial purposes of these statutes must not be defeated by strained construction, and must not be made subordinate to either convenience or economy of railroad operation."

It is sufficient to add that the views herein briefly expressed are supported by numerous decisions construing the analogous language of other sections of the Safety Appliance Law. U. S. v. Colorado N. W. R. Co., 157 Fed. 321, 85 C. C. A. 27, 15 L. R. A. (N. S.) 167, 13 Ann. Cas. 893; Atlantic Coast Line v. U. S., 168 Fed. 175, 94 C. C. A. 35; Atchison, T. & S. F. Ry. Co. v. U. S., 198 Fed. 637, 117 C. C. A. 341; Delk v. St. Louis & San Francisco R. Co., 220 U. S. 580, 31 Sup. Ct. 617, 55 L. Ed. 590; Southern Ry. Co. v. U. S., 222 U. S. 20, 32 Sup. Ct. 2, 56 L. Ed. 72.

We are of opinion that the case was correctly decided in the court below, and the judgment will therefore be affirmed.

BALTIMORE TRUST CO. v. BELLEVUE MILLS CO. et al.

(Circuit Court of Appeals, Fourth Circuit. May 4, 1915.)

No. 1328.

1. CORPORATIONS ⊂⊃479—SALE OF PROPERTY—ACCOUNTING—LIABILITY.
A corporation issued mortgage bonds of which a trust company received a part, and the stockholders, who were also unsecured creditors, the balance. A plant of the corporation was subsequently sold to a purchaser, who gave notes for the price. The notes were divided between the trust company and the stockholders, under an agreement that the trust company need not surrender any of its bonds until the notes were paid, and until the stockholders had surrendered for cancellation all their bonds, and in default of either the trust company need not account to the corporation or the stockholders for any of the proceeds of the notes. The notes were paid, with interest, and the trust company collected interest on the bonds, and thereafter all the bonds held by it were paid, with interest. *Held*, that the notes were collateral to the bonds, and the trust company was liable to account for the interest received thereon, either to the corporation or to the stockholders.
[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1869, 1872–1874; Dec. Dig. ⊂⊃479.]

2. CORPORATIONS ⊂⊃479—ACCOUNTING—LIABILITY.
Where a corporation and its stockholders attempted to deduct, from the amount payable to a holder of mortgage bonds of the corporation, a sum equivalent to interest which the holder had received on notes given by a purchaser of corporate assets, but the holder insisted on full payment, the corporation and stockholders could pay the interest on the bonds and subsequently compel the holder to account for the interest collected on the notes, especially where a contract between the parties stipulated that the question of liability to account for interest was left open.
[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1869, 1872–1874; Dec. Dig. ⊂⊃479.]

3. LIMITATION OF ACTIONS ⊂⊃22—SEALED INSTRUMENT—TIME TO SUE.
An action brought December 26, 1913, founded on a contract under seal executed March 30, 1907, was not barred by limitations.
[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 100–111; Dec. Dig. ⊂⊃22.]

4. INTEREST ⊂⊃11—ACCRUAL OF INTEREST.
Where a trust company, collecting interest on collateral notes, knew that a party with which it had dealings claimed the interest, and there was nothing to show that the company held the interest collected unused for the party, a court of equity, directing payment of the interest collected, could charge the company with interest thereon.
[Ed. Note.—For other cases, see Interest, Cent. Dig. § 22; Dec. Dig. ⊂⊃11.]

Appeal from the District Court of the United States for the District of Maryland, at Baltimore; John C. Rose, Judge.

Suit by the Bellevue Mills Company and another against the Baltimore Trust Company, trustee and individually. From a decree for complainants (214 Fed. 817), defendant appeals. Affirmed.

W. Calvin Chestnut, of Baltimore, Md. (Gans & Haman, of Baltimore, Md., on the brief), for appellant.

Edgar Allan Poe, of Baltimore, Md., and Joseph De F. Junkin, of Philadelphia, Pa., for appellees.

Before KNAPP and WOODS, Circuit Judges, and CONNOR, District Judge.

WOODS, Circuit Judge. The Bellevue Mills Company issued mortgage bonds to the amount of $175,000, of which the International Trust Company, succeeded by the Baltimore Trust Company, held $131,500, and Corr and Blythe $43,500. The latter were also unsecured creditors and owners of all the stock of the mills. The mill property covered by the mortgage consisted of three separate factories, the Windsor, Chicora, and Moorehead. The mortgage was reduced by the payment of $5,000 of the bonds held by the International Trust Company. By consent of the parties the Chicora factory was sold to Hamilton Carhartt at the net price above commissions of $127,500. The purchase money was represented by notes, of which the trust company received the later maturities, of the face value of $64,450, at the agreed value of $62,125, and Corr and Blythe the remainder, which they were to use in payment of current debts of the company. These notes were taken by the parties under an agreement dated March 30, 1907, which contains this provision:

"Whenever during the period of three years from the date of the sale of the said Chicora Mills each and all of the notes representing the proceeds of the sale thereof, delivered as aforesaid to the International Trust Company, shall have been paid by or for account of the purchaser thereof, and the said Corr and Blythe shall produce, or cause to be produced, to the International Trust Company of Maryland, as trustee, for cancellation, the sum of forty-three thousand five hundred dollars ($43,500) par value of bonds secured by said deed of trust of February 1, 1906, from the Bellevue Mills to the International Trust Company of Maryland, as trustee, the said International Trust Company of Maryland, as holder of other bonds secured by said deed of trust, will likewise produce and surrender to itself, as trustee, for cancellation, the amount of sixty-two thousand one hundred and twenty-five dollars ($62,125) par value of bonds secured by said deed of trust; but it is understood and agreed that the International Trust Company of Maryland shall be under no obligations to surrender to itself, as trustee, or to the Bellevue Mills Company, any portion of said bonds, except on the express conditions herein mentioned, to wit, the payment by or on account of the said purchaser of all the said notes above referred to, to be delivered to it, and the surrender by or on account of said Corr and Blythe of said forty-three thousand five hundred dollars ($43,500) par value of the bonds of the Bellevue Mills Company, within three years from the time aforesaid, and in default of either of said conditions the said International Trust Company of Maryland shall be under no obligation whatever to account in any way to the Bellevue Mills Company, or to said Corr and Blythe, for any of the proceeds of said notes of the purchaser of the Chicora Mills received by it as herein provided; it being the express understanding and agreement of the parties that the said portion of the proceeds of said sale of the Chicora Mills is in no way a satisfaction in whole or in part of the bonds of the Bellevue Mills Company held by it, except subject to the conditions herein expressly mentioned."

The notes were collected, and the trust company canceled the bonds held by it to the amount of $62,125, as agreed; and all of the other bonds held by it have been paid, with interest thereon. In collecting the notes the trust company collected interest thereon for the same period as that on which it collected interest on the bonds, to the amount of $7,401.18.

[1] In this suit, involving the right of the trust company to retain the interest on the notes, the District Court adjudged that the trust company took and held the Carhartt notes as collateral to the bonds of the Bellevue Mills, and that it must pay back the sum of $7,401.18 and interest thereon, on the principle that a creditor cannot hold interest collected on collateral when he has collected the principal debt and interest. The entire history of the business transactions which brought the plaintiffs and defendants into their relations to the mill property and to each other is set out in the opinion of the District Court, and a restatement here would merely incumber the record.

The contract does not expressly provide for the contingency which has arisen, and we must therefore look to its general tenor, to the relations of the parties, and to their dealings with each other for a solution of the question presented. Consideration of these relations and dealings as shown by the entire evidence, especially the contracts and letters, leaves no doubt that the trust company intended, in all that it did, that Corr and Blythe should assume the risks of the mill business, and that it should have the position of a creditor as against them and the mill company. This is shown, not only by the occurrences which led up to the contract above mentioned, but by the stipulation in it that Corr and Blythe should indorse the Carhartt notes. Again, the provision that the payment of the notes should result in the cancellation of $62,125 of the bonds indicated that the notes and the bonds were considered to represent the same obligation. This relation, namely, that the trust company was seeking repayment of the money it disbursed and avoidance of risk, and that Corr and Blythe were the owners of the stock and assuming the risks of the conduct of the business, makes a strong presumption against an intention that the trust company should receive interest on both bonds and notes for the same time. And it seems clear that the trust company should be required to point to the very words of the paper which confer this right to hold interest on both. This they were unable to do, for the paper is silent on the subject. We have said enough to show that the District Court's conclusion of fact that the notes were collateral to the bonds, and that the trust company was not entitled to the interest on both, is well supported by the evidence and cannot be disturbed.

[2] When the plaintiffs came to pay interest on the bonds, they asserted the right to credit for the interest paid on the notes; but this demand was refused by the defendant. They were not bound to carry their demand to the extent of refusing to pay the interest coupons, and thus bring upon themselves the expense and injury which a suit for foreclosure of the mortgage would have entailed. They were justified under the circumstances in deferring the ultimate assertion of their claims until final settlement and payment of the bonds. Moreover, when Corr and Blythe surrendered for cancellation the bonds held by them, a contract was made which stipulated that the question of the liability of the trust company to account for the interest collected on the Carhartt notes was left open. It follows that the payment of the interest coupons of the bonds cannot be set up by

the defendants as relinquishment of the right to claim an accounting for the interest collected on the collateral notes.

[3] There is no foundation for the plea of the statute of limitations. The contract of March 30, 1907, was under seal, and this action was brought December 26, 1913, to enforce an obligation which arose out of it.

The agreement of June 1, 1912, for the sale of the Windsor Mills does not refer to the Carhartt notes, either directly or indirectly, and it can have no effect as an estoppel.

[4] Counsel for defendant insists that, while the District Judge had the discretion in an equity case to allow interest on a claim of this kind, the discretion was abused in this case, because the money was retained by the trust company under a bona fide claim of right. There is nothing to show that the defendant held this money unused subject to the plaintiff's claim, or on any other ground had an equity to be relieved from the payment of interest on money of the plaintiff which it collected and held as its own against plaintiff's protest. On the contrary, it was engaged in the business of lending money and presumably received interest on this fund.

Affirmed.

JOHNSON et al. v. JARVIS.

(Circuit Court of Appeals, Fourth Circuit. May 4, 1915.)

No. 1291.

1. EVIDENCE ⊜383—ANCIENT DOCUMENTS—RECITALS—INFERENCES.

In a suit to remove a cloud from plaintiff's title, it was shown that the land was conveyed to H. and P. in 1798. The only proof of title out of them consisted of a deed executed by M. in 1835, and reciting that he was acting as attorney in fact for G., who was trustee and attorney in fact for the heirs of P. No authority from the heirs of P. to G., nor from G. to M., was produced, and no conveyance of H.'s half interest was shown; but there had been entry and continuous possession of the land embraced in the deed by successive grantees, and the records of the county where the powers of attorney and deed were said to be recorded had been burned. *Held*, that the recitals of the ancient deed, in connection with the testimony as to exclusive claim and possession and the destruction of the records, justified inferences that the heirs of P. had acquired the interest of H., and that G. was duly empowered to execute the deed, since, while recitals in a deed introduced by plaintiff are not binding on a defendant claiming under an adverse title, recitals in ancient deeds and acts done under them are admissible against all parties, and may form the basis of any reasonable inference to be drawn from them.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1660–1677; Dec. Dig. ⊜383.]

2. TAXATION ⊜848—FAILURE TO RETURN LAND—FORFEITURES—BURDEN OF PROOF.

In a suit to remove a cloud from plaintiff's title, defendant, who claimed that plaintiff had lost his title by forfeiture to the state for failure to return the land for taxes, had the burden of making clear proof of such loss of the land, as forfeitures are not favored.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1664; Dec. Dig. ⊜848.]

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3. TAXATION ⟸848—FAILURE TO RETURN LAND—FORFEITURES—SUFFICIENCY OF RETURN.

That the aggregate tax returns by an owner of land could not be made to correspond accurately with the land conveyed to him did not result in a forfeiture as for a failure to return the land for taxes, where there was an approximate correspondence, especially where the returns were made at a time when lands were of little value, and the inhabitants were careless in their dealings with land and business affairs generally.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1664; Dec. Dig. ⟸848.]

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

Action by Claude S. Jarvis against Robert Johnson and another. From a judgment for plaintiff (208 Fed. 353), defendants appeal. Affirmed.

E. D. Talbott, of Elkins, W. Va., and C. M. Murphy, of Philippi, W. Va. (B. M. Hoover, of Elkins, W. Va., on the brief), for appellants.

W. B. Maxwell, of Elkins, W. Va., for appellee.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

WOODS, Circuit Judge. In this suit to have defendants' claims to a tract of land known as lot 56 adjudged invalid as a cloud on the plaintiff's title, the District Court granted the relief asked for. Careful consideration of the record, in the light of the argument of counsel, leads to the affirmance of the judgment on the reasoning of the District Judge. There are two points, however, to which it may be well to make special reference. The plaintiff claims under a grant from the state to Claiborne made in 1797. The defendants claim under a grant from the state made in 1850. The junior grant overlaps the senior by 64.35 acres claimed by the defendant Harris and 126.45 acres claimed by the defendant Johnson, and this is the land in controversy.

[1] 1. The defendants insist that the plaintiff failed to establish one link of his chain of title under the Claiborne grant. This land, with other lands, in all 52,000 acres, was conveyed by Claiborne to John Hopkins and George Pickett, July 5, 1798. The plaintiff could show no better proof of title out of Pickett and Hopkins than a deed dated April 18, 1835, purporting to convey the entire fee in 4,000 acres, including the land in dispute, signed "Thomas Green, by His Attorney in Fact, William McCoy," and containing these recitals:

"This indenture made this 18th day of April, in the year eighteen and thirty-five, between William McCoy, who acts in this transaction as attorney in fact for Thomas Greene who is granted trustee attorney in fact for the heirs of George Pickett now deceased last of the city of Richmond, in the state of Virginia, of the one part and Israel Baldwin of Preston County, in said state of Virginia of the other part.

"Witnesseth, That the said McCoy acting as above named and being thereunto authorized by certain deeds powers of attorney, and as will more fully appear being recorded in the office of the Clerk of the County Court in the County of Preston aforesaid, hereby for a valuable and full compensation to him." etc.

No authority from the heirs of Pickett to Thomas Green, nor from Green to McCoy, was produced, and no deed was produced conveying the one-half interest of Hopkins. There was evidence, however, that there had been entry and continuous possession of lands embraced in the deed by successive grantees to the present time, and that the records of the county of Preston where the lacking powers of attorney and deed were said to be recorded had been burned in 1869.

True, the general rule is that recitals in a deed introduced by the plaintiff are not binding on a defendant claiming under an adverse title. Rowland Co. v. Barrett, 70 W. Va. 703, 75 S. E. 57. But recitals in ancient deeds and acts done under them are admissible against all parties, and may form the basis of any reasonable inference to be drawn from them. Carver v. Jackson, 4 Pet. 1, 7 L. Ed. 761; Crane v. Morris, 6 Pet. 598, 8 L. Ed. 514; Deery v. Cray, 5 Wall. 795, 18 L. Ed. 653; Fulkerson v. Holmes, 117 U. S. 389, 6 Sup. Ct. 780, 29 L. Ed. 915; 1 Elliott on Evidence, 428; 1 Greenleaf, 46. The recitals of this ancient deed, the fact that it purported to convey the entire fee, the testimony as to exclusive claim and possession of grantees under it, and the destruction of the records, taken together, was evidence from which the trial judge might legitimately draw the inferences that Pickett's heirs had acquired the interest of Hopkins, and that Thomas Green had been duly empowered to execute the deed and convey the entire estate. This is on the principle that it is exceedingly improbable that the Hopkins heirs would have remained inactive so long if they had any interest in the extensive domain conveyed, or that Pickett's heirs would not have repudiated the deed if Green was without authority to convey for them.

[2, 3] 2. The contention that the title under which plaintiff claims was lost by forfeiture to the state for failure to return the land for taxes was strongly presented. But forfeitures are not favored, and the burden was on the defendant to make clear proof of the loss of the land in this way. It may be true that the aggregate tax returns in the name of the owner and of his predecessor in title cannot be made to correspond certainly or accurately with the land conveyed. But there is a general correspondence, and courts would do great injustice if they required anything more than approximate correspondence in tax returns and conveyances, especially at a time when lands were of little value and the inhabitants careless in their dealings with land and business affairs generally.

Affirmed.

PENNSYLVANIA CO. v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. June 8, 1915.)

No. 2611.

1. EMINENT DOMAIN ⟸237—AWARD OF COMMISSIONERS—CONFIRMATION.
   It is not the duty of the court to refuse to confirm or to set aside an award by commissioners in condemnation proceedings, unless it was clearly unreasonable and arbitrary.
   [Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 604–613; Dec. Dig. ⟸237.]

2. EMINENT DOMAIN ⟸205—SUFFICIENCY OF EVIDENCE—COMPENSATION.
   In proceedings to condemn a strip of land adjacent to navigable water, the only value of which was a contingent value for future wharf purposes, evidence *held* not to show that the award of the commissioners was so low as to be unreasonable or arbitrary.
   [Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 544; Dec. Dig. ⟸205.]

3. EMINENT DOMAIN ⟸231—PROCEEDINGS—INSTRUCTIONS TO COMMISSIONERS—VALUE.
   In proceedings by the government to condemn a tract of land belonging to a railroad and bordering on navigable water, tried before the court and commissioners, where there was evidence that the government had purchased an adjoining tract of less acreage, and shore line from another railroad company, which had a track extending to such land, so it could then be used to transfer freight between cars and boats, while the land in controversy was many miles from the nearest line of its owner and its value was purely speculative, it was not error to refuse to instruct the commissioners that the price paid for the other tract was controlling as to the value of the one sought to be condemned.
   [Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 585–589; Dec. Dig. ⟸231.]

4. EMINENT DOMAIN ⟸231—INSTRUCTIONS—ASSUMING FACTS.
   In proceedings by the government to condemn part of a tract of land, where the trial proceeded on the theory that, if the existing government harbor improvements had been lawfully constructed, there was no damage to the part of the tract not taken, and the evidence was at least equally consistent with the existence of such improvement on the tract for more than 30 years without objection by the owner, it was not error to refuse instructions to the commissioners which assumed that the structure was unlawful.
   [Ed. Note.—For other cases, see Eminet Domain, Cent. Dig. §§ 585–589; Dec. Dig. ⟸231.]

In Error to the District Court of the United States for the Southern Division of the Western District of Michigan; Clarence W. Sessions, Judge.

Condemnation proceedings by the United States against the Pennsylvania Company. Judgment confirming the award made by the commissioners, and defendant brings error. Affirmed.

This is a condemnation proceeding. The Pennsylvania Company owned 1,800 feet of frontage along navigable water in Grand river, just above its opening into Lake Michigan. The United States desired storage space for apparatus and material used in harbor work, and so undertook to buy 1,200 feet of this frontage. Being unable to do so, it filed a condemnation petition in the District Court. Commissioners were appointed, and before the court and commissioners, as before court and jury, a trial was had. The com-

missioners made an award of $2,000, the court confirmed it, and the owner of the land brings this review. The questions presented are three: Was the award so inadequate that it should not stand? Should the price paid for adjacent land have been of persuasive or controlling effect? Were the proper rules applied with reference to damages caused to the remainder of the frontage not taken? We assume that these questions were properly raised and preserved and are now subject to review, but without intending to determine any of the matters which we so assume.

J. H. Campbell, of Grand Rapids, Mich., for plaintiff in error.

Myron H. Walker, U. S. Atty., of Grand Rapids, Mich., for the United States.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

DENISON, Circuit Judge (after stating the facts as above). [1, 2] 1. Unless the award was clearly unreasonable and arbitrary, it was not the duty of the court to set aside or to refuse to confirm. Shoemaker v. U. S., 147 U. S. 282, 293, 13 Sup. Ct. 361, 37 L. Ed. 170; Columbia Co. v. Rudolph, 217 U. S. 547, 560, 30 Sup. Ct. 581, 54 L. Ed. 877, 19 Ann. Cas. 854. This award cannot be so characterized. The sum found was much less than the parcel had cost the owner, and much less than the value assessed by the taxing authorities, but, on the other hand, was far above its value for any presently existing use. It comprised a small parcel of sandy beach, and it was practically—if not absolutely—worthless, save as it had a contingent, prospective value for wharf and dockage purposes. Because of this value in expectancy, the Pennsylvania Company had bought the property in 1873, and paid $10,000 for it; but, at the end of 40 years, this value was just as prospective as at the beginning. The case was peculiarly appropriate for rejecting both maximum and minimum views, and for fixing an amount which should give due regard to both aspects, and we cannot say that this is not what the commissioners did.

[3] 2. An adjacent part of the total property desired belonged to the Pere Marquette Railroad Company. This parcel was less in acreage and frontage than the one condemned. It was acquired by negotiation preliminary to proposed condemnation, and for $5,000; but the court refused to instruct the commissioners that the price paid was controlling as to the value of the condemned land, and refused to receive evidence based solely on such comparison. The price accepted by an owner to avoid condemnation proceedings may often, if not usually, be so far a matter of compromise that it is wholly inadmissible as bearing on the value of an adjacent parcel; but in this case the price itself appeared, and there was no error in instructing that it was not conclusive, nor in excluding evidence which assumed that the values of the two parcels must be to each other as were their respective areas. The bearing of the Pere Marquette sale upon the value of the Pennsylvania Company's parcel was, at the best, remote. The elements of value in the former were, at least in one respect, vitally different. It belonged to a railroad which ran into the adjacent city of Grand Haven, and which had a spur track leading into the parcel, and the parcel was presently capable of use for transfer between boat and rail, while the Pennsylvania Company had no line of railroad within many

miles, and it did not appear that there was any railroad or other purchaser, present or prospective, who would have any use whatever for the land. Under these conditions, we cannot assume that the price paid to the Pere Marquette would be a controlling comparative measure.

[4] 3. The remaining 600-foot portion of what we assume was the Pennsylvania Company's unitary parcel—and which portion was not condemned—was a narrow strip between a platted highway and what, at the time of the plat, had been the water's edge. At the time of this proceeding, a government harbor improvement, called a revetment, extended along the edge of the highway for nearly the whole distance in such manner that the strip which, according to the plat, belonged to the Pennsylvania Company, was occupied by the revetment or was outside of it and under water, excepting only where, because of an angle between the revetment and the highway, there was between the two, and belonging to the Pennsylvania Company, a trifling triangular piece of fast land. The case was tried on the theory, adopted by both sides, that if the government had a right to maintain this revetment, it operated to deprive this 600-foot parcel of its right of access to water, and so left no substantial value to be harmed by the taking of the 1,200-foot portion. We are not inclined, on our own motion, to question a theory thus acquiesced in by all the parties before the trial court; and so we do not decide whether this revetment was essentially different in character and effect from the ordinary river bank levee. The contention of the landowner was that, in fixing damages, the existence of the revetment should be disregarded, because its erection by the government had been unlawful, and its maintenance was a continuing trespass; and the claim of unlawful erection was to the effect that the structure had been built in 1911, and upon what was at the time fast land, rather than upon submerged land. The requested instructions upon this subject, the refusal of which is relied upon as error, all rested upon the assumption that the building of the revetment had been done at that time and in this manner. The testimony did not require such assumption, even if it tended to support these claims. The proofs are at least equally consistent with the idea that the structure, during practically its entire length across this 600 feet, had been in position without material change for 30 years, and without an objection from the land owner. The testimony regarding the building of a new revetment in 1911 relates—probably, if not certainly—only to that portion in front of the "government basin" and barely touching the 600-foot parcel.[1] Clearly, upon the accepted assumption that a lawfully built structure burdened riparian values, the situation so shown would not justify fixing damages as if the burden were not there.

4. Other questions are raised or suggested by the record; but they are either not argued in the brief of the Pennsylvania Company or seem to be sufficiently covered by what has been said.

The judgment is affirmed, without costs.

[1] The map, Exhibit D, expressly shows by one of its legends that only that part of the old pier in front of the basin was removed in 1911.

STERN et al. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. May 12, 1915.)

No. 272.

1. POST OFFICE ⟸35—USE OF MAILS IN AID OF SCHEME TO DEFRAUD—ELEMENTS OF OFFENSE.

Under Criminal Code (Act March 4, 1909, c. 321) § 215, 35 Stat. 1130 (Comp. St. 1913, § 10385), providing that whoever, having devised any scheme or artifice to defraud, shall, for the purpose of executing such scheme or artifice, or attempting to do so, place or cause to be placed any letter, etc., in any post office, station, etc., shall be fined or imprisoned or both, the government is not bound to prove that an intention to use the mails was a part of the original scheme to defraud.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. § 55; Dec. Dig. ⟸35.]

2. INDICTMENT AND INFORMATION ⟸130—JOINDER OF COUNTS—STATUTORY PROVISIONS.

Under Criminal Code, § 215, there is no restriction as to the number of counts an indictment may contain, or the period within which the separate offenses charged must have been committed, as was the case under Rev. St. § 5480, which provided that the indictment might severally charge offenses to the number of three when committed within the same six calendar months.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 419–423; Dec. Dig. ⟸130.]

3. POST OFFICE ⟸48—USE OF MAILS IN AID OF SCHEME TO DEFRAUD—SUFFICIENCY OF INDICTMENT.

An indictment for using the mails in the execution of a scheme to defraud, which not only described the offense in the language of the statute, but accompanied such language with the statement of facts fully apprising defendants with what they had to meet, was sufficient.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 67–80; Dec. Dig. ⟸48.]

4. CRIMINAL LAW ⟸372—EVIDENCE—OTHER OFFENSES.

Defendants were charged with using the mails in aid of a scheme to defraud which embraced the listing of property with them for sale; the making of a deposit by the owner for advertising and services, to be deducted from the commission when sold; and an examination of the property by some person who would either express dissatisfaction or offer an unsatisfactory price, with the result that there would be no sale and no money returned. *Held*, that evidence of other transactions in the same business, and done in the same way, with the same result as the transactions charged in the indictment, was admissible to establish the intent to defraud and to show the system of doing business.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 833, 834; Dec. Dig. ⟸372.]

5. POST OFFICE ⟸49—USE OF MAILS IN AID OF SCHEME TO DEFRAUD—QUESTIONS FOR JURY.

That defendants, after being arrested effected a sale through another broker of the property mentioned in one count of the indictment, was a fact for the jury's consideration.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 84–86; Dec. Dig. ⟸49.

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

6. POST OFFICE ⊂=49—USE OF MAILS IN AID OF SCHEME TO DEFRAUD—MATTERS TO BE PROVED.

In the absence of an express allegation in the indictment that the defendants intended to defraud every one who deposited money with them, the government was not bound to prove such an intent.

[Ed. Note.—For other cases, see Post office, Cent. Dig. §§ 84–86; Dec. Dig. ⊂=49.]

7. CRIMINAL LAW ⊂=369—EVIDENCE—FORMER ACQUITTAL IN ANOTHER COURT.

On a trial for using the mails in aid of a scheme to defraud, proof of the unsuccessful prosecution of one of the defendants in a state court on complaint of one of those claimed to have been defrauded was not admissible, especially where no record proof was offered, as the prosecution was not for the same offense.

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

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

Philip I. Schick, of New York City (George Gordon Battle, of New York City, of counsel, and J. N. Flowerman, of New York City, on the brief), for plaintiffs in error.

H. Snowden Marshall, U. S. Atty., and John C. Knox, Asst. U. S. Atty., both of New York City, for the United States.

Before LACOMBE, COXE, and WARD, Circuit Judges.

WARD, Circuit Judge. The defendants were indicted under section 215 of the Criminal Code for devising, under the name of the Reliable Brokerage Company, a scheme to defraud, in the execution of which they used the United States mails. The indictment contained four counts, in each of which a person defrauded or to be defrauded was named.

[1, 2] The defendants object that they could be tried only on three counts for offenses committed within the same six calendar months and that the government was bound to prove that an intention to use the mails was a part of the original scheme to defraud. These things were true of section 5480 of the United States Revised Statutes, but section 215 of the Criminal Code, under which this indictment is found, has amended the law by requiring only a use of the mails in executing the scheme to defraud and by prescribing no restriction as to the number of counts the indictment may contain or as to the period within which the separate offenses charged must have been committed.

[3] Objection is also made that the indictment does not sufficiently set forth the offenses charged. It is not restricted to a description of the offenses charged in the language of the statute alone, but accompanies that language with a statement of facts fully apprising the defendants with what they have to meet. The objection is frivolous.

The scheme described was substantially as follows: The defendants would see advertised in various newspapers properties to be sold or leased or businesses or stocks of goods to be sold. Thereupon they would send to the advertiser a postal card reading as follows:

"Dear Sir: If you desire to sell your property kindly call at our office without delay as we have several private parties with cash interested in same. Notice we charge no commission unless we sell. Trusting to see you, we remain."

If the advertiser called in response to the postal card, the defendants would tell him that they had one or more customers interested in property like his, but that he must make a deposit in cash to protect them against any sale over their heads. Upon receiving the deposit they would have him sign a blank form, properly filled out, authorizing the sale and concluding like this:

"$..... given by me to the Reliable Real Estate and Brokerage Company is for the advertising and services of my house for sale and to be deducted of their commission when sold by them not otherwise."

In some cases and in at least three of the cases mentioned in the indictment they would themselves give a receipt like this:

"$..... received of ..... for the expense of advertising and services on his ..... for sale ..... When sold through our office return ..... dollars of commission, not otherwise."

Thereupon some one would examine the property and either offer a price which would certainly be refused or else express dissatisfaction. The result was no sale and no money returned.

It was testified on behalf of the government by the persons claiming to have been defrauded that defendants, at the same time these papers were signed, promised to return the deposit of cash if they did not sell the property, which was denied by the defendants.

[4] It is complained that evidence of other similar transactions was erroneously admitted by the court. The case, however presents an exception to the general rule for the purpose of proving intent. The other transactions proved were in the same business and done in the same way, with the same result. An intent to defraud would be more readily inferred from many instances than from the four charged in the indictment. People v. Marrin, 205 N. Y. 275, 98 N. E. 474, 43 L. R. A. (N. S.) 754. They go to show the system of doing business. 12 Cyc. 411; People v. Peckens, 153 N. Y. 576, 592, 47 N. E. 883.

[5] After the defendants had been arrested they did effect the sale of the property mentioned in the first count through another broker. This was a fact for the consideration of the jury.

There was abundant evidence to support the conclusion at which the jury must have arrived, viz., that the whole proceeding was a sham, that the defendants never expected to sell the property and never intended to return the deposit.

[6] It is further contended that the government was bound to prove that the defendants intended to defraud every person who deposited money with them in this way, reliance being placed upon the decision in United States v. Staples (D. C.) 45 Fed. 195. The indictment in that case did expressly allege that the defendant intended to defraud every one with whom he dealt, and the government was held bound to prove the charge as made. We should not wish to go so far, and if the decision can be understood as going further, we certainly cannot approve of it.

[7] Upon direct examination of one of the defendants, it was sought to show that he had been charged in a state court by one of the persons who complained of having been defrauded and had been acquitted. No proof by record was offered, and would not have been admissible had it been offered, because not for an offense under the statute in question.

The judgment is affirmed.

ALFRED E. NORTON CO. v. BYERS.

(Circuit Court of Appeals, Second Circuit. May 12, 1915.)

No. 230.

1. MASTER AND SERVANT ⟸190—LIABILITY FOR INJURIES—NEGLIGENCE OF FOREMAN.

Labor Law N. Y. (Consol. Laws, c. 31) § 200, as amended by Laws 1910, c. 352, makes employers liable for injuries to employés caused by the negligence of any person intrusted with superintendence or with authority over any employé in the performance of his duty. Defendant was constructing the iron work of a building, and the F. Co., another independent contractor, the concrete. Defendant's general foreman, who had five or six assistants, and who moved the workmen from place to place on the work and to other jobs as he chose, went to a hoist of the F. Co., which was about to descend, and directed two of the workmen to go with him. One of such workmen was thrown from the hoist and killed by the sudden stopping thereof. The F. Co. had posted a notice forbidding persons from riding on the hoist, but there was evidence that the foremen used the hoists whenever they chose, that the foreman in question used them pretty nearly every day without objection from the F. Co.'s superintendent, and that this was the general practice on jobs in that city. *Held*, that the foreman's direction to the employés to go with him on the hoist was within the scope of his activities, and was a direction of the employé in the performance of his duty.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 449–474; Dec. Dig. ⟸190.]

2. MASTER AND SERVANT ⟸289—ACTIONS FOR INJURIES—QUESTIONS FOR JURY.

Whether the employé was himself negligent in going upon the hoist, in view of his knowledge that they were constantly used by the foremen, and in view of the fact that the foreman was also going on the hoist, was a question for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089, 1090, 1092–1132; Dec. Dig. ⟸289.]

3. MASTER AND SERVANT ⟸289—ACTIONS FOR INJURIES—ADMISSIBILITY OF EVIDENCE.

Where the point was made that the employé was an experienced ironworker, and should have known that it was improper and unsafe to ride on the hoist, it was not error to admit evidence as to the general practice on jobs in that city of riding on such hoists.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089, 1090, 1092–1132; Dec. Dig. ⟸289.]

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

This cause comes here upon appeal from a judgment in favor of defendant in error, who was plaintiff below. The action was brought

under the New York Employers' Liability Act (chapter 31 of Consolidated Laws, as amended by chapter 352, Laws of 1910) to recover damages for the death of plaintiff's intestate, alleged to have been caused by defendant's negligence, in that its foreman ordered deceased to get upon a hod hoist used in the construction of a building, which the foreman knew was an unsafe hoist for people to ride on, whereupon either through a defect in the hoist, or negligence of an engineer, or both, an accident resulted, causing injuries to intestate from which he died.

Amos H. Stephens, of New York City (E. J. Redington, of New York City, of counsel), for plaintiff in error.

Ralph Gillette, of New York City, for defendant in error.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

LACOMBE, Circuit Judge (after stating the facts as above). [1] The defendant and a fireproofing company as independent contractors were engaged in erecting a building. The former was putting up the iron work; the latter, the concrete. Byers was an iron worker in the employ of defendant. Defendant maintained ladders (and later, as the structure progressed, stairs) for the use of its employés to pass from floor to floor. The fireproofing company maintained and operated several hod hoists to carry concrete to the upper floors. These hoists were not intended for passengers; they had no safety devices. All appear to agree, and the jury certainly found on abundant proof, that the use of one of these hoists was an unsafe way to pass from upper to lower stories. At the entrance to all these hoists there was a notice which read as follows:

"Warning.

"This hoist is for material only; all persons are forbidden to ride, stand on, or stand in shaft under penalty of instant dismissal.

"National Fireproofing Company."

At or about 10 a. m. on the day of the accident the deceased and one Finnegan were working on the eighth floor (next to the roof) carrying beams to put over the top of windows for lintels, when Foreman Swansberg appeared and told them that he wanted them to go to another job. He went over to a hod hoist on the same floor, but, failing to make connection with it, he ordered the two men to follow him up the ladder to the roof, where the fireproofing company was concreting. Callan, the subforeman of the fireproofing company, was then standing on the hoist, which held two empty wheelbarrows, and he was apparently about to descend with it. As Swansberg stepped upon it he called to Finnegan and deceased, "Come on, youse." Callan then stepped off. The two empty iron wheelbarrows had been pushed onto the hoist from the Sixth avenue side of the platform and stood side by side, occupying the whole width of the platform of the hoist, with their handles extending toward Sixth avenue. The foreman and the two workmen then stepped on, Callan pulled the bellcord to signal the engineer, and the hoist descended. McCabe, the engineer of the fireproofing company, who was operating the hoist, noticed that when

a little below the second floor it was wobbling a little bit; thereupon he suddenly stopped it, with the result that Byers and one of the wheelbarrows were thrown off.

The section (section 200) of the statute relied upon makes the employer liable for personal injury caused to an employé, who is himself in the exercise of due care and diligence at the time, "by reason of the negligence of any person in the service of the employer intrusted with any superintendence, or by reason of the negligence of any person intrusted with authority to direct, control or command any employé in the performance of the duty of such employé." As the warning notice stated "dismissal" as the penalty for disobedience, it might be construed as being directed solely to the employés of the fireproofing company, whom alone that company could dismiss. But it is not necessary to give it any such construction. It may be assumed that the notice forbade any and every one from riding on these hoists. It may also be assumed that as the testimony showed, defendant had instructed its superintendent and all its foremen not to let its employés ride on the hoists and not to use them themselves. There was abundant evidence to support a finding that these warnings and orders had become a dead letter; that the foremen used the hoists whenever they chose; that Swansberg (the foreman in question) used them "pretty near every day"; that the superintendent of the fireproofing company knew of this and made no objections; that this was the general practice on jobs in New York City, even when the signs were up.

We find no proof that the men used the hoists regularly; apparently they had to walk; the foremen were the privileged characters. Swansberg was general foreman, with five or six assistants; he moved deceased and the other workmen from place to place on this job, and from this to some other job, just as he chose. If he directed deceased to come with him down the hoist to go to another place or another job, as the evidence indicates he did, we do not see why such direction was not within the scope of his activities, why it was not a direction of the employé in the performance of the duty of such employé. The court left it to the jury to say whether or not the words "Come on, youse," were a direction. They found that it was, and, as it seems to us, correctly so found.

[2] They also found that deceased was not himself negligent. That was clearly a question for them. We have no first-hand information as to the extent of Byer's knowledge as to these hoists. He had seen them constantly used by foremen without any mishap; probably envied them their privilege when he saw them doing so. Moreover, as Swansberg did not say "go," but "Come with me," it would probably not occur to deceased that he was being directed to take a serious risk of life or limb.

[3] The charge was very fair and careful, and we find no error in it. The admissibility of testimony as to the use of hoists on other jobs was fairly arguable, but a point was made that deceased was "an experienced iron worker," and therefore should have known that it was improper and unsafe to ride on a hoist such as this. We do not think it was error to show what his experience had probably taught

him, namely, that it was common practice to do so, tolerated, so far as he knew, by employers. He had never been told not to do so, so far as the testimony shows.

The judgment is affirmed.

LAU LAU v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. May 12, 1915.)

No. 267.

1. ALIENS ⟸32—DEPORTATION PROCEEDINGS—BURDEN OF PROOF.

In a proceeding to deport a Chinese laborer, who claimed that he procured the certificate required by Chinese Exclusion Act May 5, 1892, c. 60, § 6, 27 Stat. 25, as amended by Act Nov. 3, 1893, c. 14, § 1, 28 Stat. 7 (Comp. St. 1913, § 4320), but that it was subsequently lost, the burden of proving that he was given the statutory certificate was on him.

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

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

2. ALIENS ⟸32—DEPORTATION PROCEEDINGS—REVIEW—QUESTIONS OF FACT.

In a proceeding to deport a Chinese laborer, he claimed that he procured the certificate required by the Chinese Exclusion Act, but that he lost it in San Francisco at the time of the earthquake. He testified that he went to the proper place to get the certificate wih one witness only, and that witness testified that he did not sign the application, as the statute requires. Defendant's testimony showed that he had an opportunity to take his certificate out of his trunk before the house containing it was burned. He had made no effort to obtain a duplicate, and a search of the records of the revenue district in which he claimed the certificate was issued failed to show any record of such a certificate. *Held*, that the findings of the United States commissioner and the District Judge, adverse to defendant on the question of fact involved, will not be disturbed.

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

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

This cause comes here upon appeal from an order affirming an order of a United States commissioner directing the deportation to China of the defendant, a Chinese person and a laborer, who was found to be unlawfully within the United States without the certificate required by the Chinese Exclusion Act of May 5, 1892, as amended by Act Nov. 3, 1893.

James A. Donegan, of New York City, for appellant.

H. Snowden Marshall, U. S. Atty., and Frank Morse Roosa, Asst. U. S. Atty., both of New York City, for the United States.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

LACOMBE, Circuit Judge. Defendant does not dispute the proposition that he is a person who should have taken out a certificate un-

der the act. His story is that he was born in China and landed in San Francisco when he was 10 or 11 years old; that he lived there 10 years, went to Wyoming, where he stayed 2 years, and then returned to San Francisco; that, in that city, in the spring of 1894, when about 25 years of age, he procured the statutory certificate, which he claims was lost at the time of the earthquake and fire in 1906. He subsequently came to New York.

[1, 2] The only question here is one of fact: Was defendant given a statutory certificate in 1894? The burden of proving the affirmative is on him. Inasmuch as both the United States commissioner and the District Judge have decided this question adversely to him, this court, under the authorities, should not disturb that finding of fact. It may be noted, however, that defendant testified that he went to the proper place to get his certificate with one witness (naming him), and one witness only. This witness, Li Wing, testified that he went there with defendant, but did not sign the latter's application. The statute required signature, both by the applicant and his witness. Defendant's narrative of the fire, which did not reach Chinatown until two days after the earthquake, would seem to indicate that he had opportunity to take his certificate out of the trunk in which he kept it before the house containing it was burned. Certainly he, like other Chinese persons, must have appreciated the importance of a certificate, but he made no effort to obtain a duplicate down to the time of his arrest.

The act (section 6) provides that in the case of loss or destruction of the certificate judgment of deportation shall be suspended a reasonable time to enable the Chinaman to procure a duplicate from the officer granting it. By Act June 6, 1900, c. 791, 31 Stat. 611, the administration of the Exclusion Laws was transferred from the collectors of internal revenue to the Commissioner General of Immigration. The rules governing the admission of Chinese persons thereafter provided that applications for duplicate certificates should be made to the Commissioner General at Washington.

Upon the passage of the act of 1900 all internal revenue collectors were required to send their records to Washington. This they did generally. The records from some revenue districts are missing; but those from the district in which defendant says he was living in 1894, several thousand recorded certificates, are now in the Chinese Immigration Bureau in Washington. After the decision of the United States commissioner, deportation was suspended and counsel for defendant, with counsel for the government, have together searched these records thoroughly for any record of certificate and photograph, under the name Lau Lau, Lau Wing, and any others which were similar in sound. They failed to find any record of defendant's having received a statutory certificate.

The order of deportation is affirmed.

SOUTHERN COTTON OIL CO. v. SHELTON.

(Circuit Court of Appeals, Fourth Circuit. May 4, 1915.)

No. 1351.

DISMISSAL AND NONSUIT ⊂=15—TIME FOR DISMISSAL—DISMISSAL AFTER REVERSAL.

The reversal of a judgment for plaintiff in an action to recover land, on the ground that plaintiff had brought two prior actions and under a state statute was not entitled to bring a third action, decided nothing as to plaintiff's right to move to dismiss, and it was within the court's discretion to grant a motion by plaintiff to dismiss, even conceding that plaintiff could not dismiss as a matter of right; it not appearing that plaintiff would obtain any unfair advantage, or that defendant would be prejudiced.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. § 31; Dec. Dig. ⊂=15.]

In Error to the District Court of the United States for the Eastern District of South Carolina, at Columbia; Henry A. Middleton Smith, Judge.

Action by William J. Shelton against the Southern Cotton Oil Company. From an order dismissing the action on plaintiff's motion, defendant brings error. Affirmed.

See, also, 220 Fed. 247, 136 C. C. A. 509.

D. W. Robinson, of Columbia, S. C. (Thomas & Lumpkin, of Columbia, S. C., on the brief), for plaintiff in error.

Wm. H. Lyles, of Columbia, S. C., for defendant in error.

Before KNAPP and WOODS, Circuit Judges, and CONNOR, District Judge.

WOODS, Circuit Judge. In this action by William J. Shelton against the Southern Cotton Oil Company there was a verdict and judgment for the plaintiff in the District Court. This court held that the plaintiff had already had two actions for the recovery of the land involved, that he was denied by the statute of South Carolina the right to prosecute a third, and that, therefore, in this action for the recovery of the same land the District Judge should have directed a verdict for the defendant. In reversing the judgment the court said:

"We are of opinion to reverse at the cost of the defendant in error and to remand for such further action as may be proper."

Thereafter, upon the call of the case in the District Court, counsel for plaintiff moved for leave to dismiss the action. Counsel for defendant opposed this motion, and himself moved that the court should proceed to a new trial, taking the position that if, on the new trial, the evidence should be the same as on the former trial, it would be the duty of the presiding judge to direct a verdict in favor of the defendant under the instructions of this court. The District Judge, holding that "it is a case in which the motion of the plaintiff should properly be granted, if he desires to dismiss without proceeding to a new trial," granted the plaintiff's motion to dismiss.

By the reversal of the former judgment of the District Court nothing was decided as to the right of the plaintiff to move to dismiss the action. It was held in Slocum v. N. Y. L. Ins. Co., 228 U. S. 364, 399, 33 Sup. Ct. 523, 537, 57 L. Ed. 879, Ann. Cas. 1914D, 1029:

"The reversal operated to set aside the verdict and to put the issues at large, as they were before it was given."

The case thus standing on the docket for a new trial or other proper disposition, even conceding that the plaintiff could not, under the rules of the District Court, have the action dismissed as a matter of right, it was within the discretion of the District Judge to grant or refuse the motion to dismiss. There was nothing to show that the plaintiff would obtain any unfair advantage, or that the defendant would be prejudiced or deprived of any defense, by the dismissal. Indeed, it appears to be conceded by the argument of counsel for defendant in error that any future action to recover the land would be barred by the statute of limitations.

Affirmed.

In re BOLOGNESI et al.

In re VALORI et al.

(Circuit Court of Appeals, Second Circuit. May 12, 1915.)

No. 237.

1. BANKRUPTCY ⇐88—PETITION—JURISDICTION OF COURT.

A petition in involuntary bankruptcy, valid on its face, gives the court jurisdiction, and other creditors may, under Bankr. Act July 1, 1898, c. 541, § 59f, 30 Stat. 561 (Comp. St. 1913, § 9643), intervene, though by lapse of time they are barred from originating a proceeding, for their adoption of the original petition relates back to the date it was filed.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 58, 98, 104, 109–112; Dec. Dig. ⇐88.]

2. BANKRUPTCY ⇐65—INVOLUNTARY PROCEEDINGS—PETITION—VALIDITY.

An involuntary bankruptcy proceeding is not void because facts shown in affirmative defense constitute an estoppel against the petitioners taking advantage of the act of bankruptcy relied on.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 54, 121; Dec. Dig. ⇐65.]

3. BANKRUPTCY ⇐92—PETITION BY CREDITORS—WITHDRAWAL OF PETITIONERS—DISCRETION OF COURT.

A petitioner, praying that his debtor be adjudged a bankrupt, may, in the discretion of the court, withdraw from the proceeding.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 107, 108, 133–136; Dec. Dig. ⇐92.]

4. BANKRUPTCY ⇐92—PETITION—INVOLUNTARY BANKRUPTCY—INTERVENING CREDITORS.

Where creditors, petitioning for the adjudication of their debtor a bankrupt, are permitted to withdraw before other creditors intervene, the proceeding terminates; but, until they withdraw, other creditors may intervene, though barred by lapse of time from initiating a proceeding,

and other creditors so intervening may proceed, notwithstanding the subsequent withdrawal of the original petitioners.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 107, 108, 133-136; Dec. Dig. ⊂=92.]

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

This cause comes here upon appeal from an order dismissing a petition in bankruptcy filed March 12, 1914, against the alleged bankrupts, and denying a motion made by Valori and others, as intervening creditors, to confirm a report of the special master recommending an adjudication.

Charles T. Green, of New York City, and Isidor F. Greene, of Brooklyn, N. Y. (G. W. Wickersham, of New York City, of counsel), for appellants.

A. S. Gilbert, of New York City, for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge. On February 11, 1914, A. Bolognesi & Co. made a general assignment for the benefit of creditors. Subsequently and on or about the 12th day of March, 1914, a petition in bankruptcy was filed against A. Bolognesi & Co. by Paoli Bros. and others, alleging themselves to be creditors. To this petition an answer was interposed, asserting that the petitioning parties were not qualified creditors, in that they claimed priority rights to trust funds and were estopped by reason of their assent to and participation in the assignment proceedings. Various other creditors, subsequently and before the expiration of four months from the date of the insolvency, filed petitions and asked to be allowed to intervene, which requests were granted. On June 22, 1914, Valori and others, also creditors, filed petitions, and on the same day were allowed to intervene. This was more than four months after the date of the assignment, but the original petition of Paoli and his fellow creditors was still pending.

The alleged bankrupts answered this last petition, setting up the same defense which was interposed to the Paoli petition, and also averring that no act of bankruptcy had been committed within four months next preceding the date of the Valori petition. Valori and those joining with him are qualified creditors in number and amount. On June 22, 1914, Judge Learned Hand referred the matter to a special master. From time to time, some before and some after that date, the creditors, other than Valori and his associates, withdrew from the case. When the special master's report came before Judge Hough, he dismissed the petition in bankruptcy on the ground that:

"The application of all the qualified creditors to withdraw having been granted, the petition cannot be sustained on the intervention of qualified creditors after the four months period."

[1, 2] The original petition was undoubtedly valid on its face, and gave the court jurisdiction. N. Y. Tunnel Co., 166 Fed. 284, 92 C. C. A. 202. When that petition was filed a proceeding became pend-

ing in the District Court, initiated in accordance with the statute, and in which creditors who had not participated in its initiation were entitled to intervene. Bankruptcy Act, § 59f. We do not think that the mere circumstance that their intervention came so long after the act of bankruptcy that they could not then have originated a proceeding bars them from intervening in a pending proceeding; their adoption of the original petition related back to the date it was filed, because it was good and needed no amendment. Certainly the original proceeding cannot be held to be a *void* one, because facts may be shown in affirmative defense which may constitute an estoppel against the original petitioners taking advantage of the act of bankruptcy.

[3, 4] No doubt any petitioner may be allowed to withdraw, in the court's discretion. If the original petitioners so withdraw before others intervene, that ends the proceeding completely; there is nothing left to intervene in. But until they do withdraw there is a proceeding, in which others may intervene; and if others have done so, in the lifetime of the proceeding, subsequent withdrawal of the originators will leave the interveners free to proceed. In re Cronin (D. C.) 98 Fed. 584. If the opinion in Despres v. Galbraith, 32 Am. Bank. R. 170, 213 Fed. 190, in which the court seems to have held that the original petition was void, be construed to hold that intervention under a valid petition, four months after the act of bankruptcy and before the original proceeding was dismissed, gives the interveners no right to proceed, we cannot concur. The case at bar is not within the principle of United States v. McCord, 233 U. S. 157, 34 Sup. Ct. 550, 58 L. Ed. 893, because here there was no "vice in the original suit." The original petition was a valid one, under which bankruptcy could have been adjudicated, except for the interposition of an affirmative defense of estoppel.

The order is reversed.

D. T. McKEITHAN LUMBER CO. v. FIDELITY TRUST CO. et al.

(Circuit Court of Appeals, Fourth Circuit. June 8, 1915.)

No. 1318.

1. APPEAL AND ERROR ⇐1009—FINDINGS—CONCLUSIVENESS.
   Findings of the trial court in an equity case are presumptively correct, and will not be set aside by an appellate tribunal, unless based on an obvious error of law or serious mistake in dealing with the facts.
   [Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3970–3978; Dec. Dig. ⇐1009.]

2. DEEDS ⇐19—VALIDITY—SPECIFIC WARRANTY—FALSE REPRESENTATIONS.
   Under the law of South Carolina, that in sales of land there must be specific warranty of quantity or proof of misrepresentation amounting to fraud to sustain a charge of failure of consideration, a grantee in a deed containing no warranty of quantity and not induced by fraudulent representations is not entitled to relief.
   [Ed. Note.—For other cases, see Deeds, Cent. Dig. § 38; Dec. Dig. ⇐19.]

Appeal from the District Court of the United States for the Eastern District of South Carolina, at Charleston; Henry A. Middleton Smith, Judge.

Suit by the Fidelity Trust Company, trustee, against D. T. McKeithan Lumber Company and others. From decree (212 Fed. 229) for complainant and defendants J. M. Barr, W. R. Bonsal, and D. T. McKeithan, defendant Lumber Company appeals. Affirmed.

Louis G. Addison, of Columbus, Ohio (James Simons, of Charleston, S. C., on the brief), for appellant.

Henry E. Davis and P. A. Willcox, both of Florence, S. C. (Willcox & Willcox, of Florence, S. C., on the brief), for appellees.

Before KNAPP, Circuit Judge, and CONNOR, District Judge.

PER CURIAM. [1] Upon the issue of misrepresentation, which is the principal issue in the case, the learned judge presiding at the trial, who heard all the witnesses testify, made the following finding:

"The court finds as a conclusion of fact in this case that Mr. Poston and his associates in this case rested upon their own responsibility; that they relied not upon the codefendants in this case as constituting their officers or trustees, but were treating with them in the purchase of this property at arm's length; that they were intelligent business men, well aware of their rights, and well qualified and able to protect them, and they are not entitled in this case to rely upon any rule of responsibility as that the individual codefendants held towards them any position as quasi trustees. The defendants Bonsal and Barr, so far from that, I find, had nothing whatsoever to do with these negotiations prior to their consummation in the contract of sale and deed of conveyance; that they acted wholly as directors and stockholders for the protection of their own interest personally, and that of their own companies, and they undertook in no wise any responsibility whatsoever to the D. T. McKeithan Lumber Company, or to Poston and his associates, and they are not bound to any liability therefor."

Passing the point that no exception was taken to this finding, and treating it as involving a question of mixed law and fact, which is sufficiently presented by the assignments of error, we need only express the opinion, after careful study of the record, that the conclusion of the District Judge upon this issue of fact is supported by the testimony and should therefore be accepted on this appeal. It is familiar doctrine that the findings of the trial court in an equity case are presumptively correct, and will not be set aside by an appellate tribunal, unless they are based upon an obvious error of law or a serious mistake in dealing with the facts. Gorham Mfg. Co. v. Dry Goods Co. et al., 104 Fed. 243, 43 C. C. A. 511; Vanderbilt v. Bishop, 199 Fed. 421, 117 C. C. A. 652; United States v. Marshall, 210 Fed. 595, 127 C. C. A. 231; Childs v. Williams, 212 Fed. 151, 129 C. C. A. 9.

[2] It is the settled law of South Carolina that in cases of sales of land there must be a specific warranty of quantity, or proof of misrepresentation amounting to fraud, to sustain the charge of failure of consideration. Mitchell v. Pinckney, 13 S. C. 203, 209; Erskine v. Wilson, 41 S. C. 198, 19 S. E. 489; Latimer v. Wharton, 41 S. C. 508, 19 S. E. 855, 44 Am. St. Rep. 739. The deed in this case contains no warranty of quantity, and the trial court, in the explicit and comprehensive statement above quoted, has found that there was no misrepre-

sentation. If this finding be accepted, as we are convinced it should be, there is no ground for disturbing the decree. Farrar v. Churchill, 135 U. S. 609, 10 Sup. Ct. 771, 34 L. Ed. 246; Farnsworth v. Duffner, 142 U. S. 43, 12 Sup. Ct. 164, 35 L. Ed. 931; Shappirio v. Goldberg, 192 U. S. 232, 24 Sup. Ct. 259, 48 L. Ed. 419.

Affirmed.

ROBERTS et al. v. ROBERTS.†

(Circuit Court of Appeals, Eighth Circuit. May 10, 1915.)

No. 4308.

1. APPEAL AND ERROR ⊂⊃1012—FINDINGS—CONCLUSIVENESS.
   As a general rule, findings will not be disturbed, except on strong proof that they are against the clear weight of the evidence.
   [Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3990–3992; Dec. Dig. ⊂⊃1012.]

2. ADOPTION ⊂⊃17—ORAL AGREEMENT OF ADOPTION—EVIDENCE—SUFFICIENCY.
   Evidence *held* to sustain a finding of an oral agreement by a putative father to adopt his child.
   [Ed. Note.—For other cases, see Adoption, Cent. Dig. § 5; Dec. Dig. ⊂⊃17.]

3. ADOPTION ⊂⊃17—ORAL AGREEMENT—EVIDENCE—DIRECT OR CIRCUMSTANTIAL.
   An oral agreement of adoption of a babe need not be proved by direct evidence, and where the parties to the transaction are dead, except the child, the court may find the agreement on circumstantial evidence, provided the statements and conduct of the adopting parent are such as to furnish clear and satisfactory proof that an agreement of adoption existed.
   [Ed. Note.—For other cases, see Adoption, Cent. Dig. § 5; Dec. Dig. ⊂⊃17.]

Appeal from the District Court of the United States for the Eastern District of Missouri; David P. Dyer, Judge.

Suit by Myra J. Roberts against Ida R. Roberts and another. From a decree for plaintiff, defendants appeal. Affirmed.

William R. Gentry, of St. Louis, Mo. (M. F. Watts and Edwin W. Lee, both of St. Louis, Mo., on the brief), for appellants.

Ford W. Thompson, of St. Louis, Mo. (William B. Thompson, of St. Louis, Mo., on the brief), for appellee.

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

AMIDON, District Judge. Myra Jane Roberts brings this suit to enforce an alleged oral agreement by Charles J. Roberts, deceased, to adopt her as his child, and to enforce her rights in the estate of Charles J. Roberts, pursuant to such agreement, when established. The trial court found in favor of the plaintiff, and defendants appealed.

[1] There is abundant evidence in the record to support the findings, and unless this case is to be excepted from the general rule that the findings of a trial court will not be disturbed, except upon strong

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

† Rehearing denied August 23, 1915.

proof that they are against the clear weight of the evidence, the decree should be affirmed. Harrison v. Fite, 148 Fed. 781, 78 C. C. A. 447; Mastin v. Noble, 157 Fed. 506, 85 C. C. A. 98; De Laval Co. v. Iowa Co., 194 Fed. 423, 114 C. C. A. 385; United States v. Marshall, 210 Fed. 595, 127 C. C. A. 231.

[2] We are satisfied from the evidence that Charles J. Roberts was the father of plaintiff. This, together with the conceded fact of his childless married life, gave to him a natural motive and imposed upon him a moral duty to plaintiff and her mother, to make plaintiff his child in law as she was in nature. These two facts enter into all of plaintiff's evidence, giving to it reasonableness and probative force. The record at the time the plaintiff was taken by Mr. and Mrs. Roberts states: "Infant indentured to C. J. Roberts." Upon receiving plaintiff into his family, Mr. Roberts not only gave to her his own name, but the name of his mother. Her foster parents stated repeatedly, both orally and in writing, that they had adopted plaintiff as their child. They treated her as their child. She was baptized in their name. Not until she was a woman grown was she ever permitted to know that Mr. and Mrs. Roberts were not her natural parents. She was then told the facts by her foster mother upon her deathbed, and her conduct at the time shows how completely she had become identified with her foster parents. In our judgment this case falls within the decision of Lynn v. Hockaday, 162 Mo. 111, 61 S. W. 885, 85 Am. St. Rep. 480, rather than Wales v. Holden, 209 Mo. 552, 108 S. W. 89. See also Horton v. Troll, 183 Mo. App. 677, 167 S. W. 1081. By a change in the names, the language used in Lynn v. Hockaday would be equally applicable here:

"The life of that whole family in reference to this child, from the time she was first taken into it until the death of Mr. Lynn, would have to be construed to be a deception and a fraud, if we would give to it the effect that respondents claim for it. It is argued that her relatives were poor, and that she has had in the family of Mr. Lynn a better home and more refined rearing than she would have had if he had not taken her. That may be; but it does not follow as a legal conclusion that the reward was all on her side, or even that it was her gain at all. That she took the place of an only daughter in the lives of Mr. and Mrs. Lynn, and performed her part as such, is the cold fact which the law regards as sufficient consideration to support the contract. How much she added to their happiness the law does not undertake to estimate. * * * Like a bud that has been cut from its natural stem and grafted into a foreign tree, she grew into the family and became a part of its very life. Everything that adoption contemplates was accomplished. It became a contract fully performed on her part, and the statute of frauds cannot be invoked to her injury."

[3] The argument by which we are asked to reverse the decree is that there was no direct and clear evidence of an agreement to adopt at the time Myra J. Roberts was received into the family of Charles J. Roberts. There is good reason why such evidence is wanting. All of the parties to the transaction are dead, and Myra J. Roberts was herself a babe at the time of the adoption. It seems to us that in such a case it is not necessary that the court first have direct proof of the making of the contract, and then proceed forward from the contract thus established to the conduct evidencing its existence. We think it is possible to reverse that process, and if the statements and

conduct of the adopting parents are such as to furnish clear and satisfactory proof that an agreement of adoption must have existed, then the agreement may be found as an inference from that evidence.

The decree is right, and it is affirmed.

HOLLAND et al. v. McILWAINE et al.

In re NORFOLK WIRE CLOTH & WIRE FENCE MFG. CO., Inc.

(Circuit Court of Appeals, Fourth Circuit. May 4, 1915.)

No. 1315.

BANKRUPTCY ⊂=482—ATTORNEY'S FEES—ALLOWANCE—STATUTORY PROVISIONS.

Under Bankr. Act July 1, 1898, c. 541, § 72, added by Act Feb. 5, 1903, c. 487, § 18, 32 Stat. 800 (Comp. St. 1913, § 9656), providing that neither the referee, receiver, marshal, nor trustee in any form or guise receive, nor shall the court allow him, any other or further compensation for his services than that expressly authorized in the act, trustees in bankruptcy may not recover for legal services performed for creditors petitioning for adjudication, or for the bankrupt, since one who accepts the position of trustee of a bankrupt's estate renounces the right to compensation in any other form or guise, and all services rendered must be referred to his position as trustee, and they may recover only for services properly chargeable against the estate rendered prior to their appointment as trustees.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 874–876, 897; Dec. Dig. ⊂=482.]

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, Jr., Judge.

In the matter of the bankruptcy of Norfolk Wire Cloth & Wire Fence Manufacturing Company. Petition by Franklin Holland and J. Monroe Holland, copartners trading as the Holland Manufacturing Company, creditors of the bankrupt, against Richard McIlwaine, Jr., Thomas H. Willcox, and Harry K. Wolcott, individually and as trustees in bankruptcy, and others, to superintend and revise in matter of law proceedings of the District Court. Petition granted, with directions.

E. C. Carrington and Wm. Ewin Bonn, both of Baltimore, Md., for petitioners.

D. Lawrence Groner, of Norfolk, Va., for respondents.

Before KNAPP and WOODS, Circuit Judges, and CONNOR, District Judge.

WOODS, Circuit Judge. This petition to superintend and revise, filed by Holland Manufacturing Company, a creditor of the bankrupt Norfolk Wire Cloth & Wire Fence Manufacturing Company, is directed against the allowance of fees of $2,000 to Richard McIlwaine, Jr., attorney for petitioning creditors, and $1,250 to Thomas H. Willcox, attorney for the bankrupt. The objections made to the other charges were abandoned.

Three creditors having filed their petition against the corporation on 13th of May, 1913, it admitted its insolvency and its willingness to be

adjudged a bankrupt, and the adjudication was made May 30, 1913. In the meantime on May 20, 1913, a receiver had been appointed to take charge of the property. At the first meeting of the creditors on July 30, 1913, Richard McIlwaine, Jr., Thomas H. Willcox, and Harry K. Wolcott were elected trustees of the estate. The trustees were allowed as such their commissions of $866 according to law. The allowance to Mr. Willcox and Mr. McIlwaine as attorneys were for services rendered in the main after their appointment as trustees. Section 72 of the Bankruptcy Act provides:

"That neither the referee, receiver, marshall, nor trustee shall in any form or guise receive, nor shall the court allow him, any other or further compensation for his services than that expressly authorized and prescribed in this act."

The argument that the services performed as attorneys did not fall within the duties of trustees, and therefore the allowance was permissible under the statute, because not made to them in their capacity as trustees, seems to be unsound. The statute is very stringent, and was intended to cut up the abuses which had crept into the practice of allowing charges made by officers and trustees under the guise of services performed beyond those imposed on them by law. Looking at the history and terms of the law, it is manifest that to allow these charges would be to so stretch it as to defeat its purpose by opening the door of the court's discretion which the statute was intended to close. We do not doubt that the professional services rendered in this case were of value to the estate, and it is a hardship that no compensation is to be received; but the statute denies the court the power to bestow it. When one accepts the position of trustee of a bankrupt estate, he renounces the right to compensation in any other form or guise. All services rendered must be referred to his position as trustee.

The petition is granted, with directions to the District Court to disallow the attorney's fees of $2,000 to Richard M. McIlwaine, Jr., and $1,250 to Thomas H. Willcox, with leave to them to move the District Court for an allowance for services properly chargeable against the estate rendered prior to their appointment as trustees.

Reversed

In re BAY STATE MILLING CO.

(Circuit Court of Appeals, Second Circuit. May 24, 1915.)

BANKRUPTCY ⊂=455—CONFIRMATION OF COMPOSITION—APPEALABILITY OF ORDER—"DISCHARGE."

An order confirming a composition offer by a bankrupt is, under Bankr. Act July 1, 1898, c. 541, § 14c, 30 Stat. 550 (Comp. St. 1913, § 9598), a discharge of the bankrupt from his debts, and appealable under section 25, allowing appeals from the granting or denial of a discharge.

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

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

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

This is an application for alternative mandamus directed to the District Judge, District of Connecticut, its object being to secure his allowance of an appeal to this court from an order of said District Court.

R. B. Honeyman, of New York City, for the motion.
Slade & Slade, of New York City, opposed.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

LACOMBE, Circuit Judge. A bankruptcy proceeding against Maurice Soloway and Maurice Katz as partners and individuals was duly instituted in the District Court in Connecticut. An offer of composition was made and after various proceedings which need not be recited such offer was confirmed by Judge Thomas.

Within the proper time limited by the act an application on apparently proper papers was made to Judge Thomas for an allowance of appeal from such order to this court. This application was refused on the sole ground that in the opinion of the District Judge the Bankruptcy Act did not allow appeals from order confirming compositions, such orders not being included in the enumeration contained in section 25.

This section apparently has not been amended, but stands as it did when the Bankruptcy Act was passed. It allows appeals from a judgment "granting or denying a discharge." Section 14c provides that the confirmation of a composition shall discharge the bankrupt from his debts. Such judgment, therefore, is the legal equivalent of a judgment "granting a discharge," and it seems to us that under section 25 it may be revised by appeal.

Presumably it will not be necessary to issue any alternative mandamus. The District Judge, now that the section has been construed by a Circuit Court of Appeals, may sign the allowance.

STANDARD TYPEWRITER CO. v. STANDARD FOLDING TYPEWRITER SALES CO. et al.

(Circuit Court of Appeals, Second Circuit. April 29, 1915.)

No. 47.

PATENTS ⊂=328—ANTICIPATION—TYPEWRITER.

The Rose patent, No. 754,242, for a typewriter, claims 1 and 5, the distinguishing feature of which is the provision of means whereby the platen and its carriage may be folded into compact relation to the banks of keys, giving the machine a compact form for purposes of transportation, *held* void for anticipation by the device of the Carmona patent, No. 661,849.

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

This cause comes here upon an appeal from a decree entered in the United States District Court for the Southern District of New York on December 2, 1913, which refused an injunction to the Standard

Typewriter Company, plaintiff, restraining the Standard Folding Typewriter Sales Company et al., defendants, on charges of infringement of claims 1 and 5 of letters patent of the United States, No. 754,242 and claims 1, 2, 3, 4, 5, 6, and 7 of letters patent of the United States, No. 948,553.

The Standard Typewriter Company is a corporation organized and existing under the laws of the state of New York. The Standard Folding Typewriter Sales Company is a corporation also organized and existing under the laws of the state of New York. James A. Whitcomb, Eugene E. St. Germain, and Arthur W. Buckwell are citizens of the United States, and of the state of New York, and each of the defendants resides in the Southern District of New York and has a regular and established place of business in said district.

Patent No. 754,242 was granted to F. S. Rose on March 8, 1904, for a typewriting machine. And patent No. 948,553 was granted to F. S. Rose, deceased, G. F. Rose administrator, on February 8, 1910. The first of these patents was, through mesne conveyances, assigned to the complainant, and by assignment complainant also claims the exclusive right to make, use, and vend the inventions and discoveries patented in and by letters patent No. 948,553. A suit was brought to restrain the alleged infringement of both patents. A motion for a preliminary injunction was made and was granted as to claims 1 and 5 of patent No. 754,242 but was denied as to patent No. 948,553.

An appeal was taken to this court from an order granting the injunction as to the first patent and the order granting the injunction was affirmed. 181 Fed. 500. Subsequent to the granting of the preliminary injunction defendant discovered the Carmona patent, No. 661,849, which had been granted prior to the patents issued to Rose. Upon motion of defendants an order was made amending the answer to include the Carmona and other patents among those which defendants alleged fully and clearly described the inventions, or substantial and material parts thereof, claimed under the patents in suit.

The case came on for hearing under the amended answer, and, after taking of testimony, it was decided that claims 1 and 5 of patent No. 754,242 were anticipated by the Carmona patent, and that claims 1 to 7 of patent No. 948,553 were invalidated by the Sholes patent, No. 568,630, and so much of the bill of complaint as related to these claims was dismissed. The defendants conceded at the trial that claims 35 and 44 of patent No. 948,553 were valid, and a perpetual injunction was ordered to prevent their infringement by the defendants, who were also ordered to account to plaintiff for profits and damages as to those particular claims.

The preliminary injunction previously granted was vacated.

William R. Davis, Charles S. Jones, and Livingston Gifford, all of New York City, for appellant.

Julian S. Wooster and Clifton V. Edwards, both of New York City, for appellees.

Before COXE, WARD, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge (after stating the facts as above). This case involves the validity of the Rose patent, No. 754,242, for improvements in typewriters. The patentee realized that it would meet with public favor and answer a public need if a typewriting machine could be so constructed that it could be conveniently and readily transported or carried from place to place as part of one's ordinary hand baggage To meet the demand for such a machine, the patentee made a machine that was light in weight and capable of being folded into a compact package, but which could also be readily unfolded into operative condition. The folding and unfolding character of the machine

was secured by means that in no way interfered with the proper operative functions of the parts. The folding capacity was obtained by minimizing the cubical dimensions of the machine without disorganizing or disassembling the parts. An unmechanical operator could turn the parts into their folded positions and secure less cubical dimensions for transportation purposes, and could also, by turning them into their unfolded operative position, have the parts at once ready for use.

Mr. Rose states in his specification that his invention relates to improvements in typewriters, in which he seeks "to produce a new construction of the support or carriage for the typeplaten or cylindrical roller which enables the same to be folded into compact relation to the keyboard, thus making provision for ready and convenient transportation of the instrument." The folding of the platen carriage reduced the height of the machine and made a very compact package, with all the delicate parts of the operative mechanism below the upper bars of the machine when the carriage was in its folded position. The machine was thus rendered transportable in a small and convenient package. At the same time the delicate operating parts were protected by the upstanding and horizontal bars of the frame and carriage support.

When this cause was before us in 1910, the question was whether the court below committed error in granting a preliminary injunction restraining the defendants from infringing the patent. We then held no error had been committed and sustained the injunction notwithstanding the patent in suit had never been adjudicated, as we thought the case came within well-recognized exceptions to the rule that an injunction will not issue upon an unadjudicated patent. In the opinion of the court written by Judge Noyes we said:

"Now it is old in many arts to fold devices in order to obtain compact packages for storage or transportation. Thus patents for folding cameras, folding gocarts, folding organs, and folding wheelchairs are shown upon the record. If, however, these devices in other arts would negative invention in going into the typewriter art and applying the folding principle, it does not follow that the present patent is invalid. It may well be that the folding principle is so old that a patent merely for folding parts of typewriters upon other parts would possess no patentable novelty. But this patent is for the folding of a specific part, the platen carriage, into specific (overhanging) relation to another part, the keyboard, for a specific purpose, obtaining a compact and safe package. We think that it is not shown to be invalid by anything in arts other than that of the typewriter, and that we must look to that art if we are to find anticipation, or such a state thereof as negatives invention."

But before the case came on for final hearing the defendants discovered the Carmona patent, No. 661,849, and upon motion an order was made amending the answer to include it and certain other patents which need not now be mentioned.

Manuel S. Carmona was a citizen of the Republic of Mexico, where he resided. On February 2, 1900, he filed in the United States Patent Office an application for a patent for a new and improved typewriter and the patent was issued to him on November 13, 1900. This patent was regarded in the court below as an anticipation of the claims made in the Rose patents. And the question which is now presented to the court is whether the court below was justified in its conclusion that

claims 1 and 5 of the Rose patent were anticipated by Carmona and were void. Frank S. Rose, at the time he applied for his patents, was a resident of Newark, in the state of New Jersey. In his specification upon which patent No. 754,242 was issued, Rose declared:

"The important features of the present invention is the provision of means whereby the platen and its carriage may be folded into compact relation to the banks of keys, thus making provisions for convenient transportation of the instrument. In carrying out this part of the invention I employ a foldable sectional construction of a frame adapted to support the carriage and the platen, and in the drawings this frame is shown as consisting of two main parts, one of which is carried by the adjustable stems *9*, while the other part is pivoted to the nonfoldable part and serves as a track for the platen carriage. The nonfolding part of the carriage frame thus far described consists of arms, *22*, *23*, arranged in horizontal positions to extend from the front sides of the stems *9* and having their rear portions secured firmly to said stems. The folding part of the carriage frame consists of arms *24*, *25* and a base-plate *26*. Said arms *24*, *25* of the folding member of the carriage frame normally lie alongside of the arms *22*, *23*, and the two pairs of arms are pivoted directly together, as at *27*, in any suitable way. Said pivoted arms *24*, *25* are arranged to rest upon the arms *22*, *23* when the carriage and the platen are adjusted in their operative positions, as in Figs. 1 to 4, inclusive, thus sustaining the two parts of the frame in compact relation and skeletonizing the frame, so that the type-levers may work between the arms in a way to strike against the platen *10*."

He defined claim 1 of the patent as follows:

"(1) In a typewriter, a foldable support for a platen carriage having one of its members movable to an abnormal position in overhanging relation to a keyboard."

And he defined claim 5 of the patent as follows:

"(5) In a typewriter, the combination of a two-part foldable support and a carriage provided with a platen and mounted on the adjustable member of said support; said carriage and the adjustable member being movable into overhanging relation to a keyboard."

These two claims are the only ones in the patent that are alleged to have been infringed by defendants.

The important feature of the patent has been stated. It is properly set forth by the patentee in the language quoted from his specification:

"The provision of means whereby the platen and its carriage may be folded into compact relation to the banks of keys."

It is this feature which is specified in claims 1 and 5. And when the case was before this court this was the feature which we pointed out as the distinguishing feature of the patent. If this distinguishing feature is found in the prior Carmona patent it necessarily invalidates the patent.

The sole question of importance is whether the Carmona patent clearly discloses in a typewriter a folding support for a platen carriage having one of its members movable to an abnormal position in overhanging relation to a keyboard, as specified in claim 1, or a two-part foldable support and a carriage and platen mounted on the adjustable member of the support and the carriage, the adjustable member being movable into overhanging relation to a keyboard, as specified in claim 5.

Carmona, in his specification upon which patent No. 661,849 was issued, declared:

"My invention relates to typewriters of that class in which a small number of keys (for instance, five) is employed, which by their use, either singly or in combination, govern the action of the type-locating mechanism and of a printing device. One object of my present invention is to provide means for locating the type which will be positive in action and which will not be liable to deteriorate by wear, and a further arrangement of the parts, so that the movement of the carriage will be relatively slight, and to provide an improved mechanism for effecting the impression."

He then proceeded:

"The typewriter box or casing consists of an L-shaped section *20*, which forms the rear wall and the bottom wall of the typewriter box when closed, and another L-shaped section *21* which, when the box is closed, forms the front and top walls thereof. Journaled in bearings *22* on the section *20* is a shaft *23*, extending lengthwise of the typewriter box, and on said shaft is suspended so as to turn therewith the section *21*. At the end of the shaft are arranged beveled pinions *24* which engage similar pinions *25*, arranged upon transverse shafts *26*, which are journaled in the section *20*; said shafts having rigidly attached thereto end pieces *27*. These end pieces are adapted to form feet for supporting the section *20*, as shown in figures 6 to 9. It will be understood that when the section *21* is folded upward the shaft *23*, with the pinions *24*, will be turned, and this will cause the shafts *26* to turn also, so that the ends *27* will be folded upward to close the box formed by the sections *20*, *21*. Similarly when the section *21* is folded down into the position shown in the drawings the ends *27* will automotically assume the positions shown."

The Carmona patent is a complicated one, and covers a very complicated structure. The typewriter construction consists of five keys, which serve to operate the type carriage, moving it longitudinally. The type carriage is mounted in front of the platen and is moved bodily longitudinally to bring any one of the type bars opposite the printing point, and throws a hammer below the center of the carriage, when in a normal position, to move the type to printing point. The platen is mounted on a support and is moved to an upper or lower or intermediate position, as the case may be, to receive the impression of one, two, or three type characters on each of the type bars. It was supposed to be held by friction in its upper position, that being its normal position, and to be lowered into an intermediate and lower position by means of two keys at one side of the machine. The platen is rotated by an arm with a ratchet ball connection with the platen and by a thumb piece on the end. It is operated by means of the bell crank and gear connection, with slide operated by the depression of the key. On each depression of the key the escapement mechanism operates to move the platen one-letter space, and at the end of the word the space key is operated to cause the movement of the platen a double space, to make the space between the words. Each of the keys has a pin projecting therefrom and works to confine the pins in operated relation with the straight and inclined slots of the sections of the type-locating bar. On the depression of a key the pin takes the thrust and the entire energy of movement necessary to be imparted to the type-basket or carriage, the rack, and the associating parts.

The typewriter manufactured under the Rose patent and sold under the name of Standard Folding Typewriter has the features of the mod-

ern typewriter and is easy and convenient to operate. The typewriter made under the Carmona patent had only a small number of keys (five), which by their use either singly or in combination governed the action of a type-locating mechanism and of a printing device. The key action of the Carmona machine is very different from the key action of the Rose machine and of the modern typewriters with which the public is to-day familiar. The mechanism for combining these five keys into the necessary number of letters is a complicated one, and the greater part of Carmona's disclosure consisted of a description of the operation of the keyboard and type carriage. The Carmona machine appears to have been a difficult one to operate. There were seven characters which required all five keys to be pressed at once. This could be done by pressing down "with the entire arm or hand."

The key action of the two machines, however, does not now interest us. The Rose machine is, as we have seen, foldable, and so is the Carmona machine. And it is with the foldability of the two machines that we are concerned. The main object of the Rose device as of the Carmona device is the foldability of the machine. In the Carmona machine the carriage mechanism is entirely supported by one member of the box and the key mechanism by another; the two parts being hinged at one corner. In the machine of the Carmona patent the platen support consists of two parts. In the machine of the Rose patent the platen support also consists of two parts. In the Carmona machine the frame is divided into "sections *20*, *21*," which are hinged together at *23*. One of these parts *20* carries the platen and the other part *21* carries the keyboard. In the Rose machine the frame is divided into two parts, consisting of the plate *26* and arms *24* carrying the platen, and the part *5* carrying the keyboard; these parts being hinged together at *27*. Claims 1 and 5 of the Rose patent describe the arrangement as a foldable support for a platen carriage, one of whose members (*26* in the Rose patent and *20* in the Carmona patent) is movable to an abnormal position in overhanging relation to a keyboard. In our opinion the function of Carmona's part *20* is the function of Rose's parts *26* and arms *24*, and the function of Carmona's part *21* is the function of Rose's part *5*. The function of Carmona's part *21* and Rose's part *5* is to support the keyboard, and the function of Carmona's part *20* and Rose's part *26* is to support the platen carriage. We think no valid distinction can be drawn between Rose and Carmona as regards the specific typewriter mechanism parts carried by the respective platen supports. In both machines the foldable platen carriage support carries the escapement rack, the line spacing knob, the bell and mechanism for ringing the same when the platen carriage approaches the end of the line, and the tension spring to draw the platen carriage toward the end of the line. In the Carmona machine the foldable platen carriage support has a key for operating dogs to accomplish word spacing, and a key to lower platen to the lowest position, and a key to bring the platen to intermediate position. And in the Rose patent the same support has a key at the right of the platen to release the escapement, and a key at the left to release the grip of the paper.

There is nothing in the Rose patent to confine its claims to a "stand-

ard" machine, nor to a machine with a "universal" keyboard. There is no indication or suggestion that its claim is limited to a universal keyboard. And there is no attempt to define what constitutes a "standard" machine or a "universal" keyboard. We cannot discover that the patent has anything to do with the specific character of the keyboard. The question of the validity of the patent and the question of the infringement of the patent is obviously not to be determined by the number of the keys constituting the keyboard, or by the number of the parts of the typewriter mechanism added to the foldable part of the platen support.

It is a matter of no consequence, for the purposes of this case, whether the type bars are carried by one or the other part of the foldable support, or whether or not the particular mechanism for causing the keys to operate the type bars is identical, or whether the keyboard contains 5 or 25 keys, or whether the platen support is skeletonized so as to expose some of the parts even when the machine is folded, or unskeletonized so as to completely inclose the entire mechanism when folded, or whether Carmona's platen support is a "box" and Rose's support is a "frame," or whether the operator folds the foldable part of the platen support down toward the keys or the keys up toward the platen. The one vital and important fact which stands out above all else is that in both of these typewriter machines the platen support is foldable into overhanging relation with the keyboard. It is that fact which is decisive of this case, because it is that feature which is the subject of claims 1 and 5 of the Rose patent, and it is that feature which is clearly disclosed in the prior Carmona patent.

The complainant's expert was asked on cross-examination what was meant in the Rose patent by the words in claim 1 "overhanging relation to a keyboard." He answered:

"In the patent in suit, 754,242, this foldable character of the platen carriage support into overhanging relation with the keyboard has for its purpose primarily to bring the parts into such relation that the cubic dimensions of the instrument may be decreased in order to form a compact package convenient for shipment or transportation. A further object sought by the described characteristic is to provide a proper framework protection for the delicate parts of the typewriter instrument during such transportation. Viewing the phrase quoted by your question in the light of the purposes and functions sought by the patentee, it is my opinion that these words mean not necessarily the relative position noted by your question, but generally any position of the platen carriage support with relation to the keyboard of the typewriter substantially to secure the objects sought."

The purpose thus defined was as fully accomplished in the Carmona patent by the folding of the machine as it was in the Rose patent.

It has been urged upon us in the argument that the Carmona device has been found commercially impracticable, and the machine has not been manufactured. One of the experts testified that he regarded the device as practical. He said, "I don't consider it an impractical device at all." He was asked, however, "Have you ever seen a machine, other than this model, built on the lines of the Carmona patent that we have been talking about?" To which he replied: "I have seen another machine which has a key action similar to this Carmona patent, but I have never seen any other machine made to fold like this model in the

Carmona patent." And it was further brought out that the machine he had seen was not a Carmona machine. It simply had a key action which was of the same general character as that of the Carmona machine. It must be conceded that the Carmona patent is a mere paper patent, but a machine constructed under it is shown to have been capable of a limited, successful, practical operation. The patent is subject to the principle which we announced in Van Epps v. United Box Board & Paper Co., 143 Fed. 869, 874, 75 C. C. A. 77 (1906), when we said:

"Where such patents, or the machines constructed under them, embody the principle covered by a later patent, the mere fact that they are not capable of successful practical working because of objections as to the minor matters of detail in construction will not deprive them of their effect as defenses where they sufficiently disclose the invention claimed in the later patent. Pickering v. McCullough, 104 U. S. 310, 319, 26 L. Ed. 749."

The present suit is said to be another instance of an attempt to defeat a valuable invention by an abandoned "rusty relic." And our attention has been called to a decision which this court made in United Shirt & Collar Co. v. Beattie, 149 Fed. 736 (1907), in which it was said through Judge Coxe that:

"If Pine did nothing more than take an old abandoned failure and by the introduction of new and ingenious features, no matter how simple they may be, convert the rusty relic into a living machine, which does the required work better, faster, cheaper than it was ever done before, he is entitled to the protection which his patent is intended to give."

The circumstances of this case are so unlike the circumstances of that case as to make what was said in that case inapplicable to the facts of this. In that case the Boxley patent, which was the "rusty relic" alluded to, failed to disclose all the elements involved in the Pine device, and this fact, as the court declared, removed it at once from the list of anticipating references. In the case at bar the "rusty relic" of the Carmona patent discloses, in the opinion of the court, the distinguishing feature of the Rose patent.

The thought of making a typewriter foldable can hardly be regarded as a substantial novelty, in view of the well-known practice of making numberless similar articles foldable, from pocket knives to bicyles, including folding cameras, folding wheel chairs, folding beds, folding baby carriages, folding telegraph instruments, and many other articles. The purpose in all such cases has been to bring an extended article into a compact form, occupying little space for convenient transportation.

The problem of so placing the parts of a typewriter in a compact form that it could be easily packed in a small case and transported from place to place was not a particularly difficult one to solve. It required some ingenuity but nothing more. This ingenuity Rose exercised. But this ingenuity, as we have seen, had previously been exercised by Carmona. He had folded a similar machine in a similar way and for a similar purpose. The broad idea is clearly shown by Carmona. His claims read directly on Rose's device, and, being before Rose, his device anticipates. It may be conceded that the Rose typewriter is much the better typewriter. Carmona's machine may have been clumsy and inefficient and commercially unsuccessful; neverthe-

less, the broad idea of foldability was fully disclosed. The foldable support was there. It had one of its members movable to an abnormal position in overhanging relation to the keyboard.

In the machine of the Carmona patent the keyboard is a perfectly definite thing and stays in its position when the typewriter is folded. The essential essence of the Rose invention, compactness, foldability, the protection of the inner parts, are all present in both the Carmona and the Rose machines. Carmona and Rose reached the same general result—safe portability. And each reached it in the same way—by folding and unfolding the platen carriage over the keyboard.

We do not find it necessary to enter upon any discussion of the second Rose patent.

Decree affirmed.

TAIGMAN v. FORSBERG et al.

(Circuit Court of Appeals, Second Circuit. March 9, 1915.)

No. 182.

PATENTS ⇐328—VALIDITY AND INFRINGEMENT—ANTICIPATION BY PRIOR USE—MOTOR CONTROL.

The Taigman patent, No. 1,044,944, for a pulley brake for motor-controlled apparatus, and the Taigman, Wald & Britsch patent, No. 984,327, for a motor-controlled apparatus, both relating to control and brake apparatus for sewing machines operated by electric motors, *held* to disclose invention, and not shown to have been anticipated by prior use under the rule that, to establish such defense on oral evidence, the proof must be clear, satisfactory, and beyond reasonable doubt; also *held* infringed.

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

This cause comes here on an appeal from a final decree entered in the District Court of the United States for the Southern District of New York, which decree was entered on September 21, 1914, and dismissed the complainant's bill.

The complainant is a citizen of the United States and a resident of the borough of Manhattan, city and state of New York. The defendant is a citizen of the United States, residing in the state of New York, and maintains an established place of business within the Southern District of New York. David Wald is also a citizen of the United States and a resident of the borough of Manhattan, city and state of New York.

Hillary C. Messimer and Albert M. Austin, both of New York City, for appellant.

Charles Podsenick, of New York City, for appellees.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge. This is a suit in equity arising under the patent laws of the United States. The plaintiff alleges that he is the sole owner of United States letters patent No. 1,044,944 granted to him on November 19, 1912, for pulley brake for motor-controlled apparatus. He also alleges that he is the owner of an undivided two-

thirds interest in United States letters patent No. 984,327, granted on February 14, 1911, to himself and D. Wald and O. C. Britsch for motor-controlled apparatus; the plaintiff's two-third interest in the said patent being his own undivided one-third interest arising from the grant, together with the interest of his coinventor, Britsch, which he has acquired by virtue of an assignment. David Wald, as the owner of the remaining one-third interest, having been requested by plaintiff to join in the suit, and having failed to do so, has been made a defendant. William Forsberg, the other defendant herein, it is alleged, is infringing the plaintiff's rights under both of these patents. An injunction is sought, together with an accounting of the damages and profits.

The patents in suit both relate to control and brake apparatus for sewing machines operated by electric motors. Power sewing machines are driven at very high speed, and must be capable of being started and stopped instantly. The treadle used to operate the machine by foot power is utilized to move the speed control lever and apply the brake to the motor when the current is cut off. Counsel called attention to the fact that these machines are not used by skilled mechanics or electricians, and that therefore simplicity of construction and certainty of operation are essential to success. Moreover, it is necessary that the electric control or rheostat should be so constructed as to minimize or avoid danger of fire, as a spark escaping from the control box might easily set fire to the flimsy dress of the girl operator or the material being sewed. And it is important that the apparatus should be very compact, so as to occupy a very small space under the sewing machines. The patents in suit relate to improvements which go to meet the requirements above stated. The claims in suit are of a limited character. In patent No. 984,327 the specification states the object of the invention as follows:

"An object of the invention is to provide simple and efficient apparatus for controlling electric motors, which can be used for various purposes, though particularly useful in connection with motor-driven sewing machines or the like, which is rapid and positive in operation, which can be operated by means of a pedal, and which, when the pedal or corresponding part is released, automatically stops the motor."

And in patent No. 1,044,944 the specification states the object of the invention as follows:

"An object of my invention is to provide a readily actuated brake mechanism for simultaneously manipulating the brake to apply the same when the power is shut off, said mechanism having means for adjusting the support of the brake whereby the wear in the latter may be taken up and the effectiveness of the brake action varied."

If the patents are valid, infringement is admitted. To defeat the patents, defendant relies upon oral testimony as to prior uses; the testimony being unsupported by any documentary or record evidence. The defendant claims that the inventions of the patents were in public use more than two years before the patents were granted. A number of patents were set up in the answer, but none of them were referred to by defendant at the trial.

The Supreme Court of the United States, in the case of the Barbed Wire Patent, 143 U. S. 275, 12 Sup. Ct. 443, 450, 36 L. Ed. 154 (1892), held that when an unpatented device, the existence and use of which are proven only by oral testimony, is set up as a complete anticipation of a patent, the proof sustaining it must be clear, satisfactory, and beyond a reasonable doubt. The court in the course of its opinion, which was written by Mr. Justice Brown, said:

"We have now to deal with certain unpatented devices, claimed to be complete anticipations of this patent, the existence and use of which are proven only by oral testimony. In view of the unsatisfactory character of such testimony, arising from the forgetfulness of witnesses, their liability to mistakes, their proneness to recollect things as the party calling them would have them recollect them, aside from the temptation to actual perjury, courts have not only imposed upon defendants the burden of proving such devices, but have required that the proof shall be clear, satisfactory, and beyond a reasonable doubt. Witnesses whose memories are prodded by the eagerness of interested parties to elicit testimony favorable to themselves are not usually to be depended upon for accurate information. The very fact, which courts as well as the public have not failed to recognize, that almost every important patent, from the cotton gin of Whitney to the one under consideration, has been attacked by the testimony of witnesses who imagined they had made similar discoveries long before the patentee had claimed to have invented his device, has tended to throw a certain amount of discredit upon all that class of evidence, and to demand that it be subjected to the closest scrutiny. Indeed, the frequency with which testimony is tortured, or fabricated outright, to build up the defense of a prior use of the thing patented, goes far to justify the popular impression that the inventor may be treated as the lawful prey of the infringer. The doctrine was laid down by this court in Coffin v. Ogden, 18 Wall. 120, 124 [21 L. Ed. 821], that 'the burden of proof rests upon him,' the defendant, 'and every reasonable doubt should be resolved against him. If the thing were embryotic or inchoate, if it rested in speculation or experiment, if the process pursued for its development had failed to reach the point of consummation, it cannot avail to defeat a patent founded upon a discovery or invention which was completed, while in the other case there was only progress, however near that progress may have approximated to the end in view.' This case was subsequently cited with approval in Cantrell v. Wallick, 117 U. S. 689, 696 [6 Sup. Ct. 970, 29 L. Ed. 1017], and its principle has been repeatedly acted upon in the different circuits. Hitchcock v. Tremaine, 9 Blatchf. 550 [Fed. Cas. No. 6,540]; Parham v. American Button-Hole Machine Co., 4 Fish. Pat. Cas. 468 [Fed. Cas. No. 10,713]; American Bell Telephone Co. v. People's Telephone Co. [C. C.] 22 Fed. 309."

And prior to the decision in the Barbed Wire Patent, Judge Coxe, in Thayer v. Hart (C. C.) 20 Fed. 693, had said:

"The rule in such cases is very strict. It is so easy to fabricate or color evidence of prior invention, and so difficult to contradict it, that proof has been required which does not admit of reasonable doubt. Where interests so vital are at stake, where intervening years have made perfect accuracy well-nigh impossible, where an event, not deemed important at the time, has been crowded from the memory and obscured by the ever-varying incidents of an active life, it is not difficult to imagine that even an honest man may be led erroneously to persuade himself that the fact accords with his inclination concerning it. The evidence of prior invention is usually entirely within the control of the party asserting it, and so wide is the opportunity for deception, artifice, or mistake that the authorities are almost unanimous in holding that it must be established by proof clear, positive, and unequivocal. Nothing must be left to speculation or conjecture."

In the light of what the Supreme Court has said as to the testimony in such cases, let us look at the testimony relied upon in the case at

bar to defeat the plaintiff's patent. The witness Freedman, who was called by defendant, testified that he had been in the electric trade for 10 years. He was handed a control box, and he testified that he had made boxes just like it in New York in 1907. This was four years prior to the grant of patent No. 1,044,944. He was asked whether he sold them, and answered, "I sell them a whole lot." He was then asked, "That is one of them?" referring to the one in his hand. He answered, "That is it, and the name is on the cover, too." He was then shown one of complainant's boxes (Exhibit D), and testified that complainant made it and sold it in New York in 1906. This was six years prior to the application for the first of the patents in suit. He was then asked whether complainant sold boxes like that in New York, and replied:

"I could not prove the place that he sold it. For eight years he sell boxes, or nine years he sell the boxes."

But Freedman's testimony was unreliable. The name on the cover of the box he said he made in 1907 was "Freedman & Stern." But his own testimony shows that the firm of Freedman & Stern did not come into existence until 1909. There was also cast into the cover of the box the words "Patent pending." If this had been true, it would have been important, for the date of the application would have thrown light on the subject. If he had said there was an application, he would have been obliged to produce it to show its date. If he had said there was no application, he would have shown that he was guilty of a false marking of his box. To escape from this dilemma he said on cross-examination that he had paid a lawyer $25 to draw up an application, but that he had never received from the lawyer any application, and had never gone back to demand the return of the money he had paid him. Asked the name of the attorney his reply was, "It is so long ago I could not pick out the name." It appears, too, that Freedman made an affidavit on the motion for a preliminary injunction for the purpose of proving two of the prior uses, and in that affidavit made no mention whatever, and gave no hint, of any prior use by himself. It seems to us altogether improbable that, if there had been any prior use in Freedman, he would have overlooked the fact and failed to include it in the affidavit he made as to prior use in others. In consideration of all these circumstances, we are forced to conclude that the testimony of Freedman utterly fails to establish beyond a reasonable doubt a prior use in him for two years before the applications for the patents in suit. Indeed, his testimony is so far from proving it beyond a reasonable doubt that it creates almost a conviction in our minds that there was no such prior use in him.

The other witness relied upon to establish the two years' prior use was one Desure. He was asked whether he knew when starting boxes with a brake, Freedman's were first made, and he answered:

"About eight years ago. It is 1908, I believe it was—now, let me see, was it 1906? Only about six years ago, I believe."

Now it may be said of this witness, as was said of Freedman, that he, too, made an affidavit to be used on the motion for a preliminary

injunction for the purpose of proving prior use, and he, too, neither mentioned nor hinted at any prior use in Freedman. Under the circumstances, the testimony of Desure, like the testimony of Freedman, cannot be accepted as establishing beyond reasonable doubt a prior use in Freedman. And these were the only witnesses to the complainant's alleged two years' prior use. There is nothing but the unsupported recollection of these two witnesses, who may easily have been entirely wrong in fixing the date. Moreover, no claim was made that the particular box shown to these witnesses and introduced in evidence was made or sold more than two years prior to the application date of either patent in suit. At most the claim was that boxes like it were made and sold more than two years prior to the date of application for either of the patents in suit. The witnesses may easily have been mistaken in their recollection of the construction of the boxes they had in mind. It was on this defense of the prior use that the court below relied in holding the patents invalid. The complainant believed that this testimony of Freedman and Desure fell so far short of sustaining the burden of proof as to prior use that he declined to examine any witnesses in rebuttal.

We do not find it necessary to say anything concerning the loose testimony of Desure that boxes like Exhibit E had been on the market he was "almost sure for 14 years; perhaps a year less; perhaps 13 years." Exhibit E was a Diehl box, and as the Diehl Manufacturing Company was an old and established concern in Elizabeth, N. J., it would have been easy to establish by their records and their officials the facts as to this box. Moreover, the two Diehl patents were in evidence, and it appears that one of them was taken out in 1890, and the other in 1909, and neither of them shows a box having the features of the patents in suit.

The trial judge thought the case not strong upon any point, but as the evidence introduced by defendant to show the prior use had not been controverted by plaintiff he declared he might consider the testimony as to prior use "as strong, satisfactory, and sufficient to the exclusion of a reasonable doubt to establish the defense," and "as sufficient for defendant's purpose." The plaintiff, however, contends that the evidence was so weak on the subject of prior use that he was not called on to rebut it. His counsel asserts that it would be revolutionary if patents granted by the government were to be declared invalid by the courts on such "flimsy" evidence as the defendant offered in this case, and we are told that if the decision below is affirmed "it will be necessary to rewrite all of the text-books on patents." Though this states the proposition in stronger language than we should care to adopt, we agree with him in thinking that the evidence of prior use was insufficient.

We have examined all the testimony in the record, to discover whether the evidence is of such a nature as to have made it the duty of the complainant to overcome the strength of it by additional testimony to controvert that produced by defendant. We do not think it was. The rule is well established that the presumption is against two years' public use or sale, and the burden is upon the one alleg-

ing it to establish it by proof beyond a reasonable doubt. Testing the proof by which the defendant sought in this case to overcome the presumption in the plaintiff's favor, we are of the opinion that it was wholly insufficient for the purpose. If the patents are to be held void, it must be upon stronger and better testimony than was presented.

The decree dismissing the bill is reversed, with direction to enter a decree for an injunction and an accounting.

PERKINS GLUE CO. v. SOLVA WATERPROOF GLUE CO. et al.

(District Court, N. D. Illinois, E. D. June 19, 1915.)

No. 127.

1. PATENTS ⟸328—VALIDITY AND INFRINGEMENT—STARCH GLUE.
The Perkins reissue patent, No. 13,436 (original No. 1,020,655), and the Perkins patent, No. 1,020,656, each for a proces of making starch glue and the resulting product, were not anticipated by patents or processes in use in the paste-making art, disclose invention, and are valid; also *held* infringed.

2. PATENTS ⟸27—INVENTION—ADAPTATION TO NEW USE.
If an inventor finds a chemical substance devoted to a particular use, conceives the idea of applying it to a new purpose, and on experiment discovers that the substance must be treated in a particular way to suit his purpose, which method of treatment is essential to his end, but of less importance in obtaining the prior art results, he may be a real inventor, even though he selects a specific treatment in an occupied field.
[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 31, 32; Dec. Dig. ⟸27.]

In Equity. Suit by the Perkins Glue Company against the Solva Waterproof Glue Company, the Burch-Kane Company, Lowell R. Burch, and Thomas B. Kane. On final hearing. Decree for complainant.

Brown, Hanson & Boettcher, of Chicago, Ill., and Wm. Houston Kenyon, Robert N. Kenyon, and Gorham Crosby, all of New York City, for complainant.

Rector, Hibben, Davis & Macauley, of Chicago, Ill., and Livingston Gifford, of New York City, for defendants.

SANBORN, District Judge. [1] This is a suit for infringement of United States reissue letters patent No. 13,436 and United States original letters patent No. 1,020,656; the claims relied upon being Nos. 11, 13, 16, 19, 20, 24, 28, 30, 31, 32, 37 and 38 of the reissue patent and Nos. 1, 2, 3, 6, 7, and 9 of patent No. 1,020,656. Both patents were applied for by Frank G. Perkins, and issued to the complainant.

The patents relate to the process of making starch glue, also to the glue itself; cassava starch being preferably employed. The first or reissue patent covers in its first step the use of acid and heat, but

the second employs an alkali without heat. Hence the first is called the acid, and the second the alkali, patent. The process is described in the second patent thus:

"As an illustration of my process, I preferably take the cassava carbohydrate in dry form and mix with it a small amount of water and provide agitation. To this batch I then add preferably from ¼ per cent. to 1 per cent. by weight of sodium peroxid in the form of a solution of substantially 20 parts of water to 1 part of peroxid by weight. Shortly before or after this treatment I also add ¼ per cent. to ½ per cent. by weight of caustic soda in the form of a solution of about 10 parts of water to 1 part of caustic by weight. These proportions of reagents are based upon the weight of dry materials. This mixture is more or less continuously agitated for about 12 hours, but without the application of heat. The batch is then removed and dried, and is made ready for shipment to the consumer in dry form, if it is not to be used at the place where made. The glue base is preferably left in this condition until just before it is desired to use it, when it is treated in accordance with the second part of my process. The dry material obtained from the first part of my process is mixed with preferably from 2 to 3 parts by weight of water, according to the economy and strength of glue joint desired. A liquid suspension is thus formed, which is agitated and treated with a reagent which will act to dissolve the material. I believe the result is a colloidal solution. For this purpose I preferably use an aqueous solution of caustic soda or potash, using from 6 to 10 per cent. of the weight of the dry powder, of dry caustic soda, or equivalent of caustic potash. The alkali is best added in the form of a solution of from 33 per cent. to 50 per cent. strength."

Claims 7 and 9 are given as most nearly expressing the two steps referred to:

"7. The process of making a wood glue, which consists in agitating a starchy carbohydrate or its equivalent with a solution of sodium peroxid and caustic soda to decrease the water absorptive properties of the carbohydrate without rendering the carbohydrate materially soluble in water, to properly proportion the viscosity, adhesiveness, and cohesiveness resulting when the carbohydrate is dissolved to form glue, and dissolving the product thus produced with caustic soda, or its equivalent, and about 3 parts of water or less, to produce a glue for application."

"9. The process of making glue, which consists in treating a suitable amylaceous material in two stages, in the first stage treating it with sodium peroxid, or its equivalent, and caustic soda, or its alkali equivalent, and in the second stage treating with caustic soda, or its equivalent, to form an alkaline wood glue."

It is claimed for Perkins that he was the first to produce wood glue from starch which could be used in the wood veneer art with results equal to animal glue, and that he was able to get this result only after the most extended and patient experiment for a number of years. It is conceded that starch sizes and pastes had been produced by others, but it is said he was the first to discover the suitable proportion and co-ordination of the variable factors of the two successive steps; the first a slow and partial starch-degenerating step, and the second an alkaline dissolving step, so regulated as to make the product like good animal glue of the proper viscosity to be spread by machinery over a large surface, and of suitable cohesiveness in itself and adhesiveness to the wood, and possessing penetration and holding power, as well as being moisture proof and not affected by heat or drought. It is also claimed that substantially all the prior art was considered by the Patent Office on Perkins' applications, and that he was granted

a German patent after strenuous opposition, and upon a full hearing, accompanied by actual experiments and tests.

There are many prior patents covering vegetable paste, size, and mucilage. Of these are the French patent to Ferdinand Virneisel, No. 337,001, issued November 16, 1903; the German patent to Gerson & Sachse, No. 167,275, of January 31, 1906 (which is the German edition of Virneisel); the German patent to Kantorowicz, No. 88,468, of August 7, 1896; and the American patent to Higgins, No. 579,872, of 1897. Of these the best examples are Virneisel and Gerson & Sachse. If the patents in suit were only for sizes, pastes, or mucilages, they could only be sustained as covering specific processes. But it is claimed that Perkins was the first to teach the practical art of making vegetable glue equal to animal glue, and that, even if his glue base is substantially the same as that of Virneisel (which is not admitted), he applied it to a new use of great utility by producing a cheaper adhesive, as good as animal or hide glue, less objectionable as to odor and in other respects. It is further claimed that defendants deliberately appropriated the Perkins base after it had become successful, by sending an agent to the Perkins manufactory under a false name, hiring a Perkins foreman, advertising that they could produce the Perkins base, and using the identical process for awhile, and then changing it only in an unimportant particular.

Defendants do not make, use, or sell the Perkins glue as it is after the second step, ready to apply to the wood veneers. They only make the Perkins glue base, and sell it to wood veneer manufacturers, who are equipped with the tanks, pipes, rolls, and other machinery used for spreading the product. If they do not infringe, therefore, by producing the base, they can be held as infringers only if the facts justify a finding of contributory infringement.

The veneer gluing industry is now very extensive. Veneers are made with from two to five layers, often with the grain at right angles in the adjacent sheets, and are very strong, durable, and ornamental. Before the Perkins invention the more expensive animal glue was used exclusively for this purpose, but the former may now be used as a substitute. It must, however, have a large footage in order to compete. One pound should cover an average of 50 square feet. It must be spread by machinery, have the proper consistency to flow through feed pipes to the spreading rolls, properly penetrate the wood as well as cover its surface, and must not penetrate too far so as to leave an empty joint. It must be homogeneous and nongelatinous, and above all possess great cohesive strength and great adhesion to the wood. It should dry rapidly, and never contract materially, so as to destroy cohesion. The necessity or desirability of these qualities, and others which might be mentioned, shows the exacting character of the glue veneer art, so it is not strange that it should require such long and patient experiment as the testimony shows.

The Perkins invention has been very successful. Millions of pounds of what is called the glue base (being the product of the first step of the alkali patent) are sold each year. Apart from certain equities

and presumptions favorable to the complainant, the following account of the prior art and defendants' practice, written by defendants' counsel, is a clear and generally fair statement:

"At the time Perkins entered this field it had long been old to form adhesives by dissolving starch in a suitable aqueous solution in different proportions of starch to solution, according to the use to which the adhesive was to be put. The starch solutions so formed were used in various relations as substitutes for animal glue, as in sizings and coatings of various kinds, as well as in the gluing together of bodies of wood and the like. The solvents more commonly employed were hot water and cold dilute aqueous solutions of caustic soda; the former being used where it was desirable to avoid staining or other injury by the caustic, and the latter to dispense with heat. The caustic solvents were also sometimes heated.

"Starches as found upon the market, then, as now, had different degrees of solubility, depending on the sources from which they were derived, the processes by which they had been separated from the plant, and their subsequent treatment. Consequently, when dissolved under the same conditions they would yield adhesives of different degrees of fluidity, dependent upon the solubility of the starch. It was established commercial practice to treat the less soluble raw starches, which would not, without excessive water, yield sufficiently fluid solutions for the various purposes for which they were designed, with reagents to increase their solubility, after which they were dried and placed upon the market. The degree of solubility of the starch depended on its original condition and the extent to which the treatment was carried, and varied from the substantial insolubility of raw starch to the ready solubility of soluble dextrin or glucose. For some uses of such adhesives one degree of solubility was desirable, and for other uses another. Thus, where a very thin, penetrating, easily absorbed coating, readily soluble in cold water, was desired, as, for example, for envelopes, postage stamps, and the like, glucose or soluble dextrin was best. For starches for certain laundry purposes and sizings, a material less soluble in cold water was advantageous. Different sizings demanded different degrees of solubility. By stopping the process of degeneration or modification of the starch at the proper point, any required degree of fluidity within wide limits could be attained.

"The process is a progressive one, as before pointed out, and since some of the starch grains are more readily affected by the reagent than others, at any particular stage of the treatment a batch contains grains in different stages of degeneration or solubility. Thus, at one point of the treatment the batch will contain dextrin along with other less modified starch granules. It had long been known at the time Perkins entered the field that dextrin was a weaker adhesive than less fully treated starch, and that therefore, to get a maximum strength of product the treatment should not be carried to the point where dextrin, which is soluble at ordinary temperatures, is formed. Therefore, when an adhesive with great strength was desired, care was taken to stop the treatment at a point where little or no dextrin had been formed in the batch. Now, as before stated, it is desirable in all adhesives to obtain the necessary degree of fluidity with as little water as possible, since the latter must be eliminated by drying in setting the material. For this reason it was recognized as desirable to carry the process as far as possible without the formation of the objectionable dextrin, and thus secure a maximum fluidity without detriment to the strength and adhesive qualities of the material.

"Many different reagents can be and have been employed to effect this degeneration, and among them the very reagents employed by defendants. We find in a single prior art patent the preparation of the identical glue base or material by degenerating starch to the same point to which defendants' material is modified, by the same reagents, and by the same method. This material, as stated by the patent, was put upon the market in the same form that defendants' material is put upon the market, and was sold, to be dissolved by the user in a solvent containing the same aqueous solution, of the same reagent, of the same concentration as defendants' customers employ. The only difference between the process of this particular patent and the

practice of defendants is in the use to which the glue material is put and the consequent difference of dilution of the solution thereof. The patentee refers to the use of his adhesive for dressing or finishing, i. e., sizing or stiffening fabrics, while defendants and their customers employ the material for sticking veneer layers together. Therefore the prior art patentee uses and describes a relatively dilute solution, while the defendants employ a relatively heavy solution. No other difference exists. It is the defendants' view that this difference is an immaterial one, especially in view of the fact that similarly modified starch had been dissolved in aqueous solution in substantially the same proportion of starch to water employed by defendants, to make a glue for the same purpose as that for which defendants' glue is employed, to wit, to glue wood together, and otherwise as a substitute for animal glue."

In addition to the defense outlined in the quoted statement, defendants urge that complainant has raised a false issue by comparing its present product and process with the prior art, instead of so comparing the products and processes disclosed in the two original Perkins applications. They urge that it is a false issue to take all the discoveries as to proportions, manipulation, and apparatus up to the present time, and the present product itself, and set them off against Virneisel; the true question being: What did Perkins show when he went into the Patent Office? and what did Virneisel, Kantorowicz, Higgins, and other prior inventors disclose by their prior patents? This claim of defendants treats all the material amendments made during the Patent Office proceedings as new matter, not authorized by law, and hence to be rejected.

In order further to get the full force of defendants' position (so far as may be without giving the full argument), it should be said Perkins merely occupied a particular part of a prediscovered field. The important question was how far the starch should be degenerated in the first step of the process. Defendants' counsel say:

"The two extremes were the untreated starch insoluble in water at one end of the line, and at the other end the dextrinized product soluble in cold water. Between these two extremes lay a range or a field of varying degrees of degeneration. But this intermediate field had already been discovered, entered, and described by many inventors, including Virneisel, Kantorowicz, Brueder, etc. All of these inventors had expressly described as preferred that degree of degeneration just short of solubility in cold water, as we will later on more particularly show. Therefore, when Perkins appeared upon the scene, nothing remained that he could possibly do excepting to select some other specific degree within this field or range. Inevitably his invention, if any, must be one of simply narrowing or limitation, and it is from this standpoint that all the questions in the case must be viewed, including questions as to new matter introduced after the original applications were filed, and particularly after the death of Mr. Perkins."

[2] It seems obvious that this contention would be perfectly sound if the Perkins patents related to a new form or process of an old product. But how is it to be regarded when applied to a new product? If an inventor finds a chemical substance devoted to a particular use, conceives the idea of applying it to a new purpose, and on experiment discovers that the substance must be treated in a particular way to suit his purpose, which method of treatment is essential to his end, but of less importance in obtaining the prior art results, it is apparent that he may be regarded as a real inventor, even though he selects

a specific treatment in an occupied field. If he were making only a paste, as others had done, it might not be invention to select part of the old field of experiment, although he might thus produce an improved paste. But he discovers a novel and valuable use for the old product, which he modifies to suit the new purpose. In connection with his new and useful result, and as against a person who produces the old product as modified, and who sells it for the new purpose, he is an inventor, entitled, not only to restrain such sale, but also the manufacture or use of the product.

Two cases in this circuit may be referred to as supporting and illustrating this position: Kuehmsted v. Farbenfabriken, 179 Fed. 701, 103 C. C. A. 243, affirming (C. C.) 171 Fed. 887 (the Aspirin Case); and Hoskins Mfg. Co. v. General Electric Co. (D. C.) 212 Fed. 422, affirmed 224 Fed. —, — C. C. A. — (the Calorite Case). In the Aspirin Case, Hoffman took the exact formula of an old chemical powder formed from acetic acid and salicylic acid, and discovered a method of purifying it so as to enormously increase its medicinal properties. There was another way to purify it, and the evidence did not show just how defendant did this; yet he was held as an infringer. Here were the two steps analogous to the glue process. One was old; the other new, and with an improved result. The Calorite Case relates to the nickel-chromium wire used in electric flatirons, toasters, etc. The inventor claimed only a new use for an old alloy, and his invention was sustained. Judge Kohlsaat cites many cases of the new use of old materials in which the patents were held good.

The patents are meritorious and valuable inventions, and have been successful. They should not be narrowly construed, but treated as a distinct advance in the art, achieved only by long and exhausting trials. I think they should be sustained.

In regard to infringement the evidence shows that the defendants, or some one acting for them, sent agents to the Perkins plant in Florida about the time the patents were applied for, to find out what was going on there. Shortly after this one of the defendants went there under an assumed name. Mr. Warren, foreman of defendant company, formerly worked for the Perkins Company, and applied for a position with defendants, telling them that he knew how to make Perkins glue, and later he was hired for the purpose of making glue from cassava starch, which he had been doing in the Perkins plant.

Defendants make their glue in substantially the same way as the Perkins Company, except that in the first step of the process defendants use sal ammoniac in addition to caustic soda. Defendants' position is that the Perkins patents are so limited that this change of the first step avoids infringement. Their counsel state the matter thus:

"Long prior to the issue of the patents in suit defendants were engaged in the treatment and sale of starch for this purpose, and at the time the patents issued the defendants' process involved the use of peroxid of soda and caustic soda as the reagents for degenerating or modifying starch. After plaintiff's patents issued and had come to the attention of defendants, the process was changed from the use of caustic soda and peroxid, which was claimed in one of them to the use of the present solution of peroxid of soda and sal ammoniac, which, as will later appear, are reagents long employed for the purpose in the prior art."

Defendants used the Perkins process until August, 1912, and then changed the first step as follows: Instead of using ¼ per cent. peroxid and ½ per cent. caustic, they used ¾ per cent. peroxid, omitted the caustic, and added ¼ per cent. sal ammoniac several hours later. The Perkins tests were used to determine when the starch had been properly processed. The witness Hase testified that he demonstrated the Solva glue in 1913 and 1914 in practically the same way the Perkins glue was used in the plant of the St. Louis Basket & Box Company, where he had been foreman. This is the second step of the process. On January 5, 1912, the Solva Company wrote to Gorham Bros. thus:

"For some time we have been trying to interest you in our Solva glue, and due to the fact that we are to-day making glue identically as that which you are getting from the Perkins Glue Company—in other words, we have in our employ the glue maker and chemist who were with the Perkins Company for 11 years past—we can furnish the same glue as what you are using."

As to the use of the Perkins second step, the Solva Company wrote Gorham Bros. April 12, 1912, as follows:

"This glue you can use at the rate of 2½ or 2¾ pounds of water to one pound of glue, caustic to be used 7 per cent. to the cold mixture and 3 per cent. with heat. Some of the trade are using the 3 per cent. mixture, which avoids the staining of wood."

It often happens that cassava glue base can be used without any processing by the first step, in which case it is tested and sent to customers in its original state. Infringement clearly appears.

I have carefully considered the defense of prior use, and am fully satisfied from the evidence that Perkins never perfected his invention until the spring of 1907; his applications having been filed November 2, 1908. All his practice up to about the earlier date was experimental.

As to the amendments to the specifications in the Patent Office, I think they were not new matter, but only in the line of making the real invention clearer.

There should be a decree adjudging infringement of claims 13, 16, 19, 24, 28, and 38 of the acid patent, and 2, 6, 7, and 9 of the alkali patent, and for an accounting, as prayed, and injunction, with costs.

UNITED STATES v. BYRON et al.

(District Court, D. Oregon. May 3, 1915.)

No. 6726.

UNITED STATES ⊂=121—"CLAIM AGAINST THE UNITED STATES"—FRAUD—"WRITING IN SUPPORT OF ANY CLAIM."

A preliminary sworn application for the purchase of land under the Timber and Stone Act, conferring merely the privilege of purchasing land on compliance with the law and rules of the Land Department made in pursuance thereof, is not a "writing in support of, or in relation to, any claim," within Cr. Code (Act March 4, 1909, c. 321, § 29, 35 Stat. 1094 [Comp. St. 1913, § 10193]), punishing presentation of any

writing in support of, or in relation to, any claim, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeit, since a claim, within the statute, is a demand of something from the United States on the ground of right, as the assertion of a right to the title, possession, or ownership of property, or the affirming of a debt, obligation, or the like, and to constitute the crime there must be such an account claim existing or pending, and the false writing must be presented in support of, or in relation thereto.

[Ed. Note.—For other cases, see United States, Cent. Dig. § 109; Dec. Dig. ⊂⊃121.

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

Carlos L. Byron and another were indicted for crime. Demurrer to indictment sustained.

Clarence L. Reames, U. S. Atty., of Portland Or., for the United States.

P. V. Davis and E. M. Comyns, both of Seattle, Wash., for defendants.

BEAN, District Judge. Defendants were indicted for a violation of the latter clause of section 29 of the Criminal Code, which reads as follows:

"Whoever shall transmit to, or present at, or cause or procure to be transmitted to, or presented at, any office or officer of the government of the United States, any deed, power of attorney, order, certificate, receipt, contract, or other writing, in support of, or in relation to, any account or claim, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited," etc., shall be punished accordingly.

It is alleged in the indictment that on June 9, 1914, the defendants did knowingly and feloniously transmit to and present at, and cause to be presented to and presented at the United States land office at Roseburg, Or., a certain false and fraudulent writing in support of or in relation to a claim against the United States, with intent to defraud the United States, knowing the same to be false. The writing is set out in the indictment, and consists of the preliminary sworn statement or application of one Emma L. Brockwell to purchase certain described lands under the Timber and Stone Act (Act June 3, 1878, c. 151, 20 Stat. 89 [Comp. St. 1913, § 4671]). It appears to have been verified by the applicant before the receiver of the land office, and contains a statement to the effect that the applicant had personally examined the land, knew that it was unfit for cultivation and valuable chiefly for its timber, that it was worth $425, and was uninhabited, which statements, it is alleged, were untrue and false, and known to be such to the defendants when they presented or caused such application to be presented at the land office.

The defendants demurred to the indictment on the ground, among others, that a preliminary sworn statement or application for the purchase of land under the Timber and Stone Act does not constitute the presentation of a writing in support of or in relation to a claim against the United States, within the intendment of the statute, and in this view I concur.

The purpose of the statute is to punish attempts to defraud the United States by transmitting or presenting, or causing to be transmitted or presented, to or at an officer or office of the United States, any writing in support of or in relation to an account or claim against the United States, with intent to defraud the United States; the party presenting the same knowing it to be false, altered, forged, or counterfeit. The false writing must therefore be transmitted or presented in support of or in relation to some account or claim, and it is essential that there be an existing account or claim against the United States in support of or in relation to which the false writing is transmitted or presented.

"To make out a case under this section," says Judge Shiras, "it must appear that there is an account or claim against the United States, and that in support thereof, or in relation thereto, the defendant knowingly transmitted, or procured to be transmitted or presented, a false, altered, forged or counterfeited deed, etc. If a person knowingly transmitted a false or altered deed or other writing, but did not do so in support of or in relation to some existing account or claim, how could the United States be defrauded?" United States v. Kessel (D. C.) 62 Fed. 60.

A claim, within the meaning of this statute, is the demand of something from the United States on the ground of right, as the assertion of a right to the title, possession, or ownership of property, or the affirming of a debt, obligation, or the like, and to constitute the crime charged there must be such an account or claim existing or pending, and the false writing must be presented in support of or in relation thereto. Such seems to be the adjudged cases in which the statute has been enforced as far as I am able to ascertain. Thus in United States v. Staats, 8 How. 40, 12 L. Ed. 979, and United States v. Bickford, 4 Blatchf. 339, Fed. Cas. No. 14591, the false writings were submitted in support of applications for a pension and for a bounty land warrant due as a matter of right under a law of the United States to certain qualified persons for military service. In United States v. Davis, 231 U. S. 183, 34 Sup. Ct. 112, 58 L. Ed. 177, the false writing was presented in support of an application for a soldier's additional homestead under a statute of the United States. In each of these cases a right or claim against the United States was vested in certain persons by virtue of a law thereof, and the false writings were submitted in support of such claims.

Now the alleged false writing set out in the indictment, and which it is charged the defendants presented or transmitted to the land office, was not in support of or in relation to a pending right or claim against the United States. The Timber and Stone Act does not confer the right upon any person to purchase land, but the privilege to do so upon compliance with law and the rules and regulations of the Land Department made in pursuance thereof. At the time the Brockwell application was filed, she had no claim against the United States for the land she applied to purchase or prior right thereto. Her right or claim, if any, was initiated by the filing of the preliminary sworn statement or application, and it was not, in my judgment, submitted in support of or in relation to a claim within the meaning of the statute. If perjury or subornation of perjury was committed in the making or

filing of the application, there is a law providing for the punishment of the guilty party or parties; but it is not the one on which the present indictment is based.

The demurrer will be sustained.

In re TAM CHUNG.

(District Court, D. Montana. May 29, 1915.)

No. 191.

1. ALIENS ⊜23—CHINESE—DEPORTATION.

A Chinese student, entering the United States under treaty with China providing that Chinese students shall be permitted to enter with the rights, privileges, immunities, and exemptions accorded to citizens and subjects of the most favored nation, may not be deported because he has become a laborer, and has no Chinese laborer's certificate of residence, notwithstanding the rules adopted by the Secretary of Labor, under Chinese Exclusion Act Sept. 13, 1888, c. 1015, § 8, 25 Stat. 478 (Comp. St. 1913, § 4309), providing for the exclusion of a Chinese student who has completed his studies, and who has not been granted the privilege of remaining and following some exempt occupation, for the Chinese Exclusion Act, providing for identification and admission of Chinese students, does not supersede the treaty.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 76-90; Dec. Dig. ⊜23.]

2. ALIENS ⊜28—CHINESE LABORERS—CERTIFICATE OF RESIDENCE—APPLICABILITY OF STATUTE.

Act Nov. 3, 1893, c. 14, 28 Stat. 7, providing that a Chinese laborer found in the United States without a laborer's certificate shall be deported on failure to obtain a certificate within a certain time after the passage of the act, does not apply to a Chinese student entering the country long subsequent to the act, and he may not be deported on his becoming a laborer, though not obtaining a laborer's certificate of residence.

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

Application for writ of habeas corpus by Tam Chung for his release from the custody of an immigration inspector about to deport petitioner. Writ granted.

S. C. Ford, of Helena, Mont., for petitioner.

B. K. Wheeler, U. S. Atty., of Butte, Mont., and Homer G. Murphy, Asst. U. S. Atty., of Helena, Mont., for the United States.

BOURQUIN, District Judge. This petitioner for habeas corpus to an immigration inspector about to deport petitioner to China, his birthplace, is a Chinese boy of 17 years, who as a student was admitted to this country in August, 1912. The boy attended school in Washington for one year, then joined his uncle, a restaurant proprietor, in Montana. He immediately engaged an experienced teacher of Chinese, and for 17 months thereafter, and until arrested as hereinafter mentioned, for 1½ hours every day, save Sundays, he was instructed by and recited to her in various elementary studies. To preparation

he devoted about three hours daily, and was a diligent student of good progress.

Living with his uncle, he occasionally helped about the restaurant, perhaps in return for board and lodging not otherwise paid. He was arrested and given a hearing before an immigration inspector, and thereon the Secretary of Labor ordered him deported, for that he had "become a laborer since admission" and had no Chinese laborer's certificate of residence. In this the Secretary applied a rule made by him by virtue of a provision of Chinese Exclusion Act, § 8, 25 Stat. 476, that he may make "rules and regulations not in conflict with" the act, in which rule is prescribed that a student, within our treaty with China and our laws, amongst other things, is one for whose support "adequate financial provision has been made or assured, and who, upon the conclusion of his studies, departs from the United States," or on application to an immigrant officer has been granted the privilege of remaining and following some other exempt occupation, and until which no student "shall be permitted to follow in the United States any other occupation than that of studying."

[1] Our treaty with China provides that Chinese students "shall be allowed to go and come of their own free will and accord, and shall be accorded all the rights, privileges, immunities, and exemptions which are accorded to the citizens and subjects of the most favored nation." 22 Stat. 826. The Chinese Exclusion Act provides for identification and admission of Chinese students, but neither therein nor in any other law has Congress repudiated the aforesaid treaty promise of this nation. Students of all other nations coming hither can of right follow any legitimate vocation contemporaneous with or after their studies are completed, thereto need the consent of no immigration officer, can remain here so long as they please, and cannot be deported because thereof. Chinese students are guaranteed the like rights by our treaty. Having lawfully entered this country, there is no law authorizing their deportation for any reason save that applicable to all aliens, viz., for offenses committed subsequent to entry and connected with or incidental to prostitution.

Perhaps Congress could have broken our plighted faith and treaty by law stipulating that Chinese students should loaf in their leisure and not labor for a living—could have placed Chinese students who here turn to honest labor for a livelihood on the plane of panders and prostitutes so far as deportation is concerned; but, happily, not having done so, it needs no argument to demonstrate that the Secretary of Labor cannot—that it is not given to him to violate the national promise, repudiate the treaty, and convert it into a mere scrap of paper. He is but the creation of Congress, and by it has been given no such power, and his rule in effect assuming it is in conflict with the Exclusion Act and of no validity. Congress has vested him with vast power, judicial in its nature, capable of infinite abuse and tyranny, little restrained by the constitution, procedure, publicity, responsibilities, and traditions that hedge about a court, and little controlled, save by his honor and conscience; but it has its limits, and they have been exceeded here.

That a Chinese lawfully entering this country can lawfully change his vocation, and can labor of right and not of privilege granted by some immigration officer, and that without incurring the penalty of deportation by executive orders or otherwise, is the rule of 20 years' unbroken current of authority, from United States v. Sing Lee (D. C.) 71 Fed. 680, to Ex parte Lew Lin Shew (D. C.) 217 Fed. 317. See United States v. Foo Duck, 172 Fed. 856, 97 C. C. A. 204; United States v. Lim Yuen et al. (D. C.) 211 Fed. 1001; United States v. Hom Lim et al. (D. C.) 214 Fed. 456; Ex parte Lam Pui (D. C.) 217 Fed. 459. That in the face thereof like executive deportations continue, to put it mildly is amazing, though not incomprehensible to the student of history. And how many poor and friendless Chinese, unable to contest executive orders in the courts, have been so deported in defiance of our treaty, is at least food for disquieting thought. Incidentally the Secretary's rule harks back to the fourteenth century, when in feudal England those in villeinage were prohibited from changing from the calling in which they were bred; but even therein it was by law—act of Parliament—and not by executive orders. Surely those days are gone forever.

[2] In reference to petitioner's want of a Chinese laborer's certificate of residence, the law of 1893 (28 Stat. 7) providing therefor has no application to those entering the country long subsequent. In re Chin Ark Wing (D. C.) 115 Fed. 414. Petitioner is lawfully in this country, entitled to remain, not subject to deportation, and he is discharged from custody.

Writ granted.

In re FLEURY.

(District Court, E. D. New York. May 6, 1915.)

1. ALIENS ⇐61—NATURALIZATION—STATUTORY PROVISIONS.

Under Naturalization Act June 29, 1906, c. 3592, § 4, par. 2, 34 Stat. 596, as amended by Act June 25, 1910, c. 401 § 3, 36 Stat. 830 (Comp. St. 1913 § 4352), authorizing any person who is qualified under existing law to become a citizen and who has resided in the United States during the five years next preceding May 1, 1910 and who because of misinformation has acted under the impression that he was a citizen, or qualified to become a citizen on petitioning therefor, may apply to the court to become a citizen, without proof of former declaration, an alien who has resided in the United States for 18 years, and who has had first papers since 1897, and who has because of misinformation had the impression that he could become a citizen by filing his application, and who is qualified to become a citizen, may on his application become a citizen, as against the objection that his declaration of intention was not used for 7 years, after the adoption of the Naturalization Law.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 119–122; Dec. Dig. ⇐61.]

2. ALIENS ⇐68—NATURALIZATION—STATUTORY PROVISIONS.

The amendment of the Naturalization Law by Act June 25, 1910, contemplates that an alien may apply and file his petition for naturalization by complying with specified requirements, and where his petition is ac-

cepted, and he is allowed to apply, the limitation that a declaration of intention cannot be used after a person has had it for 7 years is waived.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 138–145; Dec. Dig. ⊂⊃68.]

Application of George A. Fleury to become a citizen of the United States. Granted.

Charles G. Stevenson, of Brooklyn, N. Y., for petitioner.

Melville J. France, U. S. Atty., and Thomas J. Cuff, Asst. U. S. Atty., both of Brooklyn, N. Y., for the United States.

CHATFIELD, District Judge. I think the present case is unusual, but it does not seem to me there is much room for discussion. The Naturalization Law provides, in paragraph 2, section 4, that no declaration of intention can be used after a person has had it 7 years. This is a part of the provisions requiring him to file his petition on a certain form, which contains statements as to a number of different essentials under this present statute. Now it has been decided in the Yunghauss Case, 218 Fed. 168, 134 C. C. A. 67, and the Goldstein Case (D. C.) 211 Fed. 163, that this makes a 7-year statute of limitation which has been provided by Congress, and that we have nothing to do but follow the direction of the law.

[1] In 1910, by the act of June 25th, Congress amended paragraph 2, section 4, by inserting after the proviso waiving, in some cases, the requirement that a petition be signed in the applicant's own handwriting (which is an exception in favor of those who had *old* petitions), that *certain* parties may file their application in the same way that they might have done if they had first papers in their possession which were capable of use. This amendment provides that this may be done only in a case where the person has resided in the United States continuously 5 years preceding May 1, 1910. Any such "qualified" person, who has been misinformed, either to the extent of having the impression that he was a citizen, or to the extent of having the impression that he was qualified to become a citizen upon having his petition heard, and who has shown by his acts that in good faith he has either assumed or exercised the duties (in the one case) of a citizen, or (in the other case) of a person who could become a citizen as soon as his petition could be heard, may apply to the court, and the court then has jurisdiction to naturalize the alien at once if "the court in its judgment believes that such alien has been for a period of more than five years entitled on proper proceedings to be naturalized." This last provision relates to the 5 years immediately preceding the hearing, rather than the 5 years from 1905 to 1910, and the word "entitled" is equivalent to "qualified."

In the present instance the applicant is within the jurisdiction of the court. He has resided in the United States over 18 years. He has had first papers since 1897, and has, because of misinformation, had the impression that he could become a citizen by filing his application. He has admittedly a good character. He has filled positions which require a man to be a citizen, but without knowledge of that

requirement, having recently heard thereof, and having recently learned of his inability to use his original first papers. He certainly meets the requirements that he has been for more than 5 years entitled, upon proper proceedings, to be naturalized, because he meets the standards of intelligence, moral character, and sufficiency of belief in the government and the Constitution, and has had first papers. The only possible objection is that the last 5 years of those during which he was qualified, which immediately preceded the filing of his petition, occurred more than 7 years after the adoption of the Naturalization Law. But valid first papers are not needed in such a case, for the object of the section is to allow action "without proof of former declaration."

While the amendment would seem to have been drawn to meet cases where citizens who have declared their intention have some privilege, such as voting, yet in the state of New York, intended citizens are recognized by the United States law to have certain rights and protections which distinguish them from aliens, even though they may not vote, and if Congress has seen fit to help out those who by mistake did not use their original first papers, or are seeking to rectify a mistake on the part of their father or some other individual, it would seem that the enforcement of an arbitrary statute of limitation against the use of a first paper, where no objection is shown in any way to the applicant's qualifications, would be to construe the intent of Congress as a penalty. This is not necessary in a statute intended to convey a privilege. As long as the applicant comes within the letter of this amendment, it would seem that his case should not be opposed, unless some other reason can be urged.

[2] A further reason in this case for granting the application is that the petition has already been filed. The amendment of the law plainly contemplates that a person may apply and file his petition, if he complies with certain requirements. If his petition is accepted, and he is allowed to apply, the statute of limitations has been waived by the court's action. Unless it is evident that the circumstances were such that the receipt of the application was not a waiver, it would seem that the court should not withhold a certificate.

In the present case the applicant may have his papers.

UNITED STATES to Use of MILLER et al. v. MITCHELL et al.

(District Court, E. D. New York. March 29, 1915.)

COURTS ⇐344—UNITED STATES COURTS—ADOPTION OF PRACTICE OF STATE COURTS—SERVICE OF PROCESS.

Rev. St. § 914 (Comp. St. 1913, § 1537), provides 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, etc., in the courts of record of the state within which such Circuit or District Courts are held. Section 787 (section 1311) provides that it shall be the duty of the marshal to attend the District and Circuit Courts and to execute all lawful precepts

directed to him and issued under the authority of the United States. Code Civ. Proc. N. Y. § 425, provides that the summons may be served by any person other than a party to the action. *Held*, that the summons in an action at law in a federal court sitting in New York need not be served by the marshal, since the Uniformity Act applies to the service of process, and while, if the marshal is commanded by a writ to serve it, no other person may perform that duty, no federal statute requires that all process shall be directed to the marshal, and section 787 applies only to process "directed to him."

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 917; Dec. Dig. ⊂⊃344.]

At Law. Action by the United States, to the use of Frank Miller and others, creditors of Edmund H. Mitchell and another, doing business as Mitchell & Co., against Edmund H. Mitchell and Henry T. Mitchell, doing business as Mitchell & Co., and another. On motion to vacate decree. Motion denied.

See, also, 215 Fed. 263.

King & Booth, of New York City, for use plaintiff Miller.

George R. Coughlan, of New York City, for use plaintiff E. S. Packard Co.

George W. Bristol, of New York City, for use plaintiffs J. Martin Briggs, Augustus Benvenutti, and Arthur M. Hazell.

Arthur Furber, of New York City, for defendant E. H. Mitchell.

Nelson L. Keach, of New York City, for defendant Illinois Surety Co.

VEEDER, District Judge (after deciding other issues). The validity of the service of the summons is challenged, the contention being that in the United States court service can legally be made by the marshal alone. This is undoubtedly true in equity causes by virtue of equity rule 15 (198 Fed. xxiii, 115 C. C. A. xxiii). But the summons in issue was served in an action at law, with respect to which Rev. St. § 914 (Comp. St. 1913, § 1537), provides:

"The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the Circuit and District Courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such Circuit or District Courts are held."

There can be no doubt that service of process is within the categories of the foregoing act. Amy v. Watertown, 130 U. S. 301, 9 Sup. Ct. 530, 32 L. Ed. 946; Perkins v. Watertown, 5 Biss. 320, Fed. Cas. No. 10,991. Unless, therefore, Congress has by statute prescribed a specific course of procedure for the federal courts, or has legislated generally upon the subject-matter embraced in the proceeding sought to be pursued, the state practice prevails. Federal legislation must, of course, be followed, although opposed to the practice and procedure of the state courts. With respect to the form of process, Rev. St. § 911 (Comp. St. 1913, § 1534), provides:

"All writs and processes issuing from the courts of the United States shall be under the seal of the court from which they issue, and shall be signed by the clerk thereof. Those issuing from the Supreme Court or a Circuit

Court shall bear teste of the Chief Justice of the United States, or, when that office is vacant, of the Associate Justice next in precedence, and those issuing from a District Court shall bear teste of the judge, or, when that office is vacant, of the clerk thereof."

Accordingly it has been held that an action may not be commenced in the federal courts by a summons issued in the name of the plaintiff's attorney, pursuant to the mode of commencing actions in the courts of the state of New York. Martin v. Criscuola, 10 Blatchf. 211, Fed. Cas. No. 9,159; Peaslee v. Haberstro, 15 Blatchf. 472, Fed. Cas. No. 10,884; Dwight v. Merritt (C. C.) 4 Fed. 614. Concerning the method of service Rev. St. § 787 (Comp. St. 1913, § 1311), provides:

"It shall be the duty of the marshal of each district to attend the District and Circuit Courts when sitting therein, and to execute, throughout the district, all lawful precepts directed to him, and issued under the authority of the United States; and he shall have power to command all necessary assistance."

Accordingly, the marshal or his deputy must serve process directed to him. If the marshal is commanded by the writ to serve it, no other person may perform that duty, although the state law may authorize such service by a private person. Schwabacker v. Reilly, 2 Dill. 127, Fed. Cas. No. 12,501. That case arose in the Eastern district of Missouri, and Judge Dillon states in his opinion that in Missouri the original writ is a summons directed to the officer who is to execute it.

But no federal statute requires that all process shall be directed to the marshal. The statute merely requires him to execute "all lawful process directed to him." Beyond this the Uniformity Act applies, and the state practice controls. Gordon v. Scott, Fed. Cas. No. 5,620, 2 N. B. R. 86 (quarto, 28). In that case Judge McCandless, sitting in the Western district of Pennsylvania, said:

"It is true that the marshal is the executive officer of the court, and may be directed by the court to serve it; but the mandate of the writ is not to him, but to the witness, who is commanded to appear and testify. As there is no legislation of Congress directing a service of a subpœna by the marshal, we do not feel disposed to depart from the practice of the state courts, which has always permitted the party to serve the precept, and allowed him costs for the same."

The summons in issue here, and the form regularly in use in this court, complies in the same way with the state practice. It is directed to the defendants named, in the form prescribed by section 418 of the Code of Civil Procedure. And section 425 of the Code provides:

"The summons may be served by any person, other than a party to the action, except where it is otherwise specially prescribed by law."

The motion by the defendant Edmund H. Mitchell to vacate the decree herein is therefore denied.

FORD MOTOR CO. v. WILSON.

(District Court, D. Rhode Island. June 9, 1915.)

No. 52.

1. TRADE-MARKS AND TRADE-NAMES ⟸73—UNFAIR COMPETITION—USE OF NAMES.

The Ford Motor Company is entitled to enjoin a dealer in auto parts adapted for use on its automobiles, but not manufactured by it, from advertising them as Ford articles and issuing a publication entitled "Fordealer," thus indicating dealings in articles of Ford manufacture, since, while such dealer has a right to inform the public that he is manufacturing articles suitable for use on such machines, in common acceptation the word "Ford" indicates articles manufactured by such company.

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

2. TRADE-MARKS AND TRADE-NAMES ⟸87—UNFAIR COMPETITION—LACHES OR ACQUIESCENCE.

Even though such company had some knowledge of defendant's description of his articles as Ford articles, mere nonaction or the ignoring of a few violations of its rights could not deprive it of the right to stop such unauthorized use of its name when it became of considerable magnitude, nor confer upon defendant any right to put forth his goods with a misrepresentation as to their manufacture.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 96; Dec. Dig. ⟸87.]

In Equity. Suit by the Ford Motor Company against Thomas Wilson, doing business as the Auto Parts Company. Preliminary injunction granted.

Crisp, Randall & Crisp, of New York City, and John S. Murdock, of Providence, R. I., for complainant.

Wilson, Gardner & Churchill and Horatio E. Bellows, all of Providence, R. I., for respondent.

BROWN, District Judge. [1] The defendant does business under the name of Auto Parts Company, and manufactures and sells various parts adapted for use in Ford automobiles. He has extensively advertised these parts, preceding the name of the part with the word "Ford."

Though the parts are adapted for use in Ford machines the description of the article as a Ford article would be taken to mean an article manufactured or put out by the Ford Company, and would not properly include an article wholly manufactured and put out without the supervision of the Ford Company.

The defendant also issues a publication entitled "Fordealer," thus indicating dealings in articles of Ford manufacture. This is contrary to the fact, since the articles advertised and dealt in are of his own manufacture, and are not in any way derived from the complainant.

While the defendant has a right to inform the public that he is manufacturing articles suitable for use on Ford machines, he should not be permitted to advertise them as Ford articles, but should be

required to describe them in such way as to indicate that they are not manufactured by the complainant.

The defendant makes some attempt to show acquiescence by the complainant. This attempt is not successful. So far as the publication called "Fordealer" is concerned, this was begun after protest by the complainant against the use of the Ford name.

[2] Even had the complainant some knowledge of the description of the defendant's articles as Ford articles, mere nonaction, or the ignoring of a few instances of violation of right, could not deprive it of the right to stop an unauthorized use of its name when such use became of considerable magnitude, nor could it confer upon the defendant any right to put forth his goods with what must be held to be a misrepresentation as to origin.

While the defendant may have considered himself morally justified in calling these articles Ford articles, because they were adapted for use in Ford machines, such an opinion would be erroneous, since, in common acceptation, the word "Ford" would indicate, not merely adaptation to use in Ford machines, but articles manufactured by the complainant company. It is in the latter respect that the defendant has violated the complainant's rights.

Preliminary injunction will be granted.

UNITED STATES v. MOY YOU.

(District Court, S. D. New York. June 2, 1915.)

ALIENS ⊜32—EXPULSION—DEPORTATION OF CHINESE—EVIDENCE.

Evidence *held* to sustain a finding that a Chinese was not entitled to remain in the United States on the ground of citizenship.

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

Proceeding by the United States for the deportation of Moy You. Order of commissioner, directing deportation, affirmed.

H. S. Marshall, U. S. Dist. Atty., of New York City, for the United States.

Robert M. Moore, of New York City, for defendant.

LACOMBE, Circuit Judge. Right to remain is based solely on the ground of alleged citizenship. Upon inquiry by the court if defendant wished to introduce any further testimony, the answer was in the negative. His own testimony has little probative value, not because he is a Chinaman, but because of its inconsistencies and contradictions. Before the commissioner he said that he was born at 905 Dupont street, San Francisco, about 32 years before, that his parents told him so, that he went to China with them when he was 10 years old, stayed there about 18 years, and then returned to the United States by way of Vancouver. These statements were made after consultation with his counsel; but on his first examination by the inspector he stated

that he had lived in the United States all his life, going around in different places, but could not remember the name of a single place in which he had lived, except San Francisco. Subsequently, when his attention was called to this answer, he said he gave it "because I wanted you people to release me; that is the reason I said I have not been to China." This explanation is not calculated to induce credence of any of his statements.

His single witness, Moy Fee Ni, said that he knew him when he was a small boy in San Francisco, and recognized him at once 19 years afterwards when he saw him in New York. The commissioner saw and heard this witness, but did not find his testimony persuasive. Certainly I have read nothing in it which would induce me to reverse the commissioner's finding.

Order affirmed.

EMENS v. LEHIGH VALLEY R. CO.

(District Court, N. D. New York. January 25, 1915.)

1. RAILROADS ⟸350—ACTION FOR INJURY AT CROSSING—QUESTIONS FOR JURY.
Where the testimony in an action for injury to persons riding in an automobile, which was struck by a train at a railroad crossing, was in direct conflict as to whether any signals by bell or whistle were given by the train prior to the danger signal immediately before the collision, a substantial number of witnesses, some of whom were disinterested, testifying positively that no such signals were given, while the trainmen and some passengers testified that they were given, the question was one for the jury, and their finding thereon will not be disturbed.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1152–1192; Dec. Dig. ⟸350.]

2. RAILROADS ⟸346—ACTION FOR DEATH OF PERSON STRUCK AT CROSSING—CONTRIBUTORY NEGLIGENCE—PRESUMPTION.
The presumption is that a person struck and killed on a railroad crossing looked and listened, and, in an action against the railroad company to recover for the death, the burden of establishing contributory negligence by showing that the deceased did not look or listen is on the defendant.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1117–1123; Dec. Dig. ⟸346.]

3. RAILROADS ⟸348—INJURY AT CROSSING—CONTRIBUTORY NEGLIGENCE.
A finding by a jury that a passenger in an automobile, who was killed at a railroad crossing, was not chargeable with contributory negligence, *held* sustained by the evidence, where it was shown that others in the car looked and listened continuously after reaching a point 700 or 800 feet from the crossing, and once stopped for that purpose, but neither saw nor heard a train; that all were strangers to the locality; that the view of the tracks, until within a very few feet of them, was to a very large extent obstructed by an orchard, fences, and other structures; and that the train gave no signals by bell or whistle and was running downgrade, with the steam shut off.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1138–1150; Dec. Dig. ⟸348.]

4. RAILROADS ⟸301—PUBLIC CROSSINGS—MUTUAL RIGHTS AND DUTIES.
Both those on a railroad train and those traveling on a crossing highway have a legal right to pass over the point of crossing and to require

due care on the part of the others. While the railroad train has the preference and the right of way, it is bound to give warning of its approach, and such warning must be reasonable and timely; and, on the other hand, those crossing a railroad track are bound to exercise ordinary care to ascertain whether a train is approaching.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 956; Dec. Dig. ⊂⊃301.]

5. RAILROADS ⊂⊃350—INJURY AT CROSSING—CONTRIBUTORY NEGLIGENCE.

A person driving or riding in an automobile, a stranger to the locality, who, on approaching an intricate railroad crossing at an angle of 17½ degrees, the intricacies of the crossing being unknown to him, stops at a distance of 150 feet from the crossing and within 50 feet in a direct line from the tracks and looks and listens and hears no train or signal, no signal being given, and who then proceeds at reasonable speed, continuing to look, and listen without seeing or hearing any train until it is upon him from behind, running downgrade without steam on, cannot be charged with contributory negligence, as matter of law, in not again stopping, there being nothing in the situation known to him to impress him with a doubt of the propriety of going forward.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1152–1192; Dec. Dig. ⊂⊃350.]

6. EVIDENCE ⊂⊃122—RES GESTÆ—EXCLAMATION OF THIRD PERSONS—RESTRICTION TO SPECIAL PURPOSE.

On the issue as to whether or not the engineer of a railroad train sounded the signals for a crossing upon which the train struck an automobile, a witness, who with his wife was standing near the track and in view of both the train and the approaching automobile, testified that the signals were not given. On cross-examination it was sought to show that his attention was not, or might not have been, on the matter of signals. *Held*, that on re-examination it was proper to permit the witness to state an exclamation by his wife, "Why don't the train whistle," as showing that his attention was particularly called to the subject; the jury being told that the exclamation was not to be considered as evidence on the issue.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 339–350; Dec. Dig. ⊂⊃122.]

7. RAILROADS ⊂⊃320—ACCIDENTS AT CROSSINGS—FAILURE TO GIVE SIGNALS—PRECAUTIONS AS TO PERSONS SEEN AT CROSSING.

Those in charge of a rapidly moving railroad train approaching a highway crossing without signals, and seeing and appreciating that a traveler at the crossing is not aware of his danger and is going in front of the engine, may not assume that he will see and stop or get out of danger in time, but it is their duty to signal at once and slacken speed, if reasonably possible.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1014–1016, 1019; Dec. Dig. ⊂⊃320.]

8. TRIAL ⊂⊃296—INSTRUCTIONS—ERROR CURED BY WITHDRAWAL.

A charge given to the jury on a particular subject, which on objection was withdrawn with the consent of plaintiff as not within the issues, and where the jury were plainly told to disregard it, and that plaintiff relied solely on other issues, *held* not prejudicial to defendant.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705–713, 715, 716, 718; Dec. Dig. ⊂⊃296.]

9. DEATH ⊂⊃103—ACTION FOR WRONGFUL DEATH—DAMAGES.

Under Code Civ. Proc. N. Y. §§ 1903, 1904, which provide that the damages recovered in an action for wrongful death shall be for the exclusive benefit of the next of kin of the decedent, and that the damages "may be such a sum as the jury * * * deems to be fair and

just compensation for the pecuniary injuries, resulting from the decedent's death, to the person or persons for whose benefit the action is brought," where the age, sex, health, and general intelligence of the person killed, and his or her relation to, and relations with, the next of kin are shown, it is for the jury to determine what is fair and just compensation for their pecuniary injuries, and no strict or definite rules for the measure of such damages can be laid down by the court.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 141; Dec. Dig. ⊂=103.]

At Law. Action by Edgar A. Emens, as executor of the last will of Martha E. Emens, deceased, against the Lehigh Valley Railroad Company. On motion by defendant to set aside verdict and for new trial. Denied.

Hiscock, Doheny, Williams & Cowie, of Syracuse, N. Y., for plaintiff.

A. D. Jenney, of Syracuse, N. Y., for defendant.

RAY, District Judge. On the 28th day of August, 1910, Edgar A. Emens, Mrs. Edgar A. Emens, his wife, and Martha E. Emens, his sister, with Carl M. Kilmer, the chauffeur, were riding in an automobile and proceeding on the Lake Road, so called, a public highway in a direction generally somewhat east of north, and while crossing the tracks of the Lehigh Valley Railroad Company, this defendant, at what is known as the Swarthout Crossing, the rear end of the automobile was struck by an engine drawing a train of seven or nine cars running on said tracks in a direction somewhat west of north, and such automobile was partially demolished, the occupants thrown out, and all were more or less injured, but the two ladies received injuries from which they very soon thereafter died.

This action was brought by Edgar A. Emens, as executor of the last will and testament of the said Martha E. Emens, deceased, to recover the pecuniary damages, if any, sustained and recoverable by reason of the alleged wrongful act, neglect, or default of the defendant railroad company on the occasion referred to under the provisions of sections 1902 and 1903 of the Code of Civil Procedure of the state of New York, and which read as follows:

"Sec. 1902. Action for * * * Death by Negligence, etc.—The executor or administrator of a decedent, who has left, him or her surviving, a husband, wife, or next of kin, may maintain an action to recover damages for a wrongful act, neglect, or default, by which the decedent's death was caused, against a natural person who, or a corporation which, would have been liable to an action in favor of the decedent, by reason thereof, if death had not ensued. Such an action must be commenced within two years after the decedent's death."

"Sec. 1903. For Whose Benefit Recovery Had.—The damages recovered in an action, brought as prescribed in the last section, are exclusively for the benefit of the decedent's husband or wife, and next of kin; and, when they are collected, they must be distributed by the plaintiff, as if they were unbequeathed assets, left in his hands, after payment of all debts, and expenses of administration. But the plaintiff may deduct therefrom the expenses of the action, and his commissions upon the residue; which must be allowed by the surrogate, upon notice, given in such a manner and to such persons, as the surrogate deems proper."

Martha E. Emens had never married, and she left her surviving, as her sole next of kin, four brothers, said Edgar A. Emens, Olin E. Emens, Humboldt Emens, and Fred S. Emens, all of full age. The plaintiff alleged and alleges that the defendant railroad company was negligent on the occasion referred to in that it did not give adequate or suitable notice of the approach of its train, the train referred to, to this crossing, and that this failure on its part resulted in the collision, injuries, and death of Miss Emens referred to. The collision, injuries, and death were not questioned by the defendant, but it strenuously contends that: (1) The defendant was in no way negligent; (2) that the plaintiff's testatrix was herself guilty of contributory negligence. The defendant denied and denies that there was sufficient evidence of negligence to take the case to the jury, and alleged and alleges that the evidence showed contributory negligence, as matter of law. The defendant alleges error in that on all the evidence the case should not have been submitted to the jury, but a verdict directed for the defendant; (2) that there was prejudicial errors committed in the admission and rejection of evidence; and (3) that there were prejudicial errors in the charge of the court; and (4) that the damages awarded by the jury are excessive and not supported or justified by the evidence.

The Situation.

As stated, speaking generally, the Lake Road, or highway, ran a little east of north until within about 15 or 20 feet of the westerly rail of the most westerly track of the railroad, when it turned rather sharply to the east to cross the railroad tracks. After crossing the tracks, it turns again to the north or northeast. The railroad bed and tracks run in substantially a straight line for at least a mile northerly from this Swarthout Crossing and about three-fourths of a mile southerly therefrom. The first station south is Valois and the first station north is Caywood. The grade from a point a little north of Valois descends until Caywood is reached, so that trains going north, or, as the railroad men say, on the "west-bound track," run on a downgrade. At the distance of three-fourths of a mile south of this crossing, and quite a distance northerly of Valois, there is a curve, but after rounding this curve, and for a distance of some more than 2,520 feet, a train running north on these tracks is in view of a person on the Swarthout Crossing or in the highway and within 50 feet of the most westerly rail of the railroad tracks. Seven hundred and fifty feet south of this Swarthout Crossing there is a crossroad running east and west and crossing the railroad tracks, and this crossroad intersects the Lake Road at a point about 800 feet southerly of the Swarthout Crossing and about 240 feet from the crossroad railroad crossing. It is seen that we have a triangular space formed by the crossroad for its base, the railroad tracks and embankment and the Lake Road as its two sides, and having its apex at the Swarthout Crossing. The Lake Road and the railroad tracks approach each other at an angle of 17½ degrees. At the Swarthout Crossing the railroad tracks and top of the embankment are about 6½ feet above the level of the highway (Lake Road) and at the crossroad crossing

some 9½ feet above. At the Swarthout Crossing the Lake Road fill, to make the crossing, commenced some 200 feet from the crossing, but the fill was not uniform, being more steep and abrupt just before coming to the rails, with a level place of some 13 feet after making the rise before reaching the westerly tracks. Within this triangular space are pear trees set in rows, and on the south side of the crossroad and between the Lake Road and the railroad embankment there were buildings and some apple trees. At the time of the accident there was a crossing sign at both these crossings, and the one at the Swarthout Crossing was visible to travelers on the Lake Road at all times after reaching the crossroad. There was a line of telegraph poles along the railroad. These trees were of such height at the time as to hide the railroad embankment from those in the automobile, except as a view might be caught through the openings between the trees. All the persons in this automobile were strangers to this locality. No one of them had traveled the road before. It was conceded all round that, as they approached the scene of the accident, they were conscious that they were in the vicinity of a railroad and a railroad crossing. However, of the perilous nature and character of the crossing they were necessarily ignorant. The Lake Road highway makes its sharp turn to the east to cross the tracks just before reaching the level space of 13 feet next the most westerly tracks; and hence the persons within the automobile were within 50 feet of the iron tracks when they attained a position where the automobile, having turned east, was at right angles with the tracks running north and south.

There were cattle guards and cattle guard fences on each side of these two highway crossings. This fence immediately south of the Swarthout Crossing was 93 feet from it, and the one immediately north of the crossroad crossing some 600 feet further south, and the other something like 200 feet further south. The crossing sign "Look out for the Cars" was south of the Lake Road and some feet from the most westerly railroad tracks. About halfway down to the other crossing stood a semaphore on the westerly side of the tracks. These cattle guard fences were some four feet in height and ran up to within a few feet of the tracks and were formed of boards nailed parallel to each other some six or eight inches apart on posts set in the ground. To a person sitting in an automobile and 50 feet from the westerly tracks at the Swarthout Crossing, and approaching them from the south, the cattle guard fences would obstruct a view of the line of rails more or less. In approaching the rails riding in an automobile, until the turn was fully made, to see back up the railroad tracks in the direction of the curve (that is, to the south), it was necessary to turn the head quite considerably, and, until out of line with them, the crossing sign post and semaphore would more or less interfere with or confuse the sight or view of any object beyond them and in the same line. Until the automobile made the sharp turn of the highway just before going upon the rails or the level space of 13 feet before reaching the rails, it was proceeding in substantially the same direction as the train. The two moving bodies were approaching the

apex of the triangle described, one on each of its sides, at the angle of 17½ degrees. Until the automobile ascended the fill at the Swarthout Crossing, it was lower down than the railroad tracks. The Swarthout house, with a stone stepping block in front, is 145 feet from the westerly rail of the west-bound track, where the collision occurred, or about 125 feet from the most westerly rail; that being the west rail of the east-bound track. At this point in a direct line it is 36 feet to the westerly rail. At a point 300 feet south from the crossing it is 89 feet in a direct line to the most westerly rail.

The Speed.

The evidence was conflicting as to the speed of the automobile and also as to the speed of the train as they approached the Swarthout Crossing where the collision occurred.

Carl M. Kilmer, the chauffeur, said, in substance: That he had a speedometer and had been running at from 15 to 20 miles per hour all the way from Penn Yan, and continued that speed until they passed the east and west road, crossroad, when he threw out the clutch and threw the car out of gear, shut off the power, and drifted along under the momentum until they stopped in the vicinity of the Swarthout house. That they stopped entirely. He says:

"I looked both ways, and Mr. Emens looked both ways. Mr. Emens remarked to me—he said, 'I guess it is all right, Carl;' and I didn't say anything that I remember of. I looked again, and then threw the car into gear, and we started on. We started on towards the crossing, and ahead of us, of course, was this pitch that we had to make to get up on the tracks. And I continued to look all the way up to the tracks, first in one direction and then another. And I didn't observe anything—any reason why I should stop—so I kept on going. And when I got up over this little pitch here (pointing out the abrupt pitch in the highway), I looked again to my right. I had been looking, coming up the little pitch to the left, because that was the direction that the (later he said direction from which a train moving on the westerly tracks would come), and on reaching the top of the pitch I looked again to the right, and then it was I saw the train. I hadn't heard the train previous to that. I saw it before I heard it. The automobile, when I saw the train, was on the first track. I think it is given here as the east-bound track. I knew that I couldn't stop the car in time to change my gears and back off from the track then, now the train was coming. I knew that I couldn't stop the car in time to clear the train. I knew if I stopped at all it would be so close that I would have to back the automobile up in order to clear the train. So the only chance that I could see was to make an effort to get over before the train got to us. And that is what I did. The first part of the car got off the track. The engine of the train hit the rear of the car, and when it hit," etc.

The evidence of the engineer was: That back of the curve, and near Valois, he saw a signal (Hall signal), indicating caution. That he applied air to reduce speed then about 55 or 60 miles per hour, and was decreasing some. That he blew the crossing signals for the "cross-road" crossing and also for the Swarthout Crossing. That he saw a red automobile with a man in the highway and a lady in the auto at the crossroads crossing, and, when he saw they were safe, looked ahead to see what the Hall signal at Caywood said. It was set against him. That just before he looked for the Caywood signal, which was when he was about at the crossroad crossing, he noticed the automobile on

the Lake Road coming up the incline, not back by the Swarthout house, and it was going slow, and he thought it stopped or was about to stop. That he gave no alarm or danger signal then, but, after looking at the Caywood Hall signal and noticing it against him, he took his eyes from it, and then noticed this automobile on or coming on the east-bound tracks, the most westerly tracks, and then, appreciating danger, he pulled the bell and rang the whistle, alarm, or danger whistle signal, and put on all the air he could. That he could not then apply the emergency brakes for the reason he had exhausted part of his air back near Valois when he first reduced speed. That he saw the automobile shoot ahead, and then a cloud of smoke. He thought he was running at the rate of 40 or 45 miles per hour after or when passing the crossroad.

Signal by Bell or Whistle.

[1] As just stated, the engineer testified to ringing the bell and blowing the regular crossing signals or whistle for both crossings.

Kilmer testified, not quoted above, that he listened but did not hear any bell or whistle. Mr. Emens, who was in the automobile by the side of Kilmer, testified that they very much slowed down before going up the slope, and that he looked and listened, and that he continued so to do, and heard no bell or whistle until the danger signal was given just before the automobile was struck, and saw no engine or train until that time. He says that no signals were given.

The plaintiff called several other disinterested witnesses, some of whom had their attention on the train and its signals, and some of whom did not have their attention on its signals especially, and these testified either that no bell was sounded and that no whistle was blown until the danger signal, or that, being in a position where they could and probably would have heard, heard none.

The defendant called the engineer, fireman, conductor, and quite a number of men who were on the special excursion cars attached to the train, and these testified that they observed and heard the crossing signals given. The evidence was of such a character that a question of fact for the jury was presented whether or not the crossing signals were given, and whether or not the bell was rung, or whether or not any signal of the approach of the train was given prior to the danger signal. A Mr. Granger with his wife had stopped in the highway (crossroad) but a few feet east of the railroad tracks, and saw the automobile approaching the Swarthout Crossing, and both saw and heard the train coming from the south and saw it as it passed and also the collision.

Mrs. Granger was asked:

"Q. Did you, as the automobile and train each approached the Swarthout Crossing, have in mind the question as to whether or not the train was giving signals? A. Yes, sir. * * * Q. Did you hear the danger signals? A. I did the danger signals. * * * Q. Did the train that killed these women give any signal as it approached this crossing from the time when it came around the curve until it gave the danger signals? * * * A. No, sir; it did not."

Mr. Granger said his attention was called to both the train and the automobile, and:

"Q. And did you see the train as soon as it came in sight around the curve? A. Yes, sir. * * * Q. Did it give any signal from the time it came around the curve until it gave that danger signal? A. No, sir."

He also testified that the automobile was going at the rate of about 15 miles an hour, and the train about 50 miles an hour, and that the danger signal was given when close on the automobile with which it collided. It was a still, quiet, sunshiny day. Mr. and Mrs. Granger, who apprehended the collision and were watching, and several other witnesses, testified that the danger signal and the crash of the collision came almost together. All on both sides described the danger signal as several short, sharp blasts, or "toot, toot, toot," in quick succession. The crossing signals were two long and one short blasts; hence there could be no mistaking the one for the other. Mr. and Mrs. Granger were both entirely disinterested.

More witnesses testified that the bell rang and the crossing signals were given for these crossings than testified the bell did not ring and that the crossing signals were not given, but there was a substantial number on each side, and it would be an abuse of discretion to set aside the verdict on the ground the evidence did not fairly establish negligence on the part of the defendant railroad company in failing to give signals of the approach of this train to this crossing. The jury was justified in finding negligence. Signals by a train on approaching a highway crossing serve a double purpose. They not only notify travelers on the highway of their approach but direct the attention of such travelers to the point or in the proper direction at which they are and from which their approach may be expected. Persons familiar with this crossing and accustomed to pass it know where to look and in what direction. They know the grade and curve and elevation of the track and would follow the line with the eye quickly, readily, and accurately. They know the objects along the railroad and near this crossing which would tend to confuse the sight of a stranger to the locality. They know that a train approaching on those tracks from the south will come head-on to one on or within 50 or 100 feet of the tracks, for something like three-fourths of a mile, and that the intervention of the Hall signal staff, or post sustaining the crossing sign, or the three cattle guard fences, two above the first, or on a higher elevation as you go south, or all together, would be liable to interfere with or confuse the traveler in getting a view of the on-coming train. Hence they know by experience where to look and from what point to look. To persons familiar with and accustomed to this crossing who should look, the giving of signals was of comparatively little consequence. But to strangers to the locality signals were all-important. Looking backward through the window in a curtain as you approached that crossing from the south, and before you made the sharp turn, Miss Margaret Swarthout, a witness antagonistic to the plaintiff, said, you would look into the dooryard or at the farm buildings at her brother's house. If, however, you knew the proper angle of vision and got it, you could see down the tracks to the curve after getting within 50

or 100 feet of the most westerly rail at the crossing. Mr. Kilmer, the chauffeur, and Mr. Emens and Miss Emens, the jury found, looked and listened and exercised due care in looking and listening before going upon those tracks. They heard nothing, did not hear the train, for the reason, as the jury found, that no signals were given. They saw nothing of the approaching train because of the peculiar and intricate nature of the crossing with its approaches. By the failure of the defendant to give signals, the parties in the automobile were not directed to the proper point for seeing the approaching train. This is what the jury found and must have found under the charge of the court. The jury found also, and must have found, under the charge of the court, that there was nothing in the conditions and surroundings at the crossing which impressed or which ought to have impressed the plaintiff's testatrix, Martha E. Emens, with a doubt whether it was safe to go forward, under all the circumstances and surroundings, and that she was justified in going forward and onto the tracks without actually stopping when closer to the tracks than the place where the stop was made; that is, within 50 feet or 100 feet or so of them. The jury also found, and under the charge of the court must have found, that the failure to give signals led or induced the plaintiff's testatrix to go upon the tracks or allow herself to be taken there.

The jury was plainly and explicitly told:

"When a traveler upon a highway reaches a steam railway track, and after looking and listening, which it is his duty to do, is impressed, or ought to be impressed, by what he sees or hears, with a doubt whether it is safe to go forward, he is chargeable with contributory negligence if he at once proceeds without using reasonable precaution to determine whether his doubt is well founded. And that applies here and would apply to these parties. You are to say what the truth and what the facts are. That is, if the existing surroundings and conditions, including what he hears, actually impress him, or ought to impress him, that there is or may be danger in proceeding, he should wait a reasonable time to ascertain whether or not the doubt he entertains, or ought to entertain, is well founded. So here, as to Miss Emens. Has it been proved in this case that she was negligent; that she ought to have been impressed from what she saw there, or heard, that it was unsafe to proceed, so that you can say she was guilty of contributory negligence in going upon the track at all, or allowing herself to be taken there. Proximate cause is that cause which in natural and continuous sequence, unbroken by any efficient intervening cause, produced the result complained of, and without which that result would not have occurred. Therefore, if you find from the evidence in the case, all of it together, that the plaintiff's intestate, Martha E. Emens, and those in control of the automobile, exercised due care in looking and listening before going on the railroad tracks, and under the circumstances, surroundings, and conditions seen or known, or which ought to have been seen or known, in the exercise of due care, were not required to stop and do more than was done, and you also find that the failure of the railroad company, by its employés in charge of this train, if there was failure (and that is a question of fact for you to determine) to give warning signals in time, of the approach of this train to the crossing, or its failure to stop the train or slacken the speed on seeing the danger of those in the automobile, if that danger was seen and appreciated by those operating the train, was the proximate cause of this collision or accident, and of the consequent death of the plaintiff's intestate, and that the omissions of the defendant's employés was negligence on the part of the defendant, and you also find that negligent acts and conduct of those in charge of the automobile after going on the tracks did not intervene and cause the accident and the consequent injury, the defendant here, the Lehigh Valley Railroad Com-

pany, is liable, and you come to the question of damages. If the accident or collision and consequent injury to Miss Emens was the result of the negligence of the driver of the car, and his neglect, if any, in driving in front of the engine was the proximate cause, then the plaintiff here cannot recover, even if Miss Emens herself was not negligent at all. If you find that those in the automobile were free from negligence, under all the circumstances, in going on the railroad crossing, that the negligence of the employés of the defendant company in failing to give warning signals led those in the automobile onto the tracks, and so into a place of imminent peril from the approaching train, and that those in charge of the automobile then exercised their best judgment, and did the best they could to avoid and escape the danger and the impending collision, a mere mistake or error in judgment on the part of the driver of the car in not doing the very best thing, or in not pursuing some course other than and better than the one he did, will not defeat recovery by this plaintiff, even if the driver might have avoided the collision by adopting some other course of action or conduct. That is, in an emergency demanding prompt and immediate action when in a place of peril, into which place of danger a person has been led by the negligence of the defendant railroad company, such person is bound to exercise his best judgment under the circumstances and conditions then surrounding him; and if he does, and there are two courses that may be pursued, one of which will in fact avoid the collision, and the other not, but the safe course is not perfectly plain or obvious, and such person does the best he can, recovery of damages is not defeated for the reason that he errs in judgment in such emergency, and by reason of such error pursues the wrong or the dangerous course."

Contributory Negligence.

Miss Martha E. Emens was a mere guest of Mr. and Mrs. Emens. They or one of them owned the car, were operating it, and Kilmer was hired and paid by them. But she, of course, was bound to exercise due care and look and listen and even stop, or cause the car to be stopped, if she heard or saw, or in the exercise of due care ought to have seen or heard, the approaching train. The two ladies occupied the back seat, and, as stated, the top was up, and the back curtain was down. Miss Emens could see the crossing ahead, but she was a stranger to the locality, had never been over the road, and was ignorant of the line and elevation of the tracks. She could get a dim view through the window in the back curtain and a backward view at the angle of 17½ degrees. There was a point and points after getting within 100 feet of the crossing where a view could be obtained for some three-fourths of a mile back up the track, but she was ignorant of it, and she, as well as Mr. Emens and Mr. Kilmer, supposed they had a clear and proper view, and that no train was in sight. No crossing signal or signal of the approach of the train was given. The jury found that due and proper care was exercised in looking and listening, and that there was no negligence in not stopping nearer the tracks than the vicinity of the Swarthout block (where the stop was made), and that there were objects and conditions which confused the sight or view. Mr. Emens described the objects that confused the view:

"I had a clear view down the track. The view in the other direction was obstructed and confusing. Q. How? Mr. Jenney: That I ask to be stricken out, being obstructed, Mr. Williams. I don't think it ought to go out. He don't mean absolutely obstructed. He will detail in a minute. By the Court: I suppose he objects to the use of the word 'obstructed.' He may state what there was in the way. Q. Well, describe, if you please, what there was there, as you recollect, that in any way interfered with or confused you. A.

As I recollect there was a pear orchard, an orchard, trees; and I have a distinct remembrance of a gate, board gateway, that was at the place where the cowcatchers, or the— By the Court: Cattle guards, you mean. Witness: Cattle guards, I mean. Q. Now, Professor, how many times do you recollect looking? A. I recollect looking twice before the final look, and then before that I remember looking, and perhaps I might say looking continuously. Q. First one way and then the other? And you had your mind on the question that there was a crossing there? A. Absolutely. Q. And on the possibility of a train approaching? A. I did. Q. And did you see or hear that train before you saw it at the time you have described, about 300 feet away after your car was up at the tracks? A. I did not. Q. How far away do you say it was? A. I think it was about 300 feet. That is my recollection. Q. Now were you listening as you approached that crossing? A. I was. * * * Q. Now, Professor, when would you say, as you approached that crossing, you began to listen, began listening with reference to a train? A. Why, I should say it is 800 feet, is it not? Q. To that corner 805 feet, the surveyor says. A. Why I think soon after passing that point, I should say 700 or 800 feet. Q. And were you listening from that time on? A. I was on the alert. Q. Listening for signals? A. Yes. * * * Q. It was a still afternoon? A. It was. Q. And you could hear a bell or a whistle some distance? A. I could. Q. Could you hear them as far as the curve from you? A. Yes. Q. Now, from the time that you began paying particular attention, as you have described, shortly after or about the time of passing that corner, did this train, as it approached the crossing in question, give any signal either by bell or whistle? A. It did not. Q. And you mean by that prior to the danger signal? A. Prior to the danger signal."

[2] Miss Emens was killed in this collision and could not testify as to what she did by way of looking and listening. She had every incentive to do both, and there is no presumption or inference she did not. B. & O. R. Co. v. Griffith, 159 U. S. 603, 609, 16 Sup. Ct. 105, 40 L. Ed. 274. The burden of showing contributory negligence was on the defendant. Defendant was bound to show on the whole case that Miss Emens did not look or listen, and it is presumed she did look and listen. Baltimore & Potomac R. R. v. Landrigan, 191 U. S. 461, 474, 24 Sup. Ct. 137, 48 L. Ed. 262; Texas & Pacific R. Co. v. Gentry, 163 U. S. 353, 366, 16 Sup. Ct. 1104, 41 L. Ed. 186. In Baltimore v. Landrigan, supra, at pages 473, 474, of 191 U. S., at page 140 of 24 Sup. Ct. (48 L. Ed. 262), the court said:

"There was no error in instructing the jury that, in the absence of evidence to the contrary, there was a presumption that the deceased stopped, looked and listened. The law was so declared in Texas & Pac. R. Co. v. Gentry, 163 U. S. 353, 366 [16 Sup. Ct. 1104, 41 L. Ed. 186.]"

Nothing was said by any one after Mr. Emens said, "It looks all right, and I think we can go ahead," except just as Kilmer saw the train Mrs. Emens spoke his name. Did she see the train and speak to him for that reason?

This case in some of its aspects is similar to Schofield v. Chicago, Milwaukee & St. Paul Railway Co., 114 U. S. 615, 5 Sup. Ct. 1125, 29 L. Ed. 224, and in others entirely dissimilar. There the highway and railroad trains ran in the same general course, north and south, and both the plaintiff and the defendant's trains were going north. The highway was some 280 feet west of the railroad until they came opposite the crossing, when it turned east and crossed at a point 70 rods (1,130 feet) north of the depot at Newport. The country was

flat and open, and there were no intervening or confusing objects. The plaintiff was driving a slow traveling horse attached to a cutter.

"When he arrived at a point in the wagon road 600 feet from the crossing, he could there, and all the way from there until he reached the crossing, have an unobstructed view of the railroad track to the south, and of any train on it, from the crossing back to the depot; and, when he reached a point in the wagon road 33 feet from the crossing, he could have an unobstructed view to a considerably greater distance southward beyond the depot."

And, says the case, page 616 of 114 U. S., page 1126 of 5 Sup. Ct. (29 L. Ed. 224):

"The evidence showed that, if the train had passed the depot when the plaintiff was at a point 600 feet, or any less number of feet, from the crossing, he could not have failed to see the train, if he had looked for it; and that if the train had not reached the depot, when the plaintiff arrived at a point 33 feet from the crossing, he could not at that point, or at any point in the 33 feet, have failed to see the train beyond and to the south of the depot, if he had looked for it. When the train passed the depot, the plaintiff was at least 100 feet from the crossing. The train consisted of a locomotive engine and seven or eight cars. The engine whistled at a point 4,300 feet south of the depot, which was the whistling place for that depot. The wind was blowing strongly from north to south. * * * The plaintiff resided in the neighborhood, and was familiar with the crossing. * * * The train was not a regular one, and no train was due at the time of the accident; it was moving at a high rate of speed; it did not stop at the depot; and it gave no signal by blowing a whistle or ringing a bell after it passed the depot."

It is perfectly plain that the plaintiff in that case neither looked nor listened. Probably he assumed there was no danger from the fact that no regular train was due. There was nothing to obstruct or confuse the sight or view, and the plaintiff was perfectly familiar with the situation, and the country was flat and open. The strong north wind may have prevented his hearing the train, but it did not interfere with seeing it.

[3] In the case now before this court the steam was shut off. The train was gliding or "floating." There were confusing objects. The plaintiff and those in the automobile were strangers to the locality, not familiar with the crossing. No signals of approach were given, and those in the automobile both looked and listened continuously and stopped. They did not stop at the right place to get the best view and a clear view, but they did not know where that place was. There was nothing in the situation to impress them with a doubt that it was safe to proceed. If the crossing signals had been given, the accident would not have happened, as those in the automobile would have heard, would have seen, and would have stopped before reaching the tracks on which the train was moving. All this under the evidence was for the jury, and on each proposition it found for the plaintiff.

It was not necessarily negligence that the plaintiff's testatrix did not look at the precise place and time when and where looking would have been of the most advantage. Rodrian v. N. Y., N. H. & H. R. Co., 125 N. Y. 526, 529, 26 N. E. 741. The court said:

"If, in case of an accident at a crossing, it appears that the person injured did look for an approaching train, it would not necessarily follow, as a rule of law, that he was remediless, because he did not look at the precise place

and time when and where looking would have been of the most advantage. Many circumstances might be shown which could properly be considered by the jury in determining whether he exercised due and reasonable care in making his observation."

[4] The relative rights and duties of railroads at highway crossings and of persons crossing or desiring and attempting to cross were considered and determined by the Supreme Court of the United States in Continental Improvement Co. v. Stead, 95 U. S. 161, 164, 24 L. Ed. 403, and again in Baltimore & Ohio R. R. Co. v. Griffith, 159 U. S. 603, 608, 609, 16 Sup. Ct. 105, 40 L. Ed. 274, where the language of Mr. Justice Bradley in the first case was quoted and approved. We may summarize: (1) Those traveling on either road have a legal right to pass over the point of crossing and require due care on the part of those traveling on the other to avoid collision; (2) the railroad train has the preference and the right of way; (3) "but it is bound to give due warning of its approach, so that the wagon may stop and allow it to pass and to use every exertion to stop if the wagon is inevitably in the way, and such warning must be reasonable and timely." On the other hand, those who are crossing a railroad track are bound to exercise ordinary care and diligence to ascertain whether a train is approaching. Says the court:

"They have, indeed, the greatest incentives to caution, for their lives are in imminent danger if collision happen; and hence it will not be presumed without evidence that they do not exercise proper care in a particular case. For, conceding that the railway train has the right of precedence of crossing, the parties are still on equal terms as to the exercise of care and diligence in regard to their relative duties. The right of precedence referred to does not impose upon the wagon the whole duty of avoiding a collision. It is accompanied with, and conditioned upon, the duty of the train to give due and timely warning of its approach. The duty of the wagon to yield precedence is based upon this condition. Both parties are charged with the mutual duty of keeping a careful lookout for danger; and the degree of diligence to be exercised on either side is such as a prudent man would exercise under the circumstances of the case in endeavoring fairly to perform his duty."

The court, in the Griffith Case, 159 U. S. 610, 611, 16 Sup. Ct. 108, 40 L. Ed. 274, further says:

"Since the absence of any fault on the part of a plaintiff may be inferred from cirmustances, and the disposition of persons to take care of themselves and to keep out of difficulty may properly be taken into consideration (Railroad Co. v. Gladmon, 15 Wall. 401 [21 L. Ed. 114]), it is impossible to hold in the light of this evidence, as matter of law, that the conduct of plaintiff was such as to defeat a recovery. The rule was thus expounded by Mr. Justice Lamar in Grand Trunk Railway v. Ives, 144 U. S. 408, 417 [12 Sup. Ct. 679, 682 (36 L. Ed. 485)]: 'There is no fixed standard in the law by which a court is enabled to arbitrarily say in every case what conduct shall be considered reasonable and prudent, and what shall constitute ordinary care, under any and all circumstances. The terms 'ordinary care,' 'reasonable prudence,' and such like terms, as applied to the conduct and affairs of men, have a relative significance, and cannot be arbitrarily defined. What may be deemed ordinary care in one case may, under different surroundings and circumstances, be gross negligence. The policy of the law has relegated the determination of such questions to the jury, under proper instructions from the court. It is their province to note the special circumstances and surroundings of each particular case, and then say whether the conduct of the parties in that case was such as would be expected of reasonable, prudent men, under a similar state of affairs. When a given state of facts is such that reasonable men

may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury. It is only where the facts are such that all reasonable men must draw the same conclusion from them that the question of negligence is ever considered as one of law for the court."

And it was not contributory negligence, as matter of law, not to stop nearer the tracks than the vicinity of the Swarthout block. Danskin v. Pennsylvania R. R. Co., 83 N. J. Law, 522, 83 Atl. 1006; Texas & Pac. R. Co. v. Cody, 166 U. S. 611, 612, 615, 17 Sup. Ct. 703, 41 L. Ed. 1132; Continental Im. Co. v. Stead, 95 U. S 161, 168 (24 L. Ed. 403). In this last case the court was requested to instruct the jury that:

"If by reason of the character of the ground or other obstructions, or if by reason of a defect in his sense of sight or of hearing, he cannot determine with certainty whether or not a train of cars is approaching without stopping, and, if necessary, going in advance of his team to examine, it is his duty to do so."

The Supreme Court said of this:

"Here is no assumption of facts as in the previous instruction; but it states the duty of persons approaching a railroad with wagons and teams in a more absolute and unqualified form than we think admissible. It states such duty with the rigidity of a statute, making no allowance for modifying circumstances or for accidental diversion of the attention, to which the most prudent and careful are sometimes subject, and assuming, in effect, that the duty of avoiding collision lies wholly, or nearly so, on one side."

[5] This court is of the opinion that a person driving an automobile, a stranger to the locality, who approaches a railroad crossing and stops, or substantially stops, at a point 145 or 150 feet from the actual crossing, being less than 50 feet in a direct line from such tracks, and looks and listens, exercising due and reasonable and ordinary care in so doing, hears no train and no signal, and no signal is given, and who then proceeds at reasonable speed, continuing to look and listen, and who neither sees nor hears the approaching train which is coming nearly head on behind him on a downgrade, gliding or floating at from 40 to 60 miles per hour without sounding bell or whistle, is not necessarily guilty of contributory negligence in not again stopping, or in failing to see or hear the approaching train. The same is true of one riding in such automobile, especially when the ground, with certain objects thereon, is such that there may be more or less difficulty in getting the correct line of vision for seeing the train. There may be errors of judgment and a miscalculation of locations, but this is not contributory negligence, if ordinary care, under the circumstances and surroundings, is exercised. Such a case presents a case for the consideration and determination of the jury.

Rulings and Charge.

[6] When Mr. Granger was on the stand, and after he had given his direct examination for the plaintiff, he was cross-examined, and his attention was called to certain things which it was claimed tended to show that his mind or attention was not on the train and signals when and after it came around the curve. Then on redirect this occurred:

"By Mr. Williams: Q. Mr. Granger, they have asked you about the repairs that you were making to the automobile, as things that might have distracted your attention from this train and signals. And now I want to known if there was any particular thing that attracted your attention to the train and the signals? A. Yes, sir.

"By Mr. Jenney: I object to the question as leading, incompetent, and improper.

"By the Court: He may ask that, whether there was anything that attracted his attention to the train and signals, as I understood you; is that right?

"By Mr. Williams: Yes. Q. What was it? A. My wife called my attention to the train as it was coming around the bend.

"By Mr. Jenney: That I object to, as to what his wife said, and ask that it be stricken out.

"By the Court: No, he may answer.

"Q. And what next? A. The next remark that was made—

"By the Court: Wait a minute. If there is anything here that would tend to show any negligence, if anything said by his wife, I could not permit that. As I understand, he started to say something that he wife said to him; is that it?

"By Mr. Williams: Yes.

"By the Court: If there was a conversation between him and his wife, while they saw the automobile approaching the crossing, and the train crossing the crossing, that riveted their attention to the fact that there were no signals given, I think it is competent. Now, any expressions of opinion—

"By Mr. Williams: Oh, no; I don't want any expressions of opinion.

"By the Court: —or statements that might imply negligence on the defendant's part—

"By Mr. Williams: I will not say that they might not imply negligence.

"By the Court: You seek to show some fact or facts, expression, or statement from the wife, I take it now, calling attention to the fact that signals were not given?

"By Mr. Williams: Yes, right there at the time, and before the accident; and when they knew the automobile was approaching, and the train approaching, and feared they would come right there at the same time.

"By the Court: You think, Mr. Williams, that you can go to the extent of showing what was said?

"By Mr. Williams: Yes, sir. It is a remark made right at the time, as the train sped down the course, and the automobile approached the crossing, that riveted this man's attention to the fact as to whether or not signals were being given. And I claim it is competent, as showing the reason why he can be so sure.

"By the Court: There isn't any doubt about the competency of the fact that she spoke to him. If she called his attention to the signals, that fact, and that his attention was then riveted on the train; and he watched it, all that is competent. The only point would be whether what she said was competent. What she said might be harmless.

"By Mr. Williams: I am not trying to put it in under that deception, if your honor please, at all. It is a serious matter, and an important matter, that I am discussing, and I want your honor to understand me, so that I will not be accused of fooling anybody. If he said his wife called his attention to the fact whether the signal blew or not, of course that is somewhat of a conclusion, Mr. Jenney might claim. I think it is competent. I am not claiming it isn't; but it is competent, I claim, for me to show the ejaculation of his wife on the instant; the word she said, or words she said, that did rivet his attention on the signal. It is just as competent to show it as it would be to show that this attention was called.

"By the Court: I will overrule the objection, and give you an exception.

"By Mr. Williams: I will write it out and send it up, if your honor would like me to.

"By the Court: I would rather know what it is. (Mr. Williams handed to the court a written statement.) Well, I will admit it, for the purpose of showing that his attention was called to the signals, that his mind was upon

it, and tending to show that his attention was on it. I will not admit it as proof of itself, as to the truth of the statement made at the time. The ejaculation, as proof that the whistle was not blown, that must depend on what they say about it. Tending to show that it is so near all one transaction, the whole thing, I will overrule the objection, and give an exception to the defendant.

"Q. And what next?

"By Mr. Jenney: I haven't stated my objection.

"By the Court: You may.

"By Mr. Jenney: Incompetent and improper, immaterial hearsay; reopening of the examination of the witness, and no part of the res gestæ.

"By Mr. Williams: It is offered as a part of the res gestæ in rebuttal, for the purpose of showing that his attention was attracted, and how. Not for the purpose of showing the fact.

"By the Court: I will admit it for that purpose, and that purpose only. And the ejaculation made by the wife must not be regarded by the jury as any proof that the bell did not ring, or that the whistle did not sound at that time, as they approached. That will have to depend upon the evidence of the witnesses. It is simply and purely for the purpose of showing that his attention was called at the time to the train, and to the fact of whether or not warnings were given. For that purpose, and that purpose only, I admit it. (Exception.)

"A. Make the question a little plainer, please; more definite. Q. What next called your attention to whether or not the train was giving signals?

"By Mr. Jenney: Same objection. (Overruled. Exception.)

"A. The next remark that was made after my attention was called to the train coming around the bend, saw the automobile, and this statement: 'Do you suppose the people in that automobile see the train?'

"By the Court: You may disregard that.

"Q. That isn't the one that I— Well, go on.

"By the Court: Q. Did you look at the train as it approached? A. I did. Q. Now, Mr. Williams' proposition is that something was said by your wife in reference to signals. Did she say anything on that subject? A. She did. Q. That is what we want. I give you an exception Mr. Jenney, to all of this.

"Q. What did she say? A. After mentioning what I have already stated in regard to the automobile, we saw the automobile accident at the next instant. Then she said, 'Why don't the train whistle?' Q. And did that call your attention to whether or not it was whistling, and did whistle, before the danger signal was given? A. It did.

"By Mr. Jenney: I move to strike out all of that, on the same grounds as in my objection. (Motion denied. Exception.)"

I think the evidence was competent for the purpose stated and with the limitation placed upon it. It was not the meaning of the witness, and neither the court nor the counsel on either side understood him as intending to say that the remark, "Why don't the train whistle?" came after the collision, but after and in connection with the words, "Do you suppose the people in that automobile see the train?" The remark was spontaneous and voluntary (drawn out by the situation), and called Mr. Granger's attention to the very fact whether or not the whistle was being sounded or had been sounded at or after rounding the curve and before reaching the crossing. It is true that Mr. and Mrs. Granger were onlookers and not actual participants in the running of either the train or the automobile, but in a sense they were actors by reason of their immediate proximity to the collision, only 800 feet away, and which must have occurred from within 6 to 12 seconds after the train was passing them. The train with engine occupied about one-half the distance from the crossroad crossing to the place of the collision. The fact sought to be shown was, not that

the whistle was not sounded, but the fact whether or not the attention of Granger was actually called to the question whether or not the whistle was being sounded as the engine approached and passed the crossroads crossing. The defendant, by its cross-examination, made the existence of that fact an issue.

Limited as the evidence was to the determination of the question whether or not the attention of Mr. Granger was called to the ringing or nonringing of the bell and nonblowing of the whistle of the engine at the time it approached the crossroads crossing, and whether or not the attention of the witnesses was on the whistle and bell at that time, it became a part of the res gestæ. Judge Thomas, in his work on Negligence, Rules, Decisions, and Opinions, at page 593, says:

"As applied to cases based on negligence, the doctrine of res gesta usually arises respecting evidence of statements, declarations, and expressions made by the injured person, or by a servant of one of the parties, or by third persons standing by. The rule broadly stated is that the character, quality or cause of a tortious act may be explained by exclamations, declarations, or statements coincident with the injury, provided they be calculated to unfold the nature and quality of the acts which they are intended to explain. There must be a transaction of which they are considered a part. They must be concomitant with the principal action and so connected with it as to be regarded as the result and consequence of coexisting motives, and must not have been made as merely narrative of a past occurrence."

Within this broad language, the declaration of Mrs. Granger might be competent on the question: Was the bell rung or the whistle sounded inasmuch as the whistling posts for these crossings were just south of the crossroad crossing where Mr. and Mrs. Granger were, and at which point the engineer testified he sounded the whistle? But that question is not here. The fact sought to be shown was that Granger's attention was on the sounding or nonsounding of bell and whistle, one or both. The exclamation of Mrs. Granger was entirely disinterested, and it was spontaneous (drawn out by the conditions existing), and there was no premeditation, and it was relevant. In Chamberlayne, the Modern Law of Evidence, vol. 4, § 3015, pp. 4186, 4187, the author, citing cases, says:

"Naturally the influence of a particular occurrence said to have created an automatic utterance is far more powerfully exerted upon the person immediately affected than upon those who have merely seen it. The exclamations of the latter, though obviously competent in an independently relevant capacity, are seldom spontaneous, within the meaning of the rule, and cannot, therefore, be employed as proof of the facts asserted. Should it appear, however, under the circumstances of a particular case, that a given utterance by a spectator was, in point of fact, spontaneous, it is good primary evidence of the fact which it alleges."

And in the same volume (section 2597, pp. 3521, 3522, 3523), the author says:

"The independently relevant statement may be that of a bystander. Wherever it can be fairly inferred that the declarations of such a person affected the action of the participants themselves, in some essential particular, or promoted the doing of some important act, the evidence will be received. The same administrative course is adopted where the exclamation of one standing near is felt to be necessary or expedient for connecting other facts into the narrative of significant events. Statements are not objectionable as hearsay.

These declarations of bystanders are not offered in their assertive capacity; i. e., as evidence of the facts stated."

In the case at bar this exclamation of Mrs. Granger promoted the important act on the part of Mr. Granger of paying attention to whether or not the bell was being rung or the whistle sounded. The res gestæ was not the mere collision of engine and automobile, but the causes of that collision operating at the time, and it included all that was said and done by the participants and onlookers which was relevant to the issues and spontaneous. Some of the acts and exclamations were relevant for one purpose and some for another; but as said in Chamberlayne:

"A party is not prevented from proving a constituent fact, one of the res gestæ of his case, merely because it is a transaction which in some degree is suggested from the other transactions involved in the res gestæ." Volume 4, § 3249.

And the author also says:

"And it is a well-established principle that the fact that the jury may misuse for purpose X evidence which is perfectly competent for purpose Y furnishes no ground for rejecting evidence absolutely essential to the case of the proponent in connection with purpose X. Evidence of another transaction may be necessary in order to enable a party to prove his case, to detail the res gestæ, the constituent facts upon which he is relying."

Here the foundation of the action was negligence on the part of the defendant railroad company in that it did not give suitable or any signals of the approach of this train to the crossing in question. To show that such signals by bell or whistle were not given, it was necessary to call those bystanders and spectators who were present on the occasion of the collision and especially important, in view of the decisions that the statement of those who were not paying attention is of little weight against the testimony of those who were, to show that Granger's attention was on the question of signals from the engine. The plaintiff was not confined to Granger's mere "say-so," but, in view of the cross-examination tending to show Granger's attention may have been on his own automobile, was entitled to show that his attention was in fact called to that particular question (signals) by voluntary, spontaneous, and relevant exclamations made at the time by one who was also watching the transaction and in a position to hear, see, and know. It was not an opinion or the recitation of a part transaction. The exclamation of Mrs. Granger was a part of the transaction, and drawn out by it.

This question has been decided in a very similar case (Terwilliger, as Adm'x, v. Long Island Railroad Co., 152 App. Div. 168, 172, 136 N. Y. Supp. 733, 736), where the court said:

"It is also urged that the court erred in permitting Mrs. Wilson to testify that she saw the accident and that she exclaimed, just at the moment of the approaching collision: 'Why don't they blow that whistle? The people in that car don't see that train.' The court subsequently struck out the declaration, 'The people in that car don't see that train,' and permitted the remainder of the exclamation to remain; the defendant taking an exception. The issue to be determined was whether the defendant had given any warning on its approach to this crossing, and it was clearly competent for the plaintiff to prove that no whistle was blown, and this witness had testi-

fied that she heard no whistle, and the fact that she made an exclamation at the very crisis of the transaction, referring to the fact that no whistle was blown, seems to us to be competent. It was a fact which showed that her attention was directed to the very matter in issue. It was not evidence of the fact that the whistle was not blown. It was merely a fact showing that the witness, in testifying that she heard no whistle, was testifying to a matter to which her attention was directed at the time, and is not more objectionable than any other statement of fact which would show that she was in a position and in a frame of mind to know whether the whistle was blown or not. If she had testified that she looked to see if there was escaping steam, indicating the blowing of the whistle, it would not have been objectionable. Indeed, this very question was asked and answered by this witness without objection, and we are persuaded that the question objected to was not less open to objection."

[7] There was some evidence tending to show that the engineer, on seeing the automobile on the track, or proceeding onto the track in front of the engine and in danger and appreciating such fact, no warning signal of the approach of the train having been given, was negligent in not then giving signals earlier than he did; that, instead of doing so, he looked to the signal at Caywood station to ascertain whether or not he would have to stop there; and that after this he again turned his attention to the automobile and found it almost immediately in front of him, whereupon he gave the danger signal. If those in charge of the train see a person at a highway crossing approaching the same on foot or in a vehicle or even thereon, they may assume, under ordinary conditions, that the person will stop or get off the track, especially if the view is clear and unobstructed or crossing signals have been given. The rule presupposes that the railroad company has done or is doing its duty to such traveler. But if those in charge of such train see and appreciate that such traveler is unaware of the near approach of the train, and are also negligent in not giving crossing signals, and also see and appreciate that such person is actually in or going in front of the approaching engine (that is, into a place of great peril), led there by the want of signals, especially when there are confusing objects or a confusing situation, it is the duty of such person in charge of the train not only to sound warnings, if he can, but slacken speed, if we can, and avoid doing injury to the traveler. Those in charge of a rapidly moving train approaching a highway crossing without signals and seeing and appreciating that the traveler at the crossing is not aware of his danger and is going in front of the engine in ignorance of its approach may not assume that he will see in time and stop, or will see and get out of danger in time. The duties of those in charge of the train and of the traveler are mutual and reciprocal and under such a state of facts as described it would be negligence on the part of the railroad company not to signal at once and slacken speed, if reasonably possible so to do; that is, avoid doing injury to a person in imminent peril seen and appreciated and brought about by the negligence of the railroad.

[8] The court charged the law at some length on that subject under the evidence in the case; but, when the defendant took its exception and raised the question of the sufficiency of the evidence to present that question under the pleadings, the plaintiff withdrew all claims of negli-

gence on that or those grounds and explicitly elected to stand on the sole ground of negligence in not giving signals of the approach of the train to the crossing, whereupon the court withdrew its charge on that subject and directed the jury to disregard it. The following is what occurred:

"By Mr. Jenney: I except to all that your honor said in regard to the engineer's actions after the automobile was in a position of danger, and your leaving that question to the jury, and what your honor said in regard to a traveler on the highway being led into a trap or place of danger.

"By the Court: I didn't say anything about a trap; I said place of danger.

"By Mr. Jenney: And place of peril, and to the emergency, and error of judgment. As to all of that, none of that had been alleged in the complaint as drawn or by any evidence in the case. This is a proposition which the defendant claims is not in the case at all. I want to have that distinctly understood, and the reason for my exception.

"By the Court: You claim it is not within the issues?

"By Mr. Jenney: Not within the issues of this case.

"By the Court: What do you say, Mr. Williams?

"By Mr. Williams: There is nothing said about it especially in the complaint, and I think, so far as it has any bearing on the case, it is the same question whether they were negligent or whether Martha Emens was negligent. That is all there is to it. I suppose, of course, as your honor charged, that if an engineer sees a traveler in a position of danger, and sees that he cannot escape from that position—

"By the Court: If they led him into it—if the defendant railroad company led him into it?

"By Mr. Williams: Yes. That then the engineer is bound to make such effort as he can to avoid hitting him.

"By Mr. Jenney: And do you claim that question is in this case?

"By Mr. Williams: I don't think it is pleaded directly, in the case. I claim that, so far as it is in the case, it is the same question that is involved in the question of the defendant's negligence, and Martha Emens' contributory negligence, in signaling, and in not seeing the train, as it approached the crossing. There isn't anything in the pleadings on that question. I don't know as there is anything in the case that I claim required the engineer to stop his train before it was too late for him to do it. I think the evidence is—

"By the Court: Then you stand purely upon the question of negligence, in failing to give the signals?

"By Mr. Williams: Yes, sir; we stand on that.

"By the Court: Very well. Then you will disregard what I said on the other questions of negligence, gentlemen of the jury.

"By Mr. Jenney: Your honor charged quite extensively on that subject.

"By the Court: I know I did.

"By Mr. Jenney: I take an exception to that part of the charge.

"By the Court: I strike it out. It isn't in the charge. And I direct the jury to disregard it entirely, as a part of the charge, because plaintiff now elects to stand upon the proposition that the negligence of this defendant was in failing to give the signals on the approach to those crossings. That there was the negligence, and that Miss Emens was free from contributory negligence, and therefore entitled to recover.

"By Mr. Jenney: I want it distinctly understood. The only proposition of negligence in this case to the jury is whether or not those crossing signals were given?

"By the Court: That is what I understand now.

"By Mr. Williams: Yes; that is the question."

The defendant contended on the argument that, notwithstanding this, the fact that any charge on that subject was made and then withdrawn was prejudicial. I think not. It was impressed on the jury that no

such ground of negligence was claimed or in the case or to be considered by them. The presumption is that juries will and do observe and obey the instructions of the court, and this must be so when the party openly and plainly withdraws a claim of negligence on a particular ground.

Damages.

[9] Are the damages excessive in view of the evidence and statute? Here the damages are for the benefit of the four brothers. See section 1903, Code of Civil Procedure, quoted. Section 1904 of the Code of Civil Procedure reads as follows:

"The damages awarded to the plaintiff may be such a sum as the jury upon a writ of inquiry, or upon a trial, or where issues of fact are tried without a jury, the court, or the referee, deems to be fair and just compensation for the pecuniary injuries, resulting from the decedent's death, to the person or persons for whose benefit the action is brought. * * * When final judgment for the plaintiff is rendered, the clerk must add to the sum so awarded interest thereupon from the decedent's death, and include it in the judgment. The inquisition, verdict, report, or decision may specify the day from which interest is to be computed. If it omits so to do, the day may be determined by the clerk, upon affidavits."

During the giving of the charge, this occurred:

"By Mr. Jenney: I except to what your honor said on damages, and I ask your honor to charge the jury that the damage, if any, in this case must be confined to the amount of the earnings of the plaintiff's testatrix, Miss Emens, during the probable duration of her life, such as might be reasonably expected to be received by her brothers, or is the increase in the estate which she might have accumulated had she not been killed, but lived the natural course of her life, and which estate would have been distributed among her next of kin.

"By the Court: That I decline to charge and give you an exception. (Exception.)

"By Mr. Jenney: I ask your honor to charge that in this case there is no proof of any actual money loss.

"By the Court: Well, I will charge that. I don't recollect that there is.

"By Mr. Jenney: You charge that there is not; no proof?

"By the Court: I say that, as if there was any actual money loss Mr. Williams would call my attention to it. I think not.

"By Mr. Williams: If they distinguish between money loss and pecuniary loss, why, I think that is so.

"By the Court: I so charge, because I have no recollection. If there was, it was dropped in here in such a way that it escaped my attention.

"By Mr. Jenney: I ask your honor to charge that if the jury find that the next of kin have sustained no actual money loss by reason of the death of Miss Martha Emens, and find defendant negligent, and if she is free from contributory negligence, they may award only nominal damages.

"By Mr. Williams: Well, now, that brings up the question of what the counsel means by money loss. If he means gold and silver scattered on the highway, I can see there is no proof of it.

"By the Court: If that is what you mean, in that sense, you are absolutely— but the statute says 'pecuniary.'

"By Mr. Jenney: I take exception to your honor's modification. And I ask your honor to make the same charge, substituting money earnings for money loss.

"By the Court: That is so indefinite. Put the words together.

"By Mr. Jenney: I ask your honor to charge this: That if the jury find that the next of kin have sustained no actual loss from money earnings by reason of the death of Miss Martha Emens, and find defendant negligent, and that she is free from negligence, they may award only nominal damages.

"By the Court: Why, they may, because the statute says such a sum. I so charge. I have read the statute to them.

"By Mr. Williams: But your honor don't mean that they must.

"By the Court: Why, no. No, they may. It is with them. I cannot tell them what to find."

Also the following:

"By Mr. Williams: I ask your honor to charge that one of the elements of damage in the case which the jury may consider in determining the amount of damage is the probable value of the service which Miss Emens would have rendered, if any, to her brothers during the remainder of their lives in case she had not been killed."

"By the Court: Oh, certainly. (Exception.)"

The court had before charged as follows:

"And now, gentlemen, a word in regard to the damages. If you find that the defendant company was negligent, and that the plaintiff's testatrix, Miss Emens, was free from contributory negligence, and that the negligence of the defendant was the proximate cause of the accident, collision, and consequent injury and death, the death from the injury received in the collision being conceded here, you come to the question of damages, which, as already stated, are confined to such a sum as you, gentlemen of the jury, deem to be a fair and just compensation for the pecuniary injuries resulting from the decedent's death, that of Martha E. Emens, to the surviving brothers, Olin E., Humboldt, Edgar A., and Fred S. Emens. This includes pecuniary injuries sustained up to the present time, and those that you find will be sustained by these brothers in the future. This statute does not limit recovery to exact proof of pecuniary loss. There must be pecuniary loss resulting from the death, but it (the actual loss) is oftentimes incapable of exact proof. Proof has been made here of the age, the health, and the general intelligence of Martha E. Emens, and of her relation to these surviving brothers, and also of their general business and condition in life. She lived with one of these brothers, at the old homestead, where the others, except one in the West, were in the habit of going on Thanksgiving and the holidays, and sometimes in the summer for a vacation, stopping sometimes, and, so far as appears, without charge. All of these things are a proper subject for your consideration, and have more or less of a bearing upon the question of the pecuniary loss sustained by her death, that is sustained by these brothers. No damages can be given for loss of society, or love, or affection. You may give, as pecuniary damages, such sum as you find from the evidence this lady, Miss Emens, would have accumulated from the time of her death, August 28th, during the time she would have lived, but for this accident, and left her next of kin. This is one further element of damage. Of course, you are not to be affected by passion or prejudice against railroad companies or automobiles. You are to decide this case unaffected by any passion or prejudice against railroad companies, or against automobiles. Take it under this evidence, gentlemen, as I know you will, and under the rules of law which I have given you, and determine what the facts are. And in short, if you find that the railroad company was negligent, if you find that Miss Emens was free from contributory negligence, and if you find that that negligence of the railroad company was the proximate cause of this injury, that it was not caused by the negligence of somebody else, then you come to the question of damages. And you are to give such damages (pecuniary damages only) as you believe under the facts proved as to the age of the deceased, her condition in life, situation and condition in life of these brothers, and their relations, as you may find are a just compensation to them for the loss they have sustained through her death."

The charge expressly excluded everything, except pecuniary damages; that is, pecuniary loss by reason of her death.

The deceased, Miss Martha E. Emens, was 45 years of age and unmarried. She lived on the old homestead with one of the brothers,

evidently keeping house, and here the other brothers, except the one in the West, were accustomed to go on occasion and receive attention and entertainment without charge. She was earning something; had earning capacity. There was no proof that she had saved any part of her earnings. In Phœnix Ry. v. Landis, 231 U. S. 578, 34 Sup. Ct. 179, 58 L. Ed. 377, decided by the Supreme Court of the United States, December 22, 1913, the court said:

"It is said further that the court erred in holding that the plaintiff was entitled to recover substantial damages for the benefit of the estate 'without evidence showing or tending to show that deceased had ever saved or would have saved any portion of his earnings.' We have not been referred to any ruling to this effect."

In Murphy v. Erie R. R. Co., 202 N. Y. 244, 245, 95 N. E. 699, 700, the Court of Appeals held:

"The Code of Civil Procedure provides that damages in such actions as this are exclusively for the benefit of the decedent's husband or wife and next of kin (section 1903), and they are to be a fair and just compensation for the decedent's death to the person or persons for whose benefit the action is brought (section 1904). Under these very general provisions of the statute, it has been impossible for the courts to formulate any strict or definite rules for the guidance of juries in estimating damages, and they have, therefore, given the law a broad and liberal construction. Thus, in Ihl v. Forty-Second St. & G. St. F. R. R. Co., 47 N. Y. 317 [7 Am. Rep. 450], where the action was for the benefit of the parents to recover for the death of a child of tender years, it was held that the absence of proof of special pecuniary damage to the next of kin resulting from the death of the child would not have justified the court in nonsuiting the plaintiff, or in directing the jury to find only nominal damages, and in similar cases this court has decided that the statute does not limit the right of recovery to cases in which there is exact proof of actual pecuniary loss. Oldfield v. N. Y. & Harlem R. R. Co., 14 N. Y. 310, and O'Mara v. Hudson River R. R. Co., 38 N. Y. 445, 450 [98 Am. Dec. 61]. It is always proper, and sometimes necessary, to make proof of such facts as the age, sex, health, and general intelligence of the person killed, his relation to the next of kin, and their condition in life. Houghkirk v. President, etc., D. & H. C. Co., 92 N. Y. 219 [44 Am. Rep. 370]; Lockwood v. N. Y., L. E. & W. R. R. Co., 98 N. Y. 523, 526; Matter of Meekin v. B. H. R. R. Co., 164 N. Y. 145, 152 [58 N. E. 50, 51 L. R. A. 235, 79 Am. St. Rep. 635]. All these things have a bearing upon the question of pecuniary loss suffered by those for whose benefit the action may be maintained, and these are the decedent's husband or wife and next of kin."

But in this case we have evidence that there were three brothers, one of whom lived with the sister, and she kept house for him, was living together on the old homestead. She was his housekeeper. Her death was a pecuniary loss to him certainly. The other brothers were accustomed to go there Thanksgiving time and on other occasions. Her death was a pecuniary loss to them. The recovery is for the benefit of all three, and, under the statute, I think it was the duty of the jury to fix in one sum the pecuniary loss of all three. It could not be divided up. It seems to me that the damages were not excessive. The jury is to give such damages as they, under all the proof in the case, think was just and fair. Under the circumstances presented here, it was impossible to prove with any definiteness or certainty what the damages were or to call any witness or witnesses who could estimate

them. I think it was for the jury to fix the damages under all the evidence.

The result is that the motion to set aside the verdict and for a new trial must be denied.

Ex parte CHIN LOY YOU.

(District Court, D. Massachusetts. Feb. 16, 1915.)

No. 1022.

1. ALIENS ⟸32—DEPORTATION—PROCEDURE.
   The hearing before the Secretary of Labor for the deportation of an alien unlawfully within the United States is summary and administrative, not judicial, and need not be conducted according to the procedure and rules of evidence followed in courts of law, if there is an honest effort to ascertain the truth by methods sufficiently fair and reasonable to amount to due process of law.
   [Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 84, 92-95; Dec. Dig. ⟸32.]

2. ALIENS ⟸32—DEPORTATION—PROCEDURE—RESIDENT.
   A Chinese duly admitted into the country is prima facie a legal resident, but is nevertheless subject to deportation on administrative process.
   [Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 84, 92-95; Dec Dig. ⟸32.]

3. ALIENS ⟸32—DEPORTATION—PROCEDURE—REVIEW BY COURTS.
   The courts have the right to scrutinize freely the fairness of administrative proceedings for the deportation of an alien.
   [Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 84, 92-95; Dec. Dig. ⟸32.]

4. ALIENS ⟸32—DEPORTATION—EVIDENCE—FAIRNESS OF PROCEEDINGS.
   On habeas corpus by a Chinese, who was ordered to be deported as an alien unlawfully within the country, evidence *held* to show that the alien was not given a fair hearing, though he was afforded an opportunity to produce evidence and appear by counsel before the Secretary of Labor.
   [Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 84, 92-95; Dec. Dig. ⟸32.]

5. ALIENS ⟸32—DEPORTATION—PROCEDURE—RIGHT TO COUNSEL.
   While the right to appear by counsel in criminal proceedings, given by Const. U. S. Amend. 6, does not apply to proceedings for the deportation of an alien, the refusal of a request by counsel to appear for the alien places on the immigration officials the burden of explaining such refusal, and of showing the fairness of the proceedings.
   [Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 84, 92-95; Dec. Dig. ⟸32.]

6. ALIENS ⟸32—DEPORTATION—PROCEDURE—EVIDENCE.
   While immigration officials are entitled to make their own rules of evidence for hearings in proceedings for the deportation of aliens, there are certain fundamental principles which they cannot disregard, consistently with fair treatment to the aliens.
   [Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 84, 92-95; Dec. Dig. ⟸32.]

Habeas corpus proceeding by Chin Loy You to secure a discharge from custody on a warrant for deportation as an alien unlawfully

within the United States. On hearing on the agreed statement of facts. Petitioner found not to have had a fair hearing before the immigration authorities, and final action in habeas corpus proceeding delayed for 30 days to afford opportunity to give the petitioner such hearing.

Phelan & Conway, of Boston, Mass., for petitioner.

William C. Matthews, Sp. Asst. U. S. Atty., of Boston, Mass., for respondent.

MORTON, District Judge. Habeas corpus to the immigration commissioner at Boston. The writ issued; the alien, Chin Loy You, who will be referred to as the petitioner, was delivered by the immigration commissioner to the United States marshal; the question is whether he is entitled to be discharged from custody. The case was heard before me upon an "agreed statement of facts," which incorporates by reference the record of the proceedings against the petitioner by the immigration officials upon which deportation was ordered by Acting Secretary Densmore by whom, it is agreed, the actual decision was made. Although the prisoner is a Chinese, born in China, the deportation proceedings were admittedly not based upon the Chinese Exclusion Acts, but upon the Immigration Act of 1907 (Act Feb. 20, 1907, c. 1134, § 21, 34 Stat. 905 [Comp. St. 1913, § 4270]); the general charge being that the prisoner was an alien "unlawfully within the United States." (Secretary's warrant of January 15, 1914). The reference in that warrant to the act of February 20, 1907, as "the Chinese Exclusion Laws" is evidently a mistake.

The case is somewhat unusual, in that the alien was duly admitted into this country on his arrival here. Under such circumstances, the matter goes directly to the Secretary of Labor. Sections 20 and 21 (Comp. St. 1913, §§ 4269, 4270). The practice is that, upon a representation being made to the Immigration Bureau that a certain person is an alien unlawfully in this country, a warrant for his arrest is issued in the name of the Secretary of Labor. The warrant in this case contained directions that the immigration commissioner and inspectors to whom it was addressed should grant the alleged alien "a hearing to enable him to show cause why he should not be deported." Those officers apparently considered that their duty under the warrant was only to examine the alien, to procure such other testimony, statements, and evidence as in their opinion supported the complaint against the prisoner, to offer him an opportunity to introduce evidence in his own behalf, and to make up a record to be sent to the Secretary, with their recommendation, for his decision thereon. Nothing which would ordinarily be termed a "hearing" was accorded the alien by them. The only hearing was before the Acting Secretary, and was upon the record forwarded by the inspectors to Washington. The decision was against the petitioner, and a second warrant issued, dated March 28, 1914, directing deportation, under which he was held when these proceedings were instituted.

[1-3] The principles of law applicable to the case are well settled. Broadly speaking, the question is whether the alien has been accorded

a fair hearing by the immigration authorities. Such hearing may be, and usually is, summary and administrative, rather than judicial, in character, and need not be conducted in accordance with the procedure and rules of evidence followed in courts of law. The essential thing is that there shall have been an honest effort to arrive at the truth by methods sufficiently fair and reasonable to amount to due process of law. Chin Yow v. U. S., 208 U. S. 8, 28 Sup. Ct. 201, 52 L. Ed. 369; Bouve on Aliens (1st Ed.) 513. Although the petitioner was, prima facie at least, a legal resident of this country at the time of his arrest, he is none the less, under the decision in Pearson v. Williams, 202 U. S. 281, 26 Sup. Ct. 608, 50 L. Ed. 1029, subject to deportation upon administrative process, without any judicial trial. There is, however, a tendency in the decisions of the Supreme Court on this subject to safeguard the individual against the tremendous and arbitrary power given to the Immigration Bureau by reserving to the courts the right to scrutinize with some freedom the fairness of the proceedings. In the Tang Tun Case, 223 U. S. 673, 32 Sup. Ct. 359, 56 L. Ed. 606, careful consideration was given to the evidence upon which the Immigration Department acted, and it was held to have been fairly taken and to be legally sufficient. See, too, Liu Hop Fong v. U. S., 209 U. S. 453, 28 Sup. Ct. 576, 52 L. Ed. 888.

[4] It appears that Chin Loy You arrived in this country on October 14, 1912, at San Francisco. He there applied for admission as the minor son of one Chin Yit Bak, a legally domiciled Chinese merchant engaged in business in San Francisco, and, on November 7, 1912, after a hearing upon that question before the immigration authorities at San Francisco, was duly admitted upon that ground. A certificate of identity, with his photograph annexed, was issued to him. He stayed with his alleged father about two months, and then came east to Nanticoke, Pa. From there he went to Hop Lee's laundry in Gettysburg. He was found at that place on or about September 20, 1913, by one Mallett, a United States inspector, who took from him his certificate of identity. Shortly afterward the petitioner left Gettysburg and came to Boston, where he resided until taken into custody in the deportation proceedings.

Before proceedings were instituted against this petitioner, a question had arisen in Pennsylvania concerning the status of a Chinese person there, named Dan Horn. During that trial Hop Lee was called as a witness, and after a threat by the United States officers to accuse him of crime if he did not tell the truth, and a promise to him by them of immunity from prosecution if he did tell the truth (Mallett's statement), testified, among other things, that this alien, Chin Loy You, was not the son of Chin Yit Bak; that he had been employed as a laundryman by Hop Lee (a laundryman is not in the merchant class); that the firm in San Francisco of which Chin Yit Bak was a member was engaged in the illegal importation of Chinese boys; and that this alien had been so illegally imported and was the son of a Chinese laundryman in San Francisco (and not therefore entitled to admission). "This alien was not a party to any of the proceedings at which said testimony was given, nor was he present when any of the said statements were

made, and no counsel or other person was present representing him." Agreed Facts, p. 3. Hop Lee was not called as a witness in these proceedings. Nevertheless a transcript of Hop Lee's evidence as aforesaid was incorporated into the record against the petitioner, and "was treated and considered as competent evidence in determining the issues against this alien." Agreed Facts, p. 3.

On the strength of this evidence in the Horn Case, a warrant issued for the apprehension of Chin Loy You; and he was arrested in Boston shortly afterwards. His counsel was with him at the time of the arrest and was shown the Hop Lee evidence. He then and there demanded of the immigration officers the right to confer with his client, and to be present at all examinations and hearings of the alien, and of any witnesses that might testify. His demands were refused. Immediately following the petitioner's arrest, neither his counsel nor, so far as appears, any of his friends were permitted by the immigration officers to communicate with him, until after the so-called "hearing" before them had been concluded. The officers proceeded with the "hearing," excluding the petitioner's counsel therefrom, and examined the alien at length. A transcript of the testimony so obtained was incorporated into the record and was considered in making the decision.

After the testimony of the alien had been taken in the manner above described, the "statements" of certain persons were taken in the state of Pennsylvania by Inspector Mallett for use in the proceedings against the petitioner. Neither the petitioner nor his counsel was notified of, or knew of, the taking of these "statements"; neither was present when any of them were taken; no opportunity was afforded the petitioner or his counsel to cross-examine, or even to see, the witnesses. The "statements" were added to the "record" and were used against the prisoner.

Certain letters written in Chinese characters were discovered in the possession of one Chin Chak Goon. By whom they were written did not appear. They were not addressed to Chin Loy You, and they were not written by him, nor by any person on his behalf. Agreed Facts, p. 5. He was referred to in the letters, but had no connection with them. They "were incorporated into the record," and "were considered and treated by the Secretary of Labor, together with all the other evidence, as material and competent evidence against the alien." Agreed Facts, p. 5.

After the first examination or "hearing" of the alien had been completed by the inspectors, and after the "statements" taken in Pennsylvania, and the letters referred to, had been added to the record as above stated, the alien was again brought before the inspectors in camera, without the presence of his counsel, and was further examined. This testimony was incorporated into the record and used against him.

The record submitted to the Secretary also contained what purported to be reports by one Mallett, a United States inspector. These reports are of an extraordinary and highly prejudicial character. See Mallett report of March 3, 1914; his comment on Chin Chak Goon testimony; his report of February 26, 1914. They are not confined to comment on what the record discloses, or to recommendations based

upon the record, but state other facts, as to many of which Mallett plainly had no personal knowledge. Mallett never appeared as a witness, and never was sworn; and no opportunity was given to cross-examine him. See, too, the Rodgers report of March 2, 1914.

While the warrant alleges that the petitioner is likely to become a public charge, no evidence was introduced on that issue, and it was not relied upon at all by the Department in making its decision, which was based solely upon the ground that the petitioner had fraudulently obtained admission into the United States. Acting Commissioner General's Summary and Recommendation of March 27, 1914.

After the second examination of the alien, the government's case against him seems to have been regarded as complete. He was told by the inspectors that he might thereafter be represented by counsel. His counsel was shown the record which had been made against the alien and was furnished with a copy of at least part of it. The counsel for the alien offered no evidence, but submitted a brief and appeared personally before the Acting Secretary, where he objected to the course which had been followed. The Acting Secretary disregarded the objections and directed the defendant's deportation, basing his decision upon "all the evidence" in the record (Agreed Facts, p. 6); and the question is whether the proceedings amount to fair treatment of the prisoner. The contention of the respondent is that the proceedings were fair because, after the government's case was completed, an opportunity was afforded the alien to present evidence in his behalf, and his counsel was heard by the Acting Secretary. This, it is said, was all that the prisoner was entitled to.

It is apparent that many of what we are accustomed to regard as the essential safeguards of individual liberty were ignored. The prisoner was not allowed to see any of the witnesses against him while they were testifying, nor to cross-examine them; and he had no power to make them testify afterwards. All the oral testimony against the prisoner (except his own) was taken behind his back, and, if not secretly, at least without notice to him or to his counsel, although the latter was well known to the officers and had seasonably demanded the right to be present at the taking of the testimony and to cross-examine the witnesses. The petitioner was denied the assistance of counsel both before, and while giving his testimony at, the first so-called "hearing" before the officers, and also at the second "hearing." Statements of fact not under oath, made by persons not connected with the prisoner or with the Immigration Department, and never present at any hearing, were used against him.

The proceedings plainly were not of a judicial character. They cannot be supported, it seems to me, as legitimate administrative proceedings, because the officers did not endeavor themselves to ascertain the truth about the matter. Tang Tun v. Edsell, supra; U. S. v. Sprung, 187 Fed. 903, 907, 110 C. C. A. 37 (dissenting opinion by Pritchard, J.); Bouve on Aliens, p. 518. They evidently became convinced that in investigating Hop Lee's laundry they had stumbled upon an organized and far-reaching plot to enter Chinamen fraudulently into the United States. They believed that this petitioner was among the

persons whose admission had been so procured. They thereupon instituted proceedings against him and endeavored by every legal means in their power to secure his deportation. They did not act in bad faith; I do not doubt that they honestly believed the prisoner to be unlawfully here. I think, however, that the immigration records show that they were endeavoring to make out a case, rather than to act in a fair or judicial manner toward the alien. I see no other explanation of their refusal to allow him the assistance of counsel, their omission to notify his counsel of the taking of the testimony in Pennsylvania, their uncritical acceptance and use of the testimony of Hop Lee, taken in proceedings to which this prisoner was not a party, and under circumstances which, as these experienced officers must have known, rendered it of little or no value, the extremely partisan character of the Mallett and Rodgers reports, and also, perhaps, the lack of any proper effort to obtain for these proceedings information from the San Francisco officers concerning the admission there and the testimony of the witnesses on which the petitioner was admitted, though this was to some extent done in a different proceeding, the record of which was submitted to the Secretary, and it may have been the duty of the petitioner to get more complete evidence from San Francisco, if necessary for his case.

Why were the ordinary safeguards against injustice refused or ignored? Why was no notice given to the petitioner's counsel that the testimony of the Pennsylvania witnesses was to be taken? Why was Hop Lee not examined in the proceedings against this petitioner and offered for cross-examination? Why was the petitioner denied the right of counsel before the first hearing, and at any "hearing," until the government's case against him had been completed? These seem to me to be vital questions in considering the fairness of the proceedings; and no answers to them have been suggested by the respondent, except that the officers were not legally obliged to do more than they did, which is the attitude of a prosecutor, rather than of a judge, or of a fair administrative officer, in a case like the present.

[5] It is true that the right to counsel secured by the Constitution (Amendment 6, § 1) relates only to criminal prosecutions; but it is equally true that that provision was inserted in the Constitution because the assistance of counsel was recognized as essential to any fair trial of a case against a prisoner. See, too, Amendment 14. To make the defendant's substantial rights in a matter involving personal liberty depend on whether the proceeding be called "criminal" or "civil" seems to me unsound. Indeed, historically the right to counsel in civil cases and upon charges of misdemeanors antedates such right in cases of felony and treason. Cooley, Constitutional Limitations, p. 475. "The presence, advice, and assistance of counsel" is said by Story to be necessarily included in "due process of law." Story on the Constitution, p. 668. Without undertaking to say that a prisoner has an absolute right to counsel before administrative boards, not composed of lawyers, or that the denial of counsel would in every case prevent such proceedings from being fair, I am of opinion that, under such circumstances as are disclosed in this case, where counsel for a prisoner seasonably

requests the privilege of conferring with him before the trial and of being present during the taking of the evidence, the refusal of that request puts upon the official so acting a great burden of explanation and of scrupulous regard for the prisoner's rights which in this case is not met. Ex parte Lam Pui (D. C.) 217 Fed. 456.

[6] And while it is true that the administrative boards are, generally speaking, entitled to make their own rules of evidence, and to consider any evidence which to their minds is of probative value, there are, nevertheless, certain fundamental principles which can hardly be disregarded, consistently with fair treatment to the prisoner, and which were not observed in this instance. Moreover, he had had a trial in San Francisco, which had resulted in his favor. He was poor, and was under great difficulty in retrying that issue at a point 3,000 miles away. This seems to me one more circumstance which called upon the officers to be scrupulously careful and fair in their investigation.

It does not seem to me that the opportunity here given to present evidence and to argue the case rendered the proceedings fair, or in accordance with due process of law. They are to be viewed as a whole, and, so viewed, they present, to my mind, a plain violation of the fundamental principles of fair play by the immigration inspectors. I find and rule that the proceedings before them were substantially—and on account of their mistaken attitude towards the matter I think intentionally—unfair to the alien. The Acting Secretary, instead of disaffirming the illegal conduct of his subordinates, approved it and based his decision on it. In this case the petitioner belongs to a race little favored by our law. But it has been held that immigration tribunals have authority to determine finally, with no appeal to the law courts or to a jury, questions of citizenship; and the next case of this character may be one of an American citizen endeavoring to protect himself against exile by administrative order made in this way. U. S. v. Ju Toy, 198 U. S. 253, 25 Sup. Ct. 644, 49 L. Ed. 1040; Tang Tun Case, supra.

Without considering the other points urged on behalf of the petitioner, I am of opinion that he had not a fair hearing before the immigration authorities. In accordance with the practice established in this circuit in the Petkos Case, 214 Fed. 978, 131 C. C. A. 274, final action will be delayed 30 days in order to afford an opportunity to the immigration authorities to give the petitioner a fair hearing in the meantime.

THE SKIPTON CASTLE.

(District Court, N. D. California, First Division. April 3, 1915.)

No. 15156.

SHIPPING ⊂=124—LIABILITY FOR DAMAGE TO CARGO—FAILURE IN PROPER CARE.

A shipment on a steamship from Antwerp, Belgium, to San Francisco, of merchandise consisting of mineral water in bottles, baskets, and enamel ware, when delivered, was badly damaged from heat, caused by the heating of bone meal stowed in the hold directly below; the hatchway be-

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

tween the two holds having been left partially uncovered to permit the circulation of air. That the temperature of such lower hold was much higher than than of the other holds was discovered when the ship was five days out, and such condition continued for many days. The merchandise was known to be of a kind subject to injury from heat, and it appeared that it could have been reached and at least moved sufficiently to permit the closing of the hatch cover. *Held* that, under Harter Act Feb. 13, 1893, c. 105, § 1, 27 Stat. 445 (Comp. St. 1913, § 8029), which makes void any provision of a bill of lading exempting the carrier from liability for loss of damage arising from negligence, fault, or failure in proper stowage or care of merchandise, the ship was liable for such damage for failure of the master to exercise proper care to prevent the same.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 458, 466; Dec. Dig. ⇐124.]

In Admiralty. Suit by the American Import Company and others against the British steamer Skipton Castle. Decree for libelants.

William Denman, of San Francisco, Cal., for libelants.

Ira A. Campbell and McCutchen, Olney & Willard, all of San Francisco, Cal., for claimant.

DOOLING, District Judge. In December, 1910, libelants shipped on board the British steamer Skipton Castle, then lying in the port of Antwerp, Belgium, certain merchandise to be carried from said port to San Francisco. This merchandise, consisting for the most part of mineral water, baskets, and enamel ware, was stowed in the No. 1 between-decks. In the No. 1 hold immediately below was stowed a quantity of bone meal. The hatch between the No. 1 hold and No. 1 between-decks was not entirely closed, but was left with spaces between the boards so that the air from the hold could rise freely into the between-decks. The merchandise, when delivered in San Francisco, was badly damaged; the damage, speaking generally, consisting of the bursting of the bottles containing the mineral water, the molding and rotting of the baskets, and rusting of the enamel ware.

The bills of lading provide, among other things, that the ship "should not be liable for loss or damage occasioned by act of God, * * * sweating, * * * decay, or the indirect causes thereof, contact with, or smell or evaporation from, other goods, * * * injury to wrappers, however caused, * * * heat * * * at any time or in any place, * * * or any other perils of the sea, the negligence, default, or error in judgment of the master, pilot, mariners, engineers, stevedores, or other persons employed in or about the ship." It is claimed that whatever injury was suffered was the result of some one of the enumerated exemptions.

The loading of the vessel at Antwerp was concluded on December 18th, and on that day she left Antwerp and proceeded to Hull, where she arrived on the morning of December 19th. On the morning of December 21st she left Hull for her destination on this coast, via Las Palmas. The loading of libelants' merchandise was completed on December 17th, so that on December 22d, when the temperature of the holds was first taken, as disclosed by the log, this merchandise, allowing for the time required to load and stow it, was on board some-

thing over five days. On December 22d the mean temperature of the No. 1 hold was ascertained to be 101, while the temperature of the air ranged during the day from 52 to 53 and the mean temperature of the other holds was as follows: No. 2, 83; No. 3, 82; No. 4, 83; No. 5, 87; poop, 84. On December 23d the mean temperature of No. 1 hold was 100; the temperature of the air ranging during the day from 53 to 57, and that of the other holds ranging from 80 to 86. So through succeeding days the temperature of No. 1 hold was much higher than that of any of the others, and from 30 to 50 degrees higher than that of the air. On December 29th the Skipton Castle arrived at Las Palmas; the temperature of the holds on that day apparently not having been taken. But on December 30th, while still at Las Palmas, the temperature of No. 1 hold was ascertained to be 110; of No. 2, 85; of No. 3, 85; of No. 4, 82; and of No. 5, 90; while the highest temperature of the air during the day was 65. It was not until January 14th that the temperature of No. 1 hold became fairly uniform with that of the others. No. 1 hold, because of its location, should under normal conditions be, if not cooler than the others, at least as cool as any of them. So that the high temperature of this hold must be attributed to some cause existing therein, and it is not now disputed that it was due to the heating of the bone meal which was there stowed.

It is in evidence that bone meal does not ordinarily heat, and there was therefore no reason to anticipate that it would heat upon this occasion. There is no doubt, however, that it did heat, and that the heat generated by it had free access through the partly open hatch into No. 1 between-decks, where libelants' merchandise was stowed. Everything indicates that the damage to this merchandise is to be attributed to the heat thus occasioned. The question, then, for determination, is whether or no, under the circumstances, the ship is excusable, either under the Harter Act, or because of the exemptions contained in the bill of lading.

Section 1 of the Harter Act provides that it shall not be lawful to insert in a bill of lading any clause relieving from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any merchandise, and that any words or clauses of such import shall be null and void.

Section 2 provides that it shall not be lawful to insert in any bill of lading any agreement by which the obligation of the owner of a vessel to exercise due diligence to properly equip, man, provision, and outfit such vessel, and to make such vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo and to care for and properly deliver the same, shall in anywise be lessened, weakened, or avoided.

Section 3 provides that, if the owner of any vessel shall exercise due diligence to make said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agents, or charterers shall be held responsible for damage or loss resulting from faults or errors in navigation or in the management of such vessel, nor shall they be liable for losses arising * * * from

the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or resulting from any act or omission of the shipper or owner of the goods.

The provisions of the bill of lading must be read in connection with the sections of the Harter Act set out above, and none of the exemptions apply, if the shipper prove that the damage arises from negligence in proper loading, stowage, custody, or care of the goods, and no exemption can do away with the obligation of the master properly to care for the cargo while it is in his charge. It is true that, when the damage is shown to result from some of the exempted causes, the burden is upon the shipper to show negligence on the part of the ship. It is contended here that, as to the No. 1 between-decks, the vessel was not seaworthy for the carriage of this cargo, because of the existence of all the elements in No. 1 hold to produce heat, even though such heating was not to be anticipated, and because free access of such heat to No. 1 between-decks was permitted by leaving the hatch partly uncovered, and because the cargo in question was peculiarly susceptible to be damaged by heat.

This is an interesting question, but one which I do not find necessary to determine. The merchandise in question, particularly the mineral water, was stowed in No. 1 between-decks because every one recognized the necessity of having it stowed where it might be kept as cool as possible, and not be subjected to sudden and violent changes of temperature. Yet within five days after it was so stowed it was ascertained that the temperature of the hold immediately beneath it was nearly 50 degrees hotter than the temperature of the air, and nearly 20 degrees hotter than that of the other holds, although it should ordinarily be cooler than any of them. This condition continued day after day; the officers knowing that the hot air of No. 1 hold had free access to No. 1 between-decks, and that the mineral water therein stowed was peculiarly susceptible to heat, and had been stowed there, according to their own testimony, in order that it might be kept as cool as possible. Nothing was done to relieve the situation.

Although the master testified that it would be absolutely impossible, without jettisoning the cargo, to get into any of the lower holds for the purpose of restowing cargo, and that when he found there was a difference of 25 degrees in temperature there was no place to take the cargo out, still it does not appear that it would have been difficult, certainly not impossible, during the fine weather then experienced, and particularly while lying at Las Palmas, to move or raise such portion of the cargo as was on the square of the hatch, and to close the hatch between No. 1 between-decks and No. 1 hold, so that the heated air of the latter might rise through the ventilator without reaching the between-decks. If any of the merchandise in question was then found to be suffering injury because of heat, or because of moisture occasioned by bursting bottles, such portion might have been cared for by drying and airing it. The hatchway between No. 1 between-decks and No. 1 hold was 24 feet long and 16 feet wide, and the depth of No. 1 between-decks was between 7 and 8 feet. The cargo stowed on this partly covered hatch consisted for the most part of baskets. It does not seem

that any insuperable difficulty should attend the raising of such portion of a cargo of basket ware as covered a hatch 24 by 16 feet to a depth of not exceeding 8 feet, or that it would be at all necessary to jettison the same, and I cannot escape the conclusion that the failure to make any effort whatsoever to relieve the conditions then known to exist was such negligence in the care of the cargo as will render the ship liable for the damage occasioned thereby. It is not impossible that the ship may be liable for other reasons suggested by counsel for libelants, but I am satisfied that she *is* liable for the reasons set forth.

A decree will therefore be entered fixing such liability, and the cause referred to the commissioner to ascertain and report the damage.

NICKERSON v. WARREN CITY TANK & BOILER CO.

(District Court, E. D. Pennsylvania. June 15, 1915.)

No. 3414.

1. PROCESS ⇐164—SERVICE—RETURN—AMENDMENT.

In determining the validity of a default judgment, the record may properly be closely scrutinized to see that there was a valid service on defendant; but where defendant has actual knowledge of the issuance of the writ, and has specially appeared for the purpose of questioning its propriety and sufficiency, defendant should be required to stand upon its legal rights, and if the service was in fact proper, and legally sufficient, the return should not be set aside for mere informality, without an opportunity to amend it in conformity with the facts.

[Ed. Note.—For other cases, see Process, Cent. Dig. §§ 176, 239–248; Dec. Dig. ⇐164.]

2. PROCESS ⇐64—SERVICE—REQUISITES OF VALID SERVICE.

To constitute a good service of process, defendant must be actually or constructively present within the jurisdiction, and the service must be made in the legal mode or manner prescribed.

[Ed. Note.—For other cases, see Process, Cent. Dig. §§ 55, 56, 76–82; Dec. Dig. ⇐64.]

3. PROCESS ⇐141—SERVICE—RETURN—OPERATION AND EFFECT.

Whether it was the defendant who was served with process, or whether he was in fact served, is to be determined in the first instance by the marshal or other officer, and the fact, at least prima facie, must be as returned by him.

[Ed. Note.—For other cases, see Process, Cent. Dig. §§ 189–192; Dec. Dig. ⇐141.]

4. PROCESS ⇐141—SERVICE—RETURN—OPERATION AND EFFECT.

The old rule, that for the purpose of bringing defendant into court the sheriff's return was conclusive and must be accepted as a verity, has been somewhat relaxed, and the present tendency is to permit an inquiry into the real facts, and to allow the return to stand or to set it aside in accordance with the facts as found by the court.

[Ed. Note.—For other cases, see Process, Cent. Dig. §§ 189–192; Dec. Dig. ⇐141.]

5. COURTS ⇐344—UNITED STATES COURTS—CONFORMITY TO STATE PRACTICE.

The federal courts must determine for themselves the fact of defendant's presence within the jurisdiction, and may or may not follow the rulings of the state courts.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 917; Dec. Dig. ⇐344.]

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6. COURTS ⊂=344—UNITED STATES COURTS—CONFORMITY TO STATE PRACTICE.
State statutes creating a constructive presence within the jurisdiction for the service of process, such as acts providing for service upon the registered agents of foreign corporations, apply to the service of process of the United States courts.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 917; Dec. Dig. ⊂=344.]

7. COURTS ⊂=344—UNITED STATES COURTS—CONFORMITY TO STATE PRACTICE.
When defendant's presence within the jurisdiction of the court is not in dispute, and only the mode or manner of the service is in question, a service in accordance with the state statute is good.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 917; Dec. Dig. ⊂=344.]

8. CORPORATIONS ⊂=668—ACTIONS AGAINST FOREIGN CORPORATIONS—SERVICE OF PROCESS.
Foreign corporations may be sued where they are doing business, and process may be served upon the agent who there acts for and represents them, since corporations can only do business in foreign jurisdictions with the express or implied consent of the state in which they do such business, which consent may be given upon condition that they be amenable to process, and this condition may be implied.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2603–2627; Dec. Dig. ⊂=668.]

9. CORPORATIONS ⊂=642—ACTIONS AGAINST FOREIGN CORPORATIONS—SERVICE OF PROCESS—"DOING BUSINESS."
A corporation was in the business of constructing and erecting oil tanks, which, when practicable, were constructed at its main works in the state of its incorporation and shipped in charge of its employés, who erected them in the place of their location; the man in charge there employing such labor as might be required. *Held*, that it was doing business in a district where it erected such a tank, so as to be subject to suit there for injuries sustained in erecting such tank, though it was not registered as doing business in that state.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2520–2527; Dec. Dig. ⊂=642.

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

10. CORPORATIONS ⊂=668—ACTIONS AGAINST FOREIGN CORPORATIONS—SERVICE OF PROCESS.
The foreman in charge of the work of erecting such a tank in a state other than that of its incorporation was the corporation's agent upon whom process might be served under the statutes of Pennsylvania, though service upon a mere workman charged with no representative responsibilities would not be sufficient.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2603–2627; Dec. Dig. ⊂=668.]

11. PROCESS ⊂=164—SERVICE—RETURN—AMENDMENT.
Where the return of service upon the foreman in charge of the work of erecting such a tank described him merely as foreman, it might be amended to show that he was the agent of the corporation in charge of its business.

[Ed. Note.—For other cases, see Process, Cent. Dig. §§ 176, 239–248; Dec. Dig. ⊂=164.]

At Law. Action by Charles Nickerson against the Warren City Tank & Boiler Company. On motion to set aside service of writ. Leave to amend return granted, and rule discharged.

A. D. MacDade, of Chester, Pa., for plaintiff.
A. D. Wiler, of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. [1] The defendant is an Ohio corporation, unregistered in Pennsylvania. The action is to recover damages for injuries sustained here. The witnesses are here. These and other obvious considerations make this the natural and convenient jurisdiction in which to try the issues likely to be raised. Unless, however, the defendant was in fact amenable to the service of the process of the court, and the service as returned is found to have been sufficient, the plaintiff, however inconvenient it may be, must seek the defendant within that jurisdiction in which it can be found and may be served. One other broad generalization may be made. Whenever the question of service is raised in determining the validity of a judgment obtained by default and without notice in fact to the defendant, and because of this without opportunity to present the defense, the record may properly be closely scrutinized to see that there was valid service. Whenever, however, the defendant has actual knowledge of the issuance of the writ, and has specially appeared for the purpose of raising the question of the propriety of the service, or of compliance with the formalities of a return of service, the defendant should be required to stand upon his legal rights, and if the service was in fact proper and legally sufficient, the return should not be set aside for mere informality, without an opportunity being afforded for its amendment in conformity with the facts.

[2–4] Two facts are essential to a good service of process. One is the actual or constructive presence of the defendant within the jurisdiction. The other is a service made in the legal mode or manner prescribed. The motion in this case challenges the existence of both of these necessary facts. It asserts, first, that defendant was not here to be served; and, secondly, that the mode of service as returned was unauthorized by law, and the return thereof insufficient. The answer avers the presence of the defendant and maintains the sufficiency of the return. The basis of a return of service thus being a fact or facts, there is in every question of its sufficiency the accompanying query of how the facts are to be determined and by whom they are to be found. Take the case of a defendant returned as served and without other complicating circumstances. The one fact here is the simple one of whether it was the defendant who was served, or whether he was in fact served. Necessarily, in the first instance, at least, the marshal or other officer must determine the fact. This finding he makes in his return. Necessarily, again, the fact, at least prima facie, must be as returned. If the fact be challenged, and the real defendant denies he was served, we come to the intermediate query of how the question of fact can be raised or the remedy at the command of a defendant so circumstanced. One remedy which suggests itself is an action against the marshal for a false return. Another is a plea in abatement. Still another, at least possible one, is a motion to quash the return or to set aside the service. Out of the choice of possible remedies arises this preliminary question. The earlier cases in Pennsylvania laid down the doctrine that the return of the sheriff could not be questioned, but for

the purpose of bringing the defendant into court was conclusive, and, as it must be accepted as verity, the defendant was remitted to his plea in abatement or his action for a false return. This rule has, however, latterly been somewhat relaxed, and the principle has been modified, at least to the extent that where the return of the sheriff is not in itself complete, in the sense of not being wholly self-supporting, there a motion would be entertained, and the facts inquired into and determined by the court. This modification implied the converse, that when the return is complete and self-supporting, the old rule still pertains. The rulings have nevertheless shown a drift, and the courts avow it in the direction of permitting an inquiry into the real facts, and allowing the return to stand or setting it aside in accordance with the facts as found by the court. Park Bros. v. Oil City Boiler Works, 204 Pa. 453, 54 Atl. 334; Fulton v. Association, 172 Pa. 117, 33 Atl. 324; Hagerman v. Empire Slate Co., 97 Pa. 534.

[5, 6] This is the attitude of the courts of the United States. The fact of the presence of the defendant within the jurisdiction they determine for themselves, and in determining it they may or may not follow the rulings of the state courts. The statutes of the states creating a constructive presence within the jurisdiction for process service, such as acts providing for service upon the registered agents of foreign corporations, are held to include service of process by the courts of the United States. Schollenberger Case, 96 U. S. 369, 24 L. Ed. 853; Lafayette Co. v. French, 59 U. S. (18 How.) 404, 15 L. Ed. 451.

[7] When the fact of the presence of the defendant is not in dispute, and only the mode or manner of the service is in question, a service in accordance with the requirements of the state statutes is a good service. Dinzy v. Railroad (C. C.) 61 Fed. 49.

[8] The presence of an individual defendant is a manifest fact. The presence of a corporation as an entity is not so manifest. It may in its charter of incorporation declare the place of its domicile and its residence, in the sense of its principal office or place of business. Its presence otherwise is not manifested, except by its officers or agents. Strictly speaking, a corporation does not migrate when its officers move into another jurisdiction. It would follow from this that it could be sued only in the state of its incorporation. It is a well-known fact, however, that many corporations do business in foreign jurisdictions. They can only do this with the consent, express or implied, of the state in which they are thus found. This consent may be given upon condition that they be amenable to process where their business is transacted. This condition may likewise be implied. Out of this we get the principle that foreign corporations may be sued where they are doing business, and process may be served upon the agent who there acts for and represents them. Such agent must not merely be in the jurisdiction, but he must also be there acting for the corporation. St. Clair v. Cox, 106 U. S. 350, 1 Sup. Ct. 354, 27 L. Ed. 222.

The real question, therefore, is whether the corporation is doing business in the jurisdiction in which the process issues. The defendant in the instant case denies that it was thus doing business here, and refers us (among other cases) to Green v. Chicago R. R. Co., 205 U.

S. 530, 27 Sup. Ct. 595, 51 L. Ed. 916, as ruling the question in its favor. The return there set forth a service upon the corporation, the fact that the corporation was doing business within the district, and the mode of service as one upon an agent. Without defining what constitutes "doing business" within the district, the court held that under the facts of that case the corporation was not "doing business" in the sense of being amenable to the service of process.

[9-11] The difference in the facts of the case cited and those of the case at bar obtrudes itself upon the mind. Here the defendant company was incorporated for and engaged in the business of constructing and erecting oil tanks. Its business is large and territorially widely distributed. When practicable, the tanks were constructed at its main works in the state of its incorporation, and when to be erected in another state were there shipped in charge of its employés, who erected them in the place of their location; the man in charge there employing such labor as might be required. The tank might be shipped in its entirety or in sections, according to size and other circumstances of convenience, and its construction completed at the place of erection. The defendant had made a contract to construct and erect a tank within this district. It was here in the performance of its contract and for the purpose of doing the work it had contracted to do. It was therefore here doing the very thing which it was incorporated to do, and was therefore in the most emphatic practical sense "doing business" in this district. It was also here in the sense that by its act the plaintiff was here injured (if it be the fact that he was so injured). Being here, in this double sense of doing here what it could not do if not here, it is difficult to reconcile our minds to the conclusion that it is not here in the sense of being here answerable for the acts which it has here performed. Its tangible presence here could only be made manifest in the persons of those who were here acting for it. Such persons must in this sense be considered the representatives of and agents for the corporation. Under the proofs such representative and agent was the man who has been designated as "foreman in charge of the work."

The defendant being thus here to be served, we come to the mode of service. If the process had issued from a state court, this would send us to a consideration of the statutes. As already found, a mode of service in conformity with the statutes would be a good service. A reference to them discloses that there are provisions applicable (among other things) to defendants according to their differing characters. A mode of service is provided for individual defendants and corporations, both domestic and foreign. The modes of service are various and sometimes in the alternative. The general practice act of 1901, with its amendments, provides for service upon resident individual defendants and upon domestic corporations and foreign corporations having registered agents for process service. There are older acts providing for service upon unregistered foreign corporations. We are unable to find that the general practice act repeals these earlier statutes. Where it provides a mode of service, such mode under the law of Pennsylvania is doubtless exclusive. Where it is silent, the older provision

may well remain unaffected. All legal questions which arise in the progress of a cause have their practical side, sight of which should not be lost. All the provisions of the Pennsylvania statutes requiring foreign corporations to register as a condition of here doing business recognize the fact that they may be doing business here without a compliance with the law. If they comply with the law, a mode of service is provided which, for their protection, then becomes an exclusive method of service. If without a compliance with the law they do business here, they should be made answerable to process here, and not be permitted to escape responsibility, because by their own act they have made the mode of service provided for their benefit impossible. They should still be protected from the consequences of a possible judgment against them without the opportunity of defense; but the question of service should be made to turn upon the fact of service, and not upon any mere choice of verbiage. The Pennsylvania statutes provide for service upon foreign corporations doing business within the state by service made upon the agent here representing and acting for them in the business they are here doing.

Under the authority of Green v. Railroad, above cited, the fact being that the defendant was here doing business, service upon its agent in charge of the business it was here doing would have been a good service. The man upon whom the service was made was such agent, and the service in matter of fact and substance a real service upon the corporation. The only question which can arise is as to the formal correctness of the return. This is under the facts a mere choice of verbiage. The return describes the person served as "foreman." Service upon one who was a mere workman employé, charged with no representative responsibilities, and having neither authority nor sense of obligation to act for his employer, would not be service upon the principal in fact, and would be a mode of service fraught with too much danger of injustice to sanction. Where, however, the person served is in responsible charge of the work which an unregistered foreign corporation is doing, and is such a person as that the corporation has no one to act for and represent it, unless such person is its agent and representative, it is not going further than the ends of justice require to hold that service upon the one clothed with such powers and authority is service upon the corporation. Such a case the facts show the present case to be.

Leave is therefore granted to amend the return, by showing the service as made to have been made upon the "agent" of the corporation in charge of its business, and, upon this amendment being made, the rule to set aside the service is discharged.

F. A. MILLS, Inc., v. STANDARD MUSIC ROLL CO.

(District Court, D. New Jersey. July 1, 1915.)

1. COPYRIGHTS ⊂=48—LICENSE AGREEMENT FOR USE OF COPYRIGHTED WORKS—CONSTRUCTION—"MUSICAL COMPOSITION."

A license agreement, which recites that plaintiff is the owner of a copyrighted musical composition, that defendant desires to secure the privilege of using it in the manufacture of its music rolls, and which declares that plaintiff gives to defendant the privilege to use the copyrighted musical composition in the manufacture of its sound records in any form, and consents to extending the original copyright to the instruments serving to reproduce mechanically the musical work, does not permit defendant to print and distribute without additional charge, on separate sheets of paper, the words of the composition in the boxes containing the rolls, though the words and music were not copyrighted separately; the words "musical composition" having a more limited meaning in the license agreement than in the copyright statute, where the expression means both words and music.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 46; Dec. Dig. ⊂=48.

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

2. COPYRIGHTS ⊂=75—INFRINGEMENT—DEFENSES.

Copyright Act March 4, 1909, c. 320, § 1, 35 Stat. 1076 (Comp. St. 1913, § 9519), giving any person entitled thereto, on complying with the act, the exclusive right to print, reprint, publish, copy, and vend a copyrighted work, to perform the copyrighted work publicly for profit, and requiring a copyright owner using the musical composition himself for the maintenance of parts of instruments serving to reproduce mechanically the musical work, or licensing others to do so, to file notice thereof, and providing that any failure to file notice shall be a defense to any suit for any infringement of such copyright, does not prevent an owner of a copyrighted musical composition to maintain an action for protection of his exclusive right to print, reprint, publish, copy, and vend the copyrighted work, merely because he has licensed others to use the copyrighted work on parts of instruments serving to reproduce mechanically the musical work and has failed to file a notice thereof.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 65; Dec. Dig. ⊂=75.]

3. COPYRIGHTS ⊂=87—INFRINGEMENT—DAMAGES.

Where a licensee of the right to use a copyrighted musical composition in the manufacture of sound records infringed the copyright by distributing free with the perforated rolls copies of the words of the composition, but discontinued the practice almost immediately after it was begun, and he realized no profits from the practice, nor damaged the licensor, the court, in a suit for infringement, would only allow nominal damages, under Copyright Act 1909, § 25.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 81; Dec. Dig. ⊂=87.]

4. COPYRIGHTS ⊂=90—INFRINGEMENT—COSTS.

A defendant, unsuccessful in a suit against him for infringement of a copyright, is liable to reasonable counsel fees, awarded to plaintiff as provided by Copyright Act 1909, § 40.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 85; Dec. Dig. ⊂=90.]

In Equity. Two suits, tried together, by F. A. Mills, Incorporated, against the Standard Music Roll Company, for alleged infringements of copyrights. On final hearing. Decree for complainant.

Nathan Burkan, of New York City, for plaintiff.
Louis M. Sanders, of Orange, N. J., for defendant.

HAIGHT, District Judge. F. A. Mills, Incorporated, the plaintiff, has instituted two suits against the Standard Music Roll Company, a corporation, the defendant, for alleged infringements of the plaintiff's copyrights in two musical compositions, entitled respectively, "Waiting for the Robert E. Lee" and "Take Me to That Swanee Shore." They were copyrighted on May 3, 1912, and August 30, 1912, respectively. The suits were tried together, as the facts and questions presented in each are the same.

The plaintiff is engaged in the publication of musical compositions, and the defendant in the manufacture of perforated music rolls serving to reproduce mechanically the musical features of such compositions. Prior to the committing of the alleged infringing acts, the plaintiff had licensed the defendant to use the copyrighted musical compositions in the manufacture of its perforated rolls. The defendant inclosed and distributed in the boxes containing the rolls separate sheets or slips of paper, on which it had caused to be printed the words or lyrics of the compositions. This, it is claimed, infringed the plaintiff's copyrights.

[1] It is contended primarily on behalf of the defendant that the license agreement permitted the defendant to do this, and consequently that there was no infringement. The license agreement in each case is in writing, and both are in identically the same form. After reciting that the plaintiff is the owner of the copyright, and that the defendant desires to secure the privilege to use "the said copyrighted musical composition, in the manufacture of its music rolls," they each grant the privilege in the following language:

"The publisher [the plaintiff] hereby gives to the company [the defendant] the right, privilege, and authority to use the said copyrighted musical composition, ———, in the manufacture of its sound records in any form whatsoever, and hereby consents to extending the original copyright of said musical composition to the instruments serving to reproduce mechanically the said musical work."

While it seems that the words "musical composition," as used in the copyright statute, mean both words and music (M. Witmark & Sons v. Standard Music Roll Co., 221 Fed. 376 (— C. C. A. — [C. C. A. 3d Cir.]), still I think that they must be given a more limited meaning in the license agreements in question. The privilege granted was to use the musical composition "in the manufacture of its [defendant's] sound records." The printing of the words on a separate sheet of paper and the distribution of the latter had nothing whatsoever to do with the manufacture of the perforated rolls. They were quite distinct acts. Also by the terms of the license agreements the original copyright is extended "to the *instruments* serving to reproduce mechanically the said musical work." Neither the rolls nor

the instruments in which they were to be used reproduced the words of the compositions, nor were they capable of doing so.

I can readily perceive that, if the defendant were manufacturing discs or records for use in phonographs or similar instruments, which produce both the words and the music, the license agreements would permit the use of both the words and the music, because both would then enter into the manufacture of the records. Admittedly, it was not until some months after the license agreements were executed that the scheme of inclosing the printed words in the same packages with the perforated rolls was conceived by the defendant. It could not, therefore, have been contemplated by the parties, at the time the agreements were executed, that the privilege was to extend to the use of the words in the way in which the defendant has used them. If the defendant has the right to print and distribute the words alone in the way complained of, it would have the same right to print the words and music together on a separate sheet, and distribute it with the perforated rolls. It could thus defeat the plaintiff's exclusive right to publish and sell the musical composition. Manifestly the plaintiff did not, by the license agreements, divest itself of that right. I therefore am constrained to find that the license agreements did not permit the defendant to print and distribute the words of the musical composition in the way in which it did.

It is not questioned by the defendant that, under section 3 of the Copyright Act of 1909 (35 Stat. 1075), the unauthorized use of either the words or music separately would constitute an infringement of the copyrighted "musical composition," although the words and music were not copyrighted separately. It has been so held in this district in M. Witmark & Sons v. Standard Music Roll Co. (D. C.) 213 Fed. 532, although this apparently was not the rule in this circuit prior to the act of 1909. M. Witmark & Sons Co. v. Standard Music Roll Co., 221 Fed. 376, —— C. C. A. —— (C. C. A. 3d Cir.). It therefore follows that the defendant has infringed the plaintiff's copyrights by the unauthorized printing and distribution of the words of the copyrighted musical compositions.

[2] But it is further urged on behalf of the defendant that because the plaintiff has licensed others to use the copyrighted works upon parts of instruments serving to reproduce mechanically the musical works, and has failed to file a notice thereof in the Copyright Office, as provided by subsection "e" of section 1 of the act of 1909, it is, by virtue of that section, barred from any recovery for an infringement of its copyrights. It is true that this section makes it the duty of the owner of the copyright, if he uses the musical composition himself for the manufacture of parts of instruments serving to reproduce mechanically the musical work, or licenses others to do so, to file a notice thereof in the Copyright Office, and provides that "any failure to file such notice shall be a complete defense to any suit, action or proceeding for any infringement of *such* copyright." It is the defendant's contention that this provision bars recovery for any infringement of the copyright; while the plaintiff contends that it only precludes it from instituting a suit for infringement against one using

the copyrighted work, or a part thereof, in the manufacture of parts of instruments serving to reproduce mechanically the musical work.

I think that the latter construction is the proper one. The question is novel, not having been passed upon by any court, so far as I have been able to ascertain. The statute secures to the persons entitled thereto several exclusive rights, which are mentioned separately in distinct subsections. The plaintiff was entitled to the exclusive right (1) to print, reprint, publish, copy, and vend the copyrighted work (subsection "a"); (2) to perform the copyrighted work publicly for profit, etc.; and (3) for the purposes set forth in subsection "a," to make any arrangement or setting of it or of the melody of it in any system of notation or any form of record in which the thought of an author could be recorded and from which it might be read or reproduced (subsection "e"). The two first mentioned rights existed prior to the act of 1909 (Rev. Stat. §§ 4952 and 4966), but the third one did not. White-Smith Music Publishing Company v. Apollo Company, 209 U. S. 1, 28 Sup. Ct. 319, 52 L. Ed. 655, 14 Ann. Cas. 628. In subsection "e" it is provided, "as a condition of extending the copyright control to such mechanical reproductions," that if the owner of the copyright use or permit others to use the copyrighted work upon parts of instruments serving to reproduce mechanically a musical work, any other person may make similar use of it upon payment of a royalty therein provided for; and in a separate and further proviso of the same subsection appears the clause which the defendant now invokes. Subsection "e" confers and deals with certain phases of a new copyright. The failure to file the notice of user is, by the act, a defense to an infringement of *"such"* copyright. The use of the word "such," therefore, I think, refers only to the copyright conferred by subsection "e."

Also the location of the proviso in the section and the context, I think, lends strength to this view. The proviso is found in and it is part of a distinct subsection, and is not applicable at all to some of the other matters dealt with in the other subsections. It therefore follows that, as these suits are not for infringement of the plaintiff's exclusive right secured under subsection "e," but for the right secured under subsection "a," the plaintiff's failure to have filed a notice of user is not a defense to this suit.

[3] The plaintiff prays in its bills for profits and damages, but at the final hearing consented that, in lieu of actual damages and profits, if any there were, the court should allow such damages as should appear to be just, pursuant to the provisions of section 25. Under the circumstances of this case, and as stated to counsel at the time the consent was given, I cannot conceive that the plaintiff has suffered any actual damages by reason of the infringing acts, and I will therefore allow nominal damages of 6 cents. The use of the printed words with the perforated rolls, as far as these two works were concerned, was discontinued by the defendant at or shortly before the suit was instituted and almost immediately after the practice was begun. The defendant made no extra charge for the printed slips, and, so far as appears, realized no profits therefrom.

[4] The defendant did, however, contest the right of the plaintiff to a preliminary injunction and to recover on final hearing. A motion to dismiss the bills was also made on its behalf. Under these circumstances, I think that the plaintiff's counsel is entitled to a reasonable counsel fee, as provided in section 40 of the act of 1909. This I fix at the sum of $150, to be taxed as part of the costs, to which latter the plaintiff is also entitled, as it is to the injunction prayed for.

In re WAITE et al.

(District Court, D. Maryland. May 25, 1915.)

1. BANKRUPTCY ⊂=407—GROUNDS FOR REFUSAL OF DISCHARGE—OBTAINING CREDIT BY FALSE STATEMENT.

Bankr. Act July 1, 1898, c. 541, § 14b (3), 30 Stat. 550 (Comp. St. 1913, § 9598), provides for the denial of a discharge if the bankrupt has obtained money or property on credit upon a materially false statement in writing made to obtain such credit. Upon the death of one partner it was agreed between the surviving partners that the capital of the deceased partner on the books of the firm should be credited to his estate as a liability, and it was so carried on the firm books. This indebtedness was omitted from annual statements of its financial condition furnished banks as a basis for accommodations given the partnership by them. At the time the N. Bank acquired the assets of one of such banks, one of the partners had an interview with the president, and claimed to have told him that the firm had borrowed the capital of the deceased partner; but such indebtedness was omitted from an annual statement subsequently made, upon the faith of which the N. Bank extended credit. Such statement showed a large excess of assets over liabilities, though on the face of the firm's books the firm was insolvent. *Held*, that this omission required the denial of a discharge, though the president was told what the partner claimed to have told him, and it was not excused by the partners' belief that the debt would not be presented, so as to embarrass them, or by the fact that the annual statement was made in the same form customary before such partner's death.

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

2. BANKRUPTCY ⊂=407—GROUNDS FOR REFUSAL OF DISCHARGE—OBTAINING CREDIT BY FALSE STATEMENT.

A member of such firm, in charge of the selling end of its business and claiming to know nothing of its books or accounts, but who signed one of the annual statements prior to that on which the N. Bank extended credit, and from which such indebtedness was omitted, was equally responsible with his partner for the presentation of the false statement to the N. Bank, and was not entitled to a discharge, as, however slight his knowledge of the firm's books, he knew the firm owed such debt, and must have known its approximate amount.

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

3. BANKRUPTCY ⊂=405—DISCHARGE—REFUSAL—ESTOPPEL.

The N. Bank, by objecting to the allowance of the claim of the estate of the deceased partner on the ground that the capital was not loaned to the firm, but was left with the surviving partners at the risk of their business, was not estopped to object to the discharge, there having been no determination of the issues raised by the objection to such claim and

the position of no one having been changed by it, as the partners were liable to the estate, whatever the rights of general creditors as against the claim of the estate.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 709–711; Dec. Dig. ⊂⊃405.]

4. BANKRUPTCY ⊂⊃407—GROUNDS FOR REFUSAL OF DISCHARGE—OBTAINING CREDIT BY FALSE STATEMENT.

A partnership, whose books showed it to be insolvent, as a basis for accommodations from banks, made annual statements of its financial condition from which one large item of indebtedness was omitted. The N. Bank acquired the assets of one of such banks, and as soon as it became a creditor of the partnership began pressing for a reduction of the indebtedness, which was thereafter reduced to some extent whenever notes held by it matured. A few days before the maturity of each note the partnership would present a new note for a smaller amount, which would be discounted and the proceeds passed to its credit, and a check would thereafter be drawn for the payment of the old note, there thus being in form a payment of the old loan and the contracting of a new loan. *Held*, that while for many purposes, and when necessary to do justice between the parties, such transactions are regarded as the mere renewal or continuance of an existing indebtedness, there was such an extension of credit in reliance on the financial statements as required the denial of a discharge in bankruptcy, under Bankr. Act, § 14b (3), as, whenever a note matured, the bank, until it agreed to renew it, had a right to insist upon payment in full, and probably would have exercised such right, had it known that the books of the partnership showed it to be insolvent.

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

In the matter of J. Herbert Waite and another, individually and as copartners trading as John Turnbull, Jr., & Co., bankrupts. On objections to the bankrupts' discharge. Discharge denied.

Venable, Baetjer & Howard and Charles McHenry Howard, all of Baltimore, Md., for National Bank of Baltimore.

Edward M. Hammond and Charles W. Wisner, Jr., both of Baltimore, Md., for bankrupts.

ROSE, District Judge. [1] J. Herbert Waite and Daniel H. Doyle, individually and as copartners, trading as John Turnbull, Jr., & Co., are in bankruptcy. They will be referred to as the bankrupts. The First National Bank of this city, hereafter called the Bank, is one of their creditors. It has objected to their discharge on the ground that they obtained money from it on credit upon a knowingly false statement furnished by them to it. Prior to September 19, 1910, the firm of John Turnbull, Jr., & Co. consisted, in addition to the present bankrupts, of John Turnbull, Jr., and Samuel R. Waite. On that day the former died. The surviving partners formed a new copartnership. The written agreement into which they then entered provided that on the books of the firm the capital of the deceased partner should be credited to his estate as a liability due to it. Samuel R. Waite died in December 1912. The present bankrupts thereupon adopted the former articles of copartnership, with some minor alterations not here material. For a number of years the successive copartnerships had been

borrowers from various banks. The firm was in the habit of handing them annually statements of its financial condition as a basis for the accommodation they might give it until a new statement was furnished. It closed its books as of the 31st of January in each year, and its statements always spoke as of that date, although they were not made up or furnished to the banks until some time later. Any loans or extensions which the banks might make the bankrupts between the receipt of one statement and its successor would ordinarily be in part at least based upon the assumption that the former truthfully disclosed the firm's condition on that 31st of January upon which it bore date.

The president of the bank has testified that the bank, in discounting the notes now held by it, relied upon the statement of January 31, 1914. Lenders of money and sellers of merchandise, when they get a statement from a borrower or a buyer, sometimes require him to stipulate that, until he notifies them of some change which should be made in it, they shall be entitled to rely on it as a substantially accurate summary of his financial condition whenever he borrows or buys. Questions of how far and how long the debtor is bound by such an agreement occasionally arise. But there are none of them in the instant case. The charge here is, not that the condition of the bankrupts changed for the worse between the time they furnished the statement and the dates at which their various notes now held by the bank were discounted for them by it, but that when they gave such statement to it they knew it was false, both as to their condition on the day it bore date and on the day it was delivered to the bank.

Four successive annual statements were made between the death of Turnbull and the bankruptcy. In none of them was the amount owing his estate included among the liabilities, although in accordance with the express agreement of the partners it was charged as such on the firm's books. On the 31st of January, 1914, the amount of this indebtedness was $105,172.39. The statement as of that date given the banks by the bankrupts showed their assets to amount to $196,999.10 and their liabilities to $96,369.62. If the firm then owed nothing more, its net worth would have been $100,629.48, and such the statement purported to show it was. In point of fact, the firm was then insolvent on the face of its own books to the extent of $4,542.91, being the difference between the apparent excess of its assets over liabilities, as shown by its statement, and the amount of its indebtedness to the Turnbull estate.

Prior to December, 1913, there had been no business relations between the bankrupts and the bank. In the last-mentioned month the bank acquired the assets of the National City Bank, in which the bankrupts had an account, and from which they were borrowers. In that way the bank became the owner of four notes of the bankrupts, for $22,500 in the aggregate. At some time after the account was taken over by the bank, the bankrupt Waite had an interview with its president. At that time Waite was asked about certain matters not shown on the statement, as, for example, the rent of the warehouse used by his firm, how long the lease thereof had still to run, and the approximate amount of its annual sales. Memoranda of the answers to these

questions was made by the president of the bank on the sheet upon which the bankrupts' statements for several years past had been tabulated. Waite testifies that during the conversation he said that Turnbull's will gave his surviving partners the right to borrow his capital until May 15, 1915; that they had exercised that privilege and borrowed the money. He says, however, that he was not asked and did not state what was the amount of the loan from the Turnbull estate. The president of the bank denies that he was ever told that the firm owed the estate anything. His recollection is confirmed by the fact that among the notes made by him on the tabulation referred to there is no reference to any such indebtedness, although it was a matter of far more importance than the date of the expiration of the lease of the bankrupts' warehouse. Had Waite given the information that he now thinks he did, it is inconceivable that the president of the bank would not have asked the amount of the estate's claim. According to Waite, this conversation took place at least two or three months before the statement of January 31, 1914, was given to the bank. I am persuaded that in this matter the recollection of the president of the bank is more accurate than that of Waite. Moreover, even if the latter had said what he now thinks he did, the omission of this large item of indebtedness from the statement would nevertheless have been unjustifiable.

Waite testifies that the item was not included in the statement, because the latter was made out in the same form which had been customary before Turnbull's death, and because he regarded it as a statement of the firm's "working capacity." Before Turnbull's death there was, of course, no liability to him to be included. The bankrupts' belief that the debt would not be pressed, so as to embarrass them, did not justify its omission from the statement of their liabilities. In re Miller (D. C.) 192 Fed. 730; In re Arenson (D. C.) 195 Fed. 609; Josephs v. Powell, 213 Fed. 627, 130 C. C. A. 291.

[2] The firm name to the statement of 1914 was signed by Waite. The bankrupt Doyle had had charge of the selling end of the firm's business. He says he knew nothing of its books or accounts. At first he testified that he had never signed any of the statements; but, when shown that as of January 31, 1913, he admitted that the signature to it was in his handwriting. From that, as from its successor, the indebtedness to the Turnbull estate was omitted. However slight his knowledge may have been of bookkeeping, or of the details of the entries in the firm's books, he was perfectly aware that the firm owed the Turnbull estate, and he could not have been ignorant of the approximate amount of that indebtedness. Under such circumstances he must be held equally responsible with his partner for the presentation of the statement of 1914, which was false only in the same respect as the one made by him the year before had been untrue. The facts sharply distinguish his case from that of the appellant in Frank v. Michigan Paper Co., 179 Fed. 776, 103 C. C. A. 268, 30 L. R. A. (N. S.) 623. If the discharge should be denied to Waite, it must be equally withheld from Doyle. In re Savarese, 209 Fed. 830, 126 C. C. A. 554.

[3] The bankrupts contend that the bank is estopped to say that the statement was false. This contention is based on the fact that in the bankruptcy proceedings the bank has objected to the allowance of the claim of the estate on the ground that Turnbull's capital was not a loan to the bankrupts, but was left with the bankrupts at the risk of their business. There has yet been no determination of the issues raised by this objection. The position of no one has been changed by it. No ground for estoppel has as yet arisen. Whatever may be the rights, if any, of the general creditors of the bankrupts as against the claim of the Turnbull estate, there would seem to be no question that the bankrupts are debtors to that estate. The agreement of copartnership between them and the entries upon their books would appear to place that matter beyond the reach of controversy by them.

[4] The remaining question in the case is of more difficulty. So soon as the bank became a creditor of the bankrupts, it began to press for a reduction of the indebtedness. Whenever a note of the bankrupts fell due, the new note which the bank discounted for them was always either $500 or $1,000 less than the face of the old. As a result, when the voluntary petition in bankruptcy was filed in February, 1915, the aggregate sum due the bank was $13,500, or $9,000 less than it had been in December, 1913, and at least $7,000 less than it had been when the false statement was received by the bank. Under these circumstances the bankrupts say that they obtained no money or property from the bank upon a false statement. A similar, if not identical, contention was held unsustainable by Judge Rellstab in Re Arenson, supra. In that case the bankrupt was a buyer, and the objecting creditor a seller, of merchandise. The bankrupt had been for some time a customer of the creditor. He was in the habit of paying something on his old bill whenever he contracted a new one. At a time when he already owed the creditor a good deal he was called on for a statement. He furnished one which was false and fraudulent. Thereafter he continued to buy merchandise and to make payments on account, with the result that when he went into bankruptcy he owed the creditor a smaller sum than he did when the statement was given. It was held that that circumstance was immaterial. He was refused a discharge. Judge Rellstab said that section 14b included further credit, as well as new or larger credit.

In the case at bar the bankrupts, a few days before the maturity of each note, offered for discount a new one for a smaller amount. The discount was made and passed to their credit. Thereafter they drew a check for the payment of the old note. In form, therefore, there was the payment of an old loan, and the contracting of a new. If the parties had used currency, instead of checks, the case would have been on all fours with In re Arenson, supra. The bank would have given the bankrupts the proceeds of the new note in currency, and on the same day, or, as was usually the case, on a subsequent day, the bankrupts would have brought other bills or coins to the bank to pay off their matured obligation. Nothing of that kind was done. Discount of new note, payment of old, were alike made without any actual currency changing hands. It is true, there never would have been money

enough in their account in the bank to make good the check for the old note, had not the proceeds of the new been first credited to them, although there was always a balance which might have been applied by the bank on account of the old note, even though no new one had been discounted.

The bankrupts cite cases to show that for many purposes courts have regarded such a series of transactions as the mere renewal or continuance of an existing indebtedness. Whenever, to do justice between the parties, it is necessary to look through the form to the substance, it will be done. But is there any such necessity presented by this case? Whenever a note matured, the bank, until it agreed to renew it, had the right to insist upon being paid in full. It is more than probable that it would have exercised such right, had it known that the books of the bankrupt showed it to be insolvent. It consented, by accepting a new note, to surrender its right to insist on payment for the time during which that note was to run. Was not, or at least may not, the practical effect upon it have been precisely the same as if upon the faith of the false statement it had made an absolutely new loan? Under such circumstances, can the bankrupts be heard to say that the form which they voluntarily gave their dealings with the bank is not binding on them, in order that they may escape the consequences of doing that which may have damaged the bank precisely as much as it would have been damaged, had the form which actually was adopted accurately represented in every respect and from every standpoint what was in fact done? In short, the false statement is clearly such as is in spirit within the condemnation of section 14b (3), and the form which the transactions between the parties took is within its letter. With this conclusion agrees Judge Chatfield, if I correctly understand his decision in Re Wylly (D. C.) 210 Fed. 954.

It follows that the bankrupts are not entitled to a discharge.

BECKWITH et ux. v. CHICAGO, M. & ST. P. RY. CO. et al.

(District Court, W. D. Washington, S. D. June 17, 1915.)

No. 1810.

1. REMOVAL OF CAUSES ⇐⇒49—RIGHT TO REMOVE—SEPARABLE CONTROVERSY—"ALL."

Pierce's Code Wash. 1912, tit. 81, §§ 217, 259, abolish common-law forms of pleading and provide that, for the purpose of determining the effect of a pleading, its allegations shall be liberally construed. In an action against a railway company, its engineer, and the operators of an automobile, struck by a railroad train, for the death of a person riding in the automobile, the complaint alleged that the railroad company was negligent in not maintaining warning signals at the crossing and in not keeping its right of way clear, that the engineer and the railroad company ran the train at a negligent and unsafe speed and gave no warning or signal of its approach, and after the automobile was upon the crossing negligently failed to stop the train and negligently ran into the automobile, that the driver of the automobile negligently failed to stop before crossing the railroad, and that "by reason of all of said negligent

acts" deceased was killed. *Held*, that this sufficiently charged joint and concurrent negligence on the part of the several defendants to prevent the removal of the cause by the railway company on the ground that a separable controversy was involved as to it, since the word "all" is very comprehensive in its meaning, and was used in the complaint as meaning altogether or conjointly, especially as in Washington such a tort is joint, not only as between the master and servant, through whose negligence the master is charged, but in those cases where the master is also further charged as negligent in other respects.

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

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

2. COURTS ⟸347—SEPARABLE CONTROVERSY—STATE LAWS AS RULES OF DECISION.

In determining whether an action involves a separable controversy, the federal courts will follow the state rule as to whether a cause of action is entire.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 921; Dec. Dig. ⟸347.]

3. REMOVAL OF CAUSES ⟸48—RIGHT TO REMOVE—SEPARABLE CONTROVERSY—EFFECT OF RECOVERY.

To constitute a nonseparable controversy in an action in which defendants are charged with joint and concurrent negligence, it is not necessary that a recovery be had on the trial against all those charged with such joint negligence.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 93, 94; Dec. Dig. ⟸48.]

At Law. Action by C. S. Beckwith and wife against the Chicago Milwaukee & St. Paul Railway Company and others. On motion to remand to the state court. Cause remanded.

W. H. Abel, of Montesano, Wash., for plaintiffs.

George W. Korte, of Seattle, Wash., for defendants.

CUSHMAN, District Judge. [1] Plaintiffs move to remand this cause to the state court, from which it was removed upon the petition of the Chicago, Milwaukee & St. Paul Railway Company, claiming a separable controversy was involved as to it. The suit is one brought by the parents of a deceased son, killed in a crossing accident. Deceased was a passenger in an automobile, operated by two of the defendants, which was struck by an engine of the defendant railroad company, upon which the other defendant was engineer. The defendant railroad is accused of negligence in not maintaining warning signals at the crossing and in not keeping its right of way clear, making it difficult for travelers on the right of way to know of the approach of trains. It is further alleged:

"That at the time the defendant Benjamin M. Snyder was engineer in charge of and operating a train belonging to the defendant Chicago, Milwaukee & St. Paul Railway Company, which train consisted of a locomotive and several freight cars. That the defendants, Benjamin M. Snyder and Chicago, Milwaukee & St. Paul Railway Company then operated and ran said train at a negligent, unsafe, and rapid speed, and in approaching said crossing gave no warning or signal of any kind of the approach of said train, and after said automobile, wherein the said Charles Oren Beckwith was a

passenger, got upon said crossing, said defendants negligently failed to stop said train, although it was then possible to do so, and said defendant negligently ran into and collided with said automobile, thereby throwing the said Charles Oren Beckwith out of said automobile and causing his instant death. That the driver of said automobile, to wit, one Gordan, negligently failed to stop before crossing said railroad, and by reason of all of said negligent acts the said Charles Oren Beckwith was killed. That by the negligent acts of the defendants, as alleged in this complaint, the plaintiffs have been damaged in the sum of $10,000."

Pierce's Code of Washington for 1912 (title 81, §§ 217 and 259) provides for the abolishing of common-law forms of pleading, and that, for the purpose of determining the effect of a pleading, its allegations shall be liberally construed. Under such rule it may fairly be said to be the intention of the pleader to charge that the death was caused by the joint and concurrent negligence of the several defendants. At any rate, upon a motion to remand, the court must so hold, though, were the cause before the court for trial, the disposition might be otherwise. Alabama G. Southern Ry. v. Thompson, 200 U. S. 206, at 218, 219, 26 Sup. Ct. 161, 50 L. Ed. 441, 4 Ann. Cas. 1147; 38 Cyc. 488.

In Trivette v. Chesapeake & O. R. Co., 212 Fed. 641, 643, 645, 129 C. C. A. 177, 179, 181, where the refusal to remand was upheld upon appeal, it is pointed out:

"As to this ground of negligence, therefore, a separable controversy existed, which was removable to the federal court, unless the negligence in operating the train and the negligence with respect to the depot and platform are sufficiently alleged to have concurred in producing the accident. * * * If, however, such joint action and concurrence are sufficiently alleged, the case was not removable. * * * While, according to this statement, the accident would not have happened, but for the negligent operation of the train, there is neither allegation nor necessary inference that it would not have happened but for the character of the approach provided to the depot and platform. We recognize that, if a charge of concurrent and co-operative negligence seems intended, a separable controversy does not result from the fact that separate causes of action might have been maintained, or that a separate defense might defeat a joint recovery."

The pleader in that case, so far as the report discloses, used no language equivalent to that in the present case. The pleader in the present case, after giving the facts, alleges that "all of such negligent acts caused the death." To have added "jointly and concurrently caused" would have been no more than a conclusion.

The word "all" is very comprehensive in its meaning. Moore v. Virginia Fire & Marine Ins. Co., 28 Grat. (Va.) 508, at 516, 26 Am. Rep. 377. In the sense in which it is used in the present pleading, the words "by reason of *all* of such negligent acts" form an adverbial phrase. Webster gives "altogether" as one of the synonyms for the adverb "all." It is as though the clause read, "Altogether such negligent acts caused the death." "Altogether" means conjointly. Therefore it may fairly be concluded that the pleader intended to allege that the negligent acts of which complaint is here made "conjointly" caused the death. In Illinois Central R. Co. v. Sheegog, 215 U. S. 308, 320, 30 Sup. Ct. 101, 103 (54 L. Ed. 208), it was alleged that the various acts of negligence "all together jointly caused said wreck,

and killed the plaintiffs' intestate." The cause was held not removable. If, in place of the words "all together," the word "conjointly" had been used, it is clear that the added word "jointly" changed in no way the meaning which would have been conveyed by the use of the words "all together" alone.

It is not reasonable to suppose that it was the intention of Congress to leave the determination of the right of removal, of jurisdiction between two sovereignties, to hair-splitting shades of difference between such adverbs as "jointly," "concurrently," "all," and "altogether," and their synonyms. In Washington, such a tort as that charged is held to be joint, not only as between the master and servant, through whose negligence the master is charged, but in those cases where the master is also further charged as negligent in other respects. Doremus v. Root, 23 Wash. 710, 63 Pac. 572, 54 L. R. A. 649; Abb v. N. P. Ry. Co., 28 Wash. 428, 68 Pac. 954, 58 L. R. A. 293, 92 Am. St. Rep. 864; Howe v. N. P. Ry. Co., 30 Wash. 569, 70 Pac. 1100, 60 L. R. A. 949; McHugh v. N. P. Ry. Co., 32 Wash. 30, 72 Pac. 450; Gennaux v. N. W. Imp. Co., 72 Wash. 268, 130 Pac. 495.

In Abb v. N. P. Ry. Co., plaintiff, a passenger on a street car, was injured in a collision between the car in which he was riding and a Northern Pacific Railroad train. The plaintiff, for a consideration, released the street car company from liability. The two companies were held joint tort-feasors, and the defendant railroad company was held to be released from liability by the release of its codefendant. In Field v. Spokane, Portland, etc., R. Co., 64 Wash. 445, 117 Pac. 228, it was held that the negligence of a stage driver in failing to stop, look, and listen at a railroad crossing, and that of the engineer of the railroad company, who failed to give a signal of the train's approach, was joint and concurrent.

The Supreme Court has never receded from the rule announced in Chesapeake & Ohio Ry. Co. v. Dixon, 179 U. S. 131, at 137, 21 Sup. Ct. 67, 70 (45 L. Ed. 121):

"It is well settled that an action of tort, which might have been brought against many persons, or against any one or more of them, and which is brought in a state court against all jointly, contains no separate controversy which will authorize its removal by some of the defendants into the Circuit Court of the United States, even if they file separate answers, and set up different defenses from the other defendants, and allege that they are not jointly liable with them, and that their own controversy with the plaintiff is a separate one; for, as this court has often said: 'A defendant has no right to say that an action shall be several which the plaintiff seeks to make joint. A separate defense may defeat a joint recovery, but it cannot deprive a plaintiff of his right to prosecute his suit to final decision in his own way. The cause of action is the subject-matter of the controversy, and that is, for all the purposes of the suit, whatever the plaintiff declares it to be in his pleadings.'"

[2, 3] It was held in that case that the federal court will follow the state rule as to whether a cause of action is entire, which rule still obtains. Neither is it necessary that the recovery upon the trial be against all charged with such joint negligence in the state court, in order to constitute a nonseparable controversy. Bissell v. Heyward, 96 U. S. 580, 24 L. Ed. 678; Barney v. Latham, 103 U. S. 205, 26

L. Ed. 514; Wecker v. National Enameling Co., 204 U. S. 176, 27 Sup. Ct. 184, 51 L. Ed. 430, 9 Ann. Cas. 757; Chicago, R. I. & P. Ry. v. Dowell, 229 U. S. 102, 33 Sup. Ct. 684, 57 L. Ed. 1090; Ches. & Ohio R. Co. v. Cockrell, 232 U. S. 146, 34 Sup. Ct. 278, 58 L. Ed. 544.

The cause will be remanded, as it does not present a separable controversy.

MACMILLAN CO. v. KING.

(District Court, D. Massachusetts. June 24, 1914.)

No. 360.

1. COPYRIGHTS ⊜60—INFRINGEMENT—OTHER "VERSION" OF COPYRIGHTED BOOK.

Sheets of memoranda, prepared for and used in the tutoring of students in the subject-matter of a copyrighted text-book, which are given or lent to each student, and contain, besides occasional quotations of words and sentences from the book, a reproduction, so far as is possible in an abridged and paraphrased form, of the author's treatment of the subject, are an infringement, under Copyright Act March 4, 1909, c. 320, § 1, 35 Stat. 1075 (Comp. St. 1913, § 9517), which gives the owner the exclusive right to "make any other version" of the copyright work.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 56; Dec. Dig. ⊜60.]

2. COPYRIGHTS ⊜55—INFRINGEMENT—PRINTING.

Typewriting or mimeographing constitutes a "printing," within the meaning of the copyright statutes.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 52; Dec. Dig. ⊜55.

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

3. COPYRIGHTS ⊜55—INFRINGEMENT—"PUBLICATION."

It is not necessary, in order to constitute a "publication" of a work in infringement of a copyright, that copies should be offered in the market to all who choose to buy; but there may be such publication, which will entitle the owner of the copyright to an injunction, although the number of persons to whom copies are delivered is limited, and their rights to the copies also limited by agreement with them.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 52; Dec. Dig. ⊜55.

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

4. COPYRIGHTS ⊜86—SUIT FOR INFRINGEMENT—INJUNCTION.

Proof of actual damages is not necessary to warrant the granting of an injunction to restrain infringement of a copyright, if infringement appears and damages may probably follow from its continuance.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. §§ 79, 80; Dec. Dig. ⊜86.]

In Equity. Suit by the Macmillan Company against Melaim Lenoir King. On final hearing. Decree for complainant.

Henry L. Burnham, of Boston, Mass., for plaintiff.

John E. Eaton and Mitchell, Chadwick & Kent, all of Boston, Mass., for defendant.

DODGE, District Judge. The defendant is charged with infringing the plaintiff's copyright in "Principles of Economics," a work in two volumes by F. W. Taussig, Professor of Economics in Harvard University, published in 1911 by the plaintiff, and copyrighted under the act of 1909. The bill alleges that the defendant has—

"printed, published, and leased or sold unauthorized, unfair, and unlawful abridged copies or other versions of said book."

An injunction and accounting is prayed for. 35 Stat. 1075.

The Copyright Act of 1909 secures to the owner of a copyright in a literary work an exclusive right to "print, reprint, publish, copy and vend the copyrighted work" (section 1a), and to "make any other version thereof" (section 1b). It provides that the copyright shall "protect all the copyrightable component parts of the work copyrighted, and all matter therein in which copyright is already subsisting." Section 3 (Comp. St. 1913, § 9519).

The answer denies the allegations above quoted from the bill. The defendant alleges that he is a teacher by profession; that numerous persons come to him for private instruction in various subjects, one of them being economics; that in teaching economics he makes use of and teaches the contents of the copyrighted book; that the book is sold for use as a text-book, and is studied by his pupils as such, and that they resort to him for aid in such study; that each of his pupils is recommended and expected to possess a copy of the book, and in general does so; that all of them possess copies, so far as he knows; and that if any do not is a matter beyond his control, copies being accessible in the libraries or in the hands of friends to them all; that in advance of each conference relating to the subject with his pupils, he prepares for them brief memoranda or outlines covering the ground to be dealt with; that each of these consists of a single sheet of typewritten matter, relating only to the subject-matter to be dealt with at the conference; that, if any sheet is taken away after the conference, an account is kept, and it is returned the next week; that all are subsequently destroyed; that none are sold or leased; that they are not bound or paged; that no use is made of them, apart from the use above described; that they go into his pupils' hands only on the understanding that they are to be used by the individual pupil and returned as above; that, except as stated, they are not published or distributed; and that his regular fees for instruction are fixed without regard to the use of the memoranda, and are the same whether the memoranda are used or not.

He alleges, further, that what he does as above is within the license and consent given by implication in distributing and selling the books, is within the custom of teachers, and is not an infringement of the complainant's copyright.

The defendant's allegations as to the actual use he has made of his "memoranda" are in general supported by the evidence, except that certain memorandum sheets, nine in number (marked Exhibit H), appear by his own testimony to have been prepared by him for use, not at a particular conference dealing with a particular part of the book, but for tutoring in preparation for a final examination in one of the

Harvard courses in economics; and that these were intended to outline all the subject-matter covered in that course during a certain term. These he said he loaned to the pupils tutored in that course, to be kept for "a few days," to be returned, not the next week, but immediately after the examination. It did not appear how long before the examination they were loaned. They were put in evidence by the plaintiff, in whose possession they were at the time, and appear, therefore, not to have been in fact returned to the defendant by the pupils to whom he loaned them.

[1] 1. Are the memoranda referred to such in character as to constitute "copies" or "other versions" of the copyrighted work, within the meaning of the act, if printed, reprinted, or published, within the meaning of the act?

I first consider 30 sheets of the memoranda, furnished for use as evidence by the defendant himself, and agreed to be specimens of all by a preliminary stipulation made by both parties May 9, 1913, before any other evidence had been taken in the case. That "materials for said memoranda or outlines were drawn from" the copyrighted book is also expressly agreed in the same stipulation.

The 30 conferences with his pupils, for which the defendant prepared these memoranda sheets, were to be on successive dates, never at a less interval than one week, beginning with October 6, 1911, and ending with May 24, 1912. The conferences appointed for four dates in October and for November 3 and 10 would seem never to have been actually held, although sheets for those dates were prepared. On the remaining dates conferences were held, and a sheet of memoranda prepared for each was used.

The memoranda sheets used on December 8, 15, and 22, besides dealing with parts of the copyrighted book, dealt also with parts of a different book upon the same subject, by another author, and in no way involved in this case. The sheets prepared for or used on the other dates deal each with a part of the copyrighted book. Certain chapters of the book, occupying in all not quite 60 of its more than 1,100 pages, are not dealt with in any of the sheets. The remaining chapters of the book may be said to be covered by the remaining sheets taken together; but the order of the book was not followed throughout in the successive conferences, earlier portions of it being sometimes passed over until after later portions had been dealt with.

Occasional portions of some of the sheets do no more than refer to the book for its treatment of a particular topic, the reference conveying little or no notion to the student of what is found in the book about the topic. Examples are:

(Feb. 16, under heading Taussig on Interest)
9. Rate differs in different countries. Why?
10. Justification of interest—for and against.
(Feb. 23.) Industrial Crises: (a) Periodicity—1818, 1825, 1837, 1847, 1857, break, 1873, 1884, 1893; also a double pulsation (severe, mild); some world-wide, some limited; (b) Jevon's theory of sun-spots and its value.

If the defendant's sheets had been constructed upon this plan throughout (and without infringement of the copyrighted index), it might be said that he had done no more than provide students with

visible means to aid their study of the book, which would relieve their memories of the task of retaining in proper order the principal matters treated of, and had done nothing which amounted to substantial reproduction of any of the author's treatment. The defendant offered in evidence several so-called printed outlines or abstracts prepared by other teachers for use in connection with other books. These appeared, generally speaking, to be constructed according to the plan just described. As to two of them, wherein a further use of the author's ideas is made, one appears to have been copyrighted by the author, the other by its maker, with permission from the owner of a copyright covering the English translation of the book.

The defendant's sheets certainly make a much more extensive use of the author's ideas than is made in such occasional passages as the two above quoted. For the most part they consist of paragraphs more nearly like the following:

(March 8) Taussig on Taxes on Land and Buildings:

"(a) The peculiarity of the tax on land is that it cannot be shifted, but falls on the owner. If a sale takes place, the buyer deducts the tax and is tax free—'burdenless' taxation. (b) On the other hand, the tax on buildings can be shifted (except where demand is declining), and is shifted, to the occupier, who in turn, if he is a merchant, shifts it to the purchaser of his goods."

(April 25) Taxes on Land and Buildings: (a) A tax on land "which is 'rackrented' cannot be shifted, and is no burden to the owner. (b) A tax on buildings can be shifted to tenant, because buildings cost just so much to erect. Where building is used for business, tenant may shift again to consumers. (c) According as the value of a property is in the land or in the building, the owner pays more or less, and as value of land rises, taxes rise, and thus some of unearned increment is appropriated. (d) It makes practically no difference whether tax is collected from owner as in U. S., or from occupier as in England, that is if the taxes are fixed in amount. If the rate is altered, then it does make a difference. European and American basis of assessment also differ, the 1st being annual rental value, the 2d selling value. Each has advantages and disadvantages. (e) Workingmen pay taxes on dwellings, shops, etc., either directly or indirectly. In England the owner serves as tax collector, without tenant knowing it (unfortunate). (f) In English-speaking countries, taxes on real estate are chiefly local taxes. 'The same tendency is beginning to show itself on the continent,' and the system is a wise one."

Chapter 68, pp. 515–527, of volume II of the copyrighted book, is entitled "Taxes on Land and Buildings," and is divided into sections numbered consecutively from 1 to 6. In the clauses (a) and (b) of both the above extracts, prominent propositions contained in sections 1 and 2, respectively, are (somewhat roughly) condensed, everything said in the section by way of proof, modification, illustration, or application being disregarded. In the clauses (c), (d), (e), and (f) of the second extract the same thing is done with regard to sections 3–6, inclusive, of the chapter.

It will be noticed that clause (a) contains one word, and clause (f) an entire sentence, in quotation marks. The words so quoted are taken direct from the book. Instances of such quotation are frequent throughout the sheets. They are generally short, consisting of one or two words only; the words selected being usually such as would be likely to catch the attention and remain in the memory. Instances of

entire sentences quoted are not so common, though there are several of them. The language of the book is sometimes followed, without being distinguished by quotation marks, though not for more than a few words at a time, so far as I have noticed.

I next consider the nine pages of memoranda which were put in evidence by the plaintiff while cross-examining the defendant (Exhibit H). These, as has been stated, were also prepared by the defendant from the book, for use in "tutoring" his pupils for a final examination upon all the work in economics supposed to have been done by the students at the University who had taken that course during the second term of the year 1911–1912; and they were so used. They correspond generally to the memoranda sheets prepared for his conferences on February 16 and on successive dates thereafter until and including May 24. The portions of the book to which they relate are, in general, the same as those covered by the memoranda sheets for the conferences referred to; but the latter contain matter necessarily omitted from Exhibit H, into whose nine consecutive pages is further condensed what had occupied 15 of the separate memoranda sheets. What has been said above of the memoranda sheets will serve to describe what is found in Exhibit H. In it, as in them, there is frequent quotation of words, and occasional quotation of sentences from the book; the topics treated are topics treated in the book, the attempt is made to reproduce in abridged and paraphrased form (so far as such reproduction is possible within the very narrow limits adopted) the author's treatment of the topics selected, and the author's order and arrangement of topics within the portions of the book dealt with is followed, except for a certain amount of transposition or repetition.

It seems to me that the defendant's method of dealing with the book has resulted in an appropriation by him of the author's ideas and language more extensive than the copyright law permits. It is true that the whole book has not been thus dealt with; but the copyright protects every substantial component part of the book, as well as the whole. Though the reproduction of the author's ideas and language is incomplete and fragmentary, and frequently presents them in somewhat distorted form, important portions of them are left substantially recognizable. If they had not been so left, the defendant's evident purpose could not have been accomplished. It seems obvious that what he was trying to give, and what his pupils were trying to get, was an acquaintance with the contents of the book, which should resemble as much as possible that acquaintance which they would have obtained for themselves by following with sufficient diligence the University course of instruction for which the book was the appointed text-book. Nor do I see any reason to doubt that, as the author testifies, these "outlines" might readily "cause the student to think he (could) meet the minimum requirements without using the book itself." It cannot be said that the outlines go no further than to "give just enough information to put the reader upon inquiry" regarding the contents of the book. It was because the alleged infringing "version" went no further than this that no infringement was found by the court in G. Ricordi & Co. v. Mason (C. C.) 201 Fed. 182–185 (on appeal 210 Fed. 277, 127 C. C. A. 125).

It gave in half a page an abridged synopsis of the copyrighted libretto of an opera, covering 46 pages. It was said, in refusing the preliminary injunction (201 Fed. 183):

"The abridgments which have been condemned by the courts involve colorable shortening of the original text, where immaterial incidents are omitted and voluminous dissertations are cut down, but where the characters, the plot, the language, and the ideas of the author are pirated."

It was further said on final hearing (201 Fed. 185):

"Of course, if the defendant's stories consisted of mere modifications of the copyrighted works, or abridgments thereof, reproducing portions of the dialogue, words, or phrases, the scenes, and characters, a different question would be presented."

Following here a similar principle of distinction, I must hold that the defendant's sheets are not, in any event, such abridgments from the copyrighted book as he has the right to make, and that they constitute "versions" of substantial portions of the book, such as the plaintiff alone has the right to make.

[2] 2. The defendant has neither leased nor sold his sheets. "Printing" I must regard as including typewriting or mimeographing, for the purposes of the act, and he has therefore "printed" them. Can he be said to have "published" them, as the bill alleges, in such sense as to make his publication an infringement, entitling the plaintiff to an injunction?

[3] It is not necessary, in order to constitute publication, that they should have been offered in the market to whoever chose to buy them. There may be a limited publication, which will entitle the owner of the copyright to an injunction. Ladd v. Oxnard (C. C.) 75 Fed. 703, 730. And, as held in that case, there may be such publication, although the number of persons to whom copies are delivered is limited, and their rights to the copies also limited by agreement with them. Although the defendant issued the infringing sheets only to his own pupils, and to them only upon agreement that they should be returned to him within a limited time, the evidence relating to Exhibit H shows either that the agreement was not fulfilled in every case, or that these sheets were copied before being returned. No precautions against such copying appear to have been taken. I must hold that sufficient publication of the outlines has been shown to constitute infringement.

If the above conclusions are right, I am unable to believe that the defendant's use of the outlines is any the less infringement of the copyright because he is a teacher, because he uses them in teaching the contents of the book, because he might lecture upon the contents of the book without infringing, or because his pupils might have taken their own notes of his lectures without infringing.

[4] 3. The evidence can hardly be said to show that the infringing outlines have injured the sale of the book. Nothing more appears than that they might do so, by enabling students to get along without the book who otherwise would have had to buy it. The plaintiff's loss, if any, prior to the filing of the bill, can hardly have been of substantial amount, because the two volumes of the book were copyrighted, respectively, on September 25 and October 4, 1911, and the bill was filed

June 7, 1912. The outlines prepared and used by the defendant during the University year 1911–12 are thus the only ones involved in the case as it now stands. The defendant's uncontradicted evidence is that the number of students who used his outlines, whether in conference classes or in separate tutoring for examinations, did not exceed 15 at the first and 17 at the second term of the year. The evidence shows, however, that outlines similar to Exhibit H, though not precisely the same, were prepared from the book by the defendant and used during 1912–13 in tutoring for mid-year and final examinations. If an injunction is refused, it is obvious that continued use of similar outlines, such as that heretofore made, may well result in damage more substantial than any shown by the evidence thus far submitted. Proof of actual damage is not necessary for the issuance of an injunction, if infringement appears and damage may probably follow from its continuance. Reed v. Holliday (C. C.) 19 Fed. 325, 327; Sampson, etc., Co. v. Seaver, etc., Co. (C. C.) 134 Fed. 890; Id., 140 Fed. 539, 72 C. C. A. 55. It is understood that no accounting is desired by the plaintiff, and an injunction only is sought. To that I think the plaintiff is entitled, and there may be a decree accordingly.

R. M. ROSE CO. v. SOUTHERN EXPRESS CO.

(District Court, N. D. Alabama, S. D. May 24, 1915.)

No. 264.

1. COURTS ⇐493—CONFLICTING JURISDICTION—PRIORITY OF JURISDICTION.
   The pendency in the state courts of suits involving the validity of a state statute, under the federal Constitution, does not oust a federal court of jurisdiction of causes subsequently brought between the same or other parties involving the decision of the same question, nor afford any reason for declining to assume jurisdiction, as to make the res in two causes identical, and exclude the jurisdiction of all co-ordinate courts other than that first obtaining jurisdiction, it is not sufficient that similar questions be involved in the two cases.
   [Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1346–1352; Dec. Dig. ⇐493.]

2. COURTS ⇐493—CONFLICTING JURISDICTION—PRIORITY OF JURISDICTION.
   The R. Co. and other nonresident liquor dealers sued in the Alabama state courts to enjoin an express company from refusing to receive shipments of intoxicating liquors pursuant to a state statute claimed to be unconstitutional, but the R. Co. was subsequently stricken from the plaintiffs in such suit. The Attorney General brought suit in the name of the state against the express company and such liquor dealers to restrain such dealers from prosecuting their suit and other suits, and from delivering to the express company and the express company from receiving such liquors for transportation, and obtained an ex parte temporary injunction. The R. Co. then sued in the federal court and sought an injunction restraining the express company from refusing such shipments. It did not appear that the express company was acting in collusion with the state, or that it was acting dilatorily in the litigation in the state court. *Held* that, to avoid a clash between the state and federal courts, and the injustice resulting from placing the express company in a position

of enforced disobedience to the orders of one of the courts, the injunction should be denied, notwithstanding the probable loss of business to the R. Co., pending a final hearing in the state court, since, though it was doubtful whether that court had jurisdiction over the nonresident liquor dealers, so long as it retained and was exercising jurisdiction, a co-ordinate court could not treat its proceedings as coram non judice, and, moreover, it had undoubted jurisdiction to enjoin the express company from receiving such shipments.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1346–1352; Dec. Dig. ⟸493.]

In Equity. Suit by the R. M. Rose Company against the Southern Express Company. On application for interlocutory injunction. Injunction denied.

Lawrence Maxwell, of Cincinnati, Ohio, Allison, Lynch & Phillips, of Chattanooga, Tenn., Herbert Jackson, of Cincinnati, Ohio, and Weil, Stakely & Vardaman, of Montgomery, Ala., for plaintiff.

R. C. Alston, of Atlanta, Ga., and S. D. Weakley and Tillman, Bradley & Morrow, all of Birmingham, Ala., for defendant.

GRUBB, District Judge. This is a bill filed by the plaintiff, as a shipper of intoxicating liquors from another state than Alabama into Alabama, against the defendant, which is a common carrier of goods by express, seeking to enjoin the defendant to accept shipments of intoxicating liquors, tendered to it for transportation and delivery to consignees, living in dry territory in Alabama, for their personal consumption. The defendant declines to receive such shipments and make such deliveries, because of the prohibition contained in an act of Alabama, now in force in dry territory, known as the "Anti-Shipping Law," which prohibits residents of Alabama, in what is known as "dry territory," from receiving, having in possession, using, or selling intoxicating liquors, except in quantities limited by the terms of the act. The position of the plaintiff as to the act is that it is void because it violates section 1, article 8, of the federal Constitution, and the fourteenth amendment thereto, and for that reason affords no protection to the defendant in its refusal to receive shipments in excess of the quantities fixed by the act for transportation and delivery in dry territory in Alabama.

The application is for an interlocutory injunction. There has been much litigation of this question in the courts of Alabama. A recapitulation of it is necessary. A bill was first filed in the Montgomery city court by one J. E. Whittle, a foreign liquor dealer, against the defendant herein, with similar purpose and effect. The defendant appeared and answered the bill. The Attorney General was invited by the defendant and did assist in the argument of the case. Upon the final hearing, a decree was rendered for the plaintiff, perpetually enjoining the defendant from refusing to accept, at plaintiff's instance, liquor shipments intended for the personal consumption of residents in Alabama dry territory in excess of the quantities permitted by the Alabama Anti-Shipping Act. The ground of the decision was the unconstitutionality of the Alabama Anti-Shipping Law as a regulation of interstate

commerce. An appeal was taken by the defendant from this decree to the Supreme Court of Alabama, which is now pending and will probably be argued and submitted in the Supreme Court of Alabama during the present month.

The operation of the final decree was not suspended by the defendant pending the appeal. After the final disposition of the Whittle Case in the Montgomery city court, a second bill was filed in that court, of similar tenor, effect, and seeking like relief, against the defendant in this case, which was also the defendant in the Whittle Case. The plaintiffs in the second bill were about 60 liquor dealers, residents of states other than the state of Alabama, having a trade in intoxicating liquors with residents of Alabama who inhabited dry territory, and are therefore now amenable to the terms and restrictions of the Alabama Anti-Shipping Law with reference to the quantities of liquors they are entitled to receive, use, possess, or sell. Among the original plaintiffs to the second bill was the present plaintiff. However, before the filing of the present bill in this court, the second bill in the Montgomery city court was amended, with the effect that the plaintiff in this bill was stricken from among the parties plaintiff to the bill in that cause. After the filing of the second bill in the Montgomery city court, an application was made to the judge of that court for the allowance of a temporary injunction, in pursuance of the prayer for relief. The judge of the city court declined the application, upon the ground that the bill was defective, in that there was a misjoinder of parties plaintiff, of which he was required to take notice by the Alabama statute upon a motion for a preliminary injunction. This bill is now pending in the Montgomery city court.

After the filing of this second bill in the Montgomery city court, the state of Alabama, through its Attorney General, filed a bill in the chancery court of Montgomery county against the defendant herein and the various liquor dealers, who had jointly filed the second bill in the Montgomery city court, as herein stated, including the plaintiff in this cause, and also against J. E. Whittle, who was the sole plaintiff in the first bill filed in that court. The purpose of the bill filed in the name of the state was to restrain the parties plaintiff to the first and second bills from further prosecuting those proceedings, and also to restrain them from delivering to the defendant, the Southern Express Company, and the Southern Express Company from receiving from them for transportation, liquors in excess of the quantities prescribed by the Anti-Shipping Law for delivery to consignees in the dry territory, even where intended for their personal consumption. The chancellor issued ex parte a temporary injunction, restraining the various defendants named from causing to be transported into the state of Alabama in dry territory packages of spirituous, vinous, or malt liquors, or other intoxicating liquors, in excess of the quantity prescribed in section 12 of the Anti-Shipping Law. The temporary injunction, as issued, did not restrain the prosecution of the pending suits, which had been instituted by the defendants, who were liquor shippers, in the Montgomery city court. All the defendants in the bill filed by the state of Alabama were nonresidents. Except as to the defendant, the Southern Express

Company, service was sought to be had by publication. Service was also attempted to be had on attorneys for the plaintiffs in the bills in Montgomery city court, where the plaintiffs in those suits were defendants in the bill filed by the state. It was attempted in this way to obtain service on the plaintiff in this cause, the R. M. Rose Company. The defendant, the Southern Express Company, was amenable to service in Alabama, and was, in fact, properly served as a party defendant to the state's bill. The Alabama Code provides that notice of an application for an injunction to restrain the prosecution of a suit may be given the attorney for the plaintiff in the suit sought to be restrained, under certain circumstances. After the issuance of the preliminary injunction in the case filed by the state of Alabama, the defendant, the Southern Express Company, appeared and answered the bill. The bill, in this attitude, is now pending in the Montgomery chancery court.

[1] It is under this state of pending litigation that the application for a preliminary injunction is made in the present cause. It seems clear that the mere pendency of suits in the state courts of Alabama, involving the decision of the same question presented in this cause—i. e., the constitutionality of the Alabama Anti-Shipping Law as related to the provisions of the federal Constitution—would afford no reason for the federal court to decline to assume jurisdiction and decide the question involved, since it is a federal question. The fact that the state court first obtained jurisdiction of causes involving the decision of this question does not operate to oust the jurisdiction of the federal court of causes, subsequently brought to it, between other or the same parties, involving the decision of the same question. The meaning of the term "res" does not extend so far. The presence of and need for deciding similar questions in each court for the disposition of the causes does not make the "res" in each identical. There must be a more tangible subject-matter of the controversy, which is the same in each suit, before it can be said that the court, which first obtains jurisdiction of the matter, excludes the jurisdiction of all other co-ordinate courts from controversies relating to that subject-matter. So that, if the only ground for denying the injunction asked for is the necessity for passing upon the constitutionality of the Anti-Shipping Law of Alabama, if the application be entertained, while that question is under the consideration of the state courts, it would seem an inadequate one.

[2] In this case there is an additional reason advanced by the defendant, the Southern Express Company. It is already under an injunction from the chancery court of Montgomery county, the effect of which is to require it to refuse to receive for transportation "into the state of Alabama in dry territory packages of spirituous, vinous, or malt liquors, or other intoxicating liquors, in excess of the quantity prescribed in section 12 of the Anti-Shipping Law." Among the parties, named in the state bill, from whom it is enjoined from receiving liquors in the prohibited quantities for shipment into dry territory, in Alabama, is the identical plaintiff in this case, the R. M. Rose Company. While it may be doubtful whether the Montgomery chancery

court has or can acquire jurisdiction of this plaintiff (at least for any other purpose than the restraint of its suit, one that now stands dismissed, so far as the plaintiff, the R. M. Rose Company, is concerned), it is clear that this is a matter for the determination of that court, and not the federal court. So long as it still retains and is exercising jurisdiction over the cause, a co-ordinate court cannot treat its proceedings as coram non judice, even as to the nonresident defendants. It may be that they will in the course of the proceeding voluntarily appear in that court, and so eliminate the question of lack of personal jurisdiction over the nonresident defendants. Aside from that, it is without dispute that the defendant, the Southern Express Company, is properly in court in that cause, both by service and appearance in the Montgomery chancery court. That court had undoubted jurisdiction to enjoin the defendant, the Southern Express Company, from receiving for transportation into dry territory in Alabama liquor shipments for personal use of consignees there residing, in excess of the statutory quantities. And this is true, whatever the status of the nonresident defendants as to servability may be. This the Montgomery chancery court has actually done by its writ of injunction issued and served upon the defendant, the Southern Express Company, before the bill in this cause was filed by the plaintiff. This injunction in terms prohibits the Southern Express Company from accepting from this plaintiff, the R. M. Rose Company, any liquors in illegal quantities for shipment into Alabama dry territory. It is still in force and imposes on the Southern Express Company the duty of obedience.

The effect of granting the present application in the case at bar would be to require the defendant, the Southern Express Company, to accept for shipment from the plaintiff, the R. M. Rose Company, for transportation and delivery to consignees in Alabama dry territory for personal use, liquors in excess of the statutory amounts. If the application is granted, it will be impossible for the Southern Express Company to comply with the orders of both courts, since the effect of the one is to forbid it from doing what the other will require it to do. If liquor in prohibited quantities for shipment into dry territory in Alabama is tendered it by the plaintiff, the R. M. Rose Company, it must accept it or violate the order of this court. It cannot accept it without violating the order of the Montgomery chancery court, still in force. The result will be that by the action of two courts, and without apparent fault upon the part of the Southern Express Company, it will be put in an attitude of enforced contempt of the conflicting orders of at least one court. Obedience to this court's writ will necessarily result in disobedience to the prior order of the state court, and the consequent necessity of the state court to punish such disobedience will call upon this court by habeas corpus to interfere with the process and custody of the state court for the purpose of protecting its litigant in the obedience of its own order. The result will be an unseemly conflict between this court and the state court.

In the case of Peck v. Jenness, 7 How. 612, 626, 12 L. Ed. 841, the Supreme Court said:

"It is a doctrine of law too long established to require citation of authorities that, where a court has jurisdiction, it has a right to decide every question which occurs in the cause, and whether its decision be correct or otherwise, its judgment, till reversed, is regarded as binding in every other court, and that, where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another court. These rules have their foundation, not merely in comity, but on necessity; for if one can enjoin, the other may retort by injunction, and thus the parties be without remedy, being liable to a process for contempt in one, if they dare to proceed in the other."

That this is a situation to be avoided requires no argument. That it should not be created by the granting of a preliminary injunction, which is addressed to the judicial discretion of the court, and granted only when its granting accords with judicial propriety, unless for the most urgent and imperative reasons, is clear.

In this case the plaintiff, at one time, invoked the jurisdiction of the state court itself, and its doing so was the probable cause of the filing of the bill by the state in the Montgomery chancery court. The injury that will result to the plaintiff from the denial of the preliminary injunction will be the loss of business with Alabama consignees in dry territory in excess of the permitted quantities, pending final hearing in this cause, or an earlier determination of the matter in the state courts. The amount of loss is not shown with any certainty. So far as the question can be settled by the court of last resort in Alabama, it will likely be settled in a very short time. It is open to the plaintiff to appear in the suit in the Montgomery chancery court for the purpose of hastening the decision of the cause and getting rid of the ex parte injunction, in connection with its codefendant, the Southern Express Company. It will be presumed that the plaintiff can obtain justice there as effectually and speedily as in this court. It is not claimed that the Southern Express Company is acting collusively with the state, or dilatorily, in the conduct of the litigation in the state court. Its pecuniary interest aligns it with the plaintiff in this cause. It would be its duty to shippers to use all reasonable efforts in the cause in the state court to free itself of the obligation of the ex parte injunction there issued and served on it. No complaint has been made that it has been dilatory in this respect up to this time. A failure to use due diligence to free itself in that court might present the matter differently in this court, upon this or a renewed application of like effect.

As now presented, the defendant, the Southern Express Company, is not charged with fault or collusion, in involving itself in the embarrassing situation of conflicting orders of co-ordinate courts impossible of consistent execution, that will result if this application be granted. The resulting situation will not only unduly embarrass an innocent litigant, but will produce a direct conflict of authority between the state court and this court, that must be determined, if carried to extremity, by a test of force between the executive officers of the two courts, in endeavoring to enforce the conflicting orders of each. Balancing, as against this direct, immediate, and inevitable clash between the state and federal courts, and the injustice done by the court in placing an innocent litigant in a position of enforced dis-

obedience to the orders of at least one court, the probable loss to plaintiff's business pending final hearing, though it be considerable, I think that judicial discretion and propriety require the avoidance of such an unfortunate situation by the denial of the plaintiff's application for a preliminary injunction.

In re LEVENSON.

(District Court, D. Massachusetts. April 30, 1914. On Withdrawal of Objections, June 19, 1914.)

No. 18755.

1. BANKRUPTCY ⊂=381—OFFER OF COMPOSITION—OBJECTIONS.

A debtor had had credit with a trust company not exceeding $1,000. He desired to increase the amount of his credit, and at the company's request furnished a statement of his financial condition, stipulating that it should be considered as continuing in force until the company was notified to the contrary. The statement was materially false. An additional loan of $500 obtained by the statement was paid off, and at the time of the bankruptcy the debtor owed the company only $500, which was on a renewal note taken by the trust company after the statement. Its officers testified that it relied on the statement in all subsequent transactions with the bankrupt. The testimony of the debtor and of the officers of the company showed that no disclosures of any change in the financial condition of the debtor were made to the company. *Held*, that the objection of the company to the debtor's offer of composition must be sustained.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 591; Dec. Dig. ⊂=381.]

2. BANKRUPTCY ⊂=381—COMPOSITION—OBJECTIONS—WITHDRAWAL.

The court will not permit objections to an offer in composition which had been heard and sustained to be withdrawn after the decision, under any agreement or transaction by which the objecting creditor receives, directly or indirectly, a larger sum on its claim than other creditors of the same class.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 591; Dec. Dig. ⊂=381.]

In Bankruptcy. In the matter of Max M. Levenson, alleged bankrupt. Objection to offer of composition sustained, and withdrawal of objection refused.

Warren, Garfield, Whiteside & Lamson, of Boston, Mass., for objecting creditors.

Abraham E. Goldberg and Arthur E. Burr, both of Boston, Mass., for bankrupt.

MORTON, District Judge. [1] The alleged bankrupt is an intelligent young man, who, after having studied law for a time, went into business. He employed a bookkeeper, who kept a set of books for him. He had a "line of credit" not exceeding $1,000 at the Paul Revere Trust Company; i. e., loans, not exceeding that amount in the aggregate, were from time to time made to him by the trust company. He intimated his desire to increase the amount, and was asked by the trust company for a written statement of his financial condition. Shortly

before this request, a trial balance had been made up by his bookkeeper, under date of December 4, 1911. There can be no reasonable doubt that the alleged bankrupt knew what it showed. On or about December 12, 1911, he made the statement in writing to the trust company on which the first objection to the offer in composition is based. This statement appears to be in the alleged bankrupt's handwriting; it was signed by him, and was presented by him in person to the trust company, which thereupon loaned him $500 more. The statement contained a provision that it should be considered as continuing in force, and as being a true statement of his financial condition, until the trust company was notified to the contrary.

That the statement was materially false is clear; and no serious contention to the contrary is now made. That it was known by the alleged bankrupt to be false is established. The additional loan of $500 obtained by this statement has been paid off; and at the time of the bankruptcy the alleged bankrupt owed the trust company only $500, instead of $1,000, which was the amount due to the trust company when the statement was called for.

During the period subsequent to the statement and before the failure, a number of the alleged bankrupt's notes were renewed by the trust company; notes of the alleged bankrupt aggregating $1,000 were paid and extinguished during that time. The last renewal, that of a $500 note, was made on July 12, 1912. The only outstanding indebtedness to the trust company is on this renewal note.

It is urged that there is now no existing indebtedness created in reliance upon the false statement. It is said that the trust company, having loaned up to $1,000 to the alleged bankrupt without calling for a statement, plainly did not rely on the statement in its subsequent dealings with him after the amount of his indebtedness fell below $1,000. It seems to me, however, that the evidence does not support this contention. The trust company officials say that, after the statement was received, their transactions with the alleged bankrupt were made in reliance on it, and that the $500 note which the trust company now holds would not have been accepted, but for the statement in question. The alleged bankrupt having undertaken to state his true financial condition at the trust company's request, and having agreed that he would notify the trust company of any material change in that condition, I see no sufficient reason for disbelieving the statements of the trust company officials that they did in fact rely upon the statement in all their subsequent dealings. I do not understand that the referee disbelieved them. He apparently based his conclusion that there is no existing indebtedness created through reliance on the false statement, largely, if not wholly, on his finding that previous to the last renewal the alleged bankrupt had told the trust company, in substance, that he was having a hard time, and had in effect given the trust company to understand that the statement no longer represented his true condition.

The objecting creditors insist that no evidence whatever was submitted justifying this finding. They assert that the fact, as found by the referee, was stated in the brief submitted before him on behalf of the alleged bankrupt and was unsubstantiated by any evidence. I

have carefully gone through the transcript of the testimony submitted before the referee, and have been unable to discover any evidence supporting this finding by him. I am aware that the report of testimony sometimes fails to incorporate admissions of counsel or conferences between the trial judge and counsel on which important findings of fact may be based; and I should be reluctant to disregard the referee's conclusion simply because the report of the testimony showed nothing on which his finding was based. In this case, however, in addition to the absence of such evidence, there is testimony from the bankrupt himself which indicates that he did not make any such disclosure to the trust company; and the testimony of the officers of the company certainly contains no suggestion that any such disclosure was made to them. Upon this state of the record, I cannot properly assume that there were testimony or admissions by counsel justifying the finding under discussion. The alleged bankrupt's indebtedness to the trust company is less than it was at the time when the statement was made; but, for the reasons stated in Re Arenson (D. C.) 195 Fed. 609, and Ragan, Malone & Co. v. Cotton, 200 Fed. 546, 550, 118 C. C. A. 640, this fact is not conclusive against reliance on the statement.

In re O'Callaghan (D. C.) 199 Fed. 662, on which the referee relied, is essentially different from this case. There the false statement was made, not by the bankrupt, but by her husband; it apparently resulted from an unintentional error on the part of the bookkeeper; it was almost three years and four months old at the time of the bankruptcy; and it seems to have had no provision that it should be considered as remaining in force until the creditor was notified to the contrary. The opinion of Judge Hough in Re Brener (D. C.) 166 Fed. 930, is applicable to many points in this case. See, too, In re Simon (D. C.) 201 Fed. 1004, 1008.

I therefore am obliged to hold that the first objection to the composition is well taken and must be sustained. It is not necessary to pass upon the others.

On Withdrawal of Objections to Confirmation of Composition.

[2] I am not aware of any case in which this court has permitted objections to an offer in composition which have been heard and sustained to be withdrawn after the decision, under any agreement or transaction by which the objecting creditor received, directly or indirectly, a larger amount on its claim than other creditors of the same class. In one case in which such objections had been prosecuted and upheld by the court, an arrangement was approved whereby the objecting creditor was reimbursed the actual and necessary expenses of prosecuting the objections to the composition and was paid the same dividend as other creditors in his class. Beyond that no case has gone, so far as I am aware; and I am not disposed to extend the practice. The dangers of allowing creditors to trade upon objections to petitions for discharge or to offers in composition which have been sustained are obvious. Upon the facts disclosed in the statement of the Paul Revere Trust Company, the objecting creditor, there is no sufficient reason for vacating the decision refusing confirmation of the offer in composition.

MOORE v. CLYMER-JONES LITHOGRAPH CO.

(District Court, E. D. Pennsylvania. June 24, 1915.)

No. 723.

COURTS ⇐99—LAW OF CASE—PRIOR RULING.

A master's finding that a receiver, paying a claim presented to and disallowed by the court appointing the receiver, must be surcharged therewith, will not be disturbed on exceptions to his report; the disallowance by the court being the law of the case until reversed.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 340; Dec. Dig. ⇐99.]

Action by Charles A. Moore against the Clymer-Jones Lithograph Company. On exceptions to report of special master surcharging the receiver for the payment of a claim. Exceptions dismissed.

Norman Grey, of Camden, N. J., and Theodore J. Grayson, of Philadelphia, Pa., for exceptants.

DICKINSON, District Judge. The present controversy between the parties, as voiced by the exceptions filed, may be razeed to the question of the propriety of what is termed a franchise tax claimed by the state of New Jersey to be due by the defendant company. Although termed a franchise tax, it is more in the nature of an arbitrary imposition of a required annual payment by the corporation as a condition of its continued corporate existence. By the laws of New Jersey the payment of the claim is not only required of corporations, but in cases of insolvency is made a preferred claim. The tax was paid by the receivers in pursuance of the advice of their counsel, and the question of the propriety of the payment is in form raised by the surcharge of the accountant to the amount so paid.

The payment is sought to be justified by the receivers on the ground that in the course of the administration of the affairs of the defendant company it was deemed advisable to have the corporate existence of the defendant terminated to secure relief against the running of the tax. A condition of its corporate dissolution was the payment of the claim due to the state of New Jersey. The benefit and advantage sought to be thus given to those interested in the defendant company could in consequence not be gained without the payment of the tax, and, as creditors and others interested in the defendant company have thus received the benefit of what was done, they are not in position to successfully urge refusal to pay the price of securing the benefit and advantage which has flowed to them. Furthermore, as this was a New Jersey corporation, whose affairs were being administered by the court through receivers there appointed, and whose assets were thus brought within the state, such assets were properly chargeable with the payment of the claim of the state of New Jersey; the authority and functions of the accountants being merely ancillary to the proceedings there instituted, although appointed here.

Whatever might be said in support of the argument by which these positions are sought to be maintained, the fact remains that the report of the master is based upon the former ruling of this court denying

the claim which was paid by the receivers, and refusing its allowance. This is at least returned by the master as a fact, and this finding is neither excepted to nor denied. We have not at hand access to this ruling; but, assuming it to have been made, as stated by the master, we cannot convict him of error in having followed it, because, having been made, it is the law of the case until reversed. The master plants his ruling squarely upon the ground that the claim, the subsequent payment of which is made the basis of the surcharge excepted to, was presented to this court and disallowed. After this disallowance, and notwithstanding it, the claim was paid by the receivers. The learned special master, as we understand his position, did not deem himself at liberty to disregard the ruling of this court in order to follow the views of counsel for the receivers. In adhering to this position, the master was clearly right. Obviously, if there was an error committed, it was in misconstruing the previous ruling of this court. As there is no suggestion that he committed the latter error, he was manifestly right in the conclusions which he has reached.

There is, therefore, neither necessity nor occasion to otherwise justify the report of the master. There is possible room in the statement of the record facts given us to find lodgment for the thought that the previous ruling of this court did not apply to the propriety of the payment as made by the receivers, but merely to the allowance of the claim which was disallowed by the court. No such thought, however, is squarely presented in the argument addressed to us in support of the exceptions. The argument is devoted exclusively to the validity of the claim of preference in payment made by the state of New Jersey, and the sustaining of the exceptions would require us to convict the master of error in not having reversed the ruling of the court of his appointment. It must be plain to every one that this we cannot do.

The exceptions are accordingly dismissed.

In re GROVENSTEIN-BISHOP CO.

(District Court, N. D. Georgia. February 20, 1915.)

No. 3745.

1. BANKRUPTCY ⟸345—BANKRUPTCY OF TENANT—LIEN OF LANDLORD—PRIORITY AS AGAINST CLAIM OF GENERAL CREDITORS.

A lien of a landlord exists from the beginning of the tenancy, enforceable by a ministerial act of proper officer, and is superior to the claim of general creditors of the tenant, adjudged a bankrupt.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 531, 532, 534, 539, 540; Dec. Dig. ⟸345.]

2. BANKRUPTCY ⟸191—CLAIMS—PRIORITY.

Under Bankr. Act July 1, 1898, c. 541, § 47, cl. 2, 30 Stat. 557, as amended by Act June 25, 1910, c. 412, § 8, 36 Stat. 840 (Comp. St. 1913, § 9631), giving to trustees in bankruptcy, as to all property coming into the custody of the court, the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings, a trustee in bankruptcy of a tenant has a judgment lien superior to any claim of the landlord, entitled

under Civ. Code Ga. 1910, § 3340, to a special lien on crops and a general lien on the property of the debtor liable to levy and sale, which general lien dates from the time of the levy of distress warrant to enforce the same, where the landlord did not take out a distress warrant until after bankruptcy.

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

In Bankruptcy. In the matter of the Grovenstein-Bishop Company, bankrupt. The Haralson Warehouse Company, presenting a claim, adjudged a general creditor only.

Hendrix & Silverman, of Atlanta, Ga., for petitioning creditor.

A. H. Freeman, of Newnan, Ga., for bankrupt.

T. F. Rawls, of Newnan, Ga., for claimant.

NEWMAN, District Judge. [1] The question in this case is as to the rank of a landlord's lien for rent. In the present case the landlord took out his distress warrant after the bankruptcy proceedings had commenced, and has filed it, together with a proof of claim, in the bankruptcy proceeding.

This court rendered a decision in the case of In re Dougherty Co. (D. C.) 109 Fed. 480, and established a rule which has been acted on in this district until the decision of Henderson v. Mayer, 225 U. S. 631, 32 Sup. Ct. 699, 56 L. Ed. 1233. Mr. Justice Lamar, delivering the opinion of the court in that case, says:

"The provisions of the Bankruptcy Act, preventing an insolvent from giving or the creditor from securing preferences for pre-existing debts, apply not only to mortgages and transfers voluntarily made by the debtor, but also to those preferences which are obtained through legal proceedings, whether the lien dates from the entry of the judgment, from the attachment before judgment, or, as in some states, from the levy of execution after judgment. But the statute was not intended to lessen rights which already existed, nor to defeat those inchoate liens given by statute, of which all creditors were bound to take notice and subject to which they are presumed to have contracted when they dealt with the insolvent."

Again in the opinion he says:

"The fact that the warrant could be levied upon property which had never been on the rented premises does not change the nature of the landlord's right, though it may increase the extent of his security. The statutory restrictions as to date, rank, and priority may be important in a controversy with other lienholders, but were wholly immaterial in this contest between the landlord and trustee, where the latter was only representing general creditors. As against them the landlord had from the beginning of the tenancy the right to a statutory lien, which had completely ripened and attached before the filing of the petition in bankruptcy. The priority arising from the levy of the distress warrant was not secured because Mayer had been first in a race of diligence, but was given by law because of the nature of the claim and the relation between himself as landlord and Burns as tenant. In issuing the distress warrant the justice acted ministerially. Savage v. Oliver, 110 Ga. 636 [36 S. E. 54]. The sheriff was not required to return it to any court, and no judicial hearing or action was necessary to authorize him to sell for the purpose of realizing funds with which to pay the rent. Such a lien was not created by a judgment now 'obtained through legal proceedings.'"

I think these two extracts from this opinion show that it was the view of the Supreme Court that a lien in favor of the landlord existed

from the beginning of the tenancy, inchoate in a way, perhaps, but a lien nevertheless, and all that was required was a ministerial act of the proper officer, say a justice of the peace, in enforcing it. This lien would be superior to the claim of general creditors under this decision in my opinion.

[2] The next contention here is that Act June, 1910, § 8, giving to trustees in bankruptcy, as to all property coming into the custody of the court, "all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon," gave to the trustee in this case a judgment lien superior to any claim of the landlord.

I do not see how there can be any doubt that the trustee's lien is superior to the lien of the landlord in this case. The Code of the State of 1910, § 3340, gives landlords a special lien on crops and also a general lien on the property of the debtor liable to levy and sale, "and such general lien shall date from the time of the levy of distress warrant to enforce the same." The act of June, 1910, amendatory of the Bankruptcy Act, which has been referred to, had as its main purpose the preventing of unrecorded mortgages and conditional sales from having priority over general creditors; but its effect seems to me unquestionably to defeat these claims for rent, where there is no distress warrant taken out and levied before the bankruptcy proceeding. The trustee gets a general judgment lien, and, it seems to me, necessarily has priority over a landlord's general claim for debt, in the absence of the obtaining of a distress warrant and the levy of the same.

The original legislative act refers to "the general lien of landlords for rent when reduced to execution and levy" (Acts 1873, p. 44), and the section of the Code, as indicated, says, speaking of the general lien of the landlord, that it "shall date from the time of the levy of the distress warrant to enforce the same." I think, as has been stated, that there is a lien existing all along, without reference to the issuance or levy of distress warrant, in favor of the landlord, which must be superior to general creditors; but it is not superior to judgments obtained against the property of the bankrupt, and that is what the trustee has under this amendment of June, 1910.

The case of Henderson v. Mayer, to which I have referred, was determined in the District Court prior to the amendment of the Bankruptcy Act giving to trustees a lien, so that the question as to the effect of this lien was not raised in that case. While the effect of that case is clearly to maintain the claim of the landlord for rent over the claim of general creditors, certainly from the time of issuing the distress warrant, I do not think it can be invoked in this case to show that the rights of the landlord, the Haralson Warehouse Company, are prior in dignity to the lien of the trustee as he now stands, armed with a judgment "as by legal or equitable proceedings." Even if it can be held that the distress warrant was properly taken out, it was never levied.

I think the decision of the referee, which was that the claim of the Haralson Warehouse Company was simply that of a general creditor and could only be proved in that way, must be sustained.

BUCKEYE POWDER CO. v. E. I. DU PONT DE NEMOURS POWDER CO. et al.

(Circuit Court of Appeals, Third Circuit. July 2, 1915.)

No. 1899.

1. MONOPOLIES ⟸28—ANTI-TRUST ACT—ACTIONS FOR DAMAGES—PROOF.
A plaintiff, to sustain an action under Anti-Trust Act July 2, 1890, c. 647, § 7, 26 Stat. 210 (Comp. St. 1913, § 8829), for damages for violations of sections 1 and 2 of the act, brought prior to Act Oct. 15, 1914, c. 323, § 5, 38 Stat. 731, declaring that a final judgment hereafter rendered in any suit brought by the United States under the anti-trust laws, to the effect that a defendant has violated the laws, shall be prima facie evidence against the defendant in any suit brought by any other person against the defendant under the laws, must prove that defendants have violated the Anti-Trust Act, and that by such violation they have so injured plaintiff that damages should be awarded, and the fact that defendants, in a suit by the United States, had been adjudged guilty of violating the act, was not available to plaintiff.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 18; Dec. Dig. ⟸28.]

2. APPEAL AND ERROR ⟸1003—QUESTIONS REVIEWABLE—VERDICT—CONCLUSIVENESS.
The United States Circuit Court of Appeals may not determine whether a verdict is in accord with the weight of the evidence, or review the verdict on any disputed fact, but may only inquire whether assignments of error, properly taken, disclose any material mistake in the trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3938–3943; Dec. Dig. ⟸1003.]

3. APPEAL AND ERROR ⟸839—QUESTIONS REVIEWABLE—DEFENSES.
Where the verdict for defendant relying on two defenses might have been given under either, plaintiff, on writ of error to review the judgment thereon, was entitled to raise legal rulings relevant to either defense.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2915, 3278–3280, 3286–3288, 3290–3293, 3297–3300, 3377; Dec. Dig. ⟸839.]

4. MONOPOLIES ⟸28—ANTI-TRUST ACT—ACTION FOR DAMAGES—EVIDENCE.
The mere fact that the majority of the stock of corporations engaged in the manufacture and sale of powder, other than black blasting powder, was owned or controlled by a corporation engaged in manufacturing black blasting powder, did not alone show that the former corporations participated in a conspiracy by the latter to injure the trade and business of another manufacturing black blasting powder, suing all the corporations for damages under Anti-Trust Act, § 7.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 18; Dec. Dig. ⟸28.]

5. APPEAL AND ERROR ⟸679—QUESTIONS REVIEWABLE—RULINGS ON PLEADINGS.
The action of the trial court in requiring plaintiff, suing for damages under Anti-Trust Act, § 7, for violations of sections 1 and 2 of the Act, to elect on which violation it will rely, is not reviewable, where all the evidence is not in the record.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2878–2879; Dec. Dig. ⟸679.]

6. PLEADING ⟸369—ELECTING CAUSE OF ACTION—SUIT UNDER ANTI-TRUST ACT.
Where the declaration, in an action for damages under Anti-Trust Act, § 7, sought a recovery for violations of sections 1 and 2 of the act, the

court was justified in requiring plaintiff to elect on which section it would rely.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1199–1209; Dec Dig. ⊂⊃369.]

7. APPEAL AND ERROR ⊂⊃1039—RULINGS ON PLEADINGS—HARMLESS ERROR.

Where, in an action for damages under Anti-Trust Act, § 7, plaintiff's case depended on the truth of the charge to which practically all the evidence was directed, that defendants had unlawfully attempted to monopolize a large part of the trade in an article of commerce, and the case was tried on the merits, the ruling requiring plaintiff to elect whether he would rely on a violation of section 1 or of section 2 was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4075–4088; Dec. Dig. ⊂⊃1039.]

8. JUDGMENT ⊂⊃644—ANTI-TRUST ACT—ACTIONS FOR DAMAGES—EVIDENCE—ADMISSIBILITY.

Where an action under Anti-Trust Act, § 7, for damages for violations of sections 1 and 2 of the Act, was brought prior to Act Oct. 15, 1914, making a final judgment in any suit by the United States under the trust law, to the effect that defendant has violated the law, prima facie evidence against defendant in any suit by any other person, a decree adjudging defendants guilty of violations of the Anti-Trust Act, rendered in a suit by the United States, was inadmissible, because the parties in the two suits and the subject-matter thereof were different.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1157; Dec. Dig. ⊂⊃644.]

9. APPEAL AND ERROR ⊂⊃274—QUESTIONS REVIEWABLE—INSTRUCTIONS—EXCEPTIONS.

Where the court, in response to a party's requested instructions, stated that it had touched on every one of the requests, and did not charge them in the language requested, but counsel might take an exception that it did not specifically charge in the precise language requested, and the party only excepted to that portion of the charge which refused to give the requested instructions, except as charged, did not call the trial court's attention to what was objected to, and was insufficient to call for a review of the ruling.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1591, 1592, 1605–1607, 1624, 1631–1645; Dec. Dig. ⊂⊃274.]

10. TRIAL ⊂⊃261—INSTRUCTIONS—REQUESTS.

It is not error to refuse a series of requested instructions, where one of the instructions is erroneous.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 484, 660, 671, 673, 675; Dec. Dig. ⊂⊃261.]

11. MONOPOLIES ⊂⊃28—ACTIONS FOR DAMAGES UNDER ANTI-TRUST ACT—INSTRUCTIONS.

In an action for damages under Anti-Trust Act, § 7, for violations of sections 1 and 2 of the Act, instructions which state that a defendant at the time of the organization of plaintiff company, and during the time plaintiff carried on its business, was acting in violation of the Anti-Trust Act as attempting to monopolize trade, but that the status of defendant did not make it liable to plaintiff, and plaintiff, to recover, must show that defendant used its power in the trade oppressively, at least generally, and thereby obstructed the free flow of commerce, and that, if plaintiff was sufficiently capitalized to carry on a struggle under normal conditions, it was immaterial whether it was or was not sufficiently capitalized to meet a competition forced on it by unlawful means, were not objectionable as equivalent to charging that, after a monopoly had obtained a foothold, competitors entered the field at their peril.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 18; Dec. Dig. ⊂⊃28.]

12. APPEAL AND ERROR ⇐978—NEW TRIAL ⇐44—MISCONDUCT OF JURY—FINDINGS—DISCRETION OF COURT.

Refusal of new trial on the ground of misconduct of the jury, because having in their possession, during their deliberation, papers not in evidence, is discretionary, and will not be disturbed, except for abuse of discretion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3866–3870; Dec. Dig. ⇐978; New Trial, Cent. Dig. §§ 80–85, 105; Dec. Dig. ⇐44.]

In Error to the District Court of the United States for the District of New Jersey; John Rellstab, Judge.

Action by the Buckeye Powder Company against the E. I. Du Pont de Nemours Powder Company and others. There was a judgment for defendants, and plaintiff brings error. Affirmed.

See, also, 196 Fed. 514.

Twyman O. Abbott, of New York City, for plaintiff in error.

William H. Button, of New York City, and Frank S. Katzenbach, Jr., of Trenton, N. J., for defendants in error.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

McPHERSON, Circuit Judge. In this action at law, which is brought under section 7 of the Anti-Trust Act of 1890, the Buckeye Powder Company, an Ohio corporation, is the plaintiff, and three New Jersey corporations are defendants—the E. I. Du Pont de Nemours Powder Company, the Eastern Dynamite Company, and the International Smokeless Powder & Chemical Company. In essence the declaration charged that the plaintiff's business (the manufacture of black blasting powder) had been greatly injured and finally destroyed by the defendants' unlawful conduct, in violation of sections 1 and 2 of the act. Treble damages were asked for, amounting to nearly $4,000,000, although this demand was much reduced at the end of the trial, and the dispute occupied the time of a court and jury during nearly all the working days between September 24, 1913, and February 25 of the following year. The case was submitted in a comprehensive charge marked by great ability and painstaking care, and the jury returned a verdict of "no cause of action as to all the defendants." So far as the Dynamite Company and the International Company are concerned, this was a directed verdict, the trial judge holding that the evidence did not establish their participation in any unlawful act; but the liability of the Du Pont Company was submitted to the jury and was passed on by that tribunal. Nearly 70 errors are assigned on the pending writ, but 20 of them are not pressed, and some that relate to the measure of damages are not now important. Those that still need attention can be considered more satisfactorily by taking up the subjects to which they relate than by taking them up seriatim. A short preliminary statement may be desirable in order to explain some of the questions that were presented to the court and jury.

[1] First, the relevant dates. The Buckeye Company was incorporated in January, 1903. It began business the following September and abandoned the field five years later, in September, 1908. The Du

Pont Company was incorporated in May, 1903, succeeding a number of earlier enterprises. The other defendants are older; the Eastern Dynamite Company going back to 1895, and the International Company to some date we have not found in the record, but apparently several years at least before 1903. The defendants admitted their participation in an illegal trade association as late as June 30, 1904, but denied that such participation continued thereafter. In June, 1911, the three defendants, in company with 25 other corporations and individuals, were adjudged to have violated the Anti-Trust Act. United States v. Du Pont Co. (C. C. 3d Circ.) 188 Fed. 127. But, as the government's object in that suit was merely to dissolve an unlawful combination, we need hardly say that, under the long-established rules of evidence that were in force until a few months ago, the Buckeye Company (a stranger to that proceeding) could not avail itself in the present suit either of the evidence then given or of the decree. It is true that these rules have since been changed by section 5 of the act of October 15, 1914 (38 Stat. 731, c. 323), which provides that:

"A final judgment or decree hereafter rendered * * * in any suit or proceeding in equity brought by or on behalf of the United States under the anti-trust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any suit or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto."

But as this statute had not been passed when the trial took place, and moreover as the express terms of the section confine it to future judgments or decrees, the Buckeye Company was obliged to offer evidence to prove the affirmative of the issues in the present suit: (1) That the defendants had violated the Anti-Trust Act; and (2) that by such violation they had so injured the plaintiff that damages should be awarded. Voluminous evidence on these issues in many of their aspects was offered by both parties, and the verdict has settled numerous questions of fact in favor of the defendants.

[2] We need not dwell upon the point that we have no power to determine (as we are asked to do) whether the verdict was in accord with the weight of the evidence, or to review the finding of the jury on any disputed fact. Our only business is to inquire whether the assignments of error that were properly taken disclose any material mistake in the trial. For this reason much of the plaintiff's argument must be laid aside as irrelevant; indeed, the brief contains so much that is nothing more than a conscious or unconscious attack on the verdict that we have not always found it easy to disentangle the questions of law that lie within our province from the questions of fact that lie outside.

In a few words, the situation below was this: The plaintiff charged, and attempted to prove, that an unlawful and extensive combination in several forms had existed for more than 30 years, the object of the evidence being to establish the fact that a more or less complete monopoly had been created of the trade in powder (especially in black blasting powder) and other explosives; that this attempted monopoly and consequent restraint of trade had been substantially successful, and was maintained from January, 1903, to the end of 1908, the whole

period covered by the suit; that R. S. Waddell, a man with large experience in the trade, who had been employed by the defendants for more than 20 years, had undertaken to organize the plaintiff corporation for the purpose of making and selling black blasting powder; that the defendants thereupon began to interfere with his project in various unlawful ways; and that these attempts to injure the business continued after the Buckeye Company had been incorporated and after its plant had been built near Peoria, Ill. Charges of oppressive conduct were set forth in great detail; some of such acts being directed specifically against the plaintiff, and other acts being directed against the plaintiff in company with other of the defendants' rivals. As a result the Buckeye Company alleged that its enterprise suffered injury from the beginning, and was finally sold out and abandoned at a serious loss.

The defendants denied these charges, and the plaintiff (having the burden of proof) undertook to prove some of them, but by no means all. Much conflicting evidence was taken, filling a record of several thousand pages. Among other matters the defendants contended that they had done nothing to bring about any abnormal conditions in the trade, and, if the plaintiff had suffered loss from such conditions, its misfortune should not be laid at their door. On the contrary, they insisted that the plaintiff's troubles were due to its own faults or blunders, such as improper organization, lack of capital, insufficient experience, inattention to business, misrepresentations to customers, inability to fill orders, and furnishing bad powder. A great deal of the record is devoted to this branch of the dispute, and many witnesses testified that the defendants did not interfere with the plaintiff's customers, or entice them away. When they left, it was because the plaintiff had not satisfied them. To refute the charge that the defendants had oppressively and illegally lowered prices, evidence was offered that during the period in question there was much independent competition, led by the plaintiff itself, and that this competition was the prevailing, if not the sole, factor in lowering prices. There was also evidence that the Du Pont Company's hold on the trade, and the volume of its business, continually diminished during the whole period of the suit.

[3] Two distinct defenses were therefore set up: (1) A denial that the Anti-Trust Act had been violated by the defendants after June 30, 1904; and (2) an assertion that, even if such violation had taken place, the plaintiff had suffered no injury therefrom, but had met with loss and final failure because its equipment had not been adequate, and its management had not been competent. Each defense raised numerous questions of fact, and, as the verdict in favor of the Du Pont Company may have been founded as well upon one defense as upon the other, the legal rulings that are relevant to either defense are open to the plaintiff's attack. Let us turn to such of the legal questions as we think it necessary to notice.

[4] 1. In our opinion the direction to find a verdict in favor of the Dynamite Company and of the International Company was correct. Neither of these corporations manufactured or traded in black blasting powder (which was the particular business the defendants were charged with restraining or monopolizing), and their indirect connection with the alleged unlawful combination was rested almost wholly

on the fact that a majority of the stock in each was owned or controlled by the Du Pont Company. Obviously, however, this fact alone did not prove their participation in a conspiracy, and, as there was almost nothing else to support the allegation, we need not take further time to discuss it. Moreover, only selected portions of the evidence are before us, and the district judge very properly called attention to this fact when he granted the exception now being considered, saying:

"In my judgment this exception to be considered should have behind it the entire record, but it is allowed and signed that the plaintiff may have the benefit of it in case I am in error in that view."

[5] 2. The plaintiff complains also because the trial judge required it to elect whether it would insist before the jury on a violation of section 1 of the Anti-Trust Act, or on a violation of section 2. Manifestly the correctness of this ruling also can only be satisfactorily reviewed upon the whole record, and what we have just said applies to this assignment as well.

[6, 7] Moreover, we may take note of the fact that this subject had evidently been a source of contention from the beginning of the suit, as will appear from Judge Rellstab's opinion in (D. C.) 196 Fed. 514, where the original declaration is printed. The question of duplicity was thus raised at an early stage, and as a result of that decision an amended declaration was afterwards filed. But this also contained only one count, and as Judge Lanning (sitting in the Circuit Court for the District of New Jersey) had already decided in Rice v. Standard Oil Co. (C. C.) 134 Fed. 464, that a declaration in a similar suit under the same section was bad for duplicity because it combined two causes of action in one count, we think the trial judge was sufficiently justified in requiring the plaintiff to elect. But, in any event, we do not see how the ruling could have done harm. If the declaration did not support alternative charges, and if such charges were regarded as important to the case, the easy remedy by amendment was at hand. It is not surprising, however, that the plaintiff did not ask to amend, for we cannot conceive it possible that any one could doubt, at the end of this five months' trial, that the plaintiff's case depended for success upon the truth of the charge (to which practically all the evidence was directed) that the defendants had unlawfully attempted to monopolize a large part of the trade in black powder. The case was certainly tried on the merits, and the ruling complained of was harmless, even if it were formally erroneous.

[8] 3. If we are to understand that the plaintiff is seriously insisting that the court erred in refusing leave to offer the decrees in evidence that were entered in the government's suit ([C. C.] 188 Fed. 127), we shall only say in reply that we are not aware of any rule of evidence in force at the time of the trial that would have warranted the court in making a different decision. The parties in the two suits were different; the subject-matter was different; and the trial judge's ruling is so fully justified by the well-established law then existing that no supporting authority need be cited.

[9] 4. Some of the assignments are not the subject of a proper exception. At the close of the evidence the plaintiff submitted a series

of 27 requests for instruction, and the trial judge did not answer them specifically, believing that he had substantially answered them in his general instructions, as of course he had a right to do. This is evident from what he said at the end of the charge:

"As to the plaintiff's requests, as I recall it, I have touched upon every one of these requests, and I therefore will not charge them in the language requested, but counsel may take an exception, of course, to the fact that I do not specifically charge in the precise language requested."

This, of course, invited counsel to point out which instructions, if any, they did not regard as sufficiently answered in the general charge. Many decisions declare that fairness to the court requires this to be done; but the plaintiff's counsel, instead of specifying errors or omissions or insufficient answers, asked for an exception in the most general language possible: "We also except to that portion of your honor's charge which refuses to give our instructions, except as charged." The Supreme Court has several times decided that such an exception does not call the court's attention properly to what is objected to, and is therefore insufficient. Beaver v. Taylor, 93 U. S. 55, 23 L. Ed. 797; Upton v. McLaughlin, 105 U. S. 646, 26 L. Ed. 1197; Jones v. Railroad, 157 U. S. 682, 15 Sup. Ct. 719, 39 L. Ed. 856; Thiede v. Utah, 159 U. S. 521, 16 Sup. Ct. 62, 40 L. Ed. 237.

[10] And, as the fourth request of the series is not sound, the action of the trial judge is also supported by Moulor v. Insurance Co., 111 U. S. 337, 4 Sup. Ct. 466, 28 L. Ed. 447, and Bogk v. Gassert, 149 U. S. 26, 13 Sup. Ct. 738, 37 L. Ed. 631.

[11] 5. The plaintiff also complains of certain parts of the charge as erroneous on the ground that the court's language was:

"* * * Tantamount to saying that monopoly needs but to obtain a foothold, and thereafter competitors must enter the field at their peril. It was a virtual direction of a verdict for the defendants, because it was equivalent to saying that long-continued violation of the law may ripen into privilege and may become a vested right. It is a most dangerous doctrine that monopoly can gain the right to perpetuate itself by prescription; that one who may venture into the field occupied by it must do so at his peril, and, if he does so with knowledge of its existence, can claim no protection from its unlawful methods."

It is almost needless to say that the instructions of the learned judge carry no such meaning, and could have had no such effect. After a preliminary statement outlining the previous history of the powder trade, he told the jury distinctly that:

"The defendant (the Du Pont Powder Company) therefore, at the time of the organization of the plaintiff company, * * * and during the entire time the plaintiff carried on its business, was acting in violation of the Anti-Trust Act as attempting to monopolize the trade in powder, which subjected it to be dissolved as such by direct attack on the part of the United States government."

He added, however, the qualification that was called for by the nature of the case on trial:

"The fact that the status of the defendant was such, however, that, under a direct attack by the government, it would be dissolved as an unlawful combination in restraint of trade and an attempt to monopolize, would not alone make it liable in an action for damages. Such a suit can be maintained only for injuries sustained by reason of such attempted monopolization, so that, in a suit for damages, the defendant is entitled to more defenses than would

be available in a suit brought by the government for dissolution, and the plaintiff in such a suit has more to prove than is necessary to obtain a decree in the government suit. It becomes important, therefore, to inquire into the relationship which the defendant bore to the powder trade generally at the time when the plaintiff asserts its promoter first declared his intent to engage in the powder business, and its subsequent relationship toward such trade generally, and to the plaintiff in particular, during the years 1903 to 1908, within which period the plaintiff claims it was being injured by reason of the acts of the defendant, and which it alleges were unlawful and within the operation of the Anti-Trust Act, as attempts to monopolize the powder trade."

He then summarized the foregoing paragraph, repeating that the mere fact that the defendant owed much of its growth and power in the trade to unlawful acts in the past, and that it continued to enjoy the fruits of some of such unlawful acts, did not make it liable in damages. Then follows immediately one of the passages attacked in the words already quoted from the plaintiff's brief:

"This suit is unique in many respects. The plaintiff, as a corporation and as a competitor in the powder business, is due to the efforts of R. S. Waddell, its chief witness in the suit. He organized it shortly after he separated himself from his employment with the defendant, with which and its predecessors he had been identified for about 20 years. His services, while in the employment of the Du Pont interests, brought him in touch with their business policies and operations in the vending of powder. He knew of the existence of the trade associations, and of such of the restraints and limitations put upon its members as related to the apportionment of the trade and the fixing of prices. The comparative size of the defendant's capacity for output in relation to other powder manufacturers, and its influence as a factor in the trade generally, were known to him when he severed his connection, and when he conceived and began to carry out his purpose of entering into such powder field as a competitor. The plaintiff does not occupy the same position as a competitor in existence during the period that this influence was being developed, and who may have been, during the course of such development, as well as after it had reached the height of its power, injured in its business or property by reason thereof, but is here as one entering the competitive field when such growth and influence have been established. To it (the plaintiff) this influence and power of the defendant when it (the plaintiff) was launched into the powder field is not in itself actionable, even though that status is due in part to methods which are prohibited by the Anti-Trust Act, and, before the plaintiff can recover, it must establish that the defendant used its power in the trade oppressively, not necessarily against the plaintiff alone, but at least in the conduct of its business generally; that is, that it used such methods as, backed by its influential position, tended to the suppression of open competition and to obstruct the free flow of commerce (the trade conditions sought to be secured and protected by the prohibitions of the Anti-Trust Act), and that it (the plaintiff) was injured by reason thereof."

We confess our inability to see anything objectionable in this language. It states nothing but indisputable facts, and does not take on a harmful character, even when it is bracketed with the second passage complained of. This is taken out of its place in another portion of the charge, where the learned judge was dealing with a wholly different subject, namely, with the question whether the plaintiff had been properly equipped and capitalized; this matter having a direct bearing on the defendants' allegation that the Buckeye enterprise was organized merely to be sold out, and was not intended to be a bona fide factory at all:

"Mr. Waddell, as already stated, was well advised, when he promoted the plaintiff company, of the defendant's business capacity, and policies. He

had been its agent for a long period, during which several severe competitive struggles took place, and he knew the outcome thereof, and which was, generally speaking, the taking over in one form or another of such newcomers, and at least in one instance (that of the Indiana) at a considerable profit to the owners of that company. Of course, Mr. Waddell, or the company which he formed, had a right to go into business, and the motive for entering into such business is of little moment, so far as their rights were concerned; but, if he was actuated by the belief that his company would meet with a like experience after some competitive struggles, it may have a bearing upon the question whether the plaintiff was sufficiently capitalized to engage in the struggle for the market already occupied. Of course, if you find that it was sufficiently capitalized, or that it had sufficient financial backing to weather a struggle carried on under normal or lawful competitive conditions, that is a sufficient answer, and it would make no difference whether it was or was not sufficiently capitalized to meet a competition forced upon it by unlawful means."

Certainly, as we think, no sound criticism can be made of these passages, either taken singly or placed side by side, and we shall make no further comment upon them.

6. With one exception, we do not think it necessary to take up separately any other subject embraced in the assignments of error. They have all been examined and considered, and in our opinion none of the rulings and instructions complained of could have been materially harmful, even if a minute scrutiny might disclose an occasional lapse from an ideal standard. No record could come unscathed through such an ordeal after a five months' trial, and it is greatly to the credit of the district judge that so little of importance is now urged for reversal. Many of the assignments seem to be of very slight importance, indeed, and may be passed without discussion.

[12] 7. The only subject that may need a few words of separate consideration is the refusal to grant a new trial. The principal ground of complaint pressed upon us is the fact that, while the jury were deliberating on their verdict, they had in their possession two papers, whose contents are said to have been of such a nature as to influence them improperly. This matter, however, has already been heard and decided by the District Court, and we find nothing in the record to make the present situation exceptional. The facts are these: After the verdict was rendered, a motion for a new trial was made and entertained. It assigned the usual general and formal reasons (that the verdict was against the law and against the weight of the evidence, and that the charge was erroneous both in what it said and in what it failed to say), and then added a special reason to the effect that the jury had had before it certain letters and other papers that were not in evidence. Manifestly this reason required the taking of testimony, and accordingly a number of witnesses were examined. On April 10 the motion was fully argued before the court, and was refused after what was evidently a thorough consideration. The rule in the federal courts being well settled that such a refusal is a matter of discretion that will not be reviewed except for abuse, we shall only add that we have read and considered everything contained in the record on this subject and can see no sufficient ground for interfering with what was done by the court below. Indeed, we incline to think that the subject may perhaps have been brought before us under a misapprehension, for it was argued as if the district judge had refused to

hear and entertain the motion at all, except upon the special reason referred to above, although (as we understand the record) the facts do not support such a position. On the contrary, the motion was made, and was promptly entertained, the court made an order for the taking of testimony, witnesses were examined, argument was heard, and on April 10 the whole subject was disposed of by an order discharging the rule that had been granted and refusing the motion. We see nothing reviewable in such a proceeding.

On the whole case, we are of opinion that the plaintiff had a fair and patient trial, and that whatever complaint he may have should be directed to the verdict rather than the action of the court.

The judgment is affirmed.

HOGAN v. NEW YORK CENT. & H. R. R. CO.

(Circuit Court of Appeals, Second Circuit. April 13, 1915.)

No. 225.

1. ELECTION OF REMEDIES ⇐12—ACTION UNDER EMPLOYERS' LIABILITY ACT.
Where a right of action for the injury or death of an employé exists under federal Employers' Liability Act April 22, 1908, c. 149, 35 Stat. 65 (Comp. St. 1913, §§ 8657–8665), the remedy thereunder is exclusive, and the bringing and subsequent discontinuance of an action at common law or under a state statute does not constitute an election of remedies which will bar a later suit under the federal statute.

[Ed. Note.—For other cases, see Election of Remedies, Cent. Dig. § 15; Dec. Dig. ⇐12.]

2. MASTER AND SERVANT ⇐113—MASTER'S LIABILITY FOR INJURY TO SERVANT —NEGLIGENT CONSTRUCTION OF ROUNDHOUSE.
Plaintiff's intestate, who was engineer and hostler at a roundhouse of defendant railroad company, attempted to mount a moving engine which was being brought out by his fireman at a point from three to eight feet within the doorway, and was caught between the tender and the side of the doorway and killed. The engine was of the large modern type, and the clearance between its overhang and the side of the doorway was but eight inches, while in newer roundhouses a larger clearance was provided. Deceased was not directed nor required to mount the engine at that point, and the danger of doing so was obvious. *Held*, that, the width of the doorway being sufficient for all ordinary and proper uses, defendant was not chargeable with negligence because it was not made wider.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 213, 224–227; Dec. Dig. ⇐113.]

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 United States District Court for the Western District of New York to review a judgment entered in that court, on June 15, 1914, upon the direction of a verdict by the court in favor of the defendant and against the plaintiff upon the merits and for the sum of $106.41 costs.

The plaintiff first brought her action in the proper court of the state of New York. The action in that court was brought under the state Employers' Liability Act, and plaintiff obtained a verdict in the sum of $18,375, which verdict was subsequently reduced to $12,000 by the trial court, upon the ground that it was excessive, and judgment was entered for that amount and

costs. The New York Court of Appeals reversed the judgment upon the ground that defendant was not negligent, and also because decedent was guilty of contributory negligence as a matter of law. A new trial was granted. Hogan v. N. Y. C. & H. R. R. R. Co., 209 N. Y. 20, 102 N. E. 555 (1913). The action in the state court was thereupon discontinued, and this action was commenced in the United States District Court. The facts are stated in the opinion.

Newell, Chapman & Newell, of Syracuse, N. Y. (Harry E. Newell, of Syracuse, N. Y., of counsel), for plaintiff in error.

Harris, Beach, Harris & Matson, of Rochester, N. Y. (Willis A. Matson, of Rochester, N. Y., of counsel), for defendant in error.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge. This action was brought under the Federal Employers' Liability Act of April 22, 1908, c. 149, 35 Stat. 65, as amended April 5, 1910, c. 143, 36 Stat. 291 (Comp. St. 1913, §§ 8657, 8665). The plaintiff is the administrator of Frank Hogan, who died from an injury sustained while in defendant's service. He was employed by defendant as an engineer and hostler upon its railroad, and it is alleged and not denied that at the time he met his death he was engaged in interstate commerce, as he was making ready an engine which was to draw a freight train from Rochester, N. Y., to Corning, N. Y., there being in the train cars that were to be pulled by another engine from Corning to Newberry Junction, Pa., over a branch line of defendant's road running from Corning to Williamsport, Pa.

The action might have been brought in the state courts of New York under the act of Congress as amended in 1910, for the amendment provides that:

"The jurisdiction of the courts of the United States under this act shall be concurrent with that of the courts of the several states, and no case arising under this act and brought in any state court of competent jurisdiction shall be removed to any court of the United States."

[1] The action which was brought in the New York court was not, however, brought under the federal act, but under the Employers' Liability Act of New York. The Supreme Court of the United States in Second Employers' Liability Cases, 223 U. S. 1, 53, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44 (1912), had before it the question whether the Federal Employers' Liability Act superseded the laws of the states in so far as the latter covered the same field, and answered the question in the affirmative. However, the action in the state court under the state law was discontinued, and a new suit was commenced in the District Court of the United States for the Western District. The defendant in the answer put in, in the new action, set up "the election" of the complainant to proceed under the New York law and in the New York courts, and that the proceeding in the state court constituted a bar to this action, although the action in the state court had been discontinued with defendant's consent. This theory seems later to have been abandoned, as it was not urged in this court. It need not therefore be considered, and yet it may be well to state that we fail to see how the commencement and subsequent discontinuance of the action in the state court and under the state law could estop

the complainant from bringing her action in a federal court. In Snow v. Alley, 156 Mass. 193, 195, 30 N. E. 691, 692 (1892), Mr. Justice Holmes, now of the Supreme Court of the United States correctly stated the doctrine of election when he said:

"Election exists when a party has two alternative and inconsistent rights, and it is determined by a manifestation of choice. Metcalf v. Williams, 144 Mass. 452, 454 [11 N. E. 700]. But the fact that a party wrongly supposes that he has two such rights, and attempts to choose the one to which he is not entitled, is not enough to prevent his exercising the other, if he is entitled to that. There would be no sense or principle in such a rule. Butler v. Hildreth, 5 Metc. 49, 52; Snow v. Alley, 144 Mass. 546, 554, 560 [11 N. E. 764, 59 Am. Rep. 119]; Whiteside v. Brawley, 152 Mass. 133, 135 [24 N. E. 1088]; Morris v. Rexford, 18 N. Y. 552, 557."

Inasmuch as the Federal Employers' Liability Act supersedes all state legislation, an employé who has a right of action under the statute has but one remedy, namely, that under the federal act (see Thornton's The Federal Employers' Liability and Safety Appliances Act, § 19, and the cases there cited) he is not, by bringing and discontinuing an action at common law or under a state statute, barred by the doctrine of election of remedies from subsequently bringing his action under the federal statute. See note to Lamphere v. Ore. R. & Nav. Co., 47 L. R. A. (N. S.) 78. Before the amendment of 1910, the cause of action which the act created in behalf of the injured employé did not survive his death nor pass to his representatives. But the act in case of death of the employé from his injury created a new and distinct right of action for the benefit of the defendant's relatives named in the statute. And the damages which the defendant's relatives were thus entitled to recover were strictly limited to the loss which resulted to them because of the wrongful death, which deprived them of a reasonable expectation of pecuniary benefits. American Railroad Co. of Porto Rico v. Didricksen, 227 U. S. 145, 33 Sup. Ct. 224, 57 L. Ed. 456 (1913). The amendment of April 5, 1910, added section 9 to the original act, and provided:

"Sec. 9. That any right of action given by this act to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employé, and, if none, then of such employé's parents; and, if none, then of the next of kin dependent upon such employé, but in such cases there shall be only one recovery for the same injury." 36 Stat. 291.

It has been held that the cause of action which survives under this amendment does not survive for the benefit of the deceased's estate, but only for the benefit of the relatives stated in the act and in the order specified, and that if no such relatives survive, no right of recovery is given by the amendment. Thomas v. Chicago & N. W. Ry. Co. (D. C.) 202 Fed. 766 (1913). But that question is not involved in the present action, as the dead man was survived by his widow, and she sues as administratrix to recover for herself and the next of kin on the cause of action given by the original act of 1908 for the benefit of the surviving widow for the death of the employé. The language of the act provides in its first section that a common carrier engaged in commerce between the states—

"shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employé, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employé; and, if none, then of such employé's parents; and, if none, then of the next of kin dependent upon such employé, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employés of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment." 35 Stat. 65.

The complaint alleged that the plaintiff and next of kin have sustained damages in the sum of $50,000 on account of the death of the deceased.

The plaintiff's intestate was in the employ of the defendant as hostler at its engine house at Rochester, N. Y., and had been so employed for a period of two months and a half before the accident which resulted in his death. Prior to that time he had been an engineer upon the road for eight or nine years in the freight service. As hostler he was rated as an engineer, and drew an engineer's pay. His duties as hostler consisted in moving engines in and out of the engine house, turning them, getting them ready to go out on their runs, moving them over to the shops or around the yard, seeing that the engine was made ready and properly cleaned, that it had the proper amount of fuel and water on, and was properly placed upon the storage tracks so as not to block other engines, and that it was left in the proper condition with the reverse lever in the center and cylinder cocks open and steam escaping. In the performance of these duties he was aided by a fireman who was subject to his orders and directions.

[2] On the night of the accident, which happened on the night of March 17, 1912, at about 8:30 o'clock, the deceased was standing in the roundhouse from three to eight feet from the doorway, conversing with his foreman, who instructed him to prepare for use two other engines then in the roundhouse. While this conversation was going on engine No. 2951 was slowly approaching at a speed of from three to four miles an hour. The foreman had previously instructed the deceased to have the engine turned around, the fire cleaned, and that it be supplied with a tank of water and gotten ready for a run to Corning. The fireman and assistant had turned this engine into the roundhouse, placed it on the turntable and turned it and it was moving slowly towards the deceased on its way out of the roundhouse to be filled with water. As it reached him about three to eight feet from the doorway through which it had to pass, the deceased jumped on one of the steps of the engine catching hold of the grab handles, but before he could reach a safe position on the engine he was caught between the tender and the door jamb and killed. And this action was brought by the administratrix against the defendant railroad to recover for his death on the ground that it had failed to provide him a safe place in which to work. The claim is that the doorway where he was killed and through which he was required to move engines was defective, dangerous, and unsafe, and so narrow that insufficient clearance existed between the side of the engine and the vertical wall of the doorway, which was maintained too close to the track; that it was feasible and

practicable at a small expense to have widened the doorway and thus have furnished proper and sufficient clearance; and that the failure to do so was negligence which entitled the plaintiff to recover, or made it the duty of the court to submit the facts to the jury.

The roundhouse, alleged not to have been a reasonably safe place in which to perform the work the deceased was required to do, was constructed some 40 years ago, at a time when the engines in use were of a much smaller size and type and had a much less overhang than those in use at the time of the accident. The doorway, through which the engine passed when the deceased was killed, was only 11 feet in width. An engine of the size and type of No. 2951 overhung the gauge of the rail 30 inches, and when passing through the doorway in question left a clearance of but 8 inches. An engine of the size formerly used had an overhang of 21 inches, and when passing through the doorway in question left a clearance of 16 inches. It also appeared that in the roundhouses more recently built an engine of the type of No. 2951 would have a clearance of 22 inches at Utica, of 12 inches at Syracuse, and 15 inches at East Syracuse, and 20 inches at Minoa. It was shown, too, that the doorway in question might have been widened at a cost of about $200.

Plaintiff's intestate was thoroughly familiar with the conditions existing at the roundhouse. He had worked there as a hostler for about three months, and before that had been a freight engineer for eight years, and while working as such engineer went to the roundhouse to get his engine as often as he would make a trip. During the eight years he served as engineer the practice required him to take his engine through this very doorway frequently, as it was the door through which engines went out, and while he was working as hostler the testimony showed that he passed in and out of the doorway from 3 to 25 times in each day.

One witness, who had worked for more than a year in this engine house as engineer and hostler and was acquainted with the doorway, testified that he "should think any engineer going out of that doorway would know there wasn't clearance enough there to go through on the outside of the engine." Another witness who had worked for defendant for nine years as engineer, fireman, and hostler, and whose duties took him to this engine house a great many times, testified that he knew he would be in danger if he jumped on the engine as it went through the door. Another witness who had worked for defendant as fireman, engineer, and hostler, testified that he had got on his engine "when it wasn't very far from the door"; that:

. "It was dangerous; there wasn't clearance enough. I knew it was dangerous; anybody would know it was dangerous if they looked at it. * * * If I got squeezed there, I would have got killed."

He also said that it was perfectly visible to anybody using the type of engine of No. 2951 that the clearance was very narrow. Another witness, who had been in the service of the defendant for 22 years, and who worked as hostler at this roundhouse, and was acquainted with this particular doorway, and had seen engineers board engines there and knew it had been the custom for them to do so for eight or nine years, testified that "it was perfectly apparent to any one" that on

some of the engines the clearance was so small that a man couldn't ride on the outside and get through. And another witness who had been in defendant's service as engineer and hostler, and had worked in this engine house for seven years, and who had got on his engine when in motion and about to go through the doorway, testified that "everybody did it," said he knew it was a narrow clearance, and that if he did not get in the engine he would get hurt. "I was well aware I couldn't ride on the outside of the engine and go through that doorway. Anybody could see that as they stood and looked at it." These witnesses were all the plaintiff's own witnesses, and the testimony quoted was brought out upon cross-examination, and there is nothing in the record contradictory of it.

There is proof in the record that the engineers and hostlers were accustomed to board moving engines about to pass through this doorway, but there is no proof that any duty required them to do so; and, in the absence of such proof, it is difficult to see how the defendant could be held guilty of negligence in not providing against such a contingency. It was not the duty of defendant to see that this roundhouse was made equal to the newest and safest of its engine houses, but its duty was discharged when it furnished such a place as was reasonably safe and suitable for the purposes had in view. And as it was not intended or supposed that engineers or hostlers would get upon their engines as they were about to pass through this doorway, no duty requiring them to do so, there would seem to be no evidence that the roundhouse was unsuitable for its purpose.

We think the case is governed by the case of New York, N. H. & H. R. Co. v. Dailey, 179 Fed. 289, 102 C. C. A. 660, decided by this court in 1910. The plaintiff in that case, as the plaintiff's intestate in this case, was employed as an engine hostler at defendant's roundhouse. A dead engine with no air to operate the brakes came in and was turned over to him, and a coemployé with another engine kicked it into the roundhouse from the turntable. It was given such speed that plaintiff was afraid that it would go through the building, and started to jump off to block the wheels, when he struck the post between the stalls and was injured. There was a clearance between the engine and post of about 11 inches. The evidence showed that, so far as known, no similar accident had ever occurred; it being the duty of the hostler, under ordinary circumstances, to remain on the engine. We held that defendant was not chargeable with negligence because the space was not greater, the construction being safe for employés under any circumstances to be reasonably anticipated. In the course of our opinion we said:

"The defendant was not, however, required to guard against such an extraordinary combination of circumstances as produced the injury in question. The opening into the stalls of the roundhouse between the posts was ample for all ordinary conditions and, having provided such a structure, the defendant cannot be held responsible because the plaintiff saw fit to attempt to alight at the very moment when the engine was passing the posts. If the contention of the plaintiff be sustained by the courts, it necessarily follows that the owner of a stable who has provided ample room for his horses and carriages to enter can be held liable if his coachman loses control of the horses and receives injuries in an attempt to descend from the vehicle at the moment it is passing through the door. It will hardly be contended that the

owner of a garage is required to provide an entrance wide enough, not only to admit the motor car with perfect safety, but also sufficiently ample to enable the chauffeur, should the machine become unmanageable, to leap out while passing through the entrance. We know of no rule holding a master to such extreme care. If he provides structures which guard against all accidents which can reasonably be foreseen, he has done his duty to those whom he employs."

So in the case at bar, the defendant was not guilty of negligence as respects the construction of the roundhouse. The doorway through which the engine passed, while narrower than in some of the more recently constructed roundhouses of the road, and three inches less than in the Dailey Case, was sufficient for all ordinary conditions, and defendant cannot be held responsible because the plaintiff's intestate saw fit to attempt to mount his engine just as it was about to pass through this door. It was not required to guard against any such extraordinary conduct as that an engineer or an engine hostler would attempt to enter his engine at that particular point. His duties did not make it necessary for him to do so, and no superior officer directed him on this occasion, or at any other time, to do so foolhardy a thing. And it was not customary for the men to enter their engines at that point either when the engines were moving or standing still. There was no reason, if he desired to get aboard his engine before it went through the door, why he should not have had the fireman who was running it bring the engine to a stop, or why he should not have entered it on the other side of the door. The testimony was that there was no emergency about the matter. The engine was simply going out to the water tank to take water, and was then to be placed on the storage track.

As the defendant was not negligent, it is unnecessary for us to consider whether the plaintiff's intestate, as matter of law, assumed the risk, although the question was discussed at some length in the argument.

Judgment affirmed.

NEW YORK, N. H. & H. R. CO. v. LINCOLN.

(Circuit Court of Appeals, Second Circuit. April 13, 1915.)

No. 218.

1. CARRIERS ⟸280—CARE FOR SAFETY OF PASSENGERS.

While a railroad carrier is not an insurer of the safety of passengers, it is bound to use the utmost care, consistent with the nature and extent of its business, to guard against all damages which it could reasonably anticipate, not only while the passenger is upon the train, but while he is passing to and from the same.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1085–1092, 1098–1103, 1105, 1106, 1109, 1117; Dec. Dig. ⟸280.]

2. CARRIERS ⟸ 320, 347—ACTION FOR INJURY TO PASSENGER—MEANS FOR ALIGHTING—QUESTIONS FOR JURY.

At defendant railroad company's terminal in New York City the distance between the station platform and the platform of old-style cars was 6 feet, and the distance to the ground 5 feet. Plaintiff was a commuter, using daily suburban trains, composed of old-style cars. It was

defendant's custom to have attendants at all such trains to place planks or bridges across the intervening space, and plaintiff was aware of such custom, which in his experience had never been deviated from. When he passed from the car one morning the bridge had not been placed, nor was any warning given, and, walking behind a number of other passengers, he did not notice the omission, and stepped off into the opening and was injured. If he had looked, he would have seen that the bridge was not in place, and could have stepped across. *Held*, that the questions of defendant's negligence and plaintiff's contributory negligence were properly submitted to the jury as questions of fact.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1118, 1126, 1149, 1153, 1160, 1167, 1179, 1190, 1217, 1233, 1244, 1248, 1315–1325, 1346, 1350–1386, 1388–1397, 1402; Dec. Dig. ⟸320, 347.]

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

This cause comes here on writ of error to the United States District Court for the Southern District of New York on a judgment entered on a verdict in the said court on December 23, 1914, in favor of plaintiff and against defendant.

The plaintiff below, hereinafter referred to as plaintiff, was and is a citizen of the state of New York, and at the time the accident occurred was a commuter residing in New Rochelle, N. Y. The defendant below, hereinafter referred to as defendant, was and is a foreign corporation organized and existing under and by virtue of the laws of the state of Connecticut, and was and now is engaged as a common carrier in carrying passengers and goods for hire over its railroad. On or about September 13, 1913, plaintiff became a passenger for hire on one of defendant's cars on its railroad running between New Rochelle and the city of New York. The plaintiff alleged in his complaint that defendant's station—"the Grand Central Terminal" at Forty-Second street in the city of New York—and a large number of the cars of the defendant are so constructed and maintained that, as they stand at the station to allow passengers to alight from and board said cars, there is a space between the cars and platform of the station so wide that passengers in attempting to alight and board the cars are in constant danger of falling into the space between cars and platform, and that there is no device, appliance, or equipment on the cars or on the platforms thereof to lessen the space and to render the means of alighting from and boarding the cars safe and convenient. He also averred that in consequence of such failure to provide suitable appliances and equipment, and because of the carelessness, recklessness, and negligence of defendant, its servants, and employés, and while as a passenger on one of defendant's cars he was attempting to alight therefrom at the Grand Central Terminal on September 13, 1913, he fell into the space between the platform of the car and the platform of the Terminal, and sustained the injuries for which the action was brought. He also complained that at the time and place aforesaid the defendant carelessly and negligently failed to give any notice or warning to its passengers and the plaintiff concerning the space between the platform of the car and platform of the Terminal, and negligently and carelessly failed to light the space, and to place any guard or barrier about the same, or to supply any signal, trainman, or other means of warning as to the existence of such unguarded and unlighted space; and he asked damages to the amount of $15,000. At the close of the testimony defendant moved to dismiss the complaint, on the ground that plaintiff had failed to make out a cause of action by proving any negligence on the part of the defendant, and on the further ground that defendant had affirmatively proved contributory negligence on the part of plaintiff. The motion was denied, and the case submitted to the jury, which brought in a verdict for the plaintiff for $300.

Charles M. Sheafe, Jr., of New York City (James W. Carpenter, of Brooklyn, N. Y., of counsel), for plaintiff in error.

Walradt & Blaney, of New York City (Charles P. Blaney and Edwin J. Tetlow, both of New York City, of counsel), for defendant in error.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge (after stating the facts as above). The plaintiff is a commuter on defendant's railroad, and was injured at the Grand Central Terminal in the city of New York in attempting to alight from one of defendant's cars. The station in question was constructed for the new style of cars, vestibule cars, from which passengers can step from the car platform directly to the station platform, there being only a space of a few inches between the two platforms. But when the old style of cars come into the station there is a distance of three feet between the platform of the station and the platform of such cars; and as it is practically impossible for passengers on the old style of car to alight safely from the platform of the car to that of the station, it is the custom of defendant to have attendants or "red caps" to bridge this open space by putting down a movable bridge or boards over which the passengers can pass.

To leave this space unguarded, a space three feet wide existing between the car platform and the station platform, and a distance of five feet to the ground below, makes a dangerous pitfall, into which an old, careless, or near-sighted person would be very likely to fall. It was because the railroad knew that the existence of this unguarded space was dangerous that it instructed its force of colored porters to meet incoming trains, made up of old style cars having no drop platforms, and bridge the space between the cars and the platform with planks. This practice had prevailed for a long time, and none of plaintiff's witnesses, including the plaintiff, could recall an instance when such space had been left unbridged; and no testimony was offered by defendant in contradiction thereof, but the testimony of defendant's witnesses was all to the same effect.

The plaintiff had resided in New Rochelle for a little over three months prior to the time of this accident, and had been riding on the defendant's train to New York every day since he had moved out there, using a commutation ticket. On the morning of September 13, 1913, he rode on defendant's train to the Grand Central Terminal station in New York, entering an ordinary passenger coach of the old-fashioned type, a three-step car. The plaintiff's testimony was that when the train reached the station he got up out of his seat, near the middle of the car, and moved along with the rest of the passengers towards the rear of the car; that he was behind possibly 12 to 15 passengers, who got off the car before he did, and as he walked out he was walking slowly and with short steps and in single file. The car was equipped with steel gates that were ordinarily closed when the train was in transit, and which kept passengers from going down the steps, and were at the proper time opened to allow passengers to get off the car. When he reached the platform of the car, the gate of the car was opened flat against the side of the car. There was no brake-

man or guard stationed on the platform who warned passengers, and no warning to "watch your step" was given. No board or plank to bridge the space between the car platform and the station platform had been put in place; and in stepping from the platform of the car, as he supposed, to the platform of the station, he stepped into an open space, and landed down underneath the car steps and underneath the station platform, falling a distance of five feet. The open space between the platform of the car and that of the station being only three feet, he could easily have stepped across it, had he observed it. Although some 12 passengers preceded him, he was the only one who fell. He testified that he could have seen the open space, had he been looking, but that he did not look. Passengers had become accustomed to find the space bridged over for them by "red caps," and the plaintiff was relying on the bridge being there as usual on the morning of the accident. Its absence found plaintiff off his guard and led to the accident.

[1] The law requires a carrier of passengers to exercise reasonable care for the protection of its passengers and to see that its station houses are reasonably safe, including its platform, walks, steps, and landings for use in waiting for, approaching, and leaving trains. The principle is well settled that a carrier is bound to exercise care in securing the safety of its passengers while boarding and alighting from its cars, and the degree of care required has been held to be the care which a very prudent person would have used under the circumstances. A carrier of passengers is not absolutely liable for their safety as a carrier of goods is for the safety of the goods. The carrier is not an insurer of their safety, but is bound to exercise a high degree of care respecting them. Thus in Nichols v. Lynn & Boston Railroad Co., 168 Mass. 528, 530, 47 N. E. 427 (1897), the Supreme Judicial Court of Massachusetts says that, while the carrier is not bound to adopt all possible precautions to protect its passengers from injury in leaving its cars, it is bound "to use the utmost care consistent with the nature and extent of its business to guard against all dangers which it could reasonably anticipate," and if it fails to do so is responsible for its neglect.

In Pennsylvania Company v. McCaffrey, 173 Ill. 169, 50 N. E. 713 (1898), the Supreme Court of Illinois held that the relation between passenger and carrier did not cease upon the arrival of a train at the place of the passenger's destination, but the company was bound to furnish him an opportunity to safely alight from the train; and it said, in speaking of the carrier's duty respecting him:

"It is its duty, not only to exercise a high degree of care while the passenger is upon the train, but also to use the highest degree of care and skill, reasonably practicable, in providing the passenger a safe passage from the train."

In Appleby v. Railroad Company, 60 S. C. 48, 58, 38 S. E. 237 (1900), the Supreme Court of South Carolina declares that "railroads owe extraordinary care to passengers."

When a railroad stops its trains at a station platform and so invites its passengers to alight, the law imposes upon it the duty of using due

care to provide proper and safe means of getting from the platform of the cars to the platform of the station.

In Boyce v. Manhattan Railway Co., 118 N. Y. 314, 23 N. E. 304 (1890), the Court of Appeals of the state of New York had before it a case which somewhat resembles the case at bar. The defendant in that case was a carrier of passengers on a line of elevated railway in the city of New York, and the plaintiff was a passenger upon one of defendant's trains, from which she was attempting to alight at the time of the accident. The platform of the station where the accident occurred was built on a curve, and each car as it stopped there touched the curve at a tangent, so that the middle part was within 1 or 2 inches of the platform, while the ends were about 14 inches therefrom. The result of this was an open space between the steps of the car and the platform of the station, several feet long and 14 inches wide, and this space was left open and unguarded. Nothing was put across the hole for passengers to step on as they alighted, and no warning or assistance was given by the persons in charge of the train. If the passengers saw the hole, they could step across it; but unless they saw it, there was nothing to prevent them from stepping into it. When the plaintiff attempted to step from the car to the platform, she stepped into the open space, fell through it, and was injured. The Court of Appeals held that the question of defendant's negligence and of plaintiff's contributory negligence were properly submitted to the jury. In the course of its opinion the court said:

"It is not essential to inquire why the railroad was constructed with so sharp a curve at the place where this accident occurred, nor whether the defendant is responsible for the way that the South Ferry station was built. By stopping its trains at the point in question, it invited the passengers to alight, and was thereby charged with the duty of using due care to provide proper and safe means of getting from the platform of the cars to the platform of the station. Even if the open space was necessary, owing to the peculiarities of the location, it was not necessary to leave it unguarded or unlighted. Some precaution, adapted to the situation, could have been used, such as throwing a plank across, or stationing a trainman to warn and assist passengers in alighting. At least the unguarded hole could have been well lighted, so as to be easily seen, and the passengers thus enabled to avoid the danger. We think that the evidence required the submission of the case to the jury for them to determine whether, under all the circumstances, the defendant was guilty of negligence that caused the injuries sustained by the plaintiff. Smith v. N. Y. & H. R. R. Co., 19 N. Y. 127 [75 Am. Dec. 305]; Hulbert v. N. Y. C. R. R. Co., 40 N. Y. 145; Sexton v. Zett, 44 N. Y. 430; Weston v. N. Y. E. R. R. Co., 73 N. Y. 595; Hoffman v. N. Y. C. & H. R. R. R. Co., 75 N. Y. 605; Dobiecki v. Sharp, 88 N. Y. 203."

In that case the plaintiff had never landed at this particular platform before, and did not know of the danger to be encountered. The court said she "was ignorant of any circumstance requiring the use of special care." On the question of contributory negligence the court said:

"Under the circumstances, which she had the right to assume existed, she was under no obligation, as matter of law, to look before she put her foot down; but it was a question of fact for the jury to decide, not only whether she should have been more vigilant, but also whether, if she had looked, she could have seen the hole in the surrounding darkness."

The defendant, however, insists that it cannot successfully be contended that it was negligent in not having had the space bridged before the plaintiff undertook to alight. The basis for this claim is that there was a bridge which was about to be put in place, but that the passengers did not wait until it could be put in place. It seems that there were three "red caps" putting bridges in place upon the train in question. One of them had put in place the bridge on the front platform of the car in which plaintiff rode, and then started for the rear platform to do the same with another bridge on that platform. But before he reached it the plaintiff, in his attempt to alight, had already fallen. The porter's testimony was "that he was a half a car's length away and running with his board" when the accident occurred. But the fact is not controverted that the defendant had taken no precautions to have the gate of the car kept closed until the bridge was put in place, and 12 or 15 passengers had been permitted to alight, no guard being present to warn them to watch their step. The door of the car might have been locked, or the gate of the car kept closed, until the conditions had been made safe for passengers to alight, or a guard might have been provided to warn passengers of their danger, or some provision made for preventing passengers from leaving the car until the bridge was down. Under the circumstances the defendant has no cause to complain that the court left it to the jury to say whether a failure to take any of those precautions and the failure of the porter to get his bridge in place before the passengers were permitted to leave the car amounted to a failure to exercise that reasonable care for the safety of passengers which the law imposed upon it. The court cannot say as matter of law that the defendant was not negligent.

In McDonald v. Illinois Central Ry. Co., 88 Iowa, 345, 55 N. W. 102 (1893), the Supreme Court of Iowa discussed the question as to the right of a passenger to alight from the rear platform of a car, instead of from the front platform. It said that it was a general custom for passengers to leave the cars from both platforms, and that because of this custom passengers had the right to presume, until in some way the contrary appeared, that either platform of a car was accessible for egress, and that, if the right was to be restricted in particular cases, it was the duty of the persons in charge of the train to use precautions against such egress, as by locking the door, or placing a person there to give directions.

[2] But if defendant was guilty of negligence, still there could be no recovery by plaintiff, if plaintiff was guilty of contributory negligence. The defendant insists that the plaintiff was guilty of such negligence, and plaintiff as strenuously denies it. The plaintiff was thoroughly familiar with the station, knew that a bridge was used to connect the car platform with the station platform, and admits that if he had looked he would have discovered that it had not yet been put down at the time he attempted to alight.

In Ayres v. Delaware, L. & W. R. R. Co., 158 N. Y. 254, 53 N. E. 22 (1899), the plaintiff was injured while walking on a railroad station platform in order to enter her train. She testified that she was walking as she always did, was not looking down on the platform, but looking

straight ahead in the direction of the car she was seeking. She had bought her ticket and was in the act of taking passage in defendant's train. The court held that a passenger walking on a station platform to enter a train was not bound as matter of law to look down on the platform while walking a given distance thereon, although the jury could so find as a matter of fact, where the passenger was injured by stumbling over a mail bag thrown upon the platform from an incoming train. The court said:

"She had the right to presume that the platform was a safe place, because it was provided by the defendant for passengers to walk upon as they were invited to enter its cars. Hence instructions that would be proper for a place of known danger, such as a railroad crossing at grade, would not be appropriate to a place which the passenger had a right to presume was safe. * * * The platform of a railroad station, however, is not a place of known danger, but is presumed to be a place of safety. In this respect it is not unlike an ordinary sidewalk on a public street, which the wayfarer has the right to assume is in a safe condition until in some manner warned of danger."

In Smith v. Brooklyn Heights Railroad Co., 129 App. Div. 635, 114 N. Y. Supp. 62 (1908), the Appellate Division of the Supreme Court of New York held that, as it was matter of common knowledge that there is a space between the cars and platforms on elevated railroads, one who, on a well-lighted platform, in attempting to board a car on an elevated railroad at a time when there was no crowd and she had leisure to pick her steps, did not look down to see where she was stepping, and stepped into the open space and was injured, was guilty of contributory negligence as a matter of law. The court said:

"It appears in evidence that no one else stepped into the space; other passengers found no difficulty. The plaintiff alone, paying no attention to her steps, or where she was going, went blindly into the opening. If she had exercised any care, there is no reason to suppose that her safety would have been endangered. It is a matter of common knowledge that there is a space between car and station platforms on all railroads."

The plaintiff in that case contended that she had the right to assume that no such space existed between the "car and station platforms." This case, however, differs in material respects from the case at bar. It is true that in both cases the passenger was paying no attention to his steps, and that, if he had been, the accident would have been avoided. In both cases the injury resulted from walking into the open space between the platform of the station and the platform of the car. But there the analogy ceases. In the above case the sole negligence charged in the complaint was that the car was constructed in such a manner as to leave a space between it and the station platform. There was no evidence that the railroad company was in the habit of putting down planks to bridge the space, and the passenger could not have relied on any such custom. Indeed, it is matter of common knowledge that on the elevated and subway trains in New York no such custom exists. On the other hand, in the case at bar such a practice existed, and the injured party knew of it, and in commuting daily over the line had on all previous occasions found the space bridged, and was relying on the practice when he attempted to alight at the time of the accident. Whether in relying upon it, and in walking without looking under the

circumstances, he was guilty of negligence, is a question which we cannot answer in the affirmative as a matter of law.

It certainly cannot be said as matter of law that one was negligent who was a frequent passenger on this road, and knew of the custom to provide a bridge from the car to the platform for the convenience and safety of the passengers in alighting, and who assumed that on the morning of the accident it was in place as usual. In a case such as this the carrier has no cause to complain if the trial judge leaves it to the jury to determine whether the plaintiff, in doing what he did in attempting to alight from defendant's train at the time of the accident, was in the exercise of that degree of care and caution that a man of ordinary prudence and ordinary caution would exercise under similar circumstances. This in effect was what the trial judge did. He charged the jury that:

"It is for you, gentlemen, to say whether it was or was not the exercise of due care on the part of the plaintiff to act in that way—whether the plaintiff should have looked where he was going at that time, because he says he could see. * * * Was he obliged as a reasonably prudent man to look as he alighted from the train, or was he justified in going along and relying on what he says had been there before, namely, the presence of a bridge that was put down by the attendant, between the car and the station platform? It is for you to say, therefore, whether the defendant was negligent, and whether, if the defendant was negligent, the plaintiff was sufficiently free from contributory negligence to make the defendant responsible. If you find that the plaintiff did act in the way which a reasonably prudent man would not have acted, then you must find for the defendant, even though the defendant was negligent. If, on the contrary, you find that the plaintiff acted as a reasonably prudent man would act, and that the defendant should have put his plank down to protect him, then you are to find for the plaintiff."

The question of defendant's negligence and of the contributory negligence of plaintiff were questions which the court had the right to submit to the jury. There was no error in the charge. The jury by its verdict has found defendant guilty of negligence, and plaintiff free from contributory negligence. The jury might well have concluded that plaintiff was not negligent, in view of the fact that heretofore he had always found the gap bridged, and that he was guilty of no fault in assuming that it was bridged that morning as usual.

Judgment affirmed.

FARMER et al. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. May 12, 1915.)

Nos. 241–276.

1. CONSPIRACY ⇐32—CRIMINAL RESPONSIBILITY—ELEMENTS OF OFFENSE.

To establish a conspiracy, under Criminal Code (Act March 4, 1909, c. 321) § 37, 35 Stat. 1096 (Comp. St. 1913, § 10201), to commit a violation of section 215, punishing the use of mails to promote frauds, the government must prove an intent to defraud and a defrauding by the use of the mails.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 58, 59; Dec. Dig. ⇐32.]

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2. POST OFFICE ⊂=35—OFFENSES—ELEMENTS—"USING MAILS TO DEFRAUD."
The elements of the crime of using the mails to promote frauds, punishable by Criminal Code, § 215, are, first, a scheme intended to defraud, and secondly, an actual use of the mails; and one who devised a scheme to defraud with the intention to avoid all use of the mails in carrying it out, but who in carrying it out used the mails, committed the offense.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. § 55; Dec. Dig. ⊂=35.

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

3. CONSPIRACY ⊂=47—CRIMINAL RESPONSIBILITY—EVIDENCE.
The intent of defendants charged under Criminal Code, § 37, with a conspiracy to violate section 215, punishing the use of mails to promote frauds, may be shown by circumstantial evidence; and where the scheme to defraud makes it apparent that it cannot be carried out without using the mails, the jury may convict, without further proof justifying the inference that defendants intended to use the mails.

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

4. CONSPIRACY ⊂=47—CRIMINAL RESPONSIBILITY—EVIDENCE.
Evidence *held* not to sustain a conviction of a conspiracy under Criminal Code, § 37, to violate section 215, punishing the use of mails to promote frauds.

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

5. CRIMINAL LAW ⊂=663—PRIVILEGE OF WITNESSES—WAIVER.
Accused, indicted for the use of the mails to defraud, in violation of Criminal Code, § 215, furnished bail at once, and then went to his office and there found post office inspectors, who had a subpœna duces tecum, calling for papers and threatening to remove them. A discussion followed, and the officers were permitted to remove the papers in bags, provided the bags would not be opened until accused should appear before the grand jury. The papers remained in the custody of the government until the trial, about two years later, and no application for their return was made until three days before the trial. The court, by consent of counsel, directed the placing of the papers in the custody of the clerk, giving accused and his counsel access to them. During the trial accused offered to prove that the papers were obtained from him involuntarily. *Held* that, though it be assumed that the officers exceeded their authority in removing the papers, and that the acts of accused on the occasion of their removal did not operate as a waiver to defeat his right to assert his constitutional privilege, his acquiescence in the disposition made of the papers by the court was a waiver of any right to ask for their return to him.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1602; Dec. Dig. ⊂=663.]

6. POST OFFICE ⊂=48—OFFENSES—INDICTMENT.
An indictment for misuse of the mails in furtherance of a scheme to defraud divers persons whose names are to the grand jury unknown, by selling books falsely represented to be rare and valuable, with offers to resell them for the victims at a higher price, and alleging in separate counts the mailing of letters in furtherance of the scheme to persons named, is sufficient, for the fact that the grand jury knew of the defrauding of the two persons named occurring in one case a year after the devising of the scheme, and in the other case 2½ years after that date, does not show the untruth of the statement that they did not know the names of the individuals whom defendants intended to defraud, but sufficiently advises defendants what charge they must meet in each count.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 67–80; Dec. Dig. ⊂=48.]

7. POST OFFICE ⟸35—MISUSE OF MAILS—STATUTORY PROVISIONS.
Where persons devised a scheme to defraud by misuse of the mails prior to the going into effect of the Criminal Code, their continuance of the scheme thereafter was the devising of a scheme after the going into effect of the Code.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. § 55; Dec. Dig. ⟸35.]

8. POST OFFICE ⟸49—MISUSE OF MAILS—EVIDENCE.
Under an indictment for misuse of the mails in furtherance of a scheme to defraud by selling books falsely represented to be valuable, and alleging the mailing of a letter to a person named, the letter referring to the contract of the person named, notifying him of the sending to him of books, acknowledging receipt of a specified sum and notes for the balance, and congratulating him on his securing rare and valuable sets of books, was admissible in furtherance of the scheme to defraud, because it was important to keep the person named satisfied with his bargain and unsuspicious until the notes were paid; the sale to him having been effected by the fraudulent methods charged in the indictment and practiced by defendants.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 84–86; Dec. Dig. ⟸49.]

9. POST OFFICE ⟸49—MISUSE OF MAILS—EVIDENCE.
A letter mailed by one of the defendants to a buyer of books, in response to her request for separate bills for separate sets sold, which stated that one of the parties to the fraud, who had induced the buyer to purchase books, was a dealer in special editions for himself and on his account, and that any books he obtained from the company through which defendant did business he paid for, and that nothing was known about the price for which the books were subsequently sold, nor to whom they were sold, was properly received in evidence in furtherance of the general scheme to defraud any one who could be persuaded to purchase books.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 84–86; Dec. Dig. ⟸49.]

10. POST OFFICE ⟸49—MISUSE OF MAILS—INDICTMENT—PROOF.
An indictment for misuse of the mails in furtherance of a scheme to defraud, which alleged that letters were placed in a post office of the city of New York, was sustained by evidence that the letter reached the respective addresses in due course, inclosed in envelopes post marked "New York, N. Y.," as against the objection that each letter might have been deposited in some substation or in a lamp post mail box.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 84–86; Dec. Dig. ⟸49.]

11. POST OFFICE ⟸48—MISUSE OF MAILS—INDICTMENT—EVIDENCE.
An indictment alleging that a dozen persons entered into a scheme to defraud by use of the mails justifies a conviction of only some of the persons, as against the objection of fatal variance between the scheme pleaded and the scheme proved.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 67–80; Dec. Dig. ⟸48.

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

12. CRIMINAL LAW ⟸371—EVIDENCE—ADMISSIBILITY—SIMILAR OFFENSES.
Under an indictment for misuse of the mails in furtherance of a scheme to defraud, in violation of Criminal Code, § 215, instances of frauds of exactly the same sort as charged, committed prior to the taking effect of the Criminal Code, were admissible to show intent.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 830–832; Dec. Dig. ⟸371.]

13. POST OFFICE ⇐49—MISUSE OF MAILS—EVIDENCE—ADMISSIBILITY.
Under an indictment for misuse of the mails in furtherance of a scheme to defraud by selling books falsely represented to be valuable, with offers to resell them for the victims at a higher price, letters passing between defendants while carrying out their schemes, relating to the scheme, were admissible to show intent and throw light on the methods of the scheme.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 84–86; Dec. Dig. ⇐49.]

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 judgment of conviction of the plaintiffs in error upon an indictment charging them and several others with conspiracy and with devising a scheme to defraud and using the mails in furtherance thereof. Sections 37 and 215, Criminal Code.

Stated generally, the scheme was to induce persons to purchase books upon false representations, not only as to their rarity and value, but also as to the present existence of other persons of abundant means, who were ready and willing to purchase such books from the person to whom defendants sold them at a greatly advanced price; defendants representing that they would effect such resale to the profit of the original purchaser, but well knowing that the books could not be resold even at the price paid by the original purchaser and intending not to make any effort to effect such resale. The nature of the scheme will be more easily understood by reference to some of the facts brought out in the testimony.

In the New York office of the corporation, of which James J. Farmer was president, there was stationery from different hotels in Berlin, Paris, London, Vienna, and other cities, and stationery was sent to the office from Egypt. James J. Farmer would dictate to the stenographer a fictitious letter, purporting to come from Berlin or some other foreign city and to be written by some rich man. This would be addressed to Hartley, and would state that the writer had set aside $100,000 (or some other large sum) for a library which the writer proposed to purchase on returning from abroad, and that he desired Hartley to procure for him such and such sets of books, and that on his return he would buy them from him. This letter Farmer would have the stenographer or clerk copy on the appropriate foreign stationery, would sign a fictitious name to it, and would deliver or mail it to Hartley to be shown by the latter to the victims. It also appeared that upon one or more occasions, when one of the outfit was trying to induce some one to buy a set of books at an enormous price, he would be accompanied by another of them, who, under an assumed name, would state that he represented some rich person who was desirous of purchasing the same books and who would probably buy from the victim at an advanced price.

See, also, 218 Fed. 929.

Frank J. Gaynor, of New York City, Benjamin C. Bachrach, of Chicago, Ill., and R. M. Moore, of New York City, for plaintiffs in error.

H. Snowden Marshall, U. S. Atty., and Frank Morse Roosa, Asst. U. S. Atty., both of New York City, for the United States.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

LACOMBE, Circuit Judge. [1, 2] The indictment contained five counts; the fourth and fifth were dismissed with the consent of the government; we need consider only the first three. Counts 2 and 3

charged a violation of section 215 of the Criminal Code. Count 1 charged a conspiracy (section 37) to commit a violation of that section (215). Under the first count, therefore, the government had to sustain a heavier burden of proof as to the *intent* of the conspirators than under the other two. Under 215 it is sufficient to show an intent on the part of the deviser or devisers of the scheme to defraud some one; it is no longer necessary to show an intent to use the mails to effect the scheme, as it was under section 5480, U. S. Rev. Stat. The deviser of the scheme may, at the time he planned it, have intended to avoid all use of the mails in carrying it out; nevertheless if, in carrying it out, he does use the mails, the offense is committed. There are two elements of the crime, a scheme intended to defraud and an actual use of the mails; both, of course, must be proved to warrant conviction. When, however, the charge is conspiracy to commit the offense specified in section 215, it is necessary to prove an intent, not only to defraud, but also to defraud by the use of the mails. The draftsman of the indictment fully appreciated this; the first count charges an intent to use the mails as well as an intent to defraud.

[3, 4] Upon a careful examination of the record we are satisfied that the government failed to prove an intent by the conspirators named in the first count to use the mails to effect the scheme. Direct evidence of intent is rarely available; it may be shown by circumstances. Usually when the scheme is unfolded it is apparent that it could not be carried out without using the mails, and a jury is therefore warranted, without further proof, in drawing the inference that those who devised the scheme intended to use the mails. We do not find in this record sufficient to warrant the inference that on January 2, 1910, when the conspiracy was formed, the conspirators intended to use the mails. The scheme here revealed is markedly different from others which have been before the courts (mainly under old section 5480), where it was evident that the scheme could not be successfully carried out without using the mails. Thus in the old "green goods game," no personal interview could be risked until, after an exchange of letters, it appeared that some individual was a person who might be safely trapped. When the scheme is to dispose of stock at inflated prices, advertisements have to be published calculated to bring inquiries by mail from many different places; in that way only can a sufficiently broad field be found for the dissemination of the securities. But in this scheme different tactics are required. Advertising in the hope of bringing responses from persons eager to pay $10,000 or $25,000 or $50,000 for a few books would be a waste of money. The only practical method is to find out by inquiry the names of persons likely to be fooled, and then to have them interviewed by one or more glib talkers and thus persuade them to buy through ingenious representations and the exhibition of letters, telegrams, newspaper clippings, samples, etc. When books in sets are bought, presumably they are sent by express, and the person who effected the sale personally takes the check that pays for them. Since inference is not enough to make out full intent under count 1, and there is no direct evidence of it, we think conviction under this count should be reversed.

Coming now to the conviction under counts 2 and 3.

[5] Error is assigned to the admission of much of the documentary evidence on the ground that the letters, etc., were taken from defendant Farmer against his will in the violation of his constitutional rights. The facts are these: James J. Farmer was arrested November 14, 1912, and held to bail, which was at once furnished. He then went to his office, which was also the office of the corporation defendant, and found some post office inspectors, who had a subpœna duces tecum calling for all papers, etc., and were threatening to remove them. A heated discussion followed, at the close of which a Mr. Weill, a lawyer who was present as Farmer's legal adviser, asked the officers if they would give their word that, if the bags were sealed, they would not be opened until defendant Farmer should appear before the grand jury on November 15, 1912. The promise was given, the papers were put in the bags, the bags were sealed, and Weill went with the officers and the bags to Post Office Building, where the bags were deposited in an empty room. They remained in the custody of the government until the trial.

For the purposes of the present assignments of error, without discussing the question or considering the argument of the government as to the soundness of the two assumed propositions, it may be assumed:

1. That the officers exceeded their authority in removing the papers.

2. That the acts of defendant and his counsel (Weill) on the occasion of their removal did not operate as a waiver or estoppel to defeat defendant's right to assert his constitutional privilege and to insist on their return.

The case of Weeks v. U. S., 232 U. S. 383, 34 Sup. Ct. 341, 58 L. Ed. 652, however, does not apply, because in that case defendant made "timely" application "in due season" for the return of his papers. In the case at bar no application for return was made for nearly two years, when upon a petition dated October 5, 1914, application was made to the trial judge on October 10, three days before the trial for such return. Thereupon "by consent of counsel for defendant and for the United States" the court directed that the papers should be "placed in the custody of the clerk of the court, and that defendant and his counsel should have access to said papers and full opportunity to read and inspect the same, and to make copies if desired." This was done.

In the course of the trial defendant Farmer offered to prove that the papers were obtained from him involuntarily; he made no offer to prove that he had applied to any federal court for their return prior to the motion made in October, 1914. We think that defendant's acquiescence in the disposition made of the papers by the court operated as a waiver of any right he might have had to ask for their return to him.

[6] It is contended that there was a failure of proof under the second and third counts, because the charge was that defendants devised a scheme to defraud divers persons, whose names were to the grand jury unknown. Defendants' argument treats this as if these counts charged two schemes, one to defraud Mrs. Preston, the other to defraud Evans. They tried to introduce proof to show that when

the indictment was found the jury knew that both these persons had been defrauded; the testimony was excluded and exception reserved. The objection now urged may be disposed of on the assumption that the grand jury did know of the defrauding of these two persons in 1911 and 1912. The scheme charged in these counts was a general one, not directed to the defrauding of any particular individual then identified, but of any and all persons whom the devisers of the scheme might thereafter persuade to buy their books. What the indictment charged was the intent of defendants on January 2, 1910; that intent was to defraud, but who the persons to be defrauded would be presumably defendants themselves did not then know. Mrs. Preston was not approached until the latter part of 1910; Evans not until July, 1912, two years and six months after the scheme was devised. If defendants did not on January 2, 1910, devise a scheme against either of these persons, the grand jury was quite justified in charging that they (the grand jurors) did not know the names of the persons whom on that day defendants intended to defraud. It is expressly held in Durland v. U. S., 161 U. S. 306, 16 Sup. Ct. 508, 40 L. Ed. 709, that omission to state the names of the parties *intended* to be defrauded is satisfied by the allegation, if true, that such names are to the grand jury unknown. Knowledge by the jury that the schemers defrauded Mrs. Preston a year after they devised their scheme, and Evans 2½ years after such date, would not show the untruth of a statement that the jurors did not know the names of the individuals whom the schemers on January 2, 1910, intended to defraud. Defendants were fully advised what charge they had to meet under each count. Devising a scheme to defraud generally any one whom they might catch in their net would not by itself constitute an offense under section 215. The actual use of the mails in furtherance of the scheme was a fact essential to be charged and proved. The second indictment charged the mailing of the Preston letter; conviction under that count could not be secured unless the mailing of that letter in furtherance of the scheme were shown. The mailing merely of other letters to other persons would not sustain conviction under this count. The same is true as to the Evans letter charged under the third count.

We do not see why all rights of defendants were not fully protected under this indictment. If Larkin v. U. S., 107 Fed. 697, 46 C. C. A. 588, be interpreted as holding otherwise, we cannot concur with it.

[7] We may next refer to the proof. Leaving out of consideration the other parties whom the government indicted, but (except for the one who pleaded guilty) did not convict, there is abundant evidence that on January 2, 1910, John J. Farmer, Hartley and Glenn Farmer (who was not tried under the indictment) did devise a scheme to defraud. Evidence properly admitted to show their intent indicates that they were engaged in this enterprise for a year or more before that time; continuing in it after the Criminal Code went into effect (January 1, 1910) was in law the devising of a scheme on the date charged. The scheme was of the sort set out in the indictment. Of course, at the time they did not have in mind all the particular individuals to be defrauded in this way; they contemplated defrauding any and every one whom they could persuade to part with his or her

money. This is proved beyond any possible doubt, reasonable or otherwise, as to all three. The correspondence passing between them, notably between J. J. Farmer and Hartley, reeks with fraud in every letter, except the few written in curt business phraseology, so that they could be shown in court, if necessary, to present the appearance of an honest producer of books, extra illustrated and handsomely bound, dealing at arm's length with a purchaser, who took his own risk of effecting a resale. That the letters passing between the two convicted defendants, the one on the firing line keeping the one at headquarters advised as to his every move, were in furtherance of the scheme, no intelligent mind can for a moment doubt.

[8] The indictment letter charged in the second count, mailed by J. J. Farmer to Evans, Glassport, Pa., July 29, 1912 referring to his contract, notifying him of the sending of the books, acknowledging receipt of $500 and notes for $3,400, and congratulating him on his securing two rare and valuable sets of books, was certainly in furtherance of the scheme charged. The defrauding of Evans would not be fully accomplished till the notes were paid; it was important to keep him satisfied with his bargain and unsuspicious until then. The sale was effected by the same fraudulent methods, charged in the indictment and repeatedly practiced by all three (the convicted defendants and Glenn Farmer); the government's case on this count was fully proved.

[9] The indictment letter under the third count was written and mailed by J. J. Farmer to Mrs. Preston March 21, 1911. By that time the books had been delivered and the price paid. It refuses a request to send her separate bills for the separate sets sold her stating:

"Mr. G. F. Farmer is a dealer in special editions, for himself and on his own account. Any goods that he got from this company, he paid for, and we know nothing about the price for which they were subsequently sold, nor to whom they were sold. Consequently we cannot comply with your request to furnish you individual bills for the sets mentioned."

If it stood alone, this letter might not be significant, but with the illumination of the situation which the record affords we think it may fairly be considered as written in furtherance of the general scheme. The scheme was not to defraud a particular individual (e. g., Mrs. Preston), but to defraud whomever the parties to the scheme could persuade to buy. Having been once swindled by Glenn Farmer and Hartley, Mrs. Preston and others in Boston to whom she might relate her experience would probably be immune to the further blandishments of these two enterprising agents; but if the man who got up the books and was evidently the head of the enterprise could persuade her that the publishing house knew nothing of Glenn Farmer and his coadjutor in the swindle, except that Glenn had bought books from J. J. Farmer and resold them entirely on his own account, possibly Boston might still remain a territory receptive of the J. J. Farmer books, when cultivated by other of his enterprising agents.

[10, 11] Counts 2 and 3 charged that the indictment letters were "placed in the post office in the city of New York." The evidence showed that these letters reached the respective addresses, in due

course, inclosed in envelopes postmarked "New York, N. Y." The suggestion that each letter should have been excluded, because it might have been deposited in some substation or in a lamp post mail box is too frivolous for consideration. So, too, is the contention that because the government charged that a dozen persons entered into the original scheme, and failed to prove the guilt of all of them, therefore there was a fatal variance between the scheme pleaded and the scheme proved.

[12] The instances of frauds of exactly the same sort as those charged in the indictment, committed by one or more of the defendants prior to January 2, 1910, were admissible to show intent. There is nothing in our opinion in Marshall v. U. S., 197 Fed. 511, 117 C. C. A. 65, to support a contrary contention. The Marshall Case, as we pointed out on motion for its reargument, was sui generis; there was nothing in the opinion to indicate that the wholesome practice of showing intent by a party's own acts was to be abrogated. A single sale of a single book, even at an exorbitant price, might not necessarily satisfy one that there was intent to defraud; but repeated similar transactions might well, as in the case at bar, demonstrate an intention to conduct a swindling enterprise.

[13] Plaintiffs in error, referring to letters passing between the defendants while they were carrying out their scheme, cites U. S. v. Ryan (D. C., E. D. Ark.) 123 Fed. 634. Without inquiring whether that case was or was not correctly decided under old section 5480, it is sufficient to say that under section 215, Criminal Code, conviction was had in this case only upon the indictment letters set out under the second and third counts. The letters inter partes were clearly admissible as showing intent and casting light upon the methods of the scheme devised.

Only three alleged errors in the charge have been argued. The first deals with the conspiracy count already disposed of. The second is concerned with transactions prior to January 2, 1910, which has been discussed above. The third is based upon an exception "to the statement contained in the charge that the jury can convict under the indictment if they found separate fraudulent schemes." The disposition made of the conspiracy count makes it unnecessary to consider this.

The judgment is reversed as to the first count and affirmed as to the other two; such affirmance sustains the sentence.

In re LATHROP, HASKINS & CO.

FINLEY et al. v. HOTCHKISS.

(Circuit Court of Appeals, Second Circuit. May 13, 1915.)

No. 137.

1. BANKRUPTCY ⟸328—CLAIMS—TIME FOR FILING—LIMITING TIME.

Bankrupt stockbrokers, a few hours before the filing of the petition, transferred to a bank, as security, certain securities belonging to their customers, which the trustee recovered from the bank on the ground that the transfer was a preference. The trustee, before such recovery, presented a petition stating that there were in his possession stock, bonds, etc., for which proceedings to reclaim had been brought, and that creditors of the bankrupt might assert claims to some of such securities "or other assets of this estate." The court thereupon made an order to show cause why an order should not be made directing claimants and creditors to file notice of their claims before a certain date, or be barred from asserting any claim to "said stocks, bonds, or other securities, or the proceeds thereof, or other assets of the estate," and subsequently made an order, directed to certain creditors by name and to all other claimants and creditors making any claim to any of the stocks, bonds, securities, or assets belonging to the estate, or in the possession of the receiver, or to the proceeds thereof, requiring them to file such claims before a day fixed, appointing a special master to determine all such claims, and providing that all claimants not filing notice of their claims should be forever barred from making any claim to the stocks, bonds, or securities of the estate, or the proceeds thereof, except that this should not bar them from filing proofs of claim as general creditors. The owners of the securities so pledged to the bank gave no notice of their claims for nearly four years after the time limited, and until the trustee had recovered such securities from the bank. *Held*, that the orders of the court applied to claims to such securities in the possession of the bank, as well as to securities in the possession of the receiver or trustee; the order to show cause expressly referring to securities in the possession of the receiver, or to which he or any trustee thereafter appointed might be entitled.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 518; Dec. Dig. ⟸328.]

2. BANKRUPTCY ⟸328—CLAIMS—TIME FOR FILING—LIMITING TIME.

The court, in the exercise of its equity jurisdiction, had inherent power to limit the time for the presentation of such claims.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 518; Dec. Dig. ⟸328.]

3. BANKRUPTCY ⟸328—CLAIMS—TIME FOR FILING—LIMITING TIME.

Bankr. Act July 1, 1898, c. 541, § 57n, 30 Stat. 560 (Comp. St. 1913, § 9641), providing that claims shall not be proved subsequent to one year after the adjudication, implies that creditors may file claims at any time within the year, and the court cannot fix a time for general creditors to file their claims.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 518; Dec. Dig. ⟸328.]

Ward, Circuit Judge, dissenting.

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

This cause comes here on an appeal from an order entered on the 19th day of August, 1914, dismissing intervening petitions to recover

from the trustee in bankruptcy certain stocks, bonds and other property.

See, also, 231 U. S. 50, 34 Sup. Ct. 20, 58 L. Ed. 115.

On and prior to January 19, 1910, Henry Stanley Haskins and Henry S. Leverich were conducting the business of stockbrokers as copartners in the city of New York, state of New York, under the firm name of Lathrop, Haskins & Co. An involuntary petition was filed on January 19, 1910, in the United States District Court for the Southern District of New York praying that the firm of Lathrop, Haskins & Co. be adjudged bankrupt; and on the day aforesaid Henry D. Hotchkiss was appointed receiver in bankruptcy of the said firm; and on April 18, 1910, the said Hotchkiss was elected the trustee in bankruptcy and duly qualified.

On February 7, 1914, Frederick W. Finley, Genevieve A. Vedder, Gustave S. Boehm, Robert Flanagan, Emma G. Osborne, Catherine S. Leverich, and Annie F. Leverich, trustee, filed reclamation petitions in the bankruptcy proceedings of Lathrop, Haskins & Co., seeking to reclaim certain stocks and bonds. The petitioners had notice requiring claimants to file their claims on or before May 1, 1910, but they did not comply with the order. Six of the seven petitioners, however, filed general proof of claim in bankruptcy. There is no dispute of fact in the case, the petitioners' entire case having been submitted on stipulations to the special master to whom the petitions had been referred.

Pruyn & Whittlesey, of New York City (Charles P. Howland and Robert Forsyth Little, both of New York City, of counsel), for appellants.

Abram I. Elkus and William A. Barber, both of New York City (Abram I. Elkus and William E. Collins, both of New York City, of counsel), for appellee.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge (after stating the facts as above). [1] This is a suit brought against a trustee in bankruptcy to recover certain securities which had been deposited by the bankrupt brokers with a New York bank to secure their indebtedness to it. The securities involved were delivered by the bankrupt brokers to the National City Bank of New York between 2 and 3 o'clock in the afternoon of the day on which the brokers at noon had suspended business, an involuntary petition in bankruptcy having been filed against them about 4 o'clock on the same day. On the morning of that day the bank had made a clearance loan to the brokers of $500,000 to enable them to meet current obligations. The officers of the bank later in the day demanded securities from the brokers to make good their obligations to the bank, and were informed of their suspension and that a petition in bankruptcy would be filed. After considerable discussion the securities in question were turned over to them, but with the statement that the bank was thereby obtaining a preference. This was on January 19, 1910. On May 6, 1910, the trustee in bankruptcy commenced an action against the bank to recover the securities thus transferred. He obtained judgment in the District Court (200 Fed. 287, 299 [1911–1912]), which was affirmed in this court (201 Fed. 664 [1912]). The case was then taken to the Supreme Court of the United States, which also affirmed it (231 U. S. 50, 34 Sup. Ct. 20, 58 L. Ed. 115 [1913]), and on January 21, 1914, the securities and dividends thereon were turned over to the trustee,

under the decree which required it to deliver the securities, with all interest and dividends, and in default thereof to pay $161,740.62. The trustee was allowed to recover back the securities on the ground that the bank at the time it received them had reasonable cause to believe that it was obtaining a preference.

On February 7, 1914, the petitioners herein filed their petitions against the trustee in bankruptcy, seeking to reclaim as their property certain of the stocks and bonds turned over to him by the National City Bank. The petitioners allege that, prior to the day when the brokers turned over these various securities to the bank, they had purchased through the brokers the shares of stock they now seek to reclaim, and that they were entitled to the possession of the stocks on the day they were wrongfully given to the bank. They allege they made a demand on the trustee on January 24, 1914, for the return of the shares and all dividends which had been paid on them, and that they at the same time tendered any balance which might be due from them to the bankrupts, and that the trustee refused to comply with the demand.

It appears, however, that on February 18, 1910, the court entered an order "to show cause why an order should not be made directing claimants and creditors to file notice of their claims on or before a certain date, or be forever barred from asserting any claims whatever to any right, title, interest, or lien in, to, or on said stocks, bonds, or other securities, or the proceeds thereof, or other assets of the estate." A copy of this order was mailed in accordance with its terms to all creditors and claimants. Thereafter, and on March 24, 1910, an order was made and entered which directed certain specified creditors named therein, "and all other claimants, creditors, or other persons" "making any claim to any of the stocks, bonds, securities, or assets of any kind belonging to this estate, or now in the possession of the receiver in bankruptcy, or to the proceeds of any of said stocks, bonds, or securities, to file such claims * * * on or before the 1st day of May, 1910."

Three of the present petitioners were included by name in the order, Genevieve A. Vedder, Frederick W. Finley, and Robert Flanagan. The remaining four petitioners, it is claimed, were included generally under the designation "of all other claimants, creditors, or other persons * * * making any claim to any of the stocks, bonds, securities, or assets of any kind." The order also appointed a special master, who was to hear and determine the rights of all such claimants, and who was directed in all respects to adjust, determine, and adjudicate the rights, titles, interests, equities, claims, and liens of all persons who should file with him any claim or notice of claim to any of the securities, and to report to the court his determination thereon. The order further provided that all claimants who did not file notice of their claims on or before May 1, 1910, should be "forever barred from making any claim or asserting any title or interest in or to any of the stocks, bonds, or securities of this estate or the proceeds thereof, except this order shall not be construed to bar any creditor from his right to file a proof of claim as general creditor against this estate within one year

after the order adjudicating the above named bankrupts." No notice of claim to the securities now sought to be reclaimed was given to the special master by any of the seven petitioners herein until the present petitions were filed in January, 1914, nearly four years after the time limited by the order had expired. The claimants waited until after the trustee recovered the securities from the National City Bank, and within three days thereafter came forward with their claims.

The District Judge has commented with some severity upon the course which the petitioners have pursued. It did not appear to him to be a case of candid dealing and fair play. The District Judge stated that what the petitioners did was quite deliberate and conscious:

"They declined to assert any rights at the time fixed; they allowed the trustee to assume that they had no rights, and to assert falsely, though innocently, that the securities were the property of the bankrupt; * * * they allowed him to employ counsel whose fees would in large measure be determined by the amount of the assets at stake; they took no steps to assert their own claims against the bank, independently, though they had unquestioned right to do so, at least those claimants whose assets were free; and they lay back, carried wholly at the risk of the estate for 3½ years and more, until the trustee brought them safe to port."

And he adds:

"That this was a shrewd stratagem does not seem to me to admit of the least doubt, in view of the claimants' total failure to give a scintilla of excuse. They saw the opportunity of using the trustee as their catspaw to bear all the risk of a doubtful litigation."

It is fair to say, however, that the case was tried on stipulations as to all material facts, and that the record contains no statement concerning concealment of claims. But the facts which the record discloses show that no notice of the claims was given, and that the trustee was allowed without notice to conduct the litigation without any assistance from these petitioners, who made known to him their asserted rights as soon as the securities reached his hands. The bare stipulated facts do not, however, prove sharp practice. But perhaps it is not altogether surprising that the District Judge inferentially concluded that a policy of "watchful waiting" had been deliberately adopted by the petitioners, and that such a policy was not proper under the particular circumstances of this case, and that, so thinking, he should have rebuked it.

Counsel rely upon New York Security & Trust Co. v. Lombard Investment Co. (C. C.) 75 Fed. 172 (1896). In that case the trust company had given the investment company an indemnity fund to guarantee it against loss on all loans made through its advice. This indemnity fund was to be returned to the trust company when the loans were paid. In the insolvency proceedings an order was entered requiring all persons "entitled to participate in the general assets of the insolvent" to prove their claims before a certain day. The trust company did not so prove its claim, but later intervened, asking for the return of the indemnity fund. It was held that the trust company could recover, on the ground that the order limiting the time to file claims did not apply to the indemnity fund. The court in its opinion said:

"The court had in mind the claims of creditors and stockholders 'entitled to share in the assets of the insolvent' estate. This fund, at the time of the sale, had not become an asset of the estate, because the purposes of the trust had not been subserved, so as to give the company any tangible, ascertainable, separate interest in the fund. As evidence of what was in the mind of the court, the decree declared 'that no person shall be entitled to participate in the general assets of the insolvent defendant who shall not present and establish his claim in accordance with this decree.' Under the contract in question, the rights of the respective parties in this fund cannot be ascertained and determined until the loans made through the bank shall be adjusted and wound up. Whether or not the bank shall be entitled to have all or any part of this fund and its proceeds returned to them will depend entirely upon the losses, if any, and the extent thereof sustained by the company on the loans made by and through the bank. Nor are these interveners in position to demand and receive this fund, or any part thereof, until they can establish the amount of the loss sustained in the transaction."

And it is therefore claimed in the case at bar that the securities involved in this proceeding were not included in the order made on March 24, 1910, as they were at that time in the adverse possession of the City Bank.

The first question to be decided is as to what the court below intended by its order. We are unable to agree with counsel in their claim that the order is to be construed as referring only to securities which were in the possession of the trustee at the time the order was made. There is no ambiguity about the order, and no reason for the claim that the order related simply to securities then in the receiver's possession. To give such a construction to the order is to ignore the fact that the order by its express language applied to all persons, except Caroline H. Midgeley, "making any claim to any of the stocks, bonds, securities, or assets of any kind belonging to this estate or now in the possession of the receiver," "or to the proceeds of any of said stocks, bonds, or securities." In view of this language it is impossible to say that the terms of the order related simply to securities in the then possession of the receiver. Moreover, the order directed the special master to determine "the amounts, if any, which any of the claimants who prove ownership to stock pledged in the various banks, but not sold by the banks, shall contribute to the losses sustained by those whose stocks were pledged to banks and sold out by the said banks under their rights as pledgers."

Any doubt as to the intended scope of the order, if any doubt be entertained, is removed by a perusal of the order to show cause and the petition praying for the order to show cause which led to the final order. The petition of the trustee states that there are in the possession, custody, and control of the petitioner certain stocks, bonds, securities, and other assets, and that various proceedings to reclaim have been instituted by various claimants; that it is desirable and necessary to sell the securities and distribute the proceeds among the creditors; that it is inadvisable to take such action until all rights to the securities are determined. It is then alleged that some creditors of the alleged bankrupt may assert claims to some of said securities or other assets of this estate.

And the order to show cause expressly refers to "stocks, bonds, securities, or other choses in action or assets of any kind which are now

in the possession of the receiver, or to which he or any trustee hereafter appointed may be entitled." And it proceeds to declare that the final order shall provide an injunction against the assertion of any further claims "to or on said stocks, bonds, or other securities, or the proceeds thereof, or other assets of the estate. The petition and order to show cause were mailed together to the petitioners and were received by them. They certainly must have conveyed to them an understanding of the intention to fix a limit upon the time within which any claims of any sort could be presented. And it seems to us indisputable that the petition, the order to show cause, and the order of March 24, 1910, taken together, clearly show that it was intended to bar all claims not presented within the period prescribed. It is a refinement we do not find at all persuasive to say that the order does not apply to the claims these petitioners are now undertaking to assert.

[2, 3] This brings us to inquire whether the District Court had the power to make the order of March 24th providing that all claimants who did not file "notice of claim to the said stock" on or before May 1, 1910, should be forever barred from making any claim or asserting any title or interest in or to any of the stocks, bonds, or securities of this estate or the proceeds thereof." In answering that question it is to be observed that the order expressly provided that it was "not to be construed to bar any creditor from his right to file a proof of claim as general creditor against this estate within one year after the order adjudicating the above named bankrupts." In other words, the order did not fix a time for general creditors to file claims against the estate. That the court could not have done as the Bankruptcy Act, in providing in section 57, subd. "n," that "claims shall not be proved against a bankrupt estate subsequent to one year after the adjudication," plainly implies that creditors shall be entitled to file claims at any time within the year. But the court sought by its order to require persons claiming stocks or bonds then in the possession of the receiver, or which might subsequently come into his possession, or into the possession of the trustee, to give notice of their claims within a time specified, or be barred of the right to recover them from the receiver or trustee. We are at a loss to understand why the authority of the court to make such an order should be denied. It is said that such an order is in effect a short statute of limitations, and that as such beyond the power of the court to establish. In making the order the court was in the exercise of its equity jurisdiction. The equity courts, in jurisdictions where the distinction between law and equity is maintained, while not bound by statutes of limitation not in totidem verbis applicable to equitable demands, have nevertheless from the earliest times asserted the right to adopt and apply statutes of limitation to cases over which their jurisdiction was concurrent with that of the courts of law. And in cases over which the courts of equity have exercised an exclusive jurisdiction they have acted upon the maxim "vigilantibus non dormientibus æquitas subvenit," and recognized laches as a defense peculiar to the chancery courts, and refused to grant relief to one who has unduly delayed the prosecution of his claim. And it has also been the practice of equity courts in appointing receivers to limit

the time within which claimants could assert a claim against the receivers so appointed. In the exercise of the right thus to limit rights of action the equity courts have not derived their power from any statute but have exercised an inherent power. It is too late in the history of these courts to challenge their right in this respect.

This court has in a number of cases recognized the right of the District Courts in the exercise of their equity jurisdiction to limit the time for the presentation of claims. For example, in Pennsylvania Steel Co. v. New York City Ry. Co., 198 Fed. 721, 741, 742, 117 C. C. A. 503, 523, 524 (1912), we assumed that such a right existed and said:

"Claims which, when presented within the time limited by the court for their presentation, are certain or are capable of being made certain by recognized methods of computation, should be allowed."

And again, in Pennsylvania Steel Co. v. New York City Ry. Co., 216 Fed. 458, 462, 132 C. C. A. 518, 522 (1914), we said:

"Of course some day must be fixed, and fixed by the District Court, so as not to delay distribution. In this case he did fix the time before which all claims must be filed against the City Company as December 10, 1907, and against the Metropolitan Company as January 15, 1908."

And we are also unable to see why the power of the court to make an order limiting the time within which those claiming the stocks herein involved were to file notice of their claim should be restricted to the stocks which the receiver had actually in his possession at the time the order was made, and not extended to stocks which he did not then actually possess, although having a right to obtain their possession and which he subsequently secured.

It may be conceded that the District Court had no power to determine in a summary proceeding rights to securities not in its possession. See First National Bank v. Chicago Title & Trust Co., 198 U. S. 280, 25 Sup. Ct. 693, 49 L. Ed. 1051 (1905). The right to adjudicate in rem interests in a fund depends jurisdictionally upon possession of the fund. Heidenritter v. Elizabeth Oil Cloth Co., 112 U. S. 294, 5 Sup. Ct. 135, 28 L. Ed. 729 (1884). The District Court in its order was not attempting to adjudicate the claims to the stock, but was only fixing a time limit within which persons claiming an interest in the stock should give notice of their claims. In a bankruptcy proceeding, and to facilitate the administration of the estate, it is important that a trustee should be informed of all hostile claims to any part of the estate, both that which has already reached his hands and that which is not at the time in his possession, but which he has a right to reduce into his possession. The District Court was therefore justified in making the order it did. That order left the claimants entirely free to proceed in any manner they might be advised to adopt. They were not restrained by the order from pursuing any remedies they thought they possessed. The order was made to protect the trustee against the very course of conduct which in fact the petitioners adopted. The petitioners did not attempt to recover the stocks from the bank. Indeed, as the stocks pledged were those of margin customers, the pledge as against them was valid, and they could not have maintained an action against it. The trustee eventually recovered the securities, because, as we have seen,

the delivery of them to the bank amounted to a voidable preference. The right to recover them was a right which the trustee alone could assert. The petitioners knew, or must be assumed to have known, that their rights would have to be worked out through the trustee. Surely it could be no hardship to them, therefore, to require them, as the court's order did, to give notice of their claims. The order was a reasonable one, and quite necessary if there is to be that expedition in winding up bankrupt estates which the Bankruptcy Act contemplates.

Order affirmed.

WARD, Circuit Judge (dissenting). In order to perform its duty of promptly winding up an estate in bankruptcy, the court has power to require claims against property in its possession to be made within a fixed reasonable time or thereafter to be barred. In re T. A. McIntyre & Co., 176 Fed. 552, 100 C. C. A. 140; Penna. Steel Co. v. New York City Railway Co., 198 Fed. 721, 741, 742, 117 C. C. A. 503; Pennsylvania Steel Co. v. New York City Ry. Co., 216 Fed. 458, 472, 132 C. C. A. 518. The proceeding in such cases is in rem. As between these claimants, the bankrupt, and the bank, the securities in question were lawfully hypothecated. The Bankruptcy Act, however, authorizes the trustee, and only the trustee, to avoid transfer if preferential. Sec. 60b. In this case he did not take any steps to do so until after the time fixed by the court for making claims had expired. Within that period there was nothing to show that any such proceeding would be taken or if taken would prevail. I think the order should not be held effective as to these securities, because they were not in the possession of the court within the time fixed for proving claims. It seems to me that it was beyond the power of the court to bar claimants before it had the res in its hands. Then, of course, a limit could be fixed within which adverse claims could be made, and reasonable conditions imposed as to contribution by claimants to the expenses of the proceedings to set aside the transfer. Such of the claimants as could not trace their securities in accordance with the rule laid down in our late decision (In re Hollins, 219 Fed. 544, 135 C. C. A. 312) could not recover. Except as to such claimants, if any, the order should be reversed.

MYERS et al. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. May 12, 1915.)

No. 239.

1. POST OFFICE ⇐48—MISUSE OF MAILS—SCHEME TO DEFRAUD

Where defendants devised a scheme to defraud by the use of the mails prior to the Criminal Code (Act March 4, 1909, c. 321, 35 Stat. 1088 [Comp. St. 1913, §§ 10165–10519]), and continued the scheme after the Code went into effect, there was equivalent the devising of such scheme after the taking effect of the Code, and under an indictment charging a violation of the Code the government could show the acts of defendants prior to the Code.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 67–80; Dec. Dig. ⇐48.]

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2. CRIMINAL LAW ⟸1151—CONTINUANCE—DISCRETION OF TRIAL COURT.
Denial of a continuance to enable accused to prepare his defense will not be disturbed, in the absence of a plain abuse of discretion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3045–3049; Dec. Dig. ⟸1151.]

3. CRIMINAL LAW ⟸590—CONTINUANCE—DENIAL.
A trial of defendants resulted in a disagreement of the jury. About a year later a second trial was had. Defendants were unable to retain their original counsel, and the court, 11 days before the second trial was set, assigned counsel. Defendants delayed in notifying the court that counsel would have to be assigned. One of the defendants did not come to the place of the trial until three days prior thereto. The stenographer's minutes of the first trial were available. *Held*, that denial of a reasonable continuance for preparation of the defense was not an abuse of discretion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1316, 1317; Dec. Dig. ⟸590.]

4. CRIMINAL LAW ⟸1169—HARMLESS ERROR—ERRONEOUS ADMISSION OF EVIDENCE.
Where the acts of defendants charged with crime warranted a characterization in stronger language than that used in a newspaper article admitted in evidence, the error in admitting the article was not prejudicial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 754, 3088, 3130, 3137–3143; Dec. Dig. ⟸1169.]

5. CRIMINAL LAW ⟸867—NEWSPAPER PUBLICATIONS—MISTRIAL.
Where accused's counsel brought to the attention of the court a newspaper publication improperly commenting on proceedings in the trial before the court alone, by insisting on making a motion for withdrawal of a juror in open court on account of the publication, but the court at once cautioned the jury to give no attention to the publication, if any of them had read it, the refusal to declare a mistrial was not reversible error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2071–2078; Dec. Dig. ⟸867.]

6. CRIMINAL LAW ⟸1171—HARMLESS ERROR—IMPROPER CONDUCT OF GOVERNMENT'S COUNSEL.
Where the evidence conclusively established the guilt of accused, the misconduct of government's counsel in making prejudicial statements and unfairness in cross-examining accused did not justify setting aside of a conviction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3126, 3127; Dec. Dig. ⟸1171.]

7. CRIMINAL LAW ⟸1170—HARMLESS ERROR—ERRONEOUS EXCLUSION OF EVIDENCE.
Where the guilt of accused was established by substantial evidence, exclusion of evidence which could not affect the verdict was not prejudicial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3145–3153; Dec. Dig. ⟸1170.]

8. POST OFFICE ⟸35—MISUSE OF MAILS—SCHEME TO DEFRAUD—"FRAUD."
A scheme by defendants to defraud persons by inducing them to deposit money for the purchase of treasury stock of a corporation, on representations that the money deposited would be used in conducting the business of the corporation, while the defendants intended to convert a large part of the money to their own use and to deliver to the persons depositing the money their own personal stock, is a "fraud," within Rev. St. U. S. §§ 5440, 5480, and Criminal Code, §§ 37, 215, punishing a conspira-

cy to commit any offense against the United States, and punishing the use of the mails to promote frauds.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. § 55; Dec. Dig. ⊂⊃35.

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

9. POST OFFICE ⊂⊃48—MISUSE OF MAILS.

Under an indictment for misuse of the mails in furtherance of a scheme to defraud by selling the individual corporate stock of defendants, falsely represented to be treasury stock, it is unnecessary to go into details of controversies as to the truth of general statements as to the condition of the properties whose stock defendants were offering for sale, and where the act charged was clearly established by satisfactory evidence it was immaterial whether other misleading representations were made or not.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 67–80; Dec. Dig. ⊂⊃48.

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

10. CRIMINAL LAW ⊂⊃1162—HARMLESS ERROR.

Where every element of the offense charged has been proved and stands practically undisputed, only some glaring and obviously harmful error will justify a reversal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3085; Dec. Dig. ⊂⊃1162.]

11. CRIMINAL LAW ⊂⊃1043—JOINDER OF OFFENSE—OBJECTIONS.

Where objection was made to the trial under two indictments together, and counsel stated that he would file his reasons later, but no reasons were filed, and the several transactions were all of a cognate character, the objection of the joinder will not be considered on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2654, 2655; Dec. Dig. ⊂⊃1043.]

12. CRIMINAL LAW ⊂⊃798½—INSTRUCTIONS—VITAL ERROR.

An instruction at the close of the charge, in response to a juror, as to whether the verdict should be written or oral, that the rule varies in different districts, that in that district the verdict is oral, that the clerk will ask the foreman if the jury have agreed, and if the jury have he will ask whether defendants are guilty, and that if they are the jury will say on what indictments or what counts, and that the jury can write out the verdict and read it in answer to the clerk's question, cannot be complained of as vital error, and will not be reviewed, in the absence of any exception to it or assignment of error thereon.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1801, 1938; Dec. Dig. ⊂⊃798½.]

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 conviction.

Defendants were tried under two indictments. The first contained 8 counts. Of these the first charged that on February 1, 1905, and continuously and at all times until December 29, 1909, defendants engaged in a conspiracy to defraud divers persons by inducing them to deposit money for the purpose of purchasing treasury stock of a certain specified mining corporation upon certain representations, among others, that the money so deposited would, except for a small commission, be used in conducting the business of the corporations; that defendants in truth intended not thus to use the money,

but to convert a large part of it to their own use, delivering to the persons thus depositing, not treasury stock, as promised, but defendants' own personal stock; that it was intended by defendants that the scheme should be effected by use of the mails. The second, fifth, and eighth counts, with changes of dates and names of corporations, charged similar conspiracies. All these counts were under section 5440, U. S. Rev. Statutes. The fourth count was dismissed on the government's own motion prior to the beginning of the trial. The third, sixth, and seventh counts charged each the devising of a scheme to defraud—similar to that above set forth—under section 5480, U. S. Rev. Statute.

The second indictment contained 11 counts. Except the first and fifth, each of these counts charged that in 1910 defendants, having theretofore devised a scheme to defraud (setting it forth), used the mails in furtherance of the scheme, under section 215, Criminal Code. The first and fifth counts charge conspiracy to violate that section—under section 37, Criminal Code. All these schemes and conspiracies were of the same character, dealing with various named mining companies.

The jury promptly convicted both defendants on every one of the 18 counts submitted to them. Under the first indictment each was sentenced to one year's imprisonment. Under the second each was sentenced to five years' imprisonment, to begin at the termination of the sentence under the first indictment, and Myers was also fined $10,000.

George Gordon Battle, of New York City, for plaintiffs in error.

Henry N. Arnold and Raymond G. Brown, Sp. Asst. Attys. Gen., for the United States.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge. [1] The record is inordinately long; there are four volumes of testimony; the trial lasted seven weeks; there are hundreds of exhibits. It is a most unfortunate practice to multiply counts, to marshal large numbers of defrauded persons, and to give testimony as to scores of "similar offenses to show intent," when, as will be seen from subsequent reference to the testimony, guilt in act and in intent is readily provable by documents about whose issue or signature by defendants there can be no doubt. In this connection we may state that we find no error in showing the doings of defendants prior to January 2, 1910, when the Criminal Code went into effect. Although they might have devised a scheme to defraud prior to that date, continuance of such scheme after the Code went into effect would be a full equivalent of devising such scheme on that day.

[2, 3] In discussing the case, the order in which the points relied upon by plaintiffs in error are presented in their brief will be followed, so far as practicable. It is contended that application for a reasonable continuance for the purpose of preparation was denied defendants. Unless there were some plain abuse of discretion, there is nothing which calls for review. The cause had been tried about a year before (resulting in a disagreement of the jury) and had taken nine weeks to try. Defendants asserted that they were not able to retain counsel who represented them on the first trial, or indeed any other, so counsel were assigned by the court on January 9, 1914; the trial being set for January 20th, a few more days being available for impaneling a jury and opening the government's case. Defendant's delay in notifying the court that counsel would have to be assigned

was chargeable to themselves. So, too, was the circumstance that one of the defendants chose not to come on from San Francisco until January 17th. Moreover, the nine weeks' trial, stenographer's minutes of which were available, showed up fully what defendants must expect to meet, and made the task of counsel easier than it would have been, had they not known what the details of the government's proof were to be.

[4] The second point discusses the introduction in evidence of a clipping from a newspaper, the Daily Mining Record of Denver, which it claims was highly prejudicial. Some letters between defendant Wisner and the editor or publisher of the paper had been put in evidence; all of these are apparently not printed in the record; at least all are not indexed. They seem to have involved some objections or explanations by Wisner in respect to statements which had appeared in the paper. The publisher, being on the stand, identified an issue of the paper containing the article. Objection being made, the government stated that it was offered, not in evidence of any statement of fact therein contained, but as throwing light on a letter of Wisner to investors, stating that Reinhart, the publisher, was trying to blackmail him, in order to get advertisements.

We are inclined to think the article was admissible in explanation of the letter; but, however that may be, we are satisfied that what happened was not prejudicial to defendants. The article was a long one, about 17 pages, but the court allowed only some 3 pages to be read to the jury. Nearly all of this admitted portion contained merely a summary of the contents of defendant's circulars and advertisements; all of which were abundantly proved otherwise. Through some oversight apparently, the admitted portion contained a sentence in which, criticising the Wisner method of promotion and sale of stock, the writer of the article said it "savors of the worst sort of quackery. The Record will leave to its readers to indulge in more severe language, if they so desire. In the light of A. L. Wisner & Co.'s avowed reasons for paying dividends simultaneously with the sale of treasury stock, this practice, which under any circumstances may be set down as wanting in conservatism, is made to stand out in all its shadowed outlines, gaunt and unmistakable." We find it difficult to suggest a satisfactory reason for the admission of these quoted sentences, but in view of the fact that the characterization of defendant's acts warranted much stronger language than that used in the newspaper article, we cannot believe that the defendants were injured by its introduction.

[5] It is next assigned as error that defendant's motion for withdrawal of a juror was denied. The motion was made because of a publication in two or three newspapers, while the trial was in progress. The circumstances were these: About a week after the trial began, defendants being both enlarged on bail, counsel for the government asked the trial judge to place defendant Myers "under conditional surveillance during his trial," stating he (counsel) felt "it would be a great danger to the trial to allow this man, who has plenty of money, to go about the city." It was also stated that on the former trial the jury, although kept out a very long time, disagreed, 11 to 1. This

motion was not made in court, but in Judge Martin's chambers; counsel were careful to keep it from the jury. Some enterprising journalist published it in the next issue of his paper. In a community where there is a different conception of the method of conducting criminal trials, no newspaper would have published what these New York papers did while the trial was going on. But that is the atmosphere in which our trials are conducted; if mere publication of such matters were sufficient ground for declaring a mistrial, few cases of any general interest would reach a conclusion; there would be a succession of abortive efforts to get the cause to the jury with nothing before them but what the court admitted in evidence. In this case it was defendant's counsel himself who brought the matter to the jury's attention by insisting on making his motion for withdrawal of a juror in open court. The court at once and quite fully cautioned the jury to give no attention to the article, if any of them should happen to read it. All that was stated in open court was that an article had appeared in one or two newspapers that the statements therein had "nothing to do with the facts of the case or with the guilt or innocence of the defendants." We find no error in the court's refusal to declare a mistrial. Moreover, the record indicates that no exception was reserved to denial of the motion.

[6] The fourth and fifth points deal with what are alleged to be "prejudicial statements" by counsel for the government, and alleged unfairness in questioning one of the defendants when on the witness stand. The sixth point refers to the exclusion of three letters offered by defendant, which it is averred tended to show honest intent in regard to the disposition of certain of the mining properties, and the bringing about the appointment of receivers of some of the properties. The seventh relates to the exclusion of evidence to show what Wisner did with the moneys he obtained from sales of the stock mentioned in the indictments. Inasmuch as the sufficient answer to all these objections is found in the thoroughly satisfactory evidence which established the guilt of the defendants, they may all be disposed of together.

Counsel for the government, being asked on one occasion what was the purpose of certain testimony he was asking to introduce, said that it was to show that "defendant and Mr. S. (one of his counsel) had prepared a false and perjured defense." The judge ordered this to be stricken out and told the jury to pay no attention to it. Defendant Myers, upon his direct examination, had, for some reason, given a sketch of his life, referring to several transactions in his early career having nothing to do with the enterprise mentioned in the indictments. On cross-examination the government's counsel, going over these details of the witness' early life, questioned him in a most objectionable manner; for instance, "Have you not lived by schemes to defraud since you were a boy?" and many similar questions being put to him. No amount of heat generated by the irritation of a long trial will excuse counsel for phrasing his questions so that each one is an insult, and when this is done counsel should be sharply reproved. But his doing so several times during a seven weeks' trial will not be sufficient ground for setting aside, on any theory of preju-

dice, a verdict plainly warranted by the evidence. Indeed, the prejudice is usually the other way; such treatment of a witness is calculated to excite the sympathy of a jury.

[7-9] The longer the trial the more improper incidents of this sort there may be. Also in a long trial there will be occasions when some piece of competent testimony is excluded; if it is unimportant, if it can be plainly seen that its admission could not possibly have changed the result, such exclusion will not constitute reversible error. We do not find it necessary separately to discuss the few instances referred to where testimony was excluded, because the case proved was so plain and convincing that it is manifest the verdict came, not because of any prejudice, but because intelligent jurors could reach no other conclusion. Although the case was confused by a multitude of separate charges of manifold fraudulent statements, by a mass of testimony which ran to inordinate length, by controversies as to this, that, or the other detail of the physical and financial condition of these various mining companies and properties, there is one proposition established beyond any peradventure—defendants invited people to buy "treasury stock," and when the invitation was accepted and the money paid they gave to the persons they had induced to purchase, not treasury stock, but their own personal stock. That this is fraud of the sort contemplated by the statute under which the indictments were found is settled by our opinion in Wilson v. U. S. (Aug. 20, 1911) 190 Fed. 427, 111 C. C. A. 231, where we held that it was fraud, although the persons who thus palmed off their personal stock loaned the proceeds of the sale to the company. With that species of fraud shown, it is unnecessary to go into the details of controversies as to the truth or falsehood of glittering statements as to the condition of the properties whose stocks defendants were offering for sale.

[10] This particular fraud was not only proved, but was proved in such a way that no help was needed from the instances of other false statements with which the record is filled. It was proved by defendant's own circulars, by their signed letters, by their admissions on the stand, by their counsel's admissions on the trial, and, indeed, practically in this court, because nowhere in the brief of 115 pages is there a single suggestion that they did not unload their own personal holdings on persons whom they induced to believe that they were purchasing treasury stock. With this controlling fact clearly established, it is idle to discuss whether any other misleading representations were or were not made, or what the prospects of the various properties were, or whether some particular bit of evidence might induce a belief that defendants were unprincipled men. Irrespective of all the other testimony, and with the conceded facts before them as to sale of stock falsely alleged to be "treasury stock," the jury would be bound to find that defendants had devised a scheme to defraud, if they were intelligent and conscientious. A man who plans to dispose of his individual stock to another by representing that it is treasury stock, so that the purchaser will suppose that the money he pays for it will pass directly to the company, instead of going into the seller's pocket, has devised a scheme to defraud. When he has effected the sale through such misrepresentations he has defraud-

ed his neighbor; and it makes no difference under this statute what he does with the proceeds of his fraud, the devising of the scheme is enough—plus, of course, the use of the mails. That in this case defendants used the mails in furtherance of their scheme is not, so far as we know, disputed. Every element of the statutory offense has been proved and stands practically undisputed. Under such circumstances only some glaring and obviously harmful error would justify a reversal.

[11] It is unnecessary to refer to any of the other points raised as to admission or exclusion of testimony. In point XI it is contended that the court erred in granting the motion of the government that the two indictments be tried together under section 921. Objection was made at the time, counsel stating that he would file his reasons later. The brief does not refer to any such subsequent filing nor does the assignment of error (No. 12) indicate the grounds of objection. One man, Humphrey, was defendant in the first indictment, but not in the second; the case against him had been nol. prossed some months before the trial; the several transactions were all of a cognate character. The oral argument was largely directed to points of objection to the joinder in trial, apparently not called to the attention of the trial judge.

[12] It is argued on the brief that there was "vital error" in the following remarks of the court: At the close of the charge juror No. 1 asked whether the verdict should be written or oral. To this the court replied:

"That is a very sensible question. It varies in different districts. In the Southern district of New York it is oral. The clerk will ask the foreman if you have agreed, and, if you say you have, then he will ask you, what say you? Are the defendants guilty, and if you say they are, upon what indictments or what counts in the indictments, and you can state. You can write it out and read it off. In some districts they write out a verdict, and it is handed in to the clerk; but I understand that is not the practice in this district. You can write it out, and read it out, and read it in answer to the clerk's question."

It is not surprising to find, upon referring to the record, that this instruction was not excepted to or assigned as error; the theory that it was "vital error" is an afterthought too unimportant to call for consideration.

The judgment is affirmed.

CHESAPEAKE & DELAWARE CANAL CO. v. UNITED STATES.

(Circuit Court of Appeals, Third Circuit. June 7, 1915.)

No. 1919.

1. COURTS ⇐375—LIMITATION OF ACTIONS ⇐11—ACTIONS BY UNITED STATES.
An action by the United States against a corporation to recover dividends which have been declared by defendant on stock owned by plaintiff is not brought as a stockholder, but as a creditor, and such action cannot be barred by a state statute of limitation.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 983; Dec. Dig. ⇐375; Limitation of Actions, Cent. Dig. §§ 35–39; Dec. Dig. ⇐11.]

2. UNITED STATES ⊂⊃141—ACTIONS BY TO RECOVER DEBT—PRESUMPTION OF PAYMENT FROM LAPSE OF TIME.

The presumption of payment from lapse of time, unlike limitation of actions, is not a matter of affirmative defense, but arises usually from plaintiff's own case. It is a question of the sufficiency of evidence to establish a cause of action. If plaintiff's evidence shows that 20 years have elapsed since the indebtedness accrued, the presumption of payment immediately arises, and he cannot recover unless he goes further and repels such presumption by evidence; and this rule applies as well to an action by the United States to recover a debt as to one by a private individual.

[Ed. Note.—For other cases, see United States, Cent. Dig. §§ 136–139; Dec. Dig. ⊂⊃141.]

In Error to the District Court of the United States for the District of Delaware; Edward G. Bradford, Judge.

Action at law by the United States against the Chesapeake & Delaware Canal Company. Judgment for the United States, and defendant brings error. Reversed.

See, also, 206 Fed. 964.

John G. Johnson and Charles Biddle, both of Philadelphia, Pa., for plaintiff in error.

John P. Nields, of Wilmington, Del., for the United States.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

McPHERSON, Circuit Judge. The United States is, and for many years has been, the owner of 14,625 shares of stock in the Chesapeake & Delaware Canal Company, and brings this action of assumpsit to enforce payment of three dividends that were declared thereon. The dividends in question are for 1873, 1875, and 1876, the government averring that payment has not been made. The record before us does not show precisely when or how the stock was acquired, but the ownership undoubtedly antedates the earliest of these years. The amount claimed is $51,187.50, with interest from November 17, 1911, this being the day when the Secretary of the Treasury made the first demand for payment. The district judge instructed the jury to find for the government, and the correctness of this ruling is one of the two questions presented for decision.

[1] The other question may first be disposed of, namely, the effect of the Delaware statute of limitations. This act was formally pleaded in defense, and the government challenged its application by demurrer to the plea. The demurrer was argued and sustained more than a year before the trial, and Judge Bradford's opinion overruling the plea is reported in 206 Fed. at page 964. The correctness of his decision is now attacked, the company contending that the government had abdicated its sovereignty by acquiring stock in a commercial corporation, and should therefore be treated merely as a private shareholder, who would of course be barred by the statute. We need not restate in different words the satisfactory reply of the district judge to this contention. He has carefully and correctly dis-

tinguished the cases that are cited by the company, and we adopt his opinion as expressing our own views upon this subject. We may perhaps add a few words to say that the fallacy of the company's argument seems to lurk in the assumption that in this action the government is asserting a right in its character as a stockholder. Undoubtedly the right came into being because the government owns the stock, but in no other respect has the suit anything to do with such ownership. The government is not suing as a stockholder; it is suing as a creditor, and in this character alone is it now to be considered. The right set up is a right to recover a sum of money from the company, and could be urged quite as effectively by an assignee of the dividends, although he might never have been a stockholder at all. The Delaware statute is not specially concerned with the rights of stockholders as such; it is dealing with the rights of creditor plaintiffs, no matter how such rights have been acquired; and the United States is not comprised in the general class to which such plaintiffs belong. A statute of limitations does not bind a sovereign without express words of inclusion, and in no event can the federal government be bound by such a statute passed by a state. In this particular, the United States, when it sues as a creditor, occupies an exceptional position. We may also call attention to the fact that the district judge confined his decision (and we confine ours) to the single question whether the plea of the Delaware statute set up a good defense. Neither estoppel, nor laches, nor any other equitable question, could be properly considered on demurrer to such a plea, and the cases that discuss these questions are not relevant to the point now decided.

[2] The remaining question is different in character, and requires us to examine the evidence that was offered by the government at the trial. Very little was presented; in effect, it consisted of two certificates of stock, the minute book of the board of directors showing the declaration of dividends in 1873, 1875, and 1876, and a letter from the Treasury demanding payment. The defendant offered no evidence, and in this condition of the record the district judge directed a verdict for the government, on the ground that no presumption of payment from lapse of time can arise against the United States. As an original proposition, he was evidently inclined to the belief that the ruling should have been the other way, but he felt constrained to a contrary conclusion by the dicta in two cases that will be considered hereafter.

Let us first examine the question on principle. At the outset we may note again that this is a different subject from the limitation of actions. Statutes of limitation presuppose an established substantive right, but forbid the plaintiff from enforcing it by the customary remedies. The statute is a weapon of defense, and ordinarily must be pleaded and relied on by the defendant, while the presumption or inference of payment arising from the lapse of time—generally from the lapse of 20 years—is usually drawn from the plaintiff's own case, and when so drawn it can hardly be regarded as a matter of affirmative defense. If the plaintiff cannot make out a prima facie case without showing also the fact of nonpayment for more than 20 years, the presumption of payment immediately arises, attaches at once to

his evidence, and weakens it to such an extent that he cannot recover unless he goes further and undertakes to prove facts tending to repel the presumption. The defendant is not required to repeat the proof that 20 years have elapsed without payment, for that has already appeared; he need only call the court's attention thereto, and may then rest upon the presumption or inference of fact arising therefrom until the plaintiff has strengthened the weak point in his own attack If, however, the plaintiff makes no effort so to do, he fails altogether. but he fails solely for the reason that he has not made out his case —in other words, because his evidence lacks persuasive power. Bur the presumption is disputable, not conclusive. To a plea of the statute of limitations, the plaintiff cannot successfully reply that the debt is still unpaid. The defendant may admit nonpayment without impairing the effect of the plea in the least; but if he makes such an admission, or if the plaintiff offers affirmative proof to the same effect, this is a complete reply to the presumption, and establishes the right to recover. If the evidence bearing on the fact of nonpayment is ambiguous or contradictory, a question is presented for decision in the usual manner; generally by the verdict of a jury.

Neither party to this suit controverts these rules, if the action were between individual litigants; the dispute is whether they apply when the United States is a plaintiff and is attempting to prove a debt. On principle, we see no sufficient reason why the rules should not apply in such a situation. In courts of justice, facts must be proved in the same manner and by the same means, no matter who the litigants may be. The government is not privileged merely to lay its claim before such a tribunal, and demand allowance forthwith. Speaking generally, it must offer the same evidence as an individual, both in quantity and quality; and if it offers none, or if the evidence be insufficient, it fails precisely as the individual fails in similar circumstances. The property of a citizen can only be taken according to the rules and forms of law, and, even if it be the sovereign who is striving to take it by an action in court, we think the sovereign also should be required to prove his right, and to prove it with the same strictness and according to the same rules as prevail in other cases.

As a general proposition, this is scarcely open to dispute. In U. S. v. Stinson, 197 U. S. 200, 25 Sup. Ct. 426, 49 L. Ed. 724, speaking of a suit by the government to set aside a grant of land, the court said:

"The government is subjected to the same rules respecting the burden of proof, the quantity and character of evidence, the presumptions of law and fact, that attend the prosecution of a like action by an individual. 'It should be well understood that only that class of evidence which commands respect, and that amount of it which produces conviction, shall make such an attempt successful.'"

And in U. S. v. Beebee (C. C.) 17 Fed. 40, Judge McCrary, citing numerous authorities, stated the rule as follows:

"It is well settled that when the United States becomes a party to a suit in the courts, and voluntarily submits its rights to judicial determination, it is bound by the same principles that govern individuals. When the United

States voluntarily appears in a court of justice, it at the same time voluntarily submits to the law, and places itself upon an equality with other litigants."

So, also, in Mountain Copper Co. v. U. S. (C. C. A. 9th Cir.) 142 Fed. 629, 73 C. C. A. 625, this language is used:

"It is the well-established law that, when the government comes into court asserting a property right, it occupies the position of any and every other suitor. Its rights are precisely the same; no greater, no less" (citing cases).

And in Ash's Estate, 202 Pa. 422, 51 Atl. 1030, 90 Am. St. Rep. 658, the presumption was applied to the sovereign state of Pennsylvania:

"When the commonwealth comes into its courts, it is subject like all other suitors to the established rules of evidence. It must meet the burden of proof, its evidence must be relevant, material, the best attainable, and must be presented in due order under the regular rules of procedure. In all such respects it stands upon the same footing as ordinary litigants. Statutes of limitation do not apply to it, because the maxim, 'nullum tempus occurrit regi,' though probably in its origin a part of royal prerogative, has been adopted in our jurisprudence as a matter of important public policy. But rules of evidence and legal presumptions are not changed for or against the state as a suitor. A statute of limitation is a legislative bar to the right of action, but the presumption of payment from the lapse of time is not a bar at all, but simply a rule of evidence, affecting the burden of proof. Miller v. Williamsport Overseers, 17 Pa. Super. Ct. 159. It is of equitable origin, founded on experience of the ordinary course of business and human affairs, and adopted by the law in the interest of repose and the ending of litigation. There is no good reason why it should not apply to the commonwealth just as other legal rules and presumptions do. And so it has been ruled."

We need not multiply these citations; let us turn to the two cases where the dicta are found that constrained the district judge to direct a verdict for the government. Neither of them decides the point, but both contain statements that support the ruling below. The first case is U. S. v. Williams, Fed. Cas. No. 16,720, decided in 1849 by Mr. Justice McLean at circuit. The facts were these: In 1812 Williams bought land from the United States, and gave a mortgage thereon to secure $3,200 of the purchase money in four annual payments. In 1844, about 28 years after the last bond fell due, the government filed a bill to foreclose. The principal defense was that in 1813 (during the War of 1812) the United States troops had done much damage to the premises, and Williams asserted the right to set off this damage against the government's claim, thus admitting the continued existence of the debt. In order that Congress might consider the equities of the matter, the trial was delayed, and in 1846 an act was passed directing the Secretary of the Treasury to allow a credit of $2,000 on the mortgage. Nevertheless, in his answer to the bill Williams set up that he should be allowed $4,000 instead of $2,000, giving as a reason that in 1817 the commissioners that were appointed under an act of 1816 to investigate similar claims had allowed him the larger sum. It appeared, however, that in 1831 the Treasury had rejected the allowance, and the circuit court decided that (because of this rejection) the award had not been final, and that the act of 1846 had conclusively fixed $2,000 as the amount to which he was entitled. Thereupon the matter was referred to a master to state an account, etc.

In his answer Williams had also relied upon the presumption of payment from the lapse of time. It appeared that he had paid no interest for more than 20 years before the bill to foreclose was filed, but it certainly appeared also that this fact was coupled with the admission that the mortgage debt was still in existence; for he was making strenuous efforts to have his war damages liquidated in order that he might set them off against the amount sued for and still unpaid. It was in such a situation of affairs that Mr. Justice McLean said:

"The defendant, in his answer, relies upon payment from the lapse of time. But there is nothing in the case to render such a fact probable. All the circumstances go to show that payment has not been made."

This was enough. Since it appeared that payment had not been made, clearly the presumption was no longer a relevant matter; and therefore, when the opinion goes on to say:

"If, therefore, the case stood between two individuals, and the presumption of payment from the lapse of time might be made, we suppose that no such presumption can be raised against the government. Laches cannot be charged to it, under the statute or in any other form"

—it is quite plain that these remarks, which are the foundation of the ruling now under review, were merely dictum. We think they do not show that the subject had received much consideration, and we may perhaps suggest that the evident confusion in the mind of the learned justice between laches and the presumption of payment is sufficient to warrant the inference that the remarks were probably made without sufficient reflection on the distinction between these two subjects.

After the master reported, Williams appears to have renewed his contention, and a second opinion was delivered in 1850 (Fed. Cas. No. 16,721), and substantially the same remarks were repeated by the learned justice:

"It is also set up, as matter of defense, that from the lapse of 30 years which have transpired since this mortgage was executed, there having been no payment of interest within 20 years, the court will presume the mortgage to have been satisfied. If this rule applied to the government, the facts in the case show that the money has not been paid. This clearly appears from the acts of the defendant, in applying to Congress, and in the preparation made to establish the offset to the mortgage. But laches are not chargeable to the government. The statute of limitations does not run against it; and on the same principle, the lapse of time affords no presumption of payment against the state."

Here again there appears to be some confusion of thought between a statute of limitation and the presumption arising from lapse of time, so that we think it safe to say that the subject of the presumption could not have had careful attention. In brief, having decided that the facts showed nonpayment, the learned justice declares without need that, even if the facts had not shown it, the presumption of payment would not have arisen. It is no doubt true that dicta may, and do, differ in weight. Sometimes they seem to be deliberate expressions of opinion, and may differ but little from a solemn decision; but when they are casual and apparently no more than expres-

sions of a passing thought, even about a matter having some relevancy, we have high authority for laying them respectfully aside.

In Pollock v. Farmers' Loan & Trust Company, 157 U. S. at page 574, 15 Sup. Ct. 687, 39 L. Ed. 759, Chief Justice Fuller, speaking for the court, said:

"Doubtless the doctrine of stare decisis is a salutary one, and to be adhered to on all proper occasions, but it only arises in respect of decisions directly upon the points in issue.

"The language of Chief Justice Marshall, in Cohens v. Virginia, 6 Wheat. 264, 399 [5 L. Ed. 257] may profitably again be quoted: 'It is a maxim not to be disregarded that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.'"

And in Carroll v. Carroll, 16 How. 286, 14 L. Ed. 936, Mr. Justice Curtis said:

"If the construction put by the court of a state upon one of its statutes was not a matter in judgment, if it might have been decided either way without affecting any right brought into question, then, according to the principles of the common law, an opinion on such a question is not a decision. To make it so, there must have been an application of the judicial mind to the precise question necessary to be determined to fix the rights of the parties and decide to whom the property in contestation belongs. And therefore this court, and other courts organized under the common law, has never held itself bound by any part of an opinion, in any case, which was not needful to the ascertainment of the right or title in question between the parties"—quoting from Cohens v. Virginia, supra [6 Wheat. 264, 5 L. Ed. 257], and then going on to say: "The cases of Ex parte Christy, 3 How. 292, and Peck v. Jenness, 7 How. 612 [12 L. Ed. 841], are an illustration of the rule that any opinion given here or elsewhere cannot be relied on as a binding authority, unless the case called for its expression. Its weight of reason must depend on what it contains."

See, also, The Atalanta, 3 Wheat. 423, 4 L. Ed. 422; U. S. v. Joseph, 94 U. S. 618, 24 L. Ed. 295; Wisconsin Railroad Co. v. Price County, 133 U. S. 509, 10 Sup. Ct. 341, 33 L. Ed. 687; Hans v. Louisiana, 134 U. S. 20, 10 Sup. Ct. 504, 33 L. Ed. 842; McCormick Machine Co. v. Aultman, 169 U. S. 611, 18 Sup. Ct. 443, 42 L. Ed. 875; Bardes v. Hawarden Bank, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175; Bryan v. Bernheimer, 181 U. S. 197, 21 Sup. Ct. 557, 45 L. Ed. 814.

In the other case on which the district judge relied (U. S. v. Thompson, 98 U. S. 486, 25 L. Ed. 194), no question of presumption was either raised or decided. The single point was whether the Minnesota statute of limitations was to be applied to the government, and the decision was in the negative. In the course of the opinion, Mr. Justice Swayne illustrated his reasoning in the following paragraph:

"The United States possess other attributes of sovereignty resting also upon the basis of universal consent and recognition. They cannot be sued without their consent. United States v. Clarke, 8 Pet. 436 [8 L. Ed. 1001]. If they sue, and a balance is found in favor of the defendant, no judgment can be rendered against them, either for such balance, or in any case for costs. United States v. Boyd, 5 How. 29 [12 L. Ed. 36]; Reeside v. Walker, 11 How.

272 [13 L. Ed. 693]. A judgment in their favor cannot be enjoined. Hill v. United States, 9 How. 386 [13 L. Ed. 185]. Laches, however gross, cannot be imputed to them. United States v. Kirkpatrick, 9 Wheat. 720 [6 L. Ed. 199]. There is no presumption of payment against them arising from lapse of time. United States v. Williams, supra. They can maintain a suit in their own name upon a nonnegotiable claim assigned to them. United States v. White, 2 Hill (N. Y.) 59 [37 Am. Dec. 374]."

This is all there is—a passing reference to the dictum in U. S. v. Williams—and we think little indication is thereby afforded that the subject of presumption from lapse of time was either presented or considered. Indeed, the argument of counsel (98 U. S. on page 487, 25 L. Ed. 194), states that "the real question" pressed upon the court was whether the situation should be governed by so much of the Judiciary Act as provides:

"That the laws of the several states, except where the Constitution, treaties * * * of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply." Act Sept. 24, 1789, c. 20, § 34, 1 Stat. 92.

And the opinion confirms the statement of counsel, for it declares distinctly that this was "the only argument suggested by the learned counsel for the defendants in error."

It seems to us impossible, therefore, to treat the remarks in the two cases cited as the equivalent of a considered decision, or even as a deliberate expression of opinion after argument and reflection; and accordingly we feel justified in following the general rule about the kind of evidence required from the United States, that has been established in the numerous cases referred to above. At another trial, the government will probably be able to offer evidence in reply to the presumption, and the whole controversy can be heard and decided. The record does not advise us why no evidence of nonpayment was offered in the present trial. Apparently such evidence must have been available, but for some reason it was not produced. We may perhaps be wrong about this, however, for the evidence may have been contained in a deposition that was offered by the government and excluded by the court; but of course, as this exclusion was a ruling in favor of the company, the correctness of that decision could not be brought up on this writ of error.

For the reasons given the judgment is reversed, and a new trial is awarded.

ILLINOIS SURETY CO. v. O'BRIEN.

(Circuit Court of Appeals, Sixth Circuit. June 8, 1915.)

No. 2631.

1. LANDLORD AND TENANT ⇐159—DAMAGES FOR BREACH OF GROUND LEASE—TITLE OF LESSOR.

A ground lease for 97 years required the lessee to erect a building during the first year, and to secure such agreement he gave a surety bond. He failed to erect the building, and after two years the lessor terminated the lease under its terms for default in the payment of rent. *Held*, that

the measure of damages for which the surety was liable for failure of the lessee to erect the building was not different because the lessor was himself a lessee for 99 years, and not owner of the fee.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 573, 608, 611; Dec. Dig. ⟸159.]

2. LANDLORD AND TENANT ⟸111—RENT—DUTY OF LANDLORD ON DEFAULT.
A landlord is under no obligation to a tenant or to his surety to declare a forfeiture of the lease and re-enter on a default in the payment of rent, at least unless the facts indicate that the tenant has abandoned the lease.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 336; Dec. Dig. ⟸111.]

3. LANDLORD AND TENANT ⟸199½—ACTION FOR RENT—DEFENSES.
That there was an outstanding lease having a short time to run on property leased for 97 years is not a defense to an action for rent against the surety for the second lessee, where it is not shown that the first lessee was in possession or claimed the right of possession, and the second lessee paid the rent for the time covered by the first lease without objection.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 761; Dec. Dig. ⟸199½.]

4. WORDS AND PHRASES—"LOT."
The word "lot," as used in building ordinances, *held* to mean a parcel of land which, whether covering more or less than a platted lot, is purchased or leased and then occupied as one parcel for building purposes.

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

5. EVIDENCE ⟸437—PAROL EVIDENCE TO ADD TO LEASE.
The fact that prior to the execution of a long term lease of city property, which required the lessee to erect a building of designated dimensions and material, the lessee had contemplated building a hotel on the property, which was known to the lessor, does not render parol evidence admissible to invalidate the lease by showing that the building described therein was to be a hotel, and that as such it would be in violation of then existing building ordinances, where the use to be made of the building was not stated in the lease, but it was expressly provided that in its erection the lessee should comply with all laws and ordinances, and especially where there is no evidence that the ordinances had in fact interfered with the erection of the agreed building.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2025–2029; Dec. Dig. ⟸437.]

6. CONTRACTS ⟸141—EXCUSES FOR NONPERFORMANCE—ILLEGALITY.
One who refuses to perform a contract on the ground that it is illegal must carry the burden of showing the illegality, and it is not sufficient to create confusion and suggest doubts as to its legality.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 461, 1760, 1761, 1785; Dec. Dig. ⟸141.]

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

Action at law by P. C. O'Brien against the Illinois Surety Company. Judgment for plaintiff, and defendant brings error. Affirmed.

F. J. Wing, of Cleveland, Ohio, for plaintiff in error.

A. A. Stearns, of Cleveland, Ohio, for defendant in error.

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

DENISON, Circuit Judge. When this case was here before (O'Brien v. Illinois Co., 203 Fed. 436, 121 C. C. A. 546) we reviewed the judgment which had sustained a demurrer to the petition. It then appeared that O'Brien had leased a certain lot to Nolan for 97 years, commencing in January, 1907; that Nolan, as lessee, had agreed to pay a specified rental and to erect at once a described building; that the surety company had guaranteed the performance of Nolan's promise to erect the building; that it had not been erected, and that the agreed rent had not been paid; and that, for nonpayment of the rent, O'Brien had terminated the lease and re-entered. It was decided that O'Brien's damages against the surety company on its bond were to be measured by the value which the building, if erected, would have been to him as security for the performance of Nolan's rental and other covenants in the lease. After the case was remanded, an answer was filed and a trial on the merits had. It appeared that the building would have cost more than $7,000, and that the rents and other payments which had become due from Nolan before forfeiture and re-entry were $5,100, and, accordingly, O'Brien had judgment for $5,000, the full amount of the bond penalty. The surety company brings error, and the record presents four distinct questions.

[1] 1. The fact proved to be that O'Brien was not the owner of the fee, but was himself lessee under a 99-year lease which had run 2 years, and that his lease from the fee owner covered a larger lot, from the rear end of which a parcel was cut out by his lease to Nolan. It is said that the measure of damages which we formulated on the first review contemplated its application as between the fee owner and the lessee, and is inappropriate for use between lessee and sublessee. Clearly, this would be true in many cases, and perhaps in the typical case of a short time lease. In such case, the value which the building would add to the interest in the real estate held by the first lessee would be so much more contingent and practically uncertain than in a case where the building became a part of the fee that the difficulty of determining the damage would be much increased. When we come to consider the peculiar facts now involved, the difference between the case as we formerly supposed it to exist and as it does exist is not substantial, and there is no occasion to change the rule. A leasehold interest for 97 years is often sold as readily as the fee; this building could not be expected to endure for more than 97 years; and we think it is clear enough that such a building, both for purposes of rental and for purposes of resale, would add to the value of the estate of a tenant for 97 years practically as much as it would add to the value of the fee; at any rate, the difference is so merely theoretical that we cannot think there was prejudicial error because the court did not observe such distinction as there may be.

[2] 2. It is urged that O'Brien was at fault in not endeavoring to rerent the premises, and that damages should be minimized accordingly. The rental was payable quarterly, in advance. Nolan paid each of the four quarterly installments accruing during the year 1907. He paid nothing during 1908, nor for the first quarter of 1909. O'Brien thereupon served notice of forfeiture. The lease provided that a 60-day notice should be given, and that, during the 60 days, Nolan

might perform all the conditions in default and thereupon be fully reinstated. During this 60 days, after notice served, the second quarterly installment for 1909, payable in advance, became due. We cannot see that these facts give any room for the application of the rule of duty to minimize damages. It does not appear that Nolan had surrendered or abandoned the premises or forfeited his rights as tenant. His rights could not be cut off until the expiration of 60 days after notice served, and even if it be assumed that O'Brien might have obtained possession earlier, he could not have safely rerented until the close of the 60-day period. Defendant's position, then, amounts to a claim that a landlord is bound to proceed to take possession and rerent with reasonable promptness after the tenant has made default. We think he is under no such obligation, even to the surety for the tenant—at least, unless the facts indicate that the tenant has abandoned the lease. If there were abandonment, or something equivalent, we would have to consider what, if any, duty to rerent fell upon the landlord; not so, under the facts of this record.

[3] 3. Proof was offered and refused to the effect that, at the date of the lease from O'Brien to Nolan, there was outstanding a prior lease from O'Brien—covering the premises, and having still six months to run—whereby Nolan's building operation would have been embarrassed and Nolan's surety was released. It is not made to appear that either Nolan or the surety company was ignorant of this prior lease or that they did not contract with full reference to it; but, passing this objection, there was no proof offered to show that the prior lessee was in possession, or claimed the right of possession, or did in the slightest degree interfere with anything Nolan desired to do, and it affirmatively appeared that Nolan paid the rent for the entire first year, covering this six months period and never made any objection because of this alleged outstanding lease. Under these circumstances, there is no room to claim that either Nolan or the surety company was prejudiced.

4. It is next and finally urged that the building ordinances of Cleveland, in force at the date of the lease, forbade erection of the structure which the lease contemplated, and hence that neither Nolan nor his surety can be held to respond for its nonerection. The lease contains an express agreement by Nolan that he will "at all times comply with and fully obey all lawful requirements, rules, laws, and ordinances of all lawfully constituted authorities in erecting said building and in using said premises"; but we do not see that this covenant increased Nolan's existing legal duty. Evidentially, it shows that the subject of ordinances was in the minds of the parties, and so it tends to strengthen the natural presumption that they did not intend by another paragraph of the lease expressly to provide for the erection of a building which the ordinances made unlawful. This other paragraph provided that Nolan should "erect on said premises a brick building of fireproof construction, not less than two stories in height, having a frontage on Eighth street of not less than 60 feet, and a depth of not less than 50 feet; the front of said building to be of pressed brick, with stone trimmings." The parcel leased to Nolan had a westerly frontage on Eighth street of 61.16 feet, and a depth, ex-

tending easterly, of 50.33 feet on one side and 52.39 feet on the other side. The parcel of which O'Brien was lessee, under the underlying lease, had a frontage of about 57 feet on the north side of Prospect street, and ran back northerly about 207 feet to Alpha court or Alpha alley, and was bounded on the east by the public way, called Oak Place in the O'Brien lease and Eighth street in the Nolan lease. Prospect street is assumed to be the full width, 66 feet or more. It thus appears that the Nolan parcel was practically the rear 60 feet of the O'Brien lot, and was bounded on the east and north by intersecting narrow public ways, and that the building contemplated was intended to cover substantially the entire parcel.

For the purposes of this opinion we assume that those sections of the ordinances, which were offered in evidence and the rejection of which is covered by the assignments of error, were in force at the date of making the O'Brien-Nolan lease, and during the entire period permitted for erecting the buildings. They are said to contain three limitations inconsistent with the construction of the prescribed building. These are: (1) That a building designed and intended for a hotel and fronting upon an alley must have its front wall 30 feet distant from the opposite side of the alley, and that since Eighth street was, at this point, only 16 feet wide (and hence an alley), the front wall must be 14 feet back from Eighth street, whereby the building could be only 36 feet deep, instead of 50 feet, as agreed; (2) that a building cannot occupy more than a prescribed percentage of the building site, which percentage is, in all cases, less than would be occupied by this building; (3) that behind every building a yard is required to be left of greater area than would be possible upon this parcel, if this building were put up.

[4] Those provisions of the ordinance which are before us present many points of confusion, and it is difficult to say that they are, in all material respects, intelligible. The first difficulty is to know what they mean by referring to a "lot." Does this mean (a) a parcel which is marked as a lot on some plat or subdivision; or (b) a parcel which, whether covering more or less than a platted lot, is purchased or leased and then occupied as one parcel for building purposes; or (c) does the subdivision go further, so that the word may refer to a fraction cut out from a "lot" under the first or second meanings of the word? Considering together these ordinances which are before us, we believe the second meaning is the true one intended, and that, for the purposes of this case, the lot or building site involved is the one of which O'Brien was lessee, and which was from 57 to 50 feet wide, and extended back 207 feet from Prospect street. Since the parcel leased to Nolan is described as bounded on the north by the wall of an O'Brien building, it is clear that some part of the lot north of and immediately joining the Nolan parcel and extending across the width of the lot, had been built upon by O'Brien; but whether this building extended the entire 147 feet north to Prospect street is matter of conjecture.

The next difficulty is as to the character of "Eighth street" or "Oak Place." The parties, O'Brien and Nolan, called it a street. One section provides that all thoroughfares less than 30 feet in width (and

this was 16) shall be considered alleys, and if less than 16 feet shall be considered court ways. Another section provides that alleys extending back from a full-width street shall, for all purposes of the law, be considered streets for a distance of 66 feet, and, back of that distance, shall be considered court ways. In those sections before us, there are references which show that building upon "court ways" is covered by other sections which were not put in evidence; and hence, "alleys" and "court ways" are distinct from each other. Under the first above definition, all of "Eighth street" is an alley; under the second definition, none of it is. Whether these provisions are reconcilable, or whether that part of Eighth street in question can be considered an "alley," we do not find it necessary to decide, for the reasons hereafter stated.

The next difficulty is as to the character of the O'Brien lot. The ordinance carefully defined four kinds of lots; and this lot is not within any one of the definitions. An "open lot" is one bounded upon all sides by streets; this clearly does not apply. A "corner lot" is one bounded on two sides by streets; even if "Eighth street' is not an alley, but constructively a street for 66 feet back from Prospect street, it is a street on the side for only part of the way—and a part not reaching the spot in question—and so the lot does not respond to this definition. A "through lot" abuts upon a street at each end; and this lot does not. An "interior lot" is bounded on one side by a street, and upon the other three sides by lot lines. This definition does not, at least with certainty, reach the O'Brien lot, bounded upon one side by a street, upon another side by a court, and upon a third side by a street—alley—court way; and since the main purpose of the restrictions now involved must be to secure light and air and easy and safe access for public and private purposes, it cannot be that such a boundary is the equivalent of mere abutting on an adjacent lot.

The restrictions which require that only a certain percentage of the building site shall be occupied do not apply, both because the record does not show how much of the entire lot is or would be built upon, and because such rules, if any, as apply to other than corner lots are evidently modified by other sections not put in evidence. The provisions which require yards behind the buildings apply only, and with specific variations, to corner lots and to interior lots. It is reasonably sure that this is not a "corner lot"; and, as stated above, we are not inclined to consider it an "interior lot." If it is, and if the required yard is not already in existence somewhere on the lot further north (a point not made to appear), we would have a provision requiring a yard at least 10 feet deep along Alpha court, thus narrowing, by 10 feet, the contract frontage on Eighth street; but this section further says:

"Provided, that when a through lot extends to a public or private alley or court way, the yard space for through buildings of the third and fourth grades shall be proportioned as a line court between the buildings and the rear line of the lot. For buildings of other grades, see sections 753 and 757."

Section 753 is in evidence and is foreign to the subject; section 757 is not in evidence. In this proviso, it seems quite apparent that "through" is a misprint for "interior," because it is contained in a

section referring only to interior lots; and, if so, it refers to such a lot as this, if this is an interior lot at all. If, therefore, this section refers to this lot, its true application must be found in the proviso; but we can make no further progress, because the proviso, without help outside of the record, is quite unintelligible.

Buildings are divided into six grades. It is enough to say—selecting merely illustrative uses—that a hotel is in the second grade, an automobile garage in the sixth, and the requirement for 30 feet between the building front and the opposite side of an alley applies to the second class, and not to the sixth. If, therefore, the building in question was to be a hotel (and if Eighth street was an "alley") the frontage would have to be withdrawn 14 feet from Eighth street; but if the building was to be (e. g.) an automobile garage, this restriction did not apply and the building could be made full size.

[5] It is sought to fix the building as coming within class 2 by oral evidence which, taken at its best, tended to show that, before the making of the O'Brien-Nolan lease, Nolan had plans prepared for this building as a hotel, and that O'Brien knew of these plans. This evidence falls short of establishing that the building contract was invalid. O'Brien and Nolan made a written contract for the erection of a building of a certain area, height, and of certain materials, structurally appropriate for hotel or for garage or other permitted use. In the same connection, they agreed that in its erection the building ordinances should be observed. These ordinances (perhaps) forbade the building, if it was a hotel, but (certainly) permitted, if it was a garage. Whatever the intentions of the parties that it was to be a hotel, there was no contract upon that subject. Nolan was at full liberty to change his mind and to erect and use the building for any permitted purpose. This is additionally evident from a subsequent clause (16) of the lease, providing that "*if* a hotel should be conducted in the building" certain otherwise applicable restrictions should be waived. Even defendant's answer does not claim that there was any agreement that the building should be a hotel, but says that it should be classified according to its intended use. Under these circumstances, to say that the contract was unlawful because the prior talks showed it really was for a hotel, and not for (e. g.) a garage, is to vary a written contract by parol evidence of preceding negotiations. We think this evidence was properly rejected; but, for the reasons to be stated, we do not regard the question as very important.

We have gone at length into these ordinance conditions for the purpose only of making clear the situation which we regard as controlling, viz., that, even if the intent to make the building a hotel should be incorporated into the contract, we cannot say that the ordinances made the building contract unlawful. The utmost which can be said is that the right of erection was doubtful and the attempt might provoke a controversy with the authorities. What the outcome might be no one could tell. If such vague and confused provisions are to be enforced at all, a large administrative discretion must exist. Further, such building codes are subject to summary change or suspension by the local Legislature, and it is matter of common knowledge that such changes or suspensions are often made to avoid cases of

hardship. Still further, such building codes, or portions of them, often continue by common consent in a dead-letter condition; and this is especially so where, as here, they undertake to prevent the real estate owner from making full use of his land, and where, to that extent, their constitutionality is, as here, a mooted, but unsettled, question. Still further, although Nolan was sworn as a witness for defendant, he made no claim that the ordinances had, in fact, been found in the way of his agreed building; nor does it in any way appear that, either because of their attempted enforcement or by the mere effect of their silent existence, they did in fact operate as an obstacle.

[6] We have, then, a case where Nolan agreed to erect a building, where the surety company, for a consideration, guaranteed that he would do so; where both principal and surety were equally chargeable with notice of any ordinances which might interfere with the plan; where the contract expressly agreed to observe the ordinances, and so must have been made either in the belief that the ordinances did not apply to the specified building or that, if they did, they would not be enforced or would be changed; where, at the most, the thing agreed to be done was not against good morals or against any general policy, but only against a regulation of doubtful validity; where, upon the whole case it cannot be said that there was any violation even of such regulation, but only that there was a chance that the rule might be so construed as to create such conflict; and, finally, where there is nothing to indicate that the enforcing authorities ever claimed a violation, or that the claim was thought of until astute counsel developed it to meet the exigencies of the defense. Under the situation created by all these concurrent conditions, the surety company (an insurer rather than a surety) cannot be heard to deny its liability on such ground. One who refuses to perform a contract because it is illegal must carry the burden of showing such illegality; merely to create confusion and suggest doubts is not enough, and we cannot say that illegality does appear.

None of the proof offered and rejected was put forward as creating any issue of fact for the jury; and all the argument in this court has been to the effect that the evidence, if accepted and believed, would, as matter of law, establish the invalidity of the contract. We therefore do not consider whether there may lie unnoticed in these proofs some question of fact which might have been brought out as requiring submission.

The judgment is affirmed.

YOUNGE v. UNITED STATES.

(Circuit Court of Appeals, Fourth Circuit. June 12, 1915.)

No. 1236.

1. CRIMINAL LAW ⊂=586—CONTINUANCE—DISCRETION—REVIEW.
A motion for a continuance is addressed to the discretion of the trial court, and its action is not subject to review, unless such discretion is abused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1311; Dec. Dig. ⊂=586.]

2. CRIMINAL LAW ⊂=598—CONTINUANCE—ABSENCE OF WITNESSES—DILIGENCE.
Defendant, residing in the Southern district of West Virginia, was indicted at Clarksburg in the Northern district on October 9th. On October 28th, he appeared before a commissioner of the Southern district and gave bond for his appearance in the Northern district on the first day of the next regular term; the recognizance not naming the place at which the court was to be held. On November 5th, without his knowledge or consent, the case was transferred to Philippi, where it was docketed on November 11th, and called for trial the following day. On the day the case was docketed he secured process for witnesses, and when the case was called for trial moved for a continuance because of their absence. Such witnesses were in different states and traveling from one place to another, and their testimony was material. *Held*, that the refusal of a continuance, because due diligence to procure the attendance of the witnesses had not been used, was erroneous.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1335–1341; Dec. Dig. ⊂=598.]

3. CRIMINAL LAW ⊂=649—TRIAL—ADJOURNMENT—ABSENCE OF WITNESSES.
Where defendant was forced into trial over his protest, after he had filed an affidavit as to the materiality of absent witnesses, the impossibility of securing them, the exercise of due diligence on his part, and his inability to prove the facts by any other witnesses, the request of his counsel, at the close of the government's case, that the trial be prolonged until the next day to enable him to procure the presence of two witnesses, whose presence he believed he would be able to secure, should have been granted, and it was prejudicial error to deny his motion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1512–1515; Dec. Dig. ⊂=649.]

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

Eugene L. Younge was convicted of an offense, and he brings error. Reversed, and new trial awarded.

Charles M. Murphy and A. G. Jenkins, both of Philippi, W. Va., for plaintiff in error.

S. W. Walker, U. S. Atty., of Martinsburg, W. Va., for the United States.

Before PRITCHARD and WOODS, Circuit Judges, and WADDILL, District Judge.

WADDILL, District Judge. On the 9th day of October, 1913, the grand jury of the United States for the Northern district of West Virginia, at Clarksburg, returned an indictment against the plaintiff

in error, hereinafter called the defendant, for violating Act Cong. June 25, 1910, c. 395, 36 Stat. 825 (Comp. St. 1913, §§ 8812–8819), commonly known as the "White Slave Act."

The indictment contained three counts; the first charging that the defendant did, on the ——— day of September, 1912, within the jurisdiction of said court, knowingly, unlawfully, and feloniously transport and cause to be transported, and aided and assisted in obtaining transportation for and in transporting, Mabel S. Rome, a woman, in interstate commerce, from Parkersburg, in the state of West Virginia, to Marietta, in the state of Ohio, for the purpose of prostitution, debauchery, and other immoral purposes, with intent to entice and compel the said Mabel S. Rome to become a prostitute, or give herself up to debauchery, and to engage in immoral practices. The second count covered the same transaction, and charged the defendant with procuring or assisting in procuring a railroad ticket for the said Mabel S. Rome, to make the trip between Parkersburg, W. Va., and Marietta, Ohio, for the purposes aforesaid; and the third charged him on said date with unlawfully and feloniously persuading, inducing, and coercing, and assisting in persuading, inducing, and coercing, the said Mabel S. Rome to make the trip aforesaid, for the purposes aforesaid.

On the return of the indictment, a capias was awarded by the court against the defendant, returnable forthwith before said court at Clarksburg to answer the indictment. Upon this capias the marshal made return on the 10th of October, 1913, that he was unable to find the defendant in his district; and on the 9th day of October, 1913, the court also entered the following order:

"And it is ordered that the clerk of this court do make a copy of the indictment in this case, and send same to the United States attorney for the Southern district of West Virginia."

On the 28th day of October, 1913, the defendant appeared before a United States commissioner for the Southern district of West Virginia, and entered into a recognizance in the sum of $2,000, conditioned for his appearance before the District Court of the United States for the Northern District of West Virginia, on the first day of the next regular term thereof, to answer the indictment.

On the 5th day of November, 1913, the following order was entered at Clarksburg:

"On motion of the district attorney of the United States, and for reasons appearing to the court, it is ordered that this case be transferred and remitted from this court to the District Court of the United States for the Northern District of West Virginia, sitting at Philippi, for further proceedings to be had therein."

On the 11th day of November, 1913, the court, sitting at Philippi, entered the following order:

"This day came as well the attorney of the United States as the defendant, Eugene L. Younge, in person and by his attorney. Thereupon the district attorney of the United States presented to the court the original indictment and a transcript of the record in this case from the District Court of the United States for the Northern District of West Virginia, sitting at Clarks-

burg, and on his motion it is ordered that said transcript be filed, and said cause docketed in this court for further proceedings to be had therein."

On the next day, the 12th of November, the case was called for trial, and the defendant, upon his arraignment, moved the court for a continuance, and filed in support thereof his affidavit to the effect that he was not ready to go to trial at that time, that he had been unable to get his witnesses, that it was the first calling of the case, and that he had had no time to confer with counsel and locate his witnesses, and that his witnesses were scattered; that one of his witnesses, according to his best information, was in Ohio, another in the Southern district of West Virginia, and another in North Carolina; that the evidence of his witnesses was material; that he was unable to prove the same facts by any one else, and that he could not safely go to trial without their presence; that his motion was not made for delay, but for the purpose of enabling him to have his witnesses ready to meet the government's charges; that he had used due diligence to ascertain their whereabouts and procure their attendance, without success. The court overruled the defendant's motion, and proceeded with the trial, and he thereupon pleaded not guilty.

The government introduced as witnesses only the said Mabel S. Rome, the female mentioned in the indictment, and her mother, and the defendant testified in his own behalf. The trial resulted in a verdict of guilty, upon which the court entered judgment, and sentenced the defendant to three years in the penitentiary. During the progress of the trial, and at the conclusion of the government's testimony, the defendant, by counsel, advised the court that he had been endeavoring during the day, over the phone, to procure the presence of two witnesses from Parkersburg, whose attendance he felt he could procure by the next morning, and asked the court to postpone the further hearing of the trial until the next morning, which the court overruled, and the defendant excepted. From the judgment rendered on the verdict this writ of error was sued out.

The defendant makes four assignments of error—the first, to the action of the court in refusing to grant a continuance; second, to the action of the court in allowing certain remarks to be made by the district attorney to the jury, pending argument; and the third and fourth, to the court's action in overruling the motion to set aside the verdict and grant a new trial, and entering judgment on the verdict.

[1] In the view taken by the court, it will not be necessary to pass on the assignments of error other than the first, which relates to the court's action in ruling the defendant into trial, and refusing to postpone the hearing after the government's witnesses were examined, as requested by the defendant. The law governing federal courts upon applications for continuances is well settled, namely, that such motions are addressed to the discretion of the trial court, and its action is not subject to review, unless it be shown that the exercise of discretion was abused. Isaacs v. United States, 159 U. S. 487, 489, 16 Sup. Ct. 51, 40 L. Ed. 229, and cases cited. In that case, Mr. Justice Brown, speaking for the Supreme Court, noted that 49 days before a case was called for trial the defendant made application, which was grant-

ed, to have a witness summoned at the expense of the government, but did not thereafter show other diligence, or that any attachment was asked for to secure the presence of the witness, although the trial continued several days, or make explanation why the subpœna asked for was not served; and he especially emphasized the fact that the defendant's affidavit failed to show that he could not make the same proof by other witnesses, or go safely into trial without the witness in question, and that it was apparent in the affidavit that all that the witness could prove was established by other testimony, including that of the defendant, and hence that there was no error committed by the lower court in denying the motion for a continuance, and in ruling the defendant into trial.

In the present case the government's proof is to the effect that the defendant and the prosecutrix both resided at Clarksburg, W. Va.; that the accused, in contemplation of a trip to a fishing camp on the Kanawha river, some six miles above Parkersburg, W. Va., arranged with the prosecutrix, whose transportation he provided for, that she would go to Parkersburg, a distance of some 80 miles, where he would join her, and they would go to Marietta, Ohio. Accordingly, in the latter part of August or first of September, 1912, the arrangement was carried out, she leaving Clarksburg, and he joining her at Parkersburg, and then they proceeded by street car to Marietta, Ohio, where they spent the night and part of the following day together, when the defendant left Marietta, and she paid a visit to her uncle there, making the return trip home late in the evening of that day.

The accused positively denied every statement of the government's witness, and that he had ever been with her to Marietta, or at any time had improper relations with her, and testified that during the time referred to he was at the fishing camp for a period of 10 days, and that he never left the camp from the time he arrived there until his departure for home, and that he was in the company of a number of friends at the camp, they being the witnesses whose testimony he desired. The importance of the testimony of these witnesses, as bearing on the merits of the case, as to the material parts of which said Mabel S. Rome and the accused alone testified, is quite apparent, and, if they corroborated the accused, would strongly tend to establish his innocence.

The learned judge of the lower court was of opinion that the defendant had not used due diligence to procure the attendance of his witnesses; the court certifying in the order of the 12th of November, 1913, overruling the defendant's motion for a continuance:

"That the defendant had made no attempt until the day before to have the witnesses summoned, or to procure their attendance."

[2] While not unmindful of the necessarily large discretion vested in trial courts in granting or refusing continuances, we are convinced that in this case, under its peculiar circumstances, prejudicial error was committed against the accused in ruling him into trial, as well as in refusing, after the trial had begun, as hereinafter shown, and the government had introduced its testimony, to postpone the further hear-

ing until the next morning, in order that the accused might secure the witnesses whom he had been able to locate by telephone, during the progress of the trial. Ordinarily, to have delayed summoning witnesses until the day before trial would be inexcusable; but under the facts in this case it by no means appeared that the accused could have summoned them earlier, or that he was advised of the place and time of trial in time to locate and secure the presence of his witnesses, who were scattered, or difficult of location, as the defendant's affidavit and the testimony shows. The defendant at the time of the trial resided in another judicial district, and in another portion of the state. He was indicted on the 9th day of October, 1913, at Clarksburg, in the Northern district of West Virginia, to which place a capias against him was made returnable. On the 28th of October, he appeared before a United States commissioner of the Southern district of West Virginia, and gave bond for his appearance before the District Court of the United States for the Northern District of West Virginia on the first day of the next regular term thereof. The recognizance, however, did not name the place at which the court was to be held, and presumably it would have been at Clarksburg, where the case was pending. The theory of the government is that it referred to the next term of the court for the Northern district of West Virginia, wherever it might be held.

After the execution of this recognizance, on the 5th of November, 1913, the case, without the defendant's knowledge or consent, was transferred to Philippi, at which place it was docketed on the 11th of November, 1913. There was evidently some uncertainty as to where the defendant was to appear. The place, manifestly, should have been stated in the recognizance. Until the 5th day of November, the case was pending at Clarksburg, and was never in Philippi until the 11th of November, 1913, the day before the trial. The record is silent as to any knowledge on the part of the defendant of the removal of the case from Clarksburg to Philippi. The defendant lived several hundred miles away, and, assuming that he was informed with reasonable promptness of the transfer of the case from one place to the other, still only seven days intervened from the time of removal until the trial, and it would have been extremely difficult within that time for him to have gotten his witnesses together, and secured their presence, if indeed he knew when they would be needed, until the case was docketed at Philippi. He appeared in court on the very day the case was docketed, and secured process for his witnesses; but it was too late to get them there the next day. Whether he could have secured process earlier—that is, before the case was docketed there at Philippi—may be questioned; but so it is he did secure his process the first day the case was docketed, and it is entirely clear, taking into account the time between the removal of the case from Clarksburg and its docketing in Philippi, and the location of witnesses whose presence was desired, namely, persons in different states, and traveling from one place to another, that by no reasonable exercise of diligence on his part could he have secured their presence on the day the case was tried, namely, the day after it was docketed.

[3] Furthermore, during the progress of the trial, and after the government had completed its testimony, defendant's counsel informed the court that he had been trying all day over the phone to get two witnesses from Parkersburg; and that he believed he would be able to secure their presence in court next morning, and asked as a matter of fairness that the court prolong the trial until the next day for that purpose, which motion the court overruled.

Under the circumstances of this case, it seems to the court that this motion likewise should have been granted, and that it was prejudicial error not so to do. The defendant had been forced into trial over his protest, after he had filed an affidavit as to the materiality of his witnesses, the impossibility of securing them, the exercise of due diligence on his part to secure their attendance, and his inability to prove the facts by any other witnesses, they being witnesses the materiality of whose testimony, if as claimed by the defendant, was manifest. But little inconvenience would have been caused by the postponement of the trial until and completing it on the next day. The defendant should at least have had a chance to secure these two witnesses, as he had not had opportunity to procure the others.

For the reasons stated, the action of the lower court will be reversed, and a new trial awarded to the plaintiff in error.

Reversed.

MILLER, Internal Revenue Collector, et al. v. SNAKE RIVER VALLEY R. CO.

(Circuit Court of Appeals, Ninth Circuit. May 26, 1915.)

No. 2588.

INTERNAL REVENUE ⊂=9—EXCISE TAX ON CORPORATIONS—CORPORATION "ENGAGED IN BUSINESS."

During the greater part of the year 1910 plaintiff, a railroad company, owned a line of railroad which, with its rolling stock and equipment, was leased and operated by the lessee, which was obligated by the lease to pay all expenses of maintenance and renewal, taxes on the property, and other incidental expenses, but was entitled to retain from the rental the cost of certain permanent improvements made. During such time the lessor maintained its offices, transferred stock, collected and deposited the rental, and expended such sums as were necessary in maintaining its corporate existence, including the state corporation tax. Before the end of the year the lease was canceled by mutual consent, and the lessor immediately sold and transferred all of the property, and from the proceeds paid its bonded and other indebtedness. *Held*, that the lessor was not "engaged in business" during the year, within the meaning of Corporation Tax Act Aug. 5, 1909, c. 6, § 38, 36 Stat. 112 (Comp. St. 1913, § 6300), and that it was not subject to the excise tax imposed thereby.

[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, Engage.]

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

Action at law by the Snake River Valley Railroad Company against M. A. Miller, Collector of Internal Revenue for the District of Oregon, and David M. Dunne, ex-Collector. Judgment for plaintiff, and defendants bring error. Affirmed.

Clarence L. Reames, U. S. Atty., and E. A. Johnson, Asst. U. S. Atty., both of Portland, Or., for plaintiffs in error.

W. W. Cotton, Arthur C. Spencer, and W. A. Robbins, all of Portland, Or., for defendant in error.

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

RUDKIN, District Judge. At the times hereinafter mentioned the Snake River Valley Railroad Company, a corporation organized and existing under the laws of the state of Oregon, was the owner of a line of railroad extending from the town of Wallula to the town of Grange City in the state of Washington. On the 29th day of June, 1907, the company leased this line of railroad, together with all equipment and appurtenances of every kind and nature whatsoever to the same belonging or appertaining, to the Oregon Railroad & Navigation Company for the term of five years from and after the 1st day of July, 1907. Under the terms of this lease the lessee agreed to operate the railroad, and to pay all expenses of operation, maintenance, repairs, and renewals, and all incidental expenses connected therewith, including taxes and assessments levied against the demised premises. The lessor agreed to repay to the lessee, with interest at the rate of 6 per cent. per annum, all sums advanced by the lessee upon the request of the lessor or necessarily expended by the lessee for additions and betterments to the demised premises, or for the purchase of locomotives, cars, and other equipment for use upon the railroad or in connection therewith, and the lessee was authorized to retain out of the rentals payable to the lessor any sums owing from the lessor for these purposes, together with interest. The annual rental of $140,000, less deductions for improvements and interest, was payable in semiannual installments of $70,000 each on the 1st day of June and the 1st day of December of each year during the term. The lease provided for a forfeiture in case of default on the part of the lessee, and also for its termination upon 60 days' notice in writing by either party to the other. The lease was terminated by mutual consent on the 23d day of December, 1910, and the demised premises were thereupon immediately conveyed to the Oregon-Washington Railroad & Navigation Company.

The present action was instituted by the Snake River Company against the collector and ex-collector of internal revenue for the district of Oregon to recover the sum of $870.70, corporate income tax paid by the Snake River Company to the collector under protest, under the provisions of section 38 of the act of August 5, 1909, commonly known as the Corporate Income Tax Act. The sole question presented by the record is: Was the Snake River Company "engaged in business" during the taxing year 1910 within the meaning of that act? The question thus raised depends upon the sufficiency of the

answer interposed by the defendants, to which a demurrer was sustained by the court below, and judgment given on the pleadings. A writ of error was sued out by the defendants to review this judgment. The defense interposed by the answer is well summarized in the brief of the plaintiffs in error as follows:

"It is alleged in the answer in this case, and by the demurrer admitted, that during the greater portion of the tax year mentioned defendant in error was the owner of the line of railroad in its complaint described, with rolling stock and equipment necessary to the operation thereof; that during the year in question this company maintained general offices in the city of Portland, Or., and during that time maintained its corporate existence by the holding of stockholders' meetings, and the election thereat and appointment thereafter to its various offices of corporate directors and officers, who on behalf of the corporation were engaged in collecting the income and rents accruing by virtue of the lease of its property and otherwise, in the making of transfers of stock of the corporation, and in the management of the finances and invested funds thereof, and that during the taxing year mentioned, in addition to the usual and routine business of the Snake River Company, and through the agency of its lessee, and in accordance with the terms of its lease, it engaged in the construction of certain new warehouse railroad tracks, and of other railroad tracks connecting the line of railroad of the Snake River Railroad Company with the line and road of the North Coast Railroad Company; that it also constructed in the manner aforesaid a stock and cattle passageway thereunder or thereover; that before the expiration of the taxing year it was determined by the stockholders and officers and directors of the Snake River Company that the lease theretofore made of its property should be canceled, and the property sold; that during the taxing year in question this lease was canceled (the lease itself providing for cancellation by either party thereto upon 30 days' notice to the other, but in this case cancellation being reached in less time by written agreement); that immediately after the cancellation of the lease, and on the date of December 23, 1910, and during the tax year, the entire railroad, plant, and equipment of defendant in error was sold; that on the same day the proceeds of such sale, in the amount of over $2,000,000, were received by the Snake River Company; that prior to the closing of the taxing year the Snake River Company, out of the proceeds of such sale of its property, paid its total bonded indebtedness in the amount of $1,500,000, and retired the bonds representing the same; that prior to the close of the taxing year, and out of the proceeds of the sale of its said property, the defendant in error company repaid to other railroad companies considerable sums of money theretofore advanced to defendant in error by these other companies on account of construction work by defendant in error undertaken; and that, with other business done and transacted by defendant in error company during the taxing year in question, was the payment of state annual corporate license taxes, the maintenance of offices, the carrying of accounts in bank, and depositing therein and withdrawing therefrom from time to time of sums of money, and generally all such acts are usual and necessarily incident to such transaction of the business as is pleaded in this answer."

Section 38 of the Corporation Tax Law (36 Stat. 112 to 117), provides:

"That every corporation, * * * organized for profit and having a capital stock represented by shares, * * * and engaged in business in any state, * * * 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."

This statute has been considered by the Supreme Court in the following cases: Flint v. Stone Tracy Company, 220 U. S. 107, 31 Sup. Ct. 342, 55 L. Ed. 389, Ann. Cas. 1912B, 1312; Zonne v Minneapolis Syndicate, 220 U. S. 187, 31 Sup. Ct. 361, 55 L. Ed. 428; McCoach v. Minehill Railway Co., 228 U. S. 295, 33 Sup. Ct. 419, 57 L. Ed. 842. In speaking of its former decisions, in McCoach v. Minehill Railway Company, the court said:

"In applying this principle to the several cases then sub judice—in some of which the validity of the tax was challenged by the stockholders of certain real estate companies whose business was principally the holding and management of real estate—the court dealt, among others (Flint v. Stone Tracy Co., 220 U. S. 170, 31 Sup. Ct. 342, 55 L. Ed. 389, Ann. Cas. 1912B; 1312), with the Park Realty Company, organized to 'work, develop, sell, convey, mortgage or otherwise dispose of real estate; to lease, exchange, hire or otherwise acquire property; to erect, alter or improve buildings; to conduct, operate, manage or lease hotels, apartment houses, etc.; to make and carry out contracts in the manner specified concerning buildings * * * and generally to deal in, sell, lease, exchange or otherwise deal with lands, buildings and other property, real or personal,' etc. At the time the bill was filed in that case the business of the Park Realty Company related only to the management and leasing of one hotel. Others of the realty companies that were before the court were engaged in more extensive business transactions. The court held (page 171 of 220 U. S., page 357 of 31 Sup. Ct. [55 L. Ed. 389, Ann. Cas. 1912B, 1312]): 'We think it is clear that corporations organized for the purpose of doing business, and actually engaged in such activities as leasing property, collecting rents, managing office buildings, making investments of profits, or leasing ore lands and collecting royalties, managing wharves, dividing profits, and in some cases investing the surplus, are engaged in business within the meaning of this statute, and in the capacity necessary to make such organizations subject to the law.'

"Another case argued and decided at the same time, but separately reported, is Zonne v. Minneapolis Syndicate, 220 U. S. 187, 31 Sup. Ct. 361, 55 L. Ed. 428. In this case the court held that the corporation was not doing business in such wise as to make it subject to the tax imposed by the act of 1909, because while originally organized for and engaged in the business of letting stores and offices in a building owned by it, and collecting and receiving rents therefor, it had afterwards made a lease of all lands belonging to it to certain trustees for a term of 130 years, and then had caused its articles of incorporation, which had been those of a corporation organized for profit, to be so amended as to confine the purpose of the corporation to the ownership of the lands in question, subject to the lease, and 'for the convenience of its stockholders to receive, and to distribute among them, from time to time, the rentals that accrue, under said lease, and the proceeds of any disposition of said land.' The court said (page 190 of 220 U. S., page 362 of 31 Sup. Ct. [55 L. Ed. 389, Ann. Cas. 1912B, 1312]): 'The corporation involved in the present case, as originally organized and owning and renting an office building, was doing business within the meaning of the statute as we have construed it. Upon the record now presented we are of opinion that the Minneapolis Syndicate, after the demise of the property and reorganization of the corporation, was not engaged in doing business within the meaning of the act. It had wholly parted with control and management of the property; its sole authority was to hold the title subject to the lease for 130 years, to receive and distribute the rentals which might accrue under the terms of the lease, or the proceeds of any sale of the land if it should be sold. The corporation had practically gone out of business in connection with the property and had disqualified itself by the terms of reorganization from any activity in respect to it.'"

In McCoach v. Minehill Railway Company:

"The Minehill Company was incorporated by an act of the Legislature of the state of Pennsylvania, approved March 24, 1828 (P. L. p. 205), for the

purpose of constructing and operating a railroad, with appropriate powers, including the power of eminent domain. Under this charter a railroad was built and for many years operated. Under the authority of general acts of the Legislature, approved respectively April 23, 1861 (P. L. p. 410), and February 17, 1870 (P. L. p. 31), the Minehill Company, in the year 1896, leased its entire railroad, with all side tracks, extensions, and appurtenances of every kind, and all rolling stock and personal property of every description in use or adapted for use in, upon, or about the railroad (excepting some property intended to have been described in a schedule annexed to the lease, but which is not described, no such schedule having been annexed), and also 'all the rights, powers, franchises (other than the franchise of being a corporation), and privileges which may now, or at any time hereafter during the time hereby demised, be lawfully exercised or enjoyed in or about the use, management, maintenance, renewal, extension, alteration, or improvement of the demised premises, or any of them,' unto the Philadelphia & Reading Railway Company for a term of 999 years from January 1, 1897, at a yearly rental of $252,612, that being equivalent to 6 per centum upon the capital stock of the Minehill Company. The lessee agreed to keep the road in good order and repair, keep it in public use and efficiently operate it, and return it to the lessor company at the expiration or other determination of the lease. The Minehill Company agreed during the term of the lease to maintain its corporate existence and organization, and that when requested by the lessee it would 'put in force and exercise each and every corporate power, and do each and every corporate act which the Minehill Company might now, or at any time hereafter, lawfully put in force or exercise, to enable the railway company (the lessee) to enjoy, avail itself of, and exercise every right, franchise, and privilege in respect of the use, management, maintenance, renewal, extension, etc., of the property demised, and of the business to be there carried on.' It was provided that upon default in the payment of the rent reserved, or in the performance of certain other covenants, the lessor might declare the lease forfeited and re-enter and repossess the demised premises. The lease further provided that the lessee might, under certain circumstances, abandon certain railway lines, 'whenever it shall be found legally practicable to abandon so much of the said lines of railroad, without working a forfeiture or any impairment of the chartered rights and franchises of the Minehill Company as to its railroads, or any part thereof, or without creating any liability on the part of the Minehill Company or the Railway Company, to the public or the commonwealth, for the nonuser of such portions of the railroad lines.' In the event thus provided for the abandoned rails, machinery, etc., are to be sold and the proceeds turned over to the Minehill Company, and the annual rental proportionately reduced. Pursuant to this lease the entire railroad and all property connected therewith was turned over to the Reading Company, and since then has been operated by that company, and the Minehill Company has not carried on any business in connection with the operation of it. It has, however, maintained its corporate existence and organization by the annual election of a president and board of managers, and this board has annually elected a secretary and treasurer. It receives annually from the Reading Company the fixed rental called for by the lease, and it receives annually sums of money as interest on its bank deposits, and also maintains a 'contingent fund,' from which it receives annual sums as interest or dividends. And it annually pays the ordinary and necessary expenses of maintaining its office and keeping up the activities of its corporate existence, including the payment of salaries to its officers and clerks. It keeps and maintains at its offices stockbooks for the transfer of its capital stock, and this stock is bought and sold upon the market. The annual income from the contingent fund appears to be about $24,000, its annual payments for state taxes about as much, and its expenditures for corporate maintenance about $5,000."

Under the foregoing facts it was held that the lessor company was not subject to the payment of the tax provided for in the corporation tax law. We have quoted at length from this case because of its close analogy to the case at bar. That decision is decisive here, in so

far as the mere ownership of the property, the maintenance of offices, the keeping up of its corporate existence, the transfers of stock, the collection of rents, and looking after investments by the lessor company is concerned.

We will now consider briefly the points of difference between the two cases from the standpoint of the government. Our attention is first directed to the difference in the duration of the terms of the two leases; the lease in the Minehill Case running for 999 years, and the lease in the present case running for 5 years only. This distinction no doubt exists, but it is a distinction without a difference. If the lessor of a railroad is not engaged in business or operating the railroad under a lease for 999 years, for the very same reason it is not engaged in business or operating the railroad under a lease for 5 years; for, whether the lease be for a long term or a short term, the relations of the lessor and lessee to the demised premises are exactly the same. It is further suggested that the lease in the Minehill Case was authorized by the Legislature of the state of Pennsylvania. So here the lease was authorized, or rather ratified, by the laws of the state of Washington, unless the two corporations involved are competing lines, and there is no suggestion in the record that such is the case. Laws of 1909, p. 698, §§ 1 and 2; Rem. & Bal. Code, §§ 8665 and 8666. It further appears that certain improvements were made by the lessee under the terms of the lease, such as constructing an overhead or underground crossing and making certain track connections. This work was done by the lessee and inured to the benefit of the lessor, as do all permanent improvements on demised property, and the mere fact that the lessor paid for the improvements in the adjustment of the rent does not, in our opinion, constitute engaging in business. The only other distinction pointed out between the two cases is the sale of the property by the lessor and the payment of its indebtedness during the taxing year. Had the lessor been organized for the purpose of buying, selling, and leasing railroads, this sale would no doubt constitute engaging in business within the meaning of the law. But we do not understand that it was organized for any such purpose, and the mere sale of its property as an incident of ownership does not bring it within the statute. One reason for holding that the lessor was exempt from the tax in the Minehill Case was that the lessee company was doing the business as a railroad company upon the lines covered by the lease, and was taxable because of it, and the Corporation Tax Law does not contemplate double taxation in respect to the same business. So in this case the business of operating the railroad during the entire taxing year 1910 was conducted by the lessee or grantee. They were taxable because of that business, and to impose a like tax on the lessor would be double taxation, which the law does not contemplate.

We agree with the court below, therefore, that this case cannot be distinguished from McCoach v. Minehill Railway Company, and the judgment is accordingly affirmed.

PUGET SOUND TRACTION, LIGHT & POWER CO. v. HUNT et ux.

(Circuit Court of Appeals, Ninth Circuit. May 24, 1915.)

No. 2546.

1. STREET RAILROADS ⟸117—INJURY IN COLLISION AT CROSSING—ACTION—QUESTIONS FOR JURY.

In an action against a street railroad company to recover for injuries sustained in a collision at a street crossing between a street car and an automobile in which plaintiffs were riding, where the evidence as to the speed of both the car and the automobile was directly in conflict, the question of negligence and contributory negligence *held* properly submitted to the jury.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 239–257; Dec. Dig. ⟸117.]

2. NEGLIGENCE ⟸121—ACTIONS—PRESUMPTIONS AND BURDEN OF PROOF.

In an action for personal injury, even though negligence of the defendant is shown, there is no presumption that such negligence was the proximate cause of the injury; but the burden in all cases rests on plaintiff to establish such fact by evidence.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 217–220, 224–228, 271; Dec. Dig. ⟸121.]

3. APPEAL AND ERROR ⟸1064—REVIEW—INSTRUCTIONS—HARMLESS ERROR.

In an action against a street railroad company to recover for an injury received by plaintiffs while riding in an automobile in a collision with a car of defendant at a street crossing, the charge of the court, while containing erroneous statements of the law, *held* not prejudicial to defendant in view of the evidence in the case.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4219, 4221–4224; Dec. Dig. ⟸1064.]

In Error to the District Court of the United States for the Northern Division of the Western District of Washington; Jeremiah Neterer, Judge.

Action at law by M. A. Hunt and Mary A. Hunt, his wife, against the Puget Sound Traction, Light & Power Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

James B. Howe and A. J. Falknor, both of Seattle, Wash., for plaintiff in error.

F. E. Hammond, J. M. Hammond, and T. F. Bevington, all of Seattle, Wash., for defendants in error.

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

RUDKIN, District Judge. This was an action to recover damages for injuries to person and property resulting from a collision between an automobile and a street car at the intersection of Twenty-Seventh avenue and East Cherry street in the city of Seattle. The jury returned a verdict in favor of the plaintiffs in the court below in the sum of $500, and from a judgment on the verdict the present writ of error was sued out by the defendant. To avoid confusion in the statement, we will refer to the parties as plaintiffs and defendant, as they are designated in the pleadings and in the proceedings of the court below.

[1] Error is assigned to the refusal of the court to direct the jury to return a verdict in favor of the defendant and to the giving of certain instructions duly excepted to by the defendant. Much of the brief on behalf of the defendant is devoted to a discussion of the facts in the case, and our attention is directed to the numerous conflicts and discrepancies in the testimony. It will be conceded at the outstart that the testimony is extremely conflicting where it relates to matters of fact, as well as where it relates to matter of opinion only. Thus the different witnesses estimated the speed of the street car at from 10 to 30 miles per hour, and the speed of the automobile at from 8 to 30 miles per hour, and the witnesses who placed the highest estimate on the speed of the street car placed the lowest estimate on the speed of the automobile, and vice versa. The testimony would, no doubt, warrant a finding that the defendant was free from negligence, and the driver of the automobile guilty of gross negligence. It would likewise warrant a finding that both the motorman and the driver of the automobile were violating the traffic ordinances of the city and endangering human life. But the only question with which this court is concerned under the first assignment of error is the single one: Did the testimony justify the submission of the case to the jury at all?

It appears from the testimony on the part of the plaintiffs that the automobile was driven north on Twenty-Seventh avenue immediately prior to the accident, and as the driver approached East Cherry street he slowed down to about 8 miles per hour. An apartment house on the corner at the street intersection obstructed his view, so that he could not see the street car approaching from the west until he had passed beyond the building, and there his view was again obstructed by a covered delivery wagon in the street. When he reached a point where he could see the street car, the front end of the automobile was within 10 or 12 feet of the street railway track, and the street car was about 180 feet from the crossing, approaching at a speed of 30 miles per hour. The driver of the automobile was of opinion that he could not cross over in front of the street car in safety, so he turned slightly to the left and applied the emergency brake. The automobile came to a stop within a few feet of the rail, but not in the clear, and was struck by the street car, causing the wreckage and injury complained of.

Under these facts the jury was warranted in finding that the defendant was guilty of negligence, and we think the question of contributory negligence on the part of the driver of the automobile was one of fact, and not of law. In cases of this kind the question of due care cannot always be measured in feet or in seconds. When confronted with danger, the driver of an automobile or other vehicle may not exercise good judgment, or pursue the safest or wisest course. The question is, not what might have been done to avoid the accident, but what would an ordinarily prudent person have done under the like circumstances and conditions. And we do not think it can be said as a matter of law that a person approaching a street upon which street cars are running, with his automobile under control, running at a speed of 8 miles per hour, is necessarily guilty of contributory negligence simply because he does not avoid a collision with a street car, violating traffic

ordinances and running wildly through the city at a speed of 30 miles per hour. Of course, as we have said, there was much testimony opposed to this view, but we must accept the testimony most favorable to the plaintiffs in determining the question now before us.

Our attention is further directed to section 2531 of Rem. & Bal. Code, which provides as follows:

"Every person who shall drive or operate * * * any automobile or motor vehicle * * * over any crossing, crosswalk or street intersection within the limits of any city or town, when any person is upon the same, at a rate of speed faster than one mile in fifteen minutes, * * * shall be guilty of a misdemeanor."

This section was intended primarily for the protection of foot passengers at street intersections, and is only applicable when some person is *upon the same.* In this case no person for whose protection the statute was enacted was injured, and it was for the jury to say whether there was any person upon the crossing at the time, and whether the statute was at all applicable. For these reasons we are of opinion that the court committed no error in submitting the case to the jury.

[2] The court gave numerous instructions on the question of negligence, contributory negligence, and proximate cause, among which were the following:

"You are instructed that the law considers the operation of a street car and the operation of an automobile on a public street to have in them an element of danger to the public, and when operated at an excessive rate of speed to be a menace to public safety, and has therefore fixed a limit upon the speed at which they shall be operated in certain places, and when such vehicles are operated at a speed in excess of that provision within the restricted district, and an injury is occasioned thereby, *then the law presumes that the injury was the result of the excessive speed, and casts the burden of proof upon such party to show that the injury, if any was occasioned, was not the result of its or his negligence,* and when both parties, the plaintiff and defendant, run at excessive rates of speed, it is for the jury to determine the conduct or negligence of which was the proximate cause of the injury.

"You are instructed that by ordinance of the city of Seattle it is provided that no person shall propel or cause to be propelled any street car within the business or settled residential districts of the city at a speed exceeding 12 miles per hour, and that under the provisions of this ordinance the operation of a street car in the business or settled residential district in excess of 12 miles per hour, in case of an injury resulting from such excessive speed, it would be presumed under the law that the company would be negligent in its operation. In the consideration of this ordinance it will be for you to determine the speed at which the car was operated, and in determining whether or not the car was moving at an excessive rate of speed, you will take into consideration whether the point at which the collision occurred came within the limited districts in the ordinance as above stated, which limits the speed to 12 miles per hour, and if you find that it did, and the car was running to exceed 12 miles per hour, then it will be presumed in the first instance that the company was negligent if an injury resulted, and the burden of proof would be upon the company to show that it was in fact not negligent, even though the car was running at such excessive rate of speed, *and that the injury occasioned was caused by the negligence of the plaintiff as the proximate cause thereof.* But if you should find that the place was not within the district restricted in the ordinance, then you will determine whether the car was running at such a reasonable rate of speed,

which of itself was not negligent, taking into consideration all of the surroundings as disclosed by the evidence.

"You are instructed, likewise, that under the law of the state the speed of an automobile in a city shall not be greater than 12 miles per hour, nor over a crossing of a street or crosswalk within the limits of any city at a greater speed than 4 miles per hour; and you are instructed that if a person does drive an automobile in the restricted places in the city provided in the state statute at a greater speed than that provided, and an injury should occur, the presumption would be that the automobile driver was negligent, and the burden would shift upon the driver of the automobile under such circumstances to show that the excessive speed was not the proximate cause of the injury, and therefore contributory negligence upon his part.

"So that you may fully understand these instructions in view of the circumstances of this case, I will say that I mean that if you should find that the automobile at issue was driven by the plaintiff at a greater speed than 12 miles per hour on Twenty-Seventh avenue approaching Cherry street, and more than 4 miles an hour in crossing Cherry street, and an injury resulted, the presumption of law would be that he was guilty of negligence; and if he seeks to recover for the injury resulting to himself the presumption would be that his contributory negligence was the proximate cause of the injury, and it would cast the burden upon him to show that his negligence did not contribute to the injury as the proximate cause thereof. * * *

"But if you should find that the plaintiff was driving along Twenty-Seventh avenue at a high rate of speed, and approached the street car track at an excessive rate of speed, as defined in these instructions, and that the street car coming down Cherry street approached Twenty-Seventh avenue at about the same time, and the automobile ran into the street car, and you believe by a fair preponderance of the evidence that the speed at which the automobile was operating and the failure of the plaintiff to observe the approaching car was the proximate cause of the injury, and without which it would not have happened, under such circumstances the plaintiff's conduct would be, under the law, acts which contributed to the injury as the proximate cause thereof, and he could not recover. * * *

"The duties between the plaintiff and the defendant company were reciprocal with relation to the conduct that should have been enjoyed or employed by either of them, and it is for you to determine which one was negligent with relation to the duty imposed in this case; and if you find that the defendant was negligent in the operation of its car, and that the plaintiff was free from contributory negligence which contributed to the resulting injury as the proximate cause thereof, but that the injury and damage was the proximate result of the defendant's conduct, then you will return a verdict for the plaintiff in this case.

"But if you believe from the testimony in this case that the plaintiff was negligent in the operation of his automobile, and that his negligence resulted in the injury complained of as the proximate cause thereof, then the plaintiff could not recover in this case, and your verdict must be for the defendant. * * *

"In this case, if you should find that the defendant was not negligent, or that it was negligent, but that its negligence did not result in this injury as the proximate cause thereof, but that the contributory negligence of the plaintiff was the proximate cause thereof, then your verdict would be for the defendant in this case."

Exception was duly taken to the italicized parts of the charge, wherein the court instructed the jury in substance that the law presumes that the negligence on the part of the defendant company was the proximate cause of the injury. As an abstract proposition of law this part of the charge is clearly erroneous. In every personal injury case the plaintiff must establish two propositions: First, that the defendant was negligent; and, second, the causal connection between the negligence and the injury complained of. Negligence is sometimes pre-

sumed, as in cases where the doctrine of res ipsa loquitur applies, or where there has been a violation of a statutory duty, but the proximate cause of an injury is never presumed. On this question there is no conflict of authority. See 29 Cyc. 600, and the numerous cases there cited.

[3] Was this part of the charge prejudicial, and does it call for a reversal? Independently of the question of negligence, there would seem to be no question as to the proximate cause of the injury in this case. The collision was not the result of mere accident. It resulted from negligence on the part of the defendant, negligence on the part of the driver of the automobile, or the concurring negligence of both. The street car either crashed into the automobile, or the automobile crashed into the street car, and when the question of negligence was determined, the question of proximate cause followed as a matter of course. The court instructed the jury that there could be no recovery if the negligence on the part of the plaintiff caused or contributed to the injury, and that *"the presumption would be that his contributory negligence was the proximate cause of the injury."* It will be observed that the court here fell into the same error by stating to the jury that the law presumed that contributory negligence of the plaintiffs was the proximate cause of the injury, and the charge was objectionable from the standpoint of the plaintiffs, as well as from the standpoint of the defendant. Of course, one erroneous charge does not ordinarily counteract another; but we think it can safely be said that the defendant was not prejudiced by the inadvertent use of the language complained of, and that the result would not have been different, had the objectionable words been entirely omitted.

We reach this conclusion with the less hesitation because the defendant opposed the granting of a new trial on behalf of the plaintiffs in the court below, and from this we think we have a right to assume that the defendant was satisfied with the verdict, if, as a matter of law, the case should have gone to the jury at all.

We are of opinion, therefore, that there is no prejudicial error in the record, and the judgment is affirmed.

BUTTERFIELD et al. v. WOODMAN.

In re BUTTERFIELD et al. In re NATIONAL BOAT & ENGINE CO.

(Circuit Court of Appeals, First Circuit. May 25, 1915.)

Nos. 1103, 1104.

1. BANKRUPTCY ⟸181—VALIDITY OF LIENS—PLEDGE OF BONDS FOR INVALID CONSIDERATION.

A bankrupt corporation was formed to take over the property and business of a number of others. One of the constituent companies had executed a trust deed to claimant, which by agreement was not recorded. The president of such company was one of the promoters of bankrupt and became its president, and claimant became one of its directors. The property was conveyed to bankrupt as free of incumbrance, on a secret agreement be-

tween the promoters and claimant that bonds of bankrupt would be substituted for the trust deed, which agreement was carried out; the other directors having no knowledge of the transaction or of the trust deed. *Held*, that the trust deed was invalid as against the bankrupt, and its surrender did not constitute a valid consideration for the delivery of the bonds, and that such delivery was voidable for the further reason that it constituted a fraudulent preference of a director at a time when the bankrupt was insolvent and known to be so by claimant.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 259, 260, 271, 273, 274; Dec. Dig. ⟸181.]

2. BANKRUPTCY ⟸181—VALIDITY OF LIEN—PLEDGE OF MORTGAGE BONDS BY CORPORATION.

A pledge of its mortgage bonds by a bankrupt corporation as security for notes of another corporation, whose property bankrupt had taken over with an assumption of its indebtedness, *held* valid.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 259, 260, 271, 273, 274; Dec. Dig. ⟸181.]

3. BANKRUPTCY ⟸164—PROVABLE DEBTS—SURRENDER OF "PREFERENCE."

A bankrupt corporation was indebted on notes to banks and others, indorsed by claimant, and also secured by a pledge of its mortgage bonds. Claimant paid the amount due on the notes, which, with the bonds, were transferred to him. *Held*, that payments made by bankrupt on the notes within four months prior to the bankruptcy, and when insolvent, without the knowledge of claimant, and without knowledge on the part of the holders of the insolvency, did not constitute voidable "preferences," which claimant was required to surrender before proving either the notes or bonds.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 267; Dec. Dig. ⟸164.

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

4. BANKRUPTCY ⟸334—SECURED DEBTS—NECESSITY OF PROVING.

A creditor of a bankrupt corporation, whose debt is secured by a valid pledge of its mortgage bonds, is not required to prove his claim as a general creditor to entitle him to have his bonds participate in the mortgage fund.

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

5. BANKRUPTCY ⟸205—VALIDITY OF LIENS—RIGHT OF TRUSTEE TO CONTEST.

A trustee in bankruptcy, to whom mortgage bonds of the bankrupt have been pledged as security for the purchase price of property sold by him, has such an interest as entitles him to contest the validity of other bonds, which, if allowed, would share in the mortgage fund.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 234, 303; Dec. Dig. ⟸205.]

Appeal from, and Petition to Revise Action of, the District Court of the United States for the District of Maine; Clarence Hale, Judge.

In the matter of the National Boat & Engine Company, bankrupt; Walter I. Woodman, trustee. From orders disallowing claims of William W. Butterfield and others (216 Fed. 208), claimants appeal, and petition to revise. Reversed in part, and petition dismissed.

William D. Washburn, of Chicago, Ill., and William Carpenter, of Muskegon, Mich. (Williamson, Burleigh & McLean, of Augusta, Me., on the brief), for appellants.

Robert T. Whitehouse, of Portland, Me. (Albert S. Woodman and Woodman & Whitehouse, all of Portland, Me., on the brief), for appellee.

Before PUTNAM, DODGE, and BINGHAM, Circuit Judges.

BINGHAM, Circuit Judge. This is an appeal from a decree of the District Court for the District of Maine, in a bankruptcy proceeding, disallowing a proof of claim for $88,000 of bonds, and from a refusal to allow claims on $32,000 of bonds, and on $36,456.40 of notes, found to be valid obligations of the bankrupt, until certain alleged preferences are restored to the bankrupt estate.

[1] The circumstances with regard to the $88,000 of bonds are substantially as follows: In January, 1909, the Racine Boat Manufacturing Company, a Michigan corporation, doing business in that state, had notes outstanding against it to the amount of $160,000, on which the claimant Butterfield was indorser, and, in order to secure him for his indorsements, a trust deed or mortgage of the company's property was executed and delivered to him. The trust deed was never recorded. It was withheld from record for the reason that, if recorded, it was believed it would impair the credit of the company, and it was only intended to be availed of by the claimant in case the company was on its "last legs." But, as it does not appear that any creditors of the Racine Company were misled by its being withheld from record, or that any credit was procured by the company in reliance upon the fact that its property was unincumbered, the original purpose that actuated the parties in withholding it from record seems to us unimportant.

In the summer of 1910, W. J. Reynolds, president of the Racine Company, J. Q. Ross, its attorney, and H. S. Beardsley, a promoter, conceived the idea of taking over the property and business of the Racine Company, and that of several other boat companies and individuals, and forming a corporation to be known as the National Boat & Engine Company. In pursuance of this plan, options were procured upon the plant and business of the Racine Company, and of other corporations and individuals. In September, 1910, the National Boat & Engine Company was organized under the laws of the state of Maine, and the properties upon which options had been procured, including the Racine Company, were transferred to it. These properties were appraised, and, on the basis of their appraisal, the stockholders in the old companies and the individual owners were to be paid in preferred stock and bonds of the National Company. The arrangement was that they should receive bonds at par, equaling 20 per cent. of the tangible assets transferred, and preferred stock equaling 80 per cent. of those assets. The good will, patents, and trade-marks transferred were not treated as tangible assets, but, on the basis of their appraisal, common stock of the new company was to be issued in payment therefor. All the debts of the companies and of the businesses of the individual owners were assumed by the National Boat & Engine Company.

Soon after the organization of the National Company, a resolution was adopted authorizing the issuance of bonds to an amount not

exceeding $3,000,000, to be secured by a first mortgage running to the Astor Trust Company of New York, as trustee, and covering all the property, real and personal, present and future, of the corporation. These bonds were authorized for the purpose of "furnishing additional capital and of assisting in the purchase of manufacturing properties and equipment." The mortgage was executed, and on January 18, 1911, was accepted by the trustee. Six hundred and ninety-eight thousand dollars of bonds were issued under this mortgage. Of these, $333,000 were deposited as collateral to secure obligations of the company; the $88,000 and $32,000 of bonds here in question constitute a part of that number.

The property of the Racine Company was transferred to the National Company by warranty deed and bill of sale, in which no mention was made of the outstanding trust deed held by the claimant. The claimant knew this, and it was understood between him and the promoters of the National Company that no mention of it should be made, either in the deed, bill of sale, or the prospectus of the National Company that was to be issued, and upon which the bonds and preferred stock were to be sold. The reason for this was that it was secretly arranged between the claimant and the promoters that bonds of the National Company should be issued to secure him for his indorsements upon the obligations of the Racine Company, which the National Company had assumed. In furtherance of this understanding, confirmed by subsequent agreements relating to the same matter between Butterfield and Reynolds, in which Reynolds purported to act as president for both the Racine and the National Companies, bonds of the National Company to the amount of $88,000 were delivered to Cross, Vanderwerp, Foote & Ross, as trustees, to secure Butterfield on his indorsements of the notes of the Racine Company, then amounting to about $41,000. Reynolds was also holden as indorser upon these obligations. The petition in bankruptcy was filed against the National Company August 28, 1911. The bonds were delivered in May, 1911, and within four months of the filing of the petition.

In the proof of claim for the $88,000 of bonds, the consideration alleged is the surrender by Butterfield of the trust deed of January, 1909. The trustee in bankruptcy contends that the trust deed is void, and was not a sufficient consideration for the transfer of the bonds, and that the transfer of the bonds was voidable under well-known principles of equity, and as a preference under section 60b of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 562 [Comp. St. 1913, § 9644]). While the trust deed was known to be outstanding by Reynolds and the other promoters of the National Company, the evidence discloses that, in pursuance of the secret agreement between them and Butterfield, its existence was not made known to the board of directors of the National Company or its executive committee during the life of the company; and, as we are satisfied such was the fact, we are of the opinion that the company cannot be charged with the knowledge of Reynolds and the other promoters, although they were officers of the company, and that the trust deed was not a valid incumbrance on the property purchased from the Racine Company as

against the National Company, and did not constitute a valid consideration for the delivery of the bonds.

At the time the bonds were delivered, Butterfield was a director in the National Company, and the referee in bankruptcy and the District Court have found that the National Company was then insolvent, and that Butterfield knew it to be so. The evidence fully warrants these conclusions, and they meet our approval. The validity of the mortgage, as to the personal property included therein, is in controversy; but it appears that, even if the mortgage should be held to include all of the property, real and personal, of the National Company, it would be inadequate to pay the outstanding bonds, not including those here in question, and that the $88,000 of bonds, if allowed, would not reduce the assets of the bankrupt estate available to pay the claims of the general creditors. If, in view of these facts, the transfer would not be voidable as a preference under section 60b of the Bankruptcy Act (Continental Trust Co. v. Chicago Title Co., 229 U. S. 435, 444, 33 Sup. Ct. 829, 57 L. Ed. 1268; Root Mfg. Co. v. Johnson, 219 Fed. 397, 401, 135 C. C. A. 139), nevertheless the title of the claimant to these bonds cannot be sustained, for it would be inequitable and a fraud upon the other bondholders to allow the claimant, a director of the company, to prefer himself by appropriating property of the company to secure an antecedent debt on which he was holden, at a time when the company was insolvent (Richardson v. Green, 133 U. S. 30, 10 Sup. Ct. 280, 33 L. Ed. 516; Bradley v. Farwell, Fed. Cas. No. 1799; State Bank of Chicago v. Idaho-Oregon Light & Power Co. [D. C.] 219 Fed. 583, 590; Clay v. Towle, 78 Me. 86, 2 Atl. 852; In re Brockway Mfg. Co., 89 Me. 121, 35 Atl. 1012, 56 Am. St. Rep. 401; Symonds v. Lewis, 94 Me. 501, 48 Atl. 121).

[2] We will now consider the rights of the claimant under the $32,000 of bonds and the $36,456.40 of notes, which the District Court found to be valid obligations of the National Company, but declined to allow until certain payments made by the bankrupt were returned to the bankrupt estate. These claims are based on the following notes and bonds:

The note of the Racine Company to the National Lumberman's Bank for $10,456.40, with interest, to secure which the National Company had pledged $12,000 of Astor Trust Company bonds.

The note of the Racine Company to Mary E. McCracken for $9,000, with interest, to secure which the National Company had pledged $10,000 of Astor Trust Company bonds.

The note of the Racine Company to the Hackley National Bank for $10,000, with interest, to secure which the National Company had pledged $10,000 of Astor Trust Company bonds.

The note of the Racine Company to George Boyce for $4,000, with interest—no security.

The note of the Racine Company to the Old National Bank for $3,000 and interest—no security.

All of the notes were indorsed by Butterfield, except those to Boyce and the Old National Bank, and as to them he stood as guarantor.

The notes were taken up by him in fulfillment of his obligation, and, together with the bonds, were assigned to him.

[3] The alleged preferences consisted of the following payments, made within four months of the filing of the petition in bankruptcy: One of $1,543.50 to the National Lumberman's Bank, on the first note above described; one of $1,000 to the Old National Bank; and one of $1,000 to the National Lumberman's Bank, to take up a note given by Butterfield to the bank for the accommodation of the National Company, and which the National Company had assumed and agreed to pay.

It is thus seen that the payments in question were not made upon the bonds, but upon the notes which the bankrupt had assumed, and upon which the claimant was holden as indorser, or stood in the relation of guarantor or surety for the National Company, and that the payments were made, not to the claimant, but to the holders of the notes. No contention is made that the holders of the notes knew that the National Company was insolvent. If it be conceded that the claimant knew the company was insolvent, the evidence does not satisfy us that he knew of the payments to the holders of the notes at the time they were made, or that they were brought about by his procurement. It is true that the claimant was benefited by these payments, but every payment made within four months before the filing of a petition in bankruptcy is not a voidable preference within the meaning of section 60b of the Bankruptcy Act; and the payments here in question, having been made to the holders of the notes, who did not know that the company was insolvent, and the claimant not being aware of the transactions at the time the payments were made, and not having procured them to be made, they are not voidable preferences within the meaning of the act, and the $32,000 of bonds and the notes should have been allowed.

[4] Furthermore, if the payments on the notes could be found to be voidable preferences under section 60b, that would not furnish a reason for refusing to permit the $32,000 of bonds to be allowed. The mortgage was executed and the bonds were delivered more than four months prior to the filing of the petition in bankruptcy. The claimant does not seek to have the bonds allowed against the general assets of the bankrupt, but against the property set apart by the mortgage to secure the bonds, and whether they are or are not permitted to share in the distribution of this fund will neither increase nor diminish the assets available to general creditors. Indeed, the right of the claimant to have these bonds participate in the distribution of the mortgage fund is in no way dependent upon his right to prove an unsecured claim or an unsecured balance on a partially secured claim against the general assets; and, such being the case, the Bankruptcy Act furnishes no ground for not permitting the bonds to be allowed and to participate in the distribution of the fund set apart by the mortgage to secure them. Ward v. First National Bank of Ironton, 202 Fed. 609, 612, 120 C. C. A. 655; Courtney v. Fidelity Trust Co., 219 Fed. 57, 63, 134 C. C. A. 595; Yeatman v. Savings Institution, 95 U. S. 764, 767, 24 L. Ed. 589.

[5] The trustee in bankruptcy was rightly permitted to appear and contest the claim arising out of the $88,000 of bonds. It appears that all the property of the bankrupt was sold by the trustee under an order of the District Court, free and clear of the Astor Trust Company mortgage and of all other liens upon the property, for the sum of $250,000; that $105,000 was paid in cash, and the balance secured by a pledge of Astor Trust Company mortgage bonds to the amount of $300,000; that the dividends received on these bonds out of the bankrupt estate were to be applied in payment of the purchase price, and if the dividends were more than sufficient to pay this balance, the overplus was to be delivered to the purchasers. If, therefore, the trustee, as such, had no interest entitling him to appear and defend against the allowance of the claim—a question not considered—the facts above disclosed show that, as pledgee of the $300,000 of bonds as security, he had a material interest in the controversy which entitled him to appear and defend against the claim.

Whether the testimony of Reynolds, the president of the National Company, taken under section 21a of the Bankruptcy Act, was legally admissible as evidence on the claims here in controversy, it is unnecessary to consider. The evidence was excluded by the referee, and in making up the record for review of the findings and rulings of the referee by the District Court it was stipulated between counsel for the trustee and the claimant that all the evidence legally admitted by the referee on the proof of claim for $88,000 of bonds might also be used for the purpose of determining the other claims here in issue, and that no further evidence should be offered or used for the purpose of the hearings and the determination of the claims, including the claim on the $88,000 of bonds. In view of this agreement, the admissibility of the evidence becomes a moot question.

In No. 1103, the decree of the District Court disallowing the claim on the $88,000 of bonds is affirmed. As to the claims on the $32,000 of bonds and the notes, the decree is reversed, the case is remanded to the District Court, with directions to enter a decree in accordance with this opinion, and the appellants recover their costs of appeal.

In No. 1104, the petition to revise the action of the District Court in matter of law is dismissed, without costs.

STEARNS LIGHTING & POWER CO. et al. v. CENTRAL TRUST CO. et al.

(Circuit Court of Appeals, Sixth Circuit. June 8, 1915. On Petition for Rehearing, June 30, 1915.)

No. 2618.

1. VENDOR AND PURCHASER ⊂=231—NOTICE TO PURCHASERS—MORTGAGES—RECORDING—"CONVEYANCE"—"FIXTURE."

How. Ann. St. Mich. 1912, § 10856, provides that the term "conveyance," as used in that chapter which relates to deeds and mortgages, the recording thereof, etc., shall embrace every instrument in writing by which any estate or interest in real estate is created, mortgaged, or assigned, etc. An electric light company, which gave a mortgage on all proper-

ty owned by it including real estate, leasehold interests, power plants, etc., and all property which it might thereafter acquire, then owned a power plant and generating machinery situated upon real estate held by it under a lease for 25 years, and it thereafter constructed an electric transmission line, which was annexed to and physically connected with such power plant. *Held*, that the record of the mortgage, when duly recorded as a mortgage of real estate, was constructive notice to subsequent purchasers, as the leasehold interest was governed by the laws regulating the recording of conveyances of real estate, while the transmission line contained all of the elements and attributes of a "fixture" or appurtenance to real estate.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 487, 513–539; Dec. Dig. ⟸231.

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

2. MORTGAGES ⟸274—RECORDING—NOTICE.

The transmission line having been appurtenant to an interest in real estate when the mortgage attached and when notice thereof was given by its recording, the effect thereof upon the rights already fixed under it was not defeated by the fact that, when the transmission line was sold to a purchaser against which it was sought to enforce a mortgage, the power and generating plant was unoperated and inoperative, and was not included in the sale, nor by the fact that the lease had been declared forfeited by the nonpayment of rent.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 718–724, 728; Dec. Dig. ⟸274.]

On Petition for Rehearing.

3. CORPORATIONS ⟸479—BONDS—RIGHTS OF PURCHASERS.

A purchaser at a receiver's sale of the property of an electric light and power company, which had issued bonds secured by a mortgage on all of its property, contracted to convey the property to the S. Co. free from all liens and incumbrances. He then owned a number of the mortgage bonds, but prior to such contract M. had acquired an equitable right to the bonds as collateral security for a debt, and after the transaction with the S. Co., and after it had acquired and paid for the property, he delivered the bonds to M. *Held*, that the mortgage was enforceable for M.'s benefit, since, though the contract to convey free from incumbrances gave the S. Co. an equitable title to the bonds as against its vendor, M. not only acquired the legal right to the bonds, but had an equity superior to that of the S. Co., and the fact that some of the bonds were past due was immaterial, as M.'s equity did not depend upon their negotiability.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1869, 1872–1874; Dec. Dig. ⟸479.]

Appeals from the District Court of the United States for the Western District of Michigan; Clarence W. Sessions, Judge.

Suit by the Central Trust Company and another against the Stearns Lighting & Power Company, William L. Hammond, trustee, and others. From a decree for complainants, the defendants named appeal. Affirmed.

The appellants were two of the defendants below; the appellees were complainants. We adopt the statement of facts made by the District Judge, as follows:

"Except as hereinafter noted, the material and essential facts of this case have been stipulated and those which are necessary to the determination of the legal questions involved may be stated as follows: Each of the defendants, Interurban Electric Light & Power Company (hereinafter called the

Interurban Company) and Stearns Lighting & Power Company (hereinafter called the Stearns Company) was incorporated under the laws of the state of Michigan to carry on the business of conveying electricity for supplying electric light and power. On the 1st day of June, 1909, the Interurban Company, for the purpose, among other things, of raising money to carry on, extend, improve, and develop its business, and for the purchase of the property involved in this controversy, authorized the issue of 'first mortgage 6 per cent. gold bonds' aggregating $25,000 and bearing interest at the rate of 6 per cent. per annum, payable semiannually. On the same day, and in order to secure the payment of the bonds, the Interurban Company executed and delivered to complainants, as trustees, a mortgage or deed of trust covering all property of every kind and nature which it then owned, including its real estate, leasehold interests, power plants, buildings, machinery, right of way, easements, franchises, contracts for supplying electricity, revenues, accounts, demands, etc., and also 'all of the property, real, personal, and mixed, of all kinds whatsoever, * * * which the company may hereafter acquire, or to which it may hereafter become entitled, and which may be appurtenant to the business now or hereafter conducted by the said company.' On June 2, 1909, this mortgage was filed for record and recorded in the office of the register of deeds of Mason county, and on January 20, 1910, in the office of the register of deeds of Oceana county. No other or separate copy of the mortgage was filed in either of these offices and no affidavit showing the good faith of the parties and the adequacy of the consideration was attached to the mortgage so filed for record.

"After the making of the mortgage and before December 1, 1909, the bonds secured by it were issued by the Interurban Company. These bonds were dated June 1, 1909, and were numbered consecutively from 1 to 50, both inclusive, and were duly certified by the Western Trust & Savings Bank as trustee. Each of the bonds was payable to bearer and was in the sum of $500. Five bonds matured on June 1st of each year, beginning June 1, 1910. Interest coupons were attached. After the making of the mortgage, the Interurban Company, largely from the proceeds of the sale of the bonds, purchased and erected a line of poles and towers, upon which were strung and attached lines of copper wires, together with the cross-arms and insulators suitable for a complete electrical transmission line, extending from the power station of the company at Hamlin Dam over and along a right of way procured by the company in and along the public highways to and through the city of Ludington, in Mason county; thence southerly in Oceana county to and through the village of Pentwater; and thence south to within about three miles of the village of Hart. Poles were set nearly to the village of Hart. On December 31, 1909, Harry V. Huston was, by the order of the Circuit Court of Mason county, in chancery, appointed receiver of the Interurban Company and qualified and took possession of its assets. On August 25, 1910, pursuant to the order of the court, the receiver sold all the right, title, and interest of the receiver in the assets and property of said company to one W. F. Mayhon for $3,500. By order of the court, the property was sold subject to the lien of complainants' mortgage, and also subject to the lien of receiver's certificates which had been issued to the amount of $5,500. On January 3, 1911, the receiver executed a deed to Mayhon. In this deed the property was described as in complainants' mortgage, and was conveyed subject to the lien of complainants' mortgage and the receiver's certificates.

"On May 12, 1911, W. F. Mayhon entered into a contract to sell and convey to the defendant Stearns Company the property in controversy in this suit. The description of the property to be so sold and conveyed, the consideration to be paid therefor, and the covenants of the parties were set forth in the contract as follows: 'Now, therefore, in consideration of the sum of one dollar to him in hand paid by the Stearns Lighting & Power Company, the receipt whereof is hereby confessed and acknowledged, and of other available considerations, the said party of the first part, W. F. Mayhon, hereby agrees to sell to the said party of the second part, the Stearns Lighting & Power Company, the entire lighting and power plant at Pentwater, Mich., including all real estate, franchises, and contracts, the line of poles, towers, wires,

cross-arms, and insulators extending from the Hamlin Dam, through Ludington and Pentwater, to the village of Hart, Mich., all rights of way and franchises granted by all cities, villages, and townships or municipalities through which the said line extends or is proposed to extend, granted to said W. F. Mayhon or to the Interurban Electric Light & Power Company, all tools of every description, wherever located, forming any part of the assets of the Interurban Electric Light & Power Company, including three step-up transformers located at Hamlin, and thirteen bundles of wire, twenty barrels of insulators, and all cross-arms estimated to be sufficient to complete the line to the village of Hart, and specifically including all of the property of the Interurban Electric Light & Power Company, except the water wheels, generators, and switchboard at the power house at Hamlin Dam, the buildings at Hamlin Dam, the rights in said dam, and five acres of land adjacent thereto, for the consideration and price following, that is to say: Sixteen thousand dollars in Stearns Lighting & Power Company first mortgage 6 per cent. bonds, dated and maturing as follows: Ten thousand dollars of said bonds to be dated July 1, 1911, and to mature July 1, 1916; six thousand dollars of said bonds to be dated July 1, 1911, and to mature July 1, 1917; interest on said bonds to be payable according to the coupons attached thereto. It is understood and agreed that the above bonds are not to be delivered to said Mayhon until the date specified for their issue. It is further specifically agreed and provided that upon the delivery to the said W. F. Mayhon of the bonds as above specified at the First National Bank in Ludington, Mich., said Mayhon will execute and deliver to said Stearns Lighting & Power Company at said bank good and sufficient conveyances of both the real estate and personal property, and due assignments of all contracts, franchises, etc., free of and from all liens and incumbrances; and said W. F. Mayhon hereby, in consideration of the purchase price aforesaid, agrees to warrant and defend the title to the property above contracted to be conveyed against all liens and incumbrances, and agrees to defray the expenses of all litigation arising concerning any contest of the title to said property.'

"On June 27, 1911, to secure the issue of $100,000 of 'first mortgage 6 per cent. refunding gold bonds,' the Stearns Company executed and delivered to the First National Bank of Ludington, Mich., as trustee, a deed of trust covering all of its property, including 'the transmission line of the Interurban Electric Lighting & Power Company, extending from Hamlin Dam, in Mason county, Mich., to Pentwater, and thence toward Hart, Oceana county, Mich.' A corrected draft or redraft of this deed of trust was executed by the Stearns Company to the First National Bank of Ludington, Mich., dated July 1, 1911, and was filed in the office of the city clerk of Ludington on August 29, 1911, and was recorded in the office of the register of deeds of Mason county on October 18, 1911. Thereafter the First National Bank of Ludington resigned as trustee, and upon the nomination of certain holders of the bonds secured by the trust deed the defendant William L. Hammond was appointed successor trustee.

"After the execution of the contract of sale dated May 12, 1911, the Stearns Company entered upon the rights of way and premises where the electrical transmission line of the Interurban Company was located and tore down and removed and dismantled certain portions thereof. The line running south from Ludington was removed from the Lake or Valley road (so called), which runs within a short distance from the shore of Lake Michigan, farther east to the state road (so called). The line was so changed between Ludington on the north and a point on the south, which is a short distance north and west of Pentwater. The line from Pentwater to Hart was completed with poles and wires taken from the line above Ludington. The line of towers, poles, and wires (except a few poles) between Hamlin Dam and Ludington was torn down and dismantled. These poles, towers, and wires were largely used to erect a new line of poles and wires for the Stearns Company, running east from Ludington to Scottville and Butters. The steel towers which conveyed the wires through the city of Ludington were taken down and removed to the south part of Ludington and used upon the line of the Stearns Company running easterly from its plant. On November 14, 1911, W. F. Mayhon and his wife executed and delivered to complainants a quitclaim deed of all

the property of the Interurban Company which he had purchased from the receiver of that company. In that deed the property conveyed is described substantially as in complainant's mortgage.

"At the hearing, complainants produced and introduced in evidence the 50 bonds, with interest coupons attached, payment of which was secured by their mortgage or trust deed. Oral testimony was given by several witnesses, and documentary evidence was introduced bearing upon the questions of the good faith of the Stearns Company, the value of the property purchased by it from Mayhon, and the knowledge or information of its officers as to complainants' mortgage.

"Complainants ask: (1) That their mortgage be decreed to be a valid first lien upon all the property described therein, and also upon all the property of the Stearns Company, with which it has been so intermingled as to be incapable of identification; (2) that they be given a personal decree against all of the defendants, except William L. Hammond, for the amount found to be due upon their mortgage; and (3) that their mortgage be foreclosed in the usual manner. Defendants deny that complainants are entitled to any relief."

The District Court held that the trustee's mortgage title was good against the Stearns Company, that the mortgaged property taken and mingled with its own by the Stearns Company was worth $16,000, and directed the enforcement of the mortgage lien against all the commingled property unless the Stearns Company should redeem by paying this amount. The Stearns Company and its mortgage trustee, Hammond, appealed.

Charles McPherson, of Grand Rapids, Mich., for appellants.

P. B. Eckhart, of Chicago, Ill., and W. F. Keeney, of Grand Rapids, Mich., for appellees.

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

PER CURIAM. [1] The power plant and generating machinery of the Interurban Company, to which the transmission line in question was annexed and with which it was physically connected, was situated upon real estate held by that company under lease for 25 years from January 1, 1909. The mortgage expressly covered this leasehold interest. Under the settled law of Michigan the Interurban Company's interest in the real estate (being held under lease for 3 years and upwards) is governed by the laws regulating the recording of conveyances of real estate. Howell's Mich. Stat. (2d Ed.) § 10856; Crouse v. Michell, 130 Mich. 347, 357, 90 N. W. 32, 97 Am. St. Rep. 479. The mortgage was duly recorded as a mortgage on real estate, and the record was constructive notice to subsequent purchasers of the existence and contents of the mortgage. Godfroy v. Disbrow, Walker's Ch. (Mich.) 260. With this premise, we adopt the opinion of the District Court upon the main controversy in the case, as follows:

"The first and most important question to be determined relates to the character of the property purchased and acquired by the Stearns Company from W. F. Mayhon. Was the electrical transmission line, belonging to the Interurban Company and covered by complainants' mortgage, real estate or personal property? If it was real estate, the other questions which have been elaborately presented and discussed become of little or no importance, because it is conceded that complainants' mortgage was duly executed and recorded as a real estate mortgage, and, as to all subsequent creditors, purchasers, or incumbrancers, became and continued to be a valid first lien upon all the real estate then owned or afterwards acquired by the Interurban Company. Recognizing the controlling importance of this question, counsel upon both sides, with commendable zeal and industry, have collected and re-

viewed a great many cases bearing upon the various phases of the subject. A careful and painstaking examination of the authorities cited leads to the conclusion that an electrical transmission line, constructed, connected, and situated as was this one, must be classed as real estate and not as personal property. It was a necessary and integral part of the electric plant. It was physically connected with and annexed to the power plant and generating machinery, which it must be conceded were real estate. Without the transmission line the entire property would have been valueless for the purposes for which it was constructed and created. Its construction and annexation were intended to be permanent. It could not be severed from the rest of the plant or machine without not only impairing but destroying the whole. It thus contained and combined in itself all of the elements and attributes of a fixture or appurtenance to real estate. A few of the many cases so holding are the following: Dreisbach v. Ross, 195 Pa. 278 [45 Atl. 722]; Hughes v. Lambertville Electric Light Co., 53 N. J. Eq. 435 [32 Atl. 69]; Fecht v. Drake, 2 Ariz. 239 [12 Pac. 694]; Badger Lumber Co. v. Marion Co., 48 Kan. 182 [29 Pac. 476, 15 L. R. A. 652, 30 Am. St. Rep. 301]; Keating Implement Co. v. Marshall Elec. Light Co., 74 Tex. 605 [12 S. W. 489]; Southern Elec. Supply Co. v. Rolla Elec. Light Co., 75 Mo. App. 622; Metropolitan Trust Co. v. Dolgeville Elec. Light Co. [35 Misc. Rep. 467], 71 N. Y. Supp. 1055; Tippett & Wood v. Barham, 180 Fed. 76 [103 C. C. A. 430, 37 L. R. A. (N. S.) 119]; Appeal of Des Moines Water Co., 48 Iowa, 324.

"It is doubtless true that some of the courts have seemingly announced a different doctrine. A review of these decisions would be of no benefit to any one. It is sufficient to say that, upon careful examination, it will be found that such cases can usually, if not always, be distinguished from the present one. In some instances the language of the court is mere dictum; in others it must be considered solely in its application to special statutes which create and contain in themselves artificial and arbitrary distinctions and definitions not found or permissible elsewhere; and in still others it is employed to negative the contention that electric light poles and wires and similar property are a part of the real estate upon which they are situated. Readfield Tel. & Tel. Co. v. Cyr, 95 Me. 287 [49 Atl. 1047]; Dunsmiur v. Electric Light Co., 24 Wash. 104 [63 Pac. 1095]; Railway Co. v. Western Union Co., 118 Fed. 497 [55 C. C. A. 263]; Shelbyville Water Co. v. Illinois, 140 Ill. 545 [30 N. E. 678, 16 L. R. A. 505]; Union Loan & Trust Co. v. Motor Road Co. (C. C.) 51 Fed. 840; People v. Feitrier [99 App. Div. 274] 90 N. Y. Supp. 904; People v. Hendrickson, 109 N. Y. S. 402; Portland v. Telephone Co., 103 Me. 240 [68 Atl. 1040].

"Having reached the conclusion that the electrical transmission line covered by complainants' mortgage and afterwards conveyed to the Stearns Company was real estate, an extended discussion of the other questions presented would be profitless, and they may be disposed of very briefly."

[2] The transmission line having been appurtenant to an interest in real estate when the Interurban Company's mortgage attached thereto and when notice thereof was given by its recording, the effect thereof upon the rights already fixed under it was not defeated by the fact that when Mayhon sold to the Stearns Company the power and generating plant was unoperated and inoperative, and was not included in that sale, nor by the fact that the lease had been declared forfeited for nonpayment of rent, inferably after Mayhon's purchase.

The proposition that McMullin was not a good faith purchaser of the bonds in question is not sustained by the record. At the time of the conveyance by Mayhon to the Stearns Company the former was the owner of $17,500 of the bonds secured by the trust mortgage in suit, and his warranty that the property was free from incumbrance doubtless operated to give the Stearns Company an equitable title to these bonds as against Mayhon. The bonds, however, were negotiable.

Mayhon retained their physical custody, and later, in violation of his agreement with the Stearns Company, transferred them to McMullin, who took them without notice of the Stearns claim and in good faith paid Mayhon therefor. The trustee is clearly entitled to enforce them for McMullin's benefit.

We have considered the remaining criticisms upon the decree, and think them without merit.

The decree appealed from is in our opinion correct, and is affirmed, with costs.

On Petition for Rehearing.

[3] In our opinion filed June 8th instant, in discussing appellant's contention that McMullin was not a good faith purchaser of the $17,500 of the bonds in question, after stating that at the time of Mayhon's conveyance to the Stearns Company the former was the owner of these bonds, and his warranty that the property was free from incumbrance doubtless operated to give the Stearns Company an equitable title to the bonds as against Mayhon, we said:

"The bonds, however, were negotiable. Mayhon retained their physical custody, and later, in violation of his agreement with the Stearns Company, transferred them to McMullin, who took them without notice of the Stearns claim and in good faith paid Mayhon therefor."

It is urged that the bonds in question were delivered by Mayhon to McMullin after the Stearns Company had acquired and paid for the transmission line, and only as collateral security for debts created previous to the time the Stearns Company acquired its rights, and that "since the Stearns Company became the equitable owner of the bonds" McMullin has parted with nothing of value, nor "surrendered or postponed any rights which he possessed to obtain possession of the bonds." The record shows that, prior to Mayhon's contract with the Stearns Company, McMullin had acquired an equitable right to the bonds as collateral security for a debt resulting from a prior canceled contract for the purchase by McMullin from Mayhon of the Interurban Company's properties; that after Mayhon's transaction with the Stearns Company the former delivered physical possession of the bonds to McMullin. The situation thus is that, as opposed to McMullin's legal right to the bonds, the Stearns Company has only an equity, and that this equity is later than and subordinate to McMullin's equity. The fact that some of the bonds were past due is immaterial, as McMullin's equity does not depend upon their negotiability. While, therefore, the statement in our opinion regarding Mayhon's payment for the bonds is not strictly accurate, the result reached was correct.

The petition for rehearing is denied.

BAER GROCER CO. v. BARBER MILLING CO.

(Circuit Court of Appeals, Fourth Circuit. May 6, 1915.)

No. 1293.

1. SALES ⇐382—BREACH OF CONTRACT—ACTIONS—EVIDENCE—ADMISSIBILITY.
In an action for breach of contract to buy flour, there was evidence that the buyer called for shipments for a while, and then countermanded its order because the flour was not satisfactory to its customers. The buyer introduced evidence that during the running of the contract the flour was not good, that a short time before the contract the seller changed its millers and employed new men, and changed the grade and quality of the wheat used, and that the buyer received many complaints from its retail customers as to the flour. *Held*, that evidence in rebuttal that during the running of the contract only the buyer complained of the quality of the flour furnished, though, in the same immediate section of the country, the seller sold as much as 38,000 barrels of the same quality and kind, was admissible to show that there had been no deterioration in the flour, either by the change of employés or of the quality of the wheat used, and to throw light on whether a decline in the price of flour might not have influenced the buyer in countermanding its order.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1096; Dec. Dig. ⇐ 382.]

2. SALES ⇐119, 425—CONTRACTS—REMEDY OF BUYER.
A buyer of 5,000 barrels of flour in bulk, who accepted and paid for 1,650 barrels, 1,035 whereof were received after alleged complaints from retail customers as to the quality of the flour, and after complaints had ceased and the buyer had made inquiries as to other purchases of flour, could not rescind the contract because of alleged defect in the quality of some of the flour furnished; but his remedy, if any, was by way of offset or recoupment from the price, or by suit for breach of contract.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 293, 1207, 1208; Dec. Dig. ⇐ 119, 425.]

3. SALES ⇐260, 262½—CONTRACTS—CONSTRUCTION—WARRANTY.
A seller of flour specified as "White Satin Flour" to a buyer for resale under its trade brand of "Royal Blue," in its own sacks so stamped, did not expressly or impliedly warrant that the White Satin flour should be satisfactory to the buyer's customers.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 719–726, 740–748; Dec. Dig. ⇐ 260, 262½.]

4. SALES ⇐446—CONTRACTS—BREACH—ACTIONS—EVIDENCE—INSTRUCTIONS.
An instruction, in an action for breach of contract to buy flour for resale, relating to an implied warranty of the seller, in the absence of an inspection by the buyer, that the flour was salable and merchantable, and, when found not to be, that the buyer could rescind, was properly refused for failing to consider that the alleged defect in quality consisted, not in the flour measuring up to the grade specified in the contract, but because it did not meet the demands of the buyer's customers under its trade-name, and failed to recognize that the seller's liability was measured by what it contracted to furnish, and not by the demands of the buyer's customers.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1309–1317; Dec. Dig. ⇐ 446.]

5. TRIAL ⊂260 — INSTRUCTIONS — REFUSAL OF INSTRUCTIONS COVERED BY CHARGE GIVEN.

It is not error to refuse instructions covered by instructions given, which fully and fairly submit the case as favorably as the party requesting instructions could ask.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651–659; Dec. Dig. ⊂260.]

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

Action by the Barber Milling Company against the Baer Grocer Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

J. B. Handlan, of Wheeling, W. Va., for plaintiff in error.

Joseph R. Curl and John C. Palmer, Jr., both of Wheeling, W. Va. (William Erskine, of Wheeling, W. Va., and William Furst, of Minneapolis, Minn., on the brief), for defendant in error.

Before KNAPP and WOODS, Circuit Judges, and WADDILL, District Judge.

WADDILL, District Judge. This is a writ of error to the judgment of the United States District Court for the Northern District of West Virginia, rendered 14th of May, 1914, in an action at law pending in said court, wherein the plaintiff in error (hereinafter called the defendant) was defendant, and the defendant in error (hereinafter called the plaintiff) was plaintiff.

The cause of action arose out of a breach of a contract entered into on the 12th day of September, 1910, whereby the defendant purchased from the plaintiff 5,000 barrels of White Satin flour in bulk, at the price of $5.20 per barrel, the same to be delivered as called for by the defendant. Defendant was to furnish sacks in which the flour was to be shipped under its trade-name of Royal Blue flour, being a brand for which it had secured an extensive trade. Sacks were furnished, and shipments made from time to time, between September, 1910, and the 10th of March, 1911, when the defendant, after having called for shipments aggregating 1,650 barrels, running through the months of September, October, November, and December, 1910, and January, February, and March, 1911, declined to accept the balance of the flour, and countermanded its order for the residue of 3,350 barrels, on the alleged ground that the flour did not prove satisfactory to its customers. At the time of the attempted cancellation of this contract, the price of flour had fallen on the market from $5.20 to $4.60, a difference of 60 cents per barrel, amounting to $2,100. This action of assumpsit was thereupon instituted to recover this balance claimed to be due on account of the breach of contract, with interest from March 10, 1911.

The defendant denied liability for the indebtedness, and in addition set up by two special pleas the defense (1) that it had been damaged in a sum equal to the amount of plaintiff's claim, by losses sustained to its business because of the failure of the plaintiff to furnish flour equal to that of the Royal Blue standard theretofore sold by the defend-

ant to its customers, which said plaintiff undertook to do; and (2) that the plaintiff warranted that the flour sold to the defendant was sound, merchantable, reasonably fit for use, and of the very best quality, and the defendant averred the breach of said warranty, and claimed that it had been damaged to the extent of $2,100, with interest from 10th of March, 1911.

Upon these pleadings the case was tried in the court below by a jury, a large number of witnesses on the opposing sides introduced, and a verdict rendered for the full amount claimed, with interest, in favor of the plaintiff, from which this writ of error is sued out. The assignments of error relate to the ruling of the court below in the admission of certain testimony hereinafter mentioned, over the objection of the defendant, to the refusal of the court to give three instructions asked for by the defendant, to the charge as given by the court, and to the entry of judgment on the verdict of the jury against the defendant. These assignments will be considered in the order named.

[1] The first relates to the admission by the court of evidence of certain witnesses, offered by the plaintiff in rebuttal, to prove that during the period of the running of this contract only the defendant complained of the quality of the flour furnished, although in the same immediate section of the country plaintiff had sold as much as 38,000 barrels of the same quality and kind. This testimony was offered in rebuttal after the defendant had introduced evidence to the effect that it had bought flour from the plaintiff during a period of some eight or ten years, which had always proven satisfactory, and that during the running of this contract it was not good; and it further sought to show that, a short time before entering into this contract, plaintiff had changed its millers, and employed new men, and had changed the grade and quality of the wheat used in making its White Satin flour, and that the defendant had received numerous complaints from its retail customers, throughout the Wheeling district, in reference to the flour purchased from the plaintiff.

This testimony in rebuttal was manifestly proper, as controverting the questions of fact thus raised by the defendant, with a view of showing that there had been no deterioration in the quality of the flour, either by reason of the change in employés, or because of the quality of the wheat used; and the fact that the complaints were confined to this particular customer was material from another point of view, as tending to throw light on whether the decline in the price of wheat at and about the time in question may not have influenced the action of the defendant in seeking to avoid its contract, rather than the lower quality of the flour furnished. Ames v. Quimby, 106 U. S. 342, 347, 348, 1 Sup. Ct. 116, 27 L. Ed. 100; Mayes v. McCormick Harvester Machine Co., 110 Ga. 545, 35 S. E. 714; Pike v. Fay, 101 Mass. 134.

[2] The action of the lower court upon the instructions asked for by the defendant, as well as in its charge as given, should be considered in the light of the law applicable in this case; and in this connection it may be said that the defendant was liable under the provisions of this contract to pay for the entire flour bought, because of the acceptance

of various installments thereunder, and its refusal earlier to repudiate the same. The effort is made to avoid the contract after the acceptance of and payment for 1,650 barrels of flour, 1,035 whereof were received by the defendant between November 10, 1910, and March 3, 1911, after the alleged complaint regarding the quality of the flour was received, and after complaints concerning the same had been discontinued, and defendant had made inquiries respecting other purchases of flour.

The defendant, after thus ordering the flour under its contract, and continuously for some months receiving the same thereunder, ought not in good faith and fair dealing, having partly performed the contract, to be permitted to rescind the same at its option, because of the alleged defect in the quality of some of the flour furnished. Its remedy, if any, under such circumstances, would be by way of offset or recoupment from the purchase money, or a suit for damages for breach of the contract. Lyon v. Bertram, 20 How. 149, 15 L. Ed. 847; Clark v. Wheeling Steel Works, 53 Fed. 494, 3 C. C. A. 600; Harding, Whitman & Co. v. York Knitting Mills (C. C.) 142 Fed. 228; McDonald v. Kansas City Bolt & Nut Co., 149 Fed. 360, 79 C. C. A. 298, 8 L. R. A. (N. S.) 1110; J. W. Ellison & Co. v. Flat Top Grocery Co., 69 W. Va. 380, 71 S. E. 391, 38 L. R. A. (N. S.) 539.

[3] The plaintiff's liability respecting the quality of the flour in question is to be determined by the contract between the parties, which in terms specified "White Satin flour." This was a high grade of fancy patent flour, and although the defendant purchased this flour to be sold under its trade brand of "Royal Blue," in its own sacks so stamped, which the plaintiff understood, still, there was no warranty, express or implied, on the part of the plaintiff, that its White Satin flour should be satisfactory to the defendant's customers. The case falls within the class of the purchase of described, known, and definite articles, from a manufacturer, with knowledge of the purpose for which the purchase was made; and if the known, described, and defined thing be actually furnished, and the same is of merchantable character, there is no warranty that it will answer the particular purpose intended by the buyer; and under such circumstances, clearly in the absence of express warranty or fraud, no liability would attach to the seller for the failure of the article supplied to meet the requirements of the defendant's customers—that is, either what sellers of the brand desired, or customers demanded. Dewitt v. Berry, 134 U. S. 306, 313, 10 Sup. Ct. 536, 33 L. Ed. 896; Seitz v. Brewers' Machine Co., 141 U. S. 510, 518, 12 Sup. Ct. 46, 35 L. Ed. 837; Grand Avenue Hotel Co. v. Wharton, 79 Fed. 43, 22 C. C. A. 441 and cases cited; Frederick Mfg. Co. v. Devlin, 127 Fed. 71, 62 C. C. A. 53; Davis Calyx Co. v. Mallory, 137 Fed. 332, 69 C. C. A. 662, 69 L. R. A. 973; Mason v. Chappell, 15 Grat. (Va.) 572; Williston on Sales, §§ 236, 241, 242; Benjamin on Sales (7th Ed., Bennett's), pp. 661, 691; also note to 15 L. R. A. (N. S.) 859, 884.

[4] The three instructions offered by the defendant and referred to in the assignments of error relate (1) to an implied warranty on the part of the plaintiff, in the absence of an inspection of the goods purchased by the defendant, that such flour was salable and merchant-

able, and, when found not to be, that the defendant was justified in rescinding the contract; (2) to the consequences of the failure of the plaintiff to furnish defendant with flour of first-class quality; and (3) to the burden of proof being on the plaintiff to show that it furnished, and was ready and offered to furnish, flour of the quality purchased. To the proposition involved in the first instruction, we are not prepared to give our assent under the facts of this case. It failed to take into account that the alleged defect in quality consisted not in the flour measuring up to high grade White Satin flour of the character purchased, but because it did not meet the demands of defendant's customers under its Royal Blue brand; and it also failed to recognize that plaintiff's liability was measured by what it sold and contracted to furnish, and not by the demands of the defendant's customers.

[5] Instructions Nos. 2 and 3, while not objectionable within themselves, are fully met and covered by the charge as given by the court, which, in the judgment of this court, fully and fairly submitted the case to the jury, and quite as favorably, as to the law thereof, as the defendant could possibly have asked. Indeed, the court would have been warranted in taking the case from the jury, the defendant having no right at that stage to rescind the contract, and the measure of damages not being in dispute.

We find no error in the ruling of the lower court, either in the admission of testimony, or in its rulings upon the instructions, and the case having been fairly submitted to the jury upon testimony, much of which was conflicting, the verdict in favor of the plaintiff was fully and amply sustained by the testimony, and should not be disturbed.

The lower court's action will therefore be affirmed, at the cost of the plaintiff in error.

PIEDMONT CAROLINA RY. CO. et al. v. SHAW.

(Circuit Court of Appeals, Fourth Circuit. May 4, 1915.)

No. 1302.

1. BILLS AND NOTES ⇐341—BONA FIDE PURCHASERS—FACTS PUTTING UPON INQUIRY.

A newly organized railway company entered into a construction contract, agreeing to advance to the contractor for engineering work $5,000, and the contractor agreed to procure for the railway company a loan of $75,000 on its note indorsed by its promoters. Plaintiff was then the president of a trust company, and advised the promoters to give a note, which was given by the railway company for a part of such engineering expenses, assuring them that the deal would go through. He subsequently purchased the note for value after receiving reports as to the financial condition of the promoters which he knew would lead his company to refuse to accept their indorsement for the $75,000. The enterprise fell through from failure to raise the $75,000 on the promoters' indorsement. Plaintiff, when the note purchased by him was given, had faith in the enterprise, and at that time a good part of the engineering work had been done. Pell's Revisal N. C. 1908, § 2205, provides that, to constitute notice of an infirmity in a negotiable instrument or a defect in the title of the person negotiating it, the purchaser must have had actual knowledge of the infirmity, or of such facts that his action in tak-

ing the instrument amounted to bad faith. *Held*, that plaintiff was a purchaser in good faith, as his assurance to the promoters did not make him a guarantor or surety for the contractor, and knowledge of the nature of the consideration, or that the consideration is something to be done in the future, does not affect the title of the holder of a promissory note, nor put him upon inquiry as to whether the consideration has failed.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 829; Dec. Dig. ⊂⊃341.]

2. BILLS AND NOTES ⊂⊃482—ACTIONS—PLEADING—ADMISSIONS—"PROTEST."

In an action on a note, the complaint alleged that when the note fell due it was promptly presented to the defendants and payment demanded in the regular course of business, and that, when the defendants refused to honor or pay it, it was promptly and properly protested for nonpayment against the makers and indorsers. The answer denied this paragraph of the complaint, except that it admitted "that said note was protested for nonpayment," and it expressly denied that the note was ever presented to the indorsers, that notice of dishonor was given to the indorsers, and that presentment was made by the holder or any person authorized to receive payment, or that notice was given to the indorsers by or on behalf of any party to the note who might be compelled to pay it to the holder, and who would have a right to reimbursement from the party to whom notice was given. *Held*, that the answer admitted presentment of the note to the maker and a refusal to pay, especially as the specific denial of presentment was limited to the denial of presentment to the indorsers, since, while a "protest" is, strictly speaking, only a formal declaration executed by the notary, the notary could not "properly" make such declaration without presentment, and moreover the word "protest," in its usual sense, implies due presentation and notice of nonpayment.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1533, 1562; Dec. Dig. ⊂⊃482.

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

3. BILLS AND NOTES ⊂⊃420—NOTICE OF DISHONOR—SUFFICIENCY OF NOTICE.

Pell's Revisal N. C. 1908, § 2240, provides that notice of dishonor of a negotiable instrument may be given by or on behalf of the holder, or any party who might be compelled to pay it to the holder, and who upon taking it up would have a right to reimbursement from the party to whom notice is given. Section 2243 provides that, when notice is given by or on behalf of a party entitled to give notice, it inures to the benefit of the holder and all parties subsequent to the party by whom notice is given. *Held* that, where a bank holding a note for collection gave verbal notice of dishonor to one of the indorsers, and all of the indorsers discussed the matter among themselves and determined to refuse payment, the notice was sufficient, as the indorsers notified each other, and this notice inured to the benefit of the holder; each of the indorsers having a right to a measure of reimbursement from the others.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1138–1140; Dec. Dig. ⊂⊃420.]

4. COURTS ⊂⊃322—UNITED STATES COURTS—JURISDICTION—ALLEGATIONS AS TO JURISDICTION.

In an action on a note by an indorsee thereof, brought in the Western district of North Carolina, an allegation that the note was given to the I. Co., a corporation duly chartered, organized, and existing under the laws of Delaware, sufficiently showed that the I. Co. could have brought the suit in the federal court on the ground of diversity of citizenship.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 876–881, 887; Dec. Dig. ⊂⊃322.]

5. COURTS ⇐323—UNITED STATES COURTS—JURISDICTION—PROOF.
Where, in an action by an indorsee of a note brought in the Western district of North Carolina, the complaint alleged that the note was given to the I. Co., a corporation organized under the laws of Delaware, an admission by stipulation of the articles of incorporation, and the due incorporation and existence of the corporation, was an admission that it existed under the laws of Delaware and was a citizen of that state, and showed diversity of citizenship, as the whole record may be looked into to determine the question of jurisdiction.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 885, 886; Dec. Dig. ⇐323.

Diverse citizenship as a ground of federal jurisdiction, see notes to Shipp v. Williams, 10 C. C. A. 249; Mason v. Dullagham, 27 C. C. A. 298.]

In Error to the District Court of the United States for the Western District of North Carolina, at Greensboro; James E. Boyd, Judge.

Action by Leslie M. Shaw against the Piedmont Carolina Railway Company and others. Judgment for plaintiff, and defendants bring error. Affirmed.

Thomas J. Jerome, of Greensboro, N. C., and A. H. Price, of Salisbury, N. C., for plaintiffs in error.

A. L. Brooks, of Greensboro, N. C. (Brooks, Sapp & Williams and G. S. Bradshaw, all of Greensboro, N. C., on the brief), for defendant in error.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

WOODS, Circuit Judge. [1] The main question to be decided is whether the evidence justified the instruction of the District Judge to the jury to find a verdict for the plaintiff in this suit of Leslie M. Shaw, indorsee, against the Piedmont Carolina Railway Company, maker, and W. F. Snider, T. H. Vanderford, Sr., M. L. Jackson, and Thomas J. Jerome, indorsers of a promissory note given to the Interurban Company for $3,000 on September 21, 1909, due three months after date.

The production of the note by the plaintiff duly indorsed entitled him to recover, unless there was material evidence supporting some legal defense. The indorsers were promoters of an electric railway which they planned to have constructed from Spencer, N. C., to Concord, N. C. On August 12, 1909, this railway, incorporated in North Carolina under the name of Piedmont Carolina Railway Company, made a contract for the construction of the road with the Interurban Company, a Delaware corporation, as contractor. The stipulations here involved are as follows:

"The contractor shall commence engineering work not earlier than the 1st day of September, 1909, nor later than the 10th of said month, and shall prosecute the same vigorously and without unnecessary interruption, and shall prepare duplicate copies of specifications and estimates, and shall deliver one of said copies to the railroad company as soon as the same are prepared.

"Said railroad company will advance to the contractor for the engineering work necessary for the preparation of the estimates and specifications the

sum of $5,000 September 15, 1909, and the balance upon delivery to the railroad company of the location, estimates, and specifications.

* * * * * * * * * *

"The contractor agrees to procure for the said railroad company a loan of $75,000 for a period of six months, with agreements for renewal, so that the final renewal shall extend the date of payment to a period at least six months after the said road is completed and placed in operation, the said loan to be secured by the note of the railroad company, indorsed by W. F. Snider, T. H. Vanderford, M. L. Jackson, and Thos. J. Jerome, and there shall be pledged as collateral security for the payment of said note $100,000 at par of the first mortgage bonds of said railroad company."

The railway company paid in cash $2,000 for the preparation of the estimates and specifications, and gave the indorsed note in suit for $3,000, the remainder of the $5,000 promised for that purpose. The note was indorsed to Shaw for full value on November 8, 1909. At the time the construction contract was made Shaw was president of the First Mortgage Guarantee & Trust Company of Philadelphia and was desirous that his company should finance the railway enterprise. The Interurban Company failed to construct the road, and after negotiations with several parties in the effort to discount the $75,000 note indorsed by the promoters and secured by $100,000 of bonds, the entire enterprise fell through. On the part of the defendant indorsers of the note in the suit there was evidence tending to prove (1) that the plaintiff, Shaw, earnestly advised them to give the note, assigning as a reason that capitalists would not invest until satisfied that interested parties had paid for the location, estimates, and specifications; (2) that he assured them, at the same time, that the deal would go through, that the road would be built, and they would be reimbursed for the amount in the manner provided in the construction contract; (3) that Shaw bought the note after he had received reports as to the financial condition of the promoters who were to indorse for $75,000, which he knew would lead his trust company to refuse to accept their indorsement for the $75,000 necessary for the construction of the railway.

Assuming all this to be true, and leaving out of view any evidence to the contrary, we do not think it would constitute a valid defense to the note. The North Carolina statute provides:

"2205. Actual Knowledge Necessary to Constitute Notice of Infirmity. To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same the person to whom it is negotiated must have had actual knowledge of the infirmity or defect or knowledge of such facts that his action in taking the instrument amounted to bad faith." Pell's Revisal, § 2205.

The rule is familiar that knowledge of the nature of the consideration or that the consideration is something to be done in the future does not affect the title of the indorser of a promissory note nor put upon him the duty to inquire whether the consideration has failed. Sampson v. Hatcher, 151 N. C. 359, 66 S. E. 308; Bank v. Badham, 86 S. C. 170, 68 S. E. 536, 138 Am. St. Rep. 1043; Markey v. Corey, 108 Mich. 184, 66 N. W. 493, 36 L. R. A. 117, 62 Am. St. Rep. 698; Bank of Sherman v. Apperson (C. C.) 4 Fed. 25; Taylor v. Curry, 109 Mass. 36, 12 Am. Rep. 661. The statute of North Carolina ex-

presses the doctrine thus laid down in Hotchkiss v. National Banks, 88 U. S. (21 Wall.) 354, 22 L. Ed. 645:

"The law is well settled that a party who takes negotiable paper before due for a valuable consideration, without knowledge of any defect of title, in good faith, can hold it against all the world. A suspicion that there is a defect of title in the holder, or a knowledge of circumstances that might excite such suspicion in the mind of a cautious person, or even gross negligence at the time, will not defeat the title of the purchaser. That result can be produced only by bad faith, which implies guilty knowledge or willful ignorance, and the burden of proof lies on the assailant of the title."

There is no charge and no evidence of bad faith on the part of Shaw. On the contrary, the evidence leaves no doubt that when the note was given Shaw had faith in the enterprise and believed the contracting company would be able to secure the funds and build the road. His alleged verbal assurance that if the promoters would give the note the funds could be raised and the road would be built was not and could not have been regarded a legal obligation to become a guarantor or a surety for the contractor. It was not fraudulently made, for the evidence on both sides indicates his confidence in the enterprise. These statements, if made, were not in law or morals anything more than the expression of a strong conviction that the enterprise would succeed. Having assumed no legal obligation as an inducement to the indorsement, and having acted in good faith, such an expression in connection with the giving of the note could not under the law prevent his acquiring the note as an indorser for value.

It is true that there was evidence tending to show that the plaintiff at the time he acquired the note must have been practically certain that his trust company would not undertake to finance the road for the Interurban Company, for the reason that information received about the indorsers of the $75,000 note was not satisfactory; but it does not appear that he knew the engineering work for which the note was given had not been done, or that the contract for the construction of the road had fallen through. The uncontradicted evidence shows that a good part of the engineering work had been done, that the Interurban Company was still making efforts to finance the scheme, and that the railway company, through its promoters, made another contract with the Interurban Company to construct the road, on September 12, 1910, ten months after the note had been indorsed to the plaintiff. Under these indisputable facts, and the law applicable thereto, the conclusion is unavoidable that the note was acquired in good faith before maturity.

[2] The position is taken that the indorsers were discharged for lack of presentment, in that the statute requires presentment at maturity, and there was evidence that this note was due December 21st and payment was not demanded until December 22d, and then improperly over the telephone. We think the answer admits presentment to maker and refusal to pay. The fifth paragraph of the complaint alleges:

"That when the said note or bond fell due the same was promptly presented to the defendants and payment demanded in the regular course of business by the People's National Bank of Salisbury, N. C., and that when

the said defendants refused to honor or pay the said note or bond the same was promptly and properly protested for nonpayment before W. T. Busby, a notary public, against the makers and indorsers of the same."

In response the answer contains these allegations:

"That the fifth paragraph of the complaint is not true, and the same is denied, except that it is admitted that said note was protested for nonpayment."

"It is expressly denied that said note was ever presented for nonpayment to the indorsers, Thomas L. Jerome, W. F. Snider, T. H. Vanderford, and M. L. Jackson, and it is denied that notice of dishonor or nonpayment of said note was given to the said indorsers, and it is especially denied that presentment for payment of said note was made by the holder of the same, or by any person authorized to receive payment on behalf of any holder of the same, or that notice was given to the indorsers of said note, by or on behalf of any party to the said note who might be compelled to pay it to the holder, and who, upon taking it up, would have a right to reimbursement from the party to whom notice is given."

It is true that a protest is, strictly speaking, only a formal declaration executed by the notary; but the notary could not "properly" make such declaration without presentment. Besides, the word "protest" in its usual sense implies due presentation and notice of nonpayment. Daniel on Negotiable Instruments, 926; White v. Keith, 97 Ala. 668, 12 South. 611; Wood River Bank v. First National Bank, 36 Neb. 744, 55 N. W. 239; Ayrault v. Bank, 47 N. Y. 570, 7 Am. Rep. 489; Sprague v. Fletcher, 8 Or. 367, 34 Am. Rep. 587. This view of the scope of the admission embraced in the admission of protest is made clearer by the fact that the specific denial of presentment is limited to denial of presentment to the indorsers.

[3] As to the notice of dishonor it was sufficient to give it the day following the day of presentment (Pell's Revisal, §§ 2253, 2254); and "the notice may be given by or on behalf of the holder or by or on behalf of any party to the instrument who might be compelled to pay it to the holder, and who upon taking it up would have a right to reimbursement from the party to whom notice is given." Pell's Revisal, § 2240.

The evidence shows conclusively that the indorsers controlled the corporate maker of the note, that they discussed the matter among themselves and determined to refuse payment, that one or more of them received from the bank holding the note for collection as agent of the holder verbal notice that the note had been dishonored, and that all the indorsers spoke together about the matter, thus notifying each other. This notice from indorsers to each other was sufficient, since any one of them, compelled to pay the holder, would have had a right to a measure of reimbursement from the others. The notice from the indorsers to each other inured to the benefit of the holder. Pell's Revisal, § 2243.

[4, 5] At the argument in this court a motion was made to dismiss the action for want of jurisdiction, in that it does not appear by direct averment that the Interurban Company, the payee, could have brought suit in the federal court on the ground of diversity of citizenship. The motion must be refused, since it is distinctly averred in the complaint that the note was given to "the Interurban Company,

a corporation duly chartered, organized and existing under and by virtue of the laws of the state of Delaware," and the articles of incorporation, and the due incorporation and existence of the corporation, were admitted by stipulation. This meant an admission that the corporation was chartered and existed under the laws of Delaware, and was therefore a citizen of that state. The whole record may be looked into to determine the question of jurisdiction. Sun Co. v. Edwards, 195 U. S. 377, 24 Sup. Ct. 696, 48 L. Ed. 1027; Anderson v. Watt, 138 U. S. 694, 11 Sup. Ct. 449, 34 L. Ed. 1078.

Affirmed.

CITY BANK OF WHEELING v. RHODEHAMEL.

(Circuit Court of Appeals, Fourth Circuit. May 27, 1915.)

No. 1305.

1. CORPORATIONS ⇐118—SALE OF STOCK—WAIVER OF RIGHTS BY BUYER.

Plaintiff claimed that he purchased certain stock from defendant, and that on tender of payment of his note for the price defendant refused to deliver the stock. Defendant contended that the stock was claimed by W.'s assignee, that plaintiff arranged with it not to deliver the stock to such assignee until the determination of a suit by the assignee, and that plaintiff's note was delivered to indemnify it on account of this arrangement. Plaintiff wrote a letter, in answer to one from defendant, stating that his understanding was that he bought the stock, but that he presumed it would do no damage "to be held as you say until after the court passes on the W. matter." *Held*, that this letter was not a waiver or modification of plaintiff's claim of ownership by a purchase of the stock, and was no defense to an action against defendant for conversion of the stock.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 497, 498; Dec. Dig. ⇐118.]

2. ESTOPPEL ⇐77—ESTOPPEL TO DENY TITLE.

While a plaintiff, suing for conversion, must prove title and right of possession, where plaintiff purchased corporate stock from defendant, who claimed to own it, defendant, when sued for conversion thereof, was estopped to deny plaintiff's title.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 198–203; Dec. Dig. ⇐77.]

3. JUDGMENT ⇐678—CONCLUSIVENESS—MATTERS AND PERSONS CONCLUDED.

W. pledged stock as collateral security for borrowed money, and on October 7th made an assignment. The assignee on October 15th brought a suit, alleging that there were conflicting claims to the stock pledged, and that R. claimed and represented that he was the owner of certain stock, part of which was pledged to the C. Bank and had demanded such stock. It made R. and the bank defendants, and prayed a determination of the adverse claims and the interest which passed to the assignee. The bank answered on October 17th, alleging the loan to W. on the security of the stock, and R. answered on December 2d. The suit resulted in a decree directing the C. Bank to deliver the stock to the assignee. R. claimed that on October 19th the bank, claiming to own the stock, sold it to him, and subsequently converted it by refusing to deliver it upon payment of the note given for the purchase price, while the bank claimed that it arranged with it not to deliver the stock to the assignee and gave the note to indemnify it on account of such arrangement. *Held*, that the decree was not res judicata in a suit by R. against the bank for

conversion, as the assignee's suit raised no issue of title as between R. and the bank, and gave him no standing to litigate the issue of title as between the assignee and the bank, and the pendency of such suit did not prevent the bank from claiming to be absolute owner of the stock and assuming to sell it, as R. claimed was done.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1195–1199, 1221; Dec. Dig. ⊂⊃678.]

4. TROVER AND CONVERSION ⊂⊃37—EVIDENCE—ADMISSIBILITY.

In a suit by R. against the bank for conversion, the record in the assignee's suit, including the bill of complaint, the answers of the bank and R., the amended bill of complaint, the commissioner's report, and R.'s exceptions thereto, should have been admitted as bearing upon the fact whether R. became an innocent purchaser of the stock for value, or whether the transaction with the bank was as claimed by it.

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. §§ 225–227; Dec. Dig. ⊂⊃37.]

5. APPEAL AND ERROR ⊂⊃1056—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

The rejection of such evidence was not harmless, as the facts and circumstances thereby appearing were of such significance that, if they had been taken into consideration, the jury might have rendered a different verdict.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4187–4193, 4207; Dec. Dig. ⊂⊃1056.]

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

Action by B. F. Rhodehamel against the City Bank of Wheeling. Judgment for plaintiff, and defendant brings error. Reversed and remanded, with instructions.

John C. Palmer, Jr., and John J. Coniff, both of Wheeling, W. Va. (William Erskine and Joseph R. Curl, both of Wheeling, W. Va., on the brief), for plaintiff in error.

John A. Howard and J. M. Ritz, both of Wheeling, W. Va., for defendant in error.

Before KNAPP and WOODS, Circuit Judges, and WADDILL, District Judge.

KNAPP, Circuit Judge. The defendant in error (plaintiff below) sued the City Bank of Wheeling for the conversion of 138 shares of La Belle Iron Works stock. His contention in brief was that on or about the 17th of October, 1908, he bought outright from the defendant bank 126 shares of this stock, which the bank then had in its possession and claimed to own, for the sum of $14,668.42; that this sum was paid with his note at four months, secured by the 126 shares purchased and 12 additional shares, which he delivered a few days later; and that the bank failed and refused to surrender the note and return to him the stock pledged for its payment when he demanded the same and tendered the amount due on the 6th of June, 1911.

The bank set up in defense, among other things, that the 126 shares in question were hypothecated with it by one A. L. White, of the brokerage firm of White & White, to secure the payment of his note

for $14,668.42, which became due on the 17th of October, 1908; that on the 7th of that month the firm of White & White and A. L. White individually made an assignment for the benefit of creditors to James Morgan Clark, who claimed to be entitled as such assignee to the stock so pledged by White; that the plaintiff Rhodehamel also claimed to be the owner of this stock and demanded its delivery to him; that the bank did not sell or offer to sell the stock to Rhodehamel at any time; that he was informed by the bank of the claim of White's assignee, and thereupon arranged with the bank to give his own note for the $14,668.42, in addition to the note of White, which the bank held, on condition that the bank would not deliver the 126 shares to the assignee, but would hold the same to enable Rhodehamel to prove his ownership of the stock in a pending chancery cause brought by the assignee in a state court; that to further protect the bank in carrying out this arrangement he put up 12 additional shares of Iron Works stock; that on the 19th of July, 1909, the assignee tendered to the bank the amount then due on White's note and demanded delivery of the stock to him, which the bank refused at the special instance and request of Rhodehamel; that the decree in the chancery cause on the 29th of April, 1911, awarded the 126 shares of stock to the assignee, and directed delivery of the same to him on payment of $12,246.87, which was the amount due on White's note when the assignee made the tender of July 19, 1909; that the bank complied with this decree, upon receipt of the sum named, on the 2d of May, 1911; that by reason of holding the stock under the agreement with Rhodehamel the bank had suffered a loss of interest in the sum of $1,565.55, for which it claimed a lien upon the 12 shares remaining in its hands; and that it has always been ready, upon the payment of this interest, to surrender Rhodehamel's note and the 12 shares of stock pledged by him as aforesaid.

It will thus be seen that the question of fact submitted to the jury was whether the bank actually sold to Rhodehamel in October, 1908, the 126 shares of stock which were then in its possession, or whether it merely agreed at his request, and in consideration of the security of his note and 12 additional shares, to hold the stock until the chancery suit was decided. On this issue the jury found for Rhodehamel, and the case comes here on assignments of error which will be briefly considered. The bank insists that Rhodehamel cannot maintain his action: (1) Because he waived his right to demand the stock; (2) because he had no title to the stock when the suit was brought; and (3) because the record in the chancery cause is res adjudicata in this action, and therefore the trial court should have directed a verdict in favor of the defendant.

[1] The only basis for the first objection is Rhodehamel's answer, on November 9, 1908, to a letter from defendant's cashier, in which he says:

"Your letter of the 7th at hand and contents noted. My understanding was that I had bought the 126 shares from you and that it was a closed incident. I presume, however, that it will not do any damage to be held as you say until after the court passes on the White matter."

It is impossible to see in this answer any waiver of Rhodehamel's claim to be the owner of the stock. On the contrary, it asserts the purchase which he alleges and is entirely consistent with his contention. His assent to the note and collateral remaining in the bank did not modify his claim of ownership, or operate to waive his right to demand the stock upon payment of his note. The correspondence was entitled to proper consideration by the jury, but plainly did not constitute a defense to the action.

[2] It is insisted in the second place that the action must fail because Rhodehamel had no title to the stock. But we are of opinion, in view of the verdict of the jury, that this contention cannot be sustained. The verdict for Rhodehamel necessarily involved the finding that the bank claimed to be the owner of the 126 shares and offered to sell the same to Rhodehamel, that the transaction was an absolute sale to him for an agreed price, and that as against the bank he was an innocent purchaser for value. This being so, it seems indisputable that the bank cannot question his title. It is, of course, familiar doctrine that the plaintiff in an action for conversion must prove title and right of possession. It is equally well settled that such an action may be defeated by proof that the plaintiff had no title, or that the title was in another person; but, where the plaintiff's title is derived from the defendant, the latter is estopped from denying it. The jury has found that Rhodehamel was a bona fide purchaser of this stock from the bank, and the bank cannot be heard to dispute the title which it had itself conferred.

[3-5] The governing principle is laid down, and illustrated with numerous citations, in 16 Cyc. 784 to 795, as follows:

"Where a person has, with knowledge of the facts, acted or conducted himself in a particular manner, or asserted a particular claim, title, or right, he cannot afterwards assume a position inconsistent with such act, claim, or conduct to the prejudice of another."

In considering the third objection, some further facts in regard to the chancery suit may properly be stated. The assignment of the Whites was on the 7th of October, 1908. The bill filed by the assignee on the 15th of that month alleged that White & White, with the consent of the respective owners, had pledged as collateral for moneys borrowed by them various securities, including a large amount of La Belle Iron Works stock; that there were conflicting claims to these securities, which the assignee was unable to determine; that Rhodehamel claimed to own all the La Belle stock held by the several banks which were made defendants, and demanded that the assignee surrender to him any claim to the same. The purpose of the suit was to have these adverse claims and the interest which passed to the assignee adjudicated. Both Rhodehamel and the City Bank were among the defendants named in that suit. The bank answered on the 17th of October, setting up the loan to White on the security of the 126 shares, and other facts substantially as above summarized. Although the note given by Rhodehamel bears the same date, the 17th of October, the transaction, which he alleges and the jury found was a purchase of this stock, actually occurred on the 19th of Octo-

ber, two days later. Rhodehamel answered December 2, 1903. As above stated, the decree of April 29, 1911, directed the bank to deliver this stock to the assignee, and the bank contends that this decree was an adjudication which operated to defeat Rhodehamel's action.

But that suit raised no issue of title as between Rhodehamel and the bank, nor did it give Rhodehamel any standing to litigate the issue of title as between White's assignee and the bank. Parties to an action are not bound by the judgment, in a subsequent controversy with each other, unless they were adversary parties in the original suit. As between Rhodehamel and the assignee it may be assumed that the decree was conclusive, but it did not have the effect of settling any question between Rhodehamel and the bank. In other words, the pendency of the chancery suit, and the rights therein asserted by the assignee, did not prevent the bank from claiming to be the absolute owner of the stock and assuming to sell the same to Rhodehamel; and manifestly the decree afterwards made in that suit did not enable the bank to dispute the title which the jury found it had undertaken to confer. Freeman on Judgments (4th Ed.) vol. 1, § 158; Russell v. Place, 94 U. S. 606, 24 L. Ed. 214; St. Romes v. Levee Cotton Press Co., 127 U. S. 614, 8 Sup. Ct. 1335, 32 L. Ed. 289; Harrison v. Remington Paper Co., 140 Fed. 385, 72 C. C. A. 405, 3 L. R. A. (N. S.) 954, 5 Ann. Cas. 314.

On the trial, which took place in November, 1913, the defendant offered in evidence the record in the chancery suit, including the bill of complaint, answer of the City Bank, answer of Rhodehamel, order of January 22, 1909, amended bill of complaint, report of William E. Krupp, commissioner, exceptions of Rhodehamel to the report, order of February 11, 1911, order of April 29, 1911, deposition of James Morgan Clark, and Exhibit Y thereto. The court admitted the three orders enumerated, but excluded the balance of the record. The order of January 22, 1909, merely allowed the plaintiff to file an amended complaint; the order of February 11, 1911, disposed of some of the matters in suit and postponed others for further consideration; the order of April 29, 1911, overruled the exceptions of Rhodehamel, confirmed the findings of the commissioner, and was a final decree.

We are of opinion that it was error to reject this record, or so much of it as was offered, not because it determined any issue raised in this case, but because of its bearing upon the question of fact submitted to the jury, namely, whether Rhodehamel became an innocent purchaser for value of this stock in October, 1908, as he testified, or whether the transaction at that time was of the nature asserted by the bank, as above stated.

In the first place, the amended complaint in that suit set forth in detail the somewhat peculiar situation which had arisen in respect of the dealings in La Belle Iron Works stock by White & White for the account of Rhodehamel, the hypothecation of that stock by them with various banks to secure their own notes, and the conflicting claims of ownership of the stock so pledged. Moreover, it alleges that soon after the failure of the Whites on the 7th of October, and before suit was brought on the 15th of that month, Rhodehamel had represented to the assignee that all this stock which the Whites had hypothecated

in the Wheeling banks belonged to himself. Indeed, it was largely on account of this claim and demand of Rhodehamel that the assignee brought the chancery suit. It also appears in the record that on the 17th of October, which was two days before the alleged purchase, the bank had filed its answer in that suit, in which it stated fully the circumstances under which the 126 shares came into its possession, and averred that it held the same only as security for the payment of White's note. And it further appears, from Rhodehamel's answer and otherwise, that throughout the course of the litigation no claim was made by him that he had at any time purchased Iron Works stock from the City Bank. We think that these were circumstances which the defendant was entitled to show, and that they were so related to the issue submitted to the jury as to make them admissible. In short, the ruling of the court excluded documentary evidence which, in our judgment, was relevant and material. And it cannot be said that the rejection of this evidence was harmless, because the facts and circumstances thereby appearing were of such significance that if they had been taken into consideration the jury might have rendered a different verdict.

Because of this error the judgment must be reversed, and the case remanded, with instructions to grant a new trial.

Reversed.

TRACTION COS. v. COLLECTORS OF INTERNAL REVENUE (six cases).

(Circuit Court of Appeals, Sixth Circuit. June 8, 1915.)

Nos. 2682-2687.

1. INTERNAL REVENUE ⟸9—EXCISE TAX ON CORPORATIONS—CORPORATION "ENGAGED IN BUSINESS."

The true test of distinction to determine whether a corporation organized for a business purpose is "engaged in business" within the meaning of the Corporation Tax Law (Act Aug. 5, 1909, c. 6, § 38 (1), 36 Stat. 112 [Comp. St. 1913, § 6300]) so as to be subject to the excise tax thereby imposed is whether it is continuing the body and substance of the business for which it was organized, and in which it set out, or whether it has substantially retired from it and turned it over to another. If the latter appears then its tax exempt status must be tested by the further query whether it had during the critical period done only such acts as are properly and normally incidental to the status of a mere lessor of its property or whether it has exercised its peculiar corporate franchise outside of and beyond the fair scope of that status.

[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, Engage.]

2. INTERNAL REVENUE ⟸9 — EXCISE TAX ON CORPORATIONS — CORPORATION "ENGAGED IN BUSINESS."

Street and suburban railroad companies which owned and had operated their lines leased the same to an operating company for the full term of their franchises. Thereafter they did only what was necessary to maintain their organization, and collect and disburse their rentals in

dividends and otherwise, except that in accordance with the provisions of some of the leases, giving the lessees the right to sell unimportant items of property, which was not needed and to reinvest the proceeds in other property subject to the lease, the lessors joined in conveyances of the property sold; also in one case under the terms of the lease the lessor issued to the lessee treasury stock and bonds previously authorized for improvement purposes, in payment for such improvements made by the lessee, and in another case the lessee brought a suit in the name of the lessor, the latter having no connection with the case. *Held* that none of such acts constituted "engaging in business" within the meaning of the Corporation Tax Act, § 38, and that such corporations were not subject to the excise tax imposed thereby.

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

In Error to the District Court of the United States for the Western Division of the Southern District of Ohio; John E. Sater, Judge.

Actions by the Columbus, Newark & Zanesville Electric Railway Company and by the Dayton & Eastern Traction Company against Bernhard Bettman, Collector of Internal Revenue, and by the Ft. Wayne, Van Wert & Lima Traction Company, by the Columbus, Newark & Zanesville Electric Railway Company, by the Indiana, Columbus & Eastern Traction Company, and by the Cincinnati Street Railway Company against Andrew C. Gilligan, Collector of Internal Revenue. Judgment for defendant in each case, and plaintiffs bring error. Reversed.

Under the above arbitrary title we group six causes which were heard as one. In each, the question involved was whether the plaintiff in error, plaintiff below, was "carrying on business," so as to be subject to pay the excise tax under the Corporation Tax Law (Act Aug. 5, 1909) § 38, 36 Stat. 112. In each case, the tax was paid under protest, suit was brought to recover the same, judgment was directed in the court below for the defendant revenue collector, and plaintiff has brought error. Each one of the plaintiffs is an interurban or street railway, organized under the laws of Ohio, which had built and operated a railroad, and then, before the accruing of the tax involved, had leased the railroad to an operating company (for the whole franchise period), and had ceased to carry on business, *unless* maintenance of its corporate organization and office, receiving of accrued rentals and distributing them as dividends among its stockholders, investing its undistributed receipts, and the other acts hereafter specified constituted such "carrying on" of business as required the imposition of the tax. Each case is, in a general way, analogous to McCoach v. Minehill, etc., R. R., 228 U. S. 295, 33 Sup. Ct. at page 419, 57 L. Ed. 842. In these cases, as in that, it must follow that the lessor railroads were exempt from this tax, unless the additional circumstances here presented are sufficiently distinguishing. The claims of such distinction are based upon that portion of the opinion of the court in the McCoach Case which says (page 305 of 228 U. S., at page 423 of 33 Sup. Ct. [57 L. Ed. 842]): "It should be mentioned that there is nothing in the record to show that during the taxing years in question the company exercised its power of eminent domain, or put in force any other special corporate power, in aid of the business of the lessee. We therefore do not pass upon the question whether, if it should do so, it would be taxable under the act in question."

The supposedly distinguishing circumstances, which appear in one or another of these cases, can be classified into three groups:

(a) Two of the leases provided for the sale of portions of the real estate and the substitution of other property. The pertinent portions of the respec-

tive leases on this subject are quoted in the margin.[1] One lessee sold one and the other sold two comparatively trifling parcels of real estate, and the lessors joined in the deeds. In another instance, which belongs in this group, the lessee company made a traffic contract with another traction company, permitting the latter to run some of its cars over some of the railroad lines covered by the lease, and upon the foot of this contract the president of the lessor company, pursuant to a resolution of its board, indorsed the consent and approval of the lessor company thereto. This approval was not required, either by the lease or by the traffic contract.

(b) One of the lessees, in constructing an extension to the leased lines, was about to cross, at grade, a steam railroad, and the latter was proposing to resist such construction. Thereupon action was brought against the steam railroad in the name of the lessor traction company, as plaintiff, to enjoin the steam railroad from preventing such crossing. This action was prosecuted in the trial court to a final decree for injunction, but had been appealed and was still pending. The lessee was the real party in such action, managed the same, and paid all expenses, and the lessor had no connection therewith, except to permit the use of its corporate name therein pursuant to a provision of the lease whereby the lessor covenanted "that the lessee may use the name of the lessor in bringing, prosecuting, or defending any suits or proceedings in law or in equity which may be necessary or proper in the opinion of the lessee for taking action hereafter for the protection and preservation and full enjoyment by the lessee of all the property, rights, and privileges hereby leased; * * * but the lessee shall pay and hold the lessor harmless and indemnified from and against all loss, cost, damages, and expenses whatsoever arising therefrom."

(c) Some of the lessors, during the year involved, had issued their treasury capital stock, or caused to be issued their reserve bonds in the hands of their mortgage trustees, for the purpose of financing the lessees in making extensions or betterments or acquiring new items to be added to the body of leased property. This was pursuant to lease provisions substantially similar in different cases, and examples of which are given in the margin.[2]

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[1] NOTE.—From one lease: "Whenever any of the real estate hereby leased shall become unsuitable or unnecessary for the operation of the said railroads, or any of them, the lessee may sell and dispose of the same by and with the concurrence of the lessor as to the advisability of the sale and the price therefor, to be evidenced by its uniting in the deed or other instrument of conveyance, and the proceeds of sale in every such case shall be applied to the purchase of other property to be mutually agreed upon by the lessor and the lessee, and the title to the same shall be taken in the name of the lessor, and the property purchased shall be treated and used as a part of the leased property."

From the other lease: "The lessor covenants that in case the lessee considers any part of the real or personal property hereby leased to be worn, damaged, or no longer suitable or necessary for its proper purposes, it may sell, alter, change, or replace such property, and the lessor will act with the lessee in any sale thereof, and in executing and delivering such instruments as may be necessary to transfer its title therein to the vendee; provided that such sales shall always be in accordance with the terms of the mortgages at that time existing upon the property; and provided, further, that in the absence of mortgage provisions for such a transaction, the proceeds of any such sale or sales shall be received by the lessee and shall be applied by it to the substitution of property of value at least equal to that sold or shall be expended to otherwise increase the value of the other property hereby leased."

[2] NOTE.—"The lessee hereby accepts the street and interurban street railway and electric light and power plants and systems and the estate and property real and personal hereby demised as the same actually are at the date hereof, and admits that they are in good order and condition, and covenants that it will, during said term, renew, repair, and replace the same, so as to maintain and keep the demised premises in as good order, repair, and condition as the same now are, and in their present state of efficiency, and that it will ex-

Joseph Wilby, of Cincinnati, Ohio, for plaintiff in error Cincinnati St. Ry. Co.

G. H. Warrington and Lawrence Maxwell, both of Cincinnati, Ohio, for other plaintiffs in error.

S. T. McPherson, U. S. Atty., of Cincinnati, Ohio, for defendants in error.

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

DENISON, Circuit Judge (after stating the facts as above). [1] Several decisions of the Supreme Court instruct us as to the meaning

tend and expand the same with increase of profitable demand for transportation, and electric light and power; that it will from time to time at its own expense (except as otherwise provided in article ninth hereof), make all extensions, additions, alterations, improvements, renewals, and betterments which may be necessary or proper with reference to the premises and property hereby demised and for the use and operation thereof, and will do and perform all other things necessary to make and maintain said plants and systems as first-class modern and efficient street and interurban street railway and electric light and power plants and systems, and that all lands, structures, improvements, betterments, and renewals added to or made upon the demised premises, and all rights, privileges, and franchises acquired by the lessee in connection with the demised premises, shall, upon payment therefor as hereinafter provided, become the property of the lessor, and be treated as part of the demised premises, and be subject to all the terms, conditions, and provisions of this indenture in like manner as if they had been vested in the lessor at the date of this instrument. Provided, however, that upon the expiration of the term of this lease, or if before the expiration of the term thereof this lease be terminated for any cause other than the default of the lessee, then upon such termination, the lessor shall pay to the lessee the actual value at the time of such expiration or termination of all additions, betterments, improvements, and renewals made by the lessee to and of the leased property, except such as shall have been made out of the proceeds of the sale of or insurance on the property now owned by the lessor, or shall have been made in the renewal of or substitution for property existing at the commencement of the term of this lease, and thereafter worn out or destroyed, or shall have been paid for out of funds raised from any bonds of said lessor issued under any of its mortgages, or which may in future be issued for such purpose. * * *"

"Ninth. It is hereby agreed between the parties that all uncertified bonds of the lessor which may be in the hands of the trustee under its said mortgage of $6,250,000, hereinbefore mentioned in article second, section 1, subdivision (f), and retained for the purpose of making additions or extensions or betterments to the system of the lessor, or acquiring new property, real or personal, may be used by the lessee for the purposes provided in said mortgages, and to that end, whenever the lessee shall need funds for such purpose, it shall in writing notify the lessor of the amount of money required and the purposes for which it is desired, and such notice shall be signed by the president or vice president of the lessee, attested by its secretary, and sworn to by one of the officers of the lessee, and shall state that the proposed expenditure is proper and necessary for such purposes, whereupon the lessor shall, by resolution of its board of directors, call upon the trustee under its said mortgage, in the manner provided in the mortgage, for the certification and delivery of an amount of bonds sufficient in the judgment of the lessee to provide the amount of money so required, and upon receipt of said bonds, the lessor shall either sell the same and pay the cash proceeds of such sale to the lessee, or deliver said bonds to the lessee to be used or sold by it for making the payments aforesaid as the lessee shall elect."

of the phrase "engaged in business" or "carrying on business," as used in this law. Among them, three deserve special study. In the Park Realty Co. Case (Corporation Tax Cases, 220 U. S. 107, at page 170, 31 Sup. Ct. 342, 55 L. Ed. 389, Ann. Cas. 1912B, 1312), it appeared that the corporation was organized, among other purposes, to "manage or lease hotels," and that it was managing and leasing a hotel, and was carrying on such business by continuing to receive the rents. It was continuing to carry on a business for which it was organized, in which it had been engaged, and which it had not discontinued. It was fulfilling one of the purposes of its organization. If it was not "carrying on business" at the time in question, it never had been. It had not been engaged in any business from which it had retired; and it was not required to pay the tax. In a case simultaneously decided, Zonne v. Minneapolis Syndicate, 220 U. S. 187, 31 Sup. Ct. 361, 55 L. Ed. 428, a corporation of character very similar to the Park Realty Company had been carrying on an extensive business, but had turned its property and business over to another, assuming only the position of lessor; and, although it was thereafter doing about the same acts in about the same way as the Park Realty Company, it was not subjected to the tax.

Although the Park Realty Company had power to do other business than as a landlord, and the Minneapolis Syndicate had, by amending its charter, shorn itself of such broader powers, this cannot be the true distinction between the cases, because, as Mr. Justice Holmes says, in U. S. v. Emery-Bird-Thayer Co. (April 5, 1915) 237 U. S. 28, 35 Sup. Ct. 499, 59 L. Ed. ——: "The question is rather what the corporation is doing than what it could do." When we compare these two cases, by themselves and as they have been interpreted in the McCoach Case, in U. S. v. Whitridge, 231 U. S. 144, 34 Sup. Ct. 24, 58 L. Ed. 159, and in U. S. v. Emery, etc., Co., we think the true test of distinction must be, as applied to corporations of this class, whether they are continuing the body and substance of the business for which they were organized and in which they set out, or whether they have substantially retired from it and turned it over to another.[3] If the latter appears, then their tax exempt status must be tested by the further query whether they have, during the critical period, done only such acts as are properly and normally incidental to the status of a mere lessor of such property, or whether they have exercised their peculiar corporate franchises outside of and beyond the fair scope of that status. There is helpful analogy in observing an individual. It is not usually hard to decide whether he is still "in business," or has retired; and, if the latter, he does not lose that character because here and there, in the receipt of his income, he does an item of business. When we come to apply this criterion to the circumstances which supposedly distinguish this case from the McCoach Case, we are satisfied that they are insufficient.

[3] The Emery-Bird-Thayer Case seems to hold exempt even a corporation which was organized for the purpose of leasing the real estate which it did lease; but the relations of that company to its predecessor in title and its associate company in active business indicate that the decision is not substantially inconsistent with the test we have assumed.

[2] 1. Of course, buying and selling real estate may be a carrying on of business, but such acts of that nature as were here done cannot be so characterized from the standpoint of the lessor companies. These acts were merely incidental to the business carried on by the lessee companies; they were exceptional in nature and trifling in amount; the lessors did not negotiate the sales of the original nor the purchase of the substituted property. The transaction is merely one where the tenant says to the landlord, "I have arranged an exchange whereby a parcel of leased property which has become useless shall be exchanged for another more desirable parcel," and the landlord says, "I have no objection, and I will sign the papers." When this occurs only to the extent and under the conditions here shown, we cannot think it is a "carrying on of business" by the landlord. As Mr. Justice Holmes said in the Emery-Bird-Thayer Case, "the sale of a part would signify that the [lessor] did not need it." If we resort to comparison with the individual landlord, it could hardly be thought that he had resumed his business activities and neutralized his retirement, merely because he assented to a tenant's desire that a trifling fraction of the leased property should be sold and the proceeds be used by the tenant to improve the main body of the estate. The imposition of the tax cannot be supported on this ground, without abandoning the ordinary definitions, and resorting to the unusual.

The approval of the traffic contract is, if anything, less indicative of the condemnatory "carrying on business" than is the sale of a real estate parcel. The approval might have future importance, but in its present effect it was as harmless as it was unnecessary.

2. Permitting the lessee to take and to sell reserved bonds and unissued stock presents a question of the same class. The case does not involve the sale of either bonds or stock by the lessor company. That might raise a different issue. Properties of the nature of those herein involved necessarily must be enlarged, extended, and otherwise improved at frequent intervals, and a long-time lease must make suitable provision on these points. It is matter of contract whether the business of providing these improved facilities shall be carried on by the lessor or by the lessee. These leases provide that these things shall be done by the lessee; but the lessors had funds on hand in the shape of unissued stock or reserve bonds expressly devoted to this very purpose, and the lessors have merely permitted the lessees to take these funds and use them for the purposes for which the funds were created. Again resorting to the analogy of individuals leasing ordinary buildings, it is as if the tenant desired to make improvements and the landlord permitted this to be done, and either advanced the funds or let the amount be deducted from the rent. This could hardly be thought a resumption of his once abandoned business activity. To this very point, the Circuit Court of Appeals of the Second Circuit, speaking by Judge Rogers (Anderson v. Morris Co., 216 Fed. 83, 91, 132 C. C. A. 327), says:

"The act done was a purely formal act done by the lessor to enable the lessee to raise money on the security of the property for its development and operation in the conduct of the railroad business. In doing it the lessor was not 'carrying on or doing business' within the meaning of the Corporation

Act. The meaning of the words 'carrying on or doing business' and 'engaged in business' must be given their ordinary and natural signification, and, given that signification, the act done is not within the meaning of the statute. The lessor company was not an actively operating concern. Under the terms of this lease the lessor corporation had practically gone out of business and was disqualified from any activity respecting the operation and management of the railroad business which it had been incorporated to carry on. The issuance of the bonds was an act done simply to enable the lessee to enjoy, use, and exercise the property, franchise, and rights which the lessor had previously demised, and did not amount to a resumption of business which the lessee had transferred, or a 'doing of business' in the statutory sense."

And, of the decision just quoted, Judge Putnam says, in the First Circuit (N. Y. Central v. Gill [C. C. A.] 219 Fed. 184, 185):

"This was a sensible interpretation of the statute, and one in harmony with its general terms and purposes."

3. The permitted use of the lessor's name in a lawsuit brought and wholly carried on by the lessee has even less color of carrying on business than has either of the other classes of acts. We concur fully in the opinion of the District Judge on this subject when he said:

"The lessee's attorney was directed to bring a suit in the lessee's name. * * * The attorney, notwithstanding his instruction and in disregard of it, brought the suit in the name of the plaintiff, a fact which did not become known to plaintiff until long afterwards. The lessee is conducting the litigation, has control of it, and is required to bear all the expense of it. Although the plaintiff, after hearing that the suit was instituted in its name, did not forbid its continuance, it does not appear to have taken any part in it, and I do not think, under the circumstances, that the plaintiff, by reason of such litigation, should be held to have engaged in business. The intention to do business was wanting."

Since the case was decided below, not only has the Supreme Court applied the rule of exemption in another instance—the Emery-Bird-Thayer Case—but the very questions involved in this case have been decided by other Circuit Courts of Appeals. The sale of a parcel of leased property and the purchase of other property, title to which was taken in the name of the lessor, but which was to be covered by the lease, were among the things done by the lessor company in the Gill Case, in the First Circuit, but which were held not sufficient to precipitate the tax. The issue of bonds is not only covered by the Gill Case and the Anderson Case, supra, but these cases in this respect are expressly approved by the Circuit Court of Appeals for the Third Circuit, in Lewellyn v. Pittsburgh, etc., R. R. (April 15, 1915) 222 Fed. 177. This last case, as also the Gill Case, held that the lessor company is not to be considered as engaged in business, even though it exercises, for the benefit of the lessee, its franchise right of eminent domain. Obviously, as the greater includes the less, these two decisions cover the case of such an injunction suit as was brought here against the steam railroad, if that suit did not in truth involve the exercise of the right of eminent domain; and, if it did, we should yield to the concurring opinions in the other circuits whatever doubts we had on that subject.

In each case, the judgment is reversed, without costs, and a new trial awarded.

JAMES SUPPLY & HARDWARE CO. et al. v. DAYTON COAL & IRON CO., Limited.

(Circuit Court of Appeals, Sixth Circuit. June 8, 1915.)

No. 2623.

1. BANKRUPTCY ⟸60—"ACTS OF BANKRUPTCY"—RECEIVERSHIP FOR CORPORATION.

If the appointment of a receiver for an insolvent corporation, although made in a suit to which it was defendant, was in fact procured by the corporation and in its behalf, it is as effectively an "act of bankruptcy" under Bankr. Act July 1, 1898, c. 541, § 3a(4), 30 Stat. 546 (Comp. St. 1913, § 9587), as though the suit had been in its own name as complainant.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 80; Dec. Dig. ⟸60.

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

2. BANKRUPTCY ⟸60—ACTS OF BANKRUPTCY—RECEIVERSHIP FOR CORPORATION.

In such case it is immaterial that the receivership was not ordered because of insolvency, but it is sufficient if the corporation was actually insolvent.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 80; Dec. Dig. ⟸60.]

3. BANKRUPTCY ⟸95—ACTS OF BANKRUPTCY—QUESTIONS FOR JURY.

That the procurement of the receivership was not formally authorized by a vote of the directors or stockholders will not necessarily prevent it from constituting an act of bankruptcy; and, where there was evidence that it was authorized by the managing director, whose firm also owned the majority of the stock, and who, with those acting with him in such procurement had full control of the company's affairs, the question whether it was the act of the corporation was one for the jury.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 132, 140, 145; Dec. Dig. ⟸95.]

In Error to the District Court of the United States for the Eastern District of Tennessee; Edward T. Sanford, Judge.

In the matter of the Dayton Coal & Iron Company, Limited, alleged bankrupt. From a judgment entered on a directed verdict, dismissing the petition, the James Supply & Hardware Company and others, petitioning creditors, bring error. Reversed.

Frank Spurlock and C. C. Moore, both of Chattanooga, Tenn., for plaintiffs in error.

George H. West and D. L. Grayson, both of Chattanooga, Tenn., for defendant in error.

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

KNAPPEN, Circuit Judge. On a trial to a jury of the issues joined upon a creditors' petition for adjudication in bankruptcy verdict was rendered by direction of the court, and judgment of dismissal entered accordingly. The case is here on writ of error. Elliott v. Toeppner, 187 U. S. 327, 23 Sup. Ct. 133, 47 L. Ed. 200.

There was substantial evidence tending to show insolvency. The act of bankruptcy finally relied upon is that respondent, as alleged, being insolvent applied for a receiver of its property. B. A. § 3a(4). The receivership in question was applied for and obtained in a suit brought in a state court of Tennessee in the names of three creditors of the Dayton Company, claiming priority in favor of Tennessee creditors, under sections 2551, 2552, of Shannon's Tennessee Code, and asking a winding up of the corporation. There was testimony tending to show that this proceeding was instituted at the instance and for the benefit of the Dayton Company, and through its representatives. The district court held that, as matter of law, on the record made the institution of this proceeding and the obtaining of the receivership was not the act of the Dayton Company. Whether this conclusion is correct is the pivotal question. We of course state the testimony, so far as given, in the aspect most favorable to the petitioning creditors against whom verdict was directed.

The Dayton Coal & Iron Company was a British corporation, having its home office in Glasgow, Scotland. It was engaged at Dayton, Tenn., in mining coal and making pig iron. Sir Peter Donaldson, who resided at Glasgow, was the managing director of the company, and there was testimony that he "had control of all the company's affairs." He was a member of the Glasgow firm of James Watson & Co., which owned a majority of the stock of the Dayton Company, controlled it and financed its affairs. The Dayton Company maintained an office at Cincinnati, from which the sales and commercial transactions were handled. Mr. Whitaker was assistant to the managing director and the highest representative in the United States of the Dayton Company. He had charge of the Cincinnati office and general supervision of commercial affairs at Dayton. Mr. Miller, of Chattanooga, was the general counsel in the United States of the Dayton Company and "represented the company in its legal affairs." Watson & Co. bought pig iron in the United States, and in that relation dealt directly with the Dayton Company. Shortly before June 9, 1913, Watson & Co. failed, and so defaulted on a draft for £4,000 drawn by the Dayton Company upon Watson & Co., and held by the Equitable Trust Company of New York. This failure immediately embarrassed the Dayton Company, which was unable to protect the draft, and the Dayton Company's bank creditors became insistent. Whitaker cabled the situation to the Dayton Company at Glasgow, asking what advice should be given, and stating that "director must come with full power to act." Sir W. B. Peat, a member of an accounting firm doing business both in Great Britain and in the United States, was in New York as "the representative of Watson & Co.," and was slated as liquidator of the affairs of that firm. The Dayton Company cabled Whitaker from Glasgow to go to New York and consult with Peat respecting the failure of the Dayton Company, and, if possible, to take Miller with him. Whitaker was also advised that liquidation could not be avoided, and to pay nothing more without consulting Miller. The latter was unable to go to New York at the time, but had a conference with Whitaker, and gave his opinion, from what Whitaker told him,

that a receiver should be appointed. Whitaker met Peat in New York on June 14th, and communicated to him Miller's views as to the necessity of the appointment of a receiver. Peat concurred in these views. On the evening before the interview with Peat, Miller wired Whitaker at New York:

"Am impressed immediate receivership suit here is best. Wire me your views quickly on arrival and also later after consulting with parties there."

[1] The subject seems to have been further discussed between Miller and Whitaker over the telephone, and Whitaker wired that he thought Miller's method so communicated correct, and that he would "wire just as soon as can see Peat." During the 13th and 14th Miller and Whitaker exchanged telegrams, Miller stating that he would not "precipitate action unless forced," and expressing himself as "anxiously awaiting your advice as to whether bankruptcy inevitable," Whitaker wiring Miller on the 13th that he had seen Peat, "who states to adopt plan outlined by you over telephone at once," and on the 14th, "to proceed at once." On the morning of June 14th the insolvency proceeding was instituted, the bill therefor being drafted under Miller's direction and largely by his dictation, and without definite arrangement (previous to its drafting) with the creditors in whose names it was to be filed. The bill was filed by another solicitor, who spent part of his time working in Miller's office on a salary. On the same day Whitaker wired Miller that he had "consulted with Peat who is instructed by Watson," and that Peat "advises receivership and desires his partner here Archibald Bowman appointed a receiver." An injunction was issued in the proceeding under the creditors' bill on June 14th, but no receivership was then ordered. The original bill alleged the Dayton Company's insolvency. An amended bill, decided upon by Miller, and filed on the 16th, withdrew that charge; the Dayton Company formally appeared and waived service of process and notice, "for the purpose of enabling the chancellor, without further notice [to] pronounce such decree and make such order herein as to him seems proper." Mr. Noyes, the Dayton Company's superintendent, was at once appointed temporary receiver in Tennessee. On the next day Whitaker wired the Dayton Company at Glasgow the fact of the appointment, and that attempt would be made to appoint Noyes temporary receiver in Ohio, which was done, and cable notice given by Whitaker on the next day. A few days later Bowman was appointed co-receiver with Noyes. There was thus substantial testimony tending to show that the receivership was procured at the instance of and by concert between Peat, Whitaker, and Miller. If the receivership was so procured by actual authority of the Dayton Company, and on its behalf, it was as effectively an act of bankruptcy as if the suit had been directly in the name of that company as complainant (Exploration Co. v. Pacific Co. [C. C. A. 9] 177 Fed. 825, 839, 101 C. C. A. 39), and the district court so held. Wheeler v. Denver, 229 U. S. 342, 33 Sup. Ct. 842, 57 L. Ed. 1219, contains nothing to the contrary. What is there said respecting collusion relates merely to jurisdiction. Similar holdings are found in Re Metropolitan Ry. Receivership, 208 U. S. 90, 110, 28 Sup.

Ct. 219, 52 L. Ed. 403, and American Brake, etc., Co. v. Pere Marquette R. R. Co. (C. C. A. 6) 205 Fed. 14, 18, 123 C. C. A. 322. Here the question of intent to evade the provisions of the Bankruptcy Act is involved.

[2] It is immaterial that the receivership was not ordered because of insolvency. If the corporation was actually insolvent at the time receivership was applied for, it is enough. Hill v. Electric Co. (C. C. A. 6) 214 Fed. 243, 130 C. C. A. 613.

[3] We are not impressed by the proposition that the application for a receiver by this corporation would not be an act of bankruptcy unless shown to have been expressly authorized by formal action of its board of directors or stockholders; and the district judge did not so decide. Not only is there nothing in the record to indicate that the managing director of this British corporation lacked authority to direct such action, but the testimony is inferentially to the contrary, and is specifically that he had complete control of the company's affairs. If Donaldson individually lacked full control, there was testimony that Watson & Co. represented the stock control and, inferentially at least, had whatever control Donaldson lacked; and it is perhaps of some interest in this connection that the amended bill in the insolvency proceeding by implication treats the members of Watson & Co. as Whitaker's principals. We think the record did not impugn the existence of full authority on the part of Donaldson and Watson & Co. to direct the receivership, and thus the commission of an act of bankruptcy. Exploration Co. v. Pacific Co. (C. C. A. 9) 177 Fed. 825, 839, 101 C. C. A. 39; In re Maplecroft Mills (D. C.) 218 Fed. 659, 673; 1 Remington on Bankruptcy (2d Ed.) § 152. Moreover, if those placed in full charge of the company's affairs were thus clothed in fact with sufficient power to actually accomplish a legally effective receivership, we cannot think the application therefor was any the less an act of bankruptcy because those responsible therefor had no right, as against the stockholders, to so act. A somewhat contrary holding was had in Re Wm. S. Butler Co. (C. C. A. 1) 207 Fed. 705, 713. How far that decision may have been affected by the law under which the corporation was organized does not appear.

As to the authority of Whitaker and Miller: It is unnecessary to decide whether either or both had, by virtue alone of their official positions, general authority to act for the corporation in instituting the receivership. Had the general counsel filed such bill in the name of the corporation, his authority to do so would be presumed. Pacific R. R. Co. v. Ketcham, 101 U. S. 289, 296, 25 L. Ed. 932, and we should hesitate to declare, as matter of law, in view of his general relation to the corporation, that he would not have authority to take such action through another medium when acting in the good-faith representation of the corporation's interests. We think, however, there was testimony tending to show special authority from the Glasgow management for the procuring of receivership. Miller, Whitaker, and Peat were instructed to confer together regarding the course to be taken. They did so, and acted according to their judgment. True, there is no evidence of an express direction by the Glasgow office of the Dayton

Company that action should be taken under Peat's sole advice or under that of Miller, or specifically that receivership should be applied for; but we think that under the circumstances, including the fact that Whitaker had asked the Glasgow office to send a director with power to act, and taking into account the other telegrams referred to, a direction that action should be taken according to the course which should be adopted after conference between these three persons is naturally implied, especially in view of what later passed between the Glasgow office and its representatives in the United States respecting the appointment of receiver already had and the proposal for further and ancillary appointments. Apart from such effect as they may have by way of ratification, we think these later communications, in the absence of reply thereto, directly tended to show that the company's representatives in the United States had correctly construed the authority given them from Glasgow. While, as suggested, Peat was spoken of as Watson & Co.'s representative, the later express reference of Whitaker to Peat, made by the Glasgow office of the Dayton Company, made him the company's representative for the purpose, even though originally he represented only Watson & Co., and regardless of the effect of such representation in view of the relations between that firm and the Dayton Company. And while Whitaker's telegram of the 14th was probably received by Miller after the creditors' bill was filed, and the second telegram of the 13th probably after the creditors' bill was drafted, the telegram last referred to seems to have been in accord with previous expectation, and both arrived before the amended bill was filed and the receivership application heard. It need scarcely be said that Miller's relation as creditor of the Dayton Company is important only as it affects the ultimate question whether the application for the receivership was the act of that company.

It results from these views that the issue should have been submitted to the jury. The judgment of the district court is accordingly reversed, with costs, and the record remanded to that court, with directions to award a new trial.

HINRICHS v. MISSISSIPPI VALLEY TRUST CO. et al.

(Circuit Court of Appeals, Sixth Circuit. June 8, 1915.)

No. 2617.

CORPORATIONS ⊂=579—REORGANIZATION AGREEMENT—CREDITOR ENTITLED TO SHARE IN MORTGAGE LIEN—"INDEBTEDNESS."

An unliquidated claim against a corporation for damages for conversion of coal and timber from claimant's land, upon which a contested suit was pending, was not an "indebtedness" of the company, within the meaning of a reorganization agreement made by its bondholders in order to get it out of the hands of a receiver, by which they consented to the issue of preferred bonds for the purpose of "paying the company's indebtedness" not otherwise provided for; and the claimant, on recovery of judgment when the mortgage securing such bonds was in foreclosure, was not entitled to share in the lien thereof, except as to such portion of her judgment as covered the coal and timber taken by the receiver,

which was an indebtedness of the receivership, without the payment of which the bondholders were not entitled to have the receiver discharged.

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

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

Appeal from the District Court of the United States for the Eastern District of Tennessee; Edward T. Sanford, Judge.

Suit in equity by the Mississippi Valley Trust Company against the Cumberland Coal & Coke Company and others. From a decree denying her right to share in a mortgage lien, Mrs. Amelia M. G. Hinrichs, intervener, appeals. Reversed in part.

J. B. Sizer, of Chattanooga, Tenn., for appellant.

F. M. Thompson, of Chattanooga, Tenn., for appellees.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

KNAPPEN, Circuit Judge. On May 2, 1902, Mrs. Hinrichs sued the Cumberland Coal & Coke Company (hereafter called the Coal Company) and other defendants in the chancery court for Cumberland county, Tenn., to recover lands alleged to have been fraudulently procured from her. The decree of the chancery court canceling her conveyance and ordering restoration of the lands was affirmed at the December, 1905, term of the Supreme Court. The decree of the chancery court awarding Mrs. Hinrichs recovery against the Coal Company for the net value of her interest in coal and timber taken from the lands during the years 1901 to 1905, both inclusive, was affirmed by the Supreme Court in January, 1910, in the amount of $4,198.09. Execution issued meanwhile from the chancery court was returned unsatisfied; the Coal Company being in the hands of a receiver. In 1899, and thus before Mrs. Hinrichs' suit was commenced, the Coal Company gave to the Mississippi Valley Trust Company (hereafter called the Trust Company) a mortgage on its real estate, machinery, and permanent improvements, to secure a bond issue of $1,000,000, all of which bonds were pledged either directly to creditors or to secure the indorsement of the Coal Company's paper.

On September 2, 1902, a few months after Mrs. Hinrichs' suit was begun, a receiver of the Coal Company was appointed under a general creditors' bill filed in the chancery court for Scott county, Tenn. Other litigation connected with the Coal Company's affairs having ensued, a reorganization of its affairs was had, by agreement made February 14, 1903, between the Trust Company, the Coal Company, its stockholders, directors, and certain creditors, together with so-called "voting trustees," members of a certain "syndicate," and other interested parties. This agreement recited the ownership by the Coal Company of assets amounting to $1,667,420, the mortgage of 1899, the pledge of the entire bond issue thereunder, and the existence of a floating indebtedness of about $115,000 "as nearly as can be ascertained," the company's inability to meet its obligations, and the desire

of all parties to "so reorganize the affairs of said Coal Company that it may be taken out of the hands of said receiver, pay its obligations, and provide funds to carry on its business and develop its property." The plan provided for a new bond issue of $1,300,000, of which $300,000 were called "Class A Bonds" and were given priority over the remaining or "Class B Bonds," the class A bonds (together with certain apportionable stock of the Coal Company) to be sold for cash, and the proceeds applied only to "paying the indebtedness of the company not herein otherwise provided for, developing and bettering the company's lands, building coke ovens and other corporate purposes"—as stated elsewhere in the agreement, to pay "the indebtedness of the Coal Company, which is provided to be paid herein, and also other accounts, charges, costs, and fees necessary to be paid, or incident to carrying this plan into effect." The creditors, most of whom were secured by bonds, agreed to accept the payment provided and surrender the collaterals and release their claims. All parties agreed that upon a consummation of the reorganization plan all suits or proceedings against the Coal Company should be dismissed and the receivership terminated. The reorganization plan was duly carried into effect, the new mortgage given to the Trust Company, both classes of bonds issued, the receivership terminated, and its property turned back to the Coal Company. But $253,000 of the class A bonds were issued.

November 24, 1908, foreclosure of the trust mortgage was instituted in the court below, and a receiver of the Coal Company's assets appointed pending foreclosure. Mrs. Hinrichs, having six days later obtained her decree in the chancery court against the Coal Company on account of the coal and timber taken, tendered in the foreclosure suit and asked leave to file a bill alleging her status as a creditor of the Coal Company at the time of the reorganization agreement of February 14, 1903, that by its terms she was one of the beneficiaries, and as such entitled to have her judgment paid out of such of the class A bonds as had already been sold, or, if an insufficient sum remained for the purpose, to have so many of the still unsold bonds of that class disposed of as might be necessary therefor. Leave to file this bill was denied, without prejudice to the presentation of such claim as she might have by intervening petition. Later, May 25, 1910, she filed a pleading, which has been treated as an intervening petition, asking the same relief. On this petition issue was joined. On foreclosure sale under decree of December 23, 1911, the entire property was purchased by a committee of the class A bondholders for $255,000. This sale was confirmed, and the proceeds, after payment of costs, attorney's fees, receiver's compensation, and other expenses, were divided pro rata among the holders of the $253,000 of class A bonds, except $4,000 held in the registry under order of the court to await the determination of Mrs. Hinrichs' intervention. No claim other than that of intervener and those represented by class A bonds has been presented against the Coal Company on account of indebtedness prior to the reorganization agreement, and all such other prior debts have been paid so far as the record shows. Upon final hearing

under the intervention proceedings, Mrs. Hinrichs was denied relief, and accordingly has brought this appeal.

The only question before us is whether the intervener is entitled to share, ratably with the holders of the $253,000 of class A bonds, in the net proceeds of the foreclosure sale of the mortgaged premises. In considering this question, we may lay out of account the intervener's equities in the Coal Company's assets, based on the theory of their diversion to her prejudice, under the asserted rule that the assets of an insolvent corporation constitute a trust fund in favor of creditors. We say this because at the time her right of action accrued the Coal Company's property was mortgaged for $1,000,000, the new mortgage was for only the same net amount, the issue of class B bonds was required to be reduced to the extent that class A bonds were issued, and in fact but $700,000 of class B bonds were ever issued; and while at the time of the reorganization there was a controversy over the rights of holders of a considerable part of the then existing bond issue, the record furnishes no reasonable basis for supposing that the Coal Company was not indisputably indebted on the original issue of mortgage bonds for more than the $300,000 of class A bonds, the mortgage trustee was in effect, we think, subrogated (at least to that extent) to the rights under the earlier issue, the property sold for but $255,000, and the Coal Company made no transfer of its assets to a new corporation, its corporate existence and ownership of its property being merely continued.

The sole theory of the intervener with which we are concerned thus is that under the reorganization agreement 47 class A bonds unissued and undisposed of were held by the Trust Company for the purpose of paying all then existing indebtedness of the Coal Company not otherwise provided for by the reorganization agreement, and that the intervener is through her interest in such unissued bonds entitled to share with the holders of the bonds issued. The coal and timber for which Mrs. Hinrichs recovered were appropriated as follows: First, that taken previous to the receiver's appointment was appropriated by the Coal Company; second, during the receivership a part of the proceeds of coal and timber taken was paid to the receiver and disbursed and applied by him under the orders of the court as a part of the assets of the Coal Company; third, subsequent to the receiver's discharge the balance of the coal and timber appropriated was received and used by the Coal Company.

We think it entirely clear that the intervener has no claim under the reorganization agreement on account of appropriations of her coal and timber after its property was turned back to the Coal Company. True, one of the purposes of the issue of class A bonds was to provide funds for carrying on the business of the Coal Company and developing its property, and the application of the proceeds included the building of "coke ovens and other corporate purposes." But an intention to provide for the payment of liabilities thereafter incurred cannot properly be found in the language of the agreement.

The appropriations previous to the reorganization involve somewhat different considerations. If intervener's claim is strictly an indebted-

ness, within the true meaning and intention of the reorganization agreement at the time that agreement was made, she would seem entitled to share with the class A bondholders. Her claim was not otherwise provided for, and we are not disposed to attach controlling importance to the fact that she was not a party to the agreement, inasmuch as there was no express provision that only those became parties who participated, and, indeed, all who were paid under the reorganization plan were not required to execute the papers.

Lack of privity is not conclusive against her, for her proceeding was essentially in equity, and whatever might in a given jurisdiction be the rule in suits at law, the rule is one of a general application that the party for whose benefit a promise is made may enforce it in equity. Taenzer v. C., R. I. & P. Ry. Co. (C. C. A. 6) 170 Fed. 240, 247, 95 C. C. A. 436. In our opinion, however, intervener was not, at the time of the reorganization plan, a creditor within the real intention of the agreement, nor did the latter contain any promise for her benefit. Her claim was in its essence one for waste; it was entirely unliquidated and was analogous to an action for tort. She was not at the time recognized as a creditor, and presumably did not so appear upon the Coal Company's books. On the contrary, her entire claim, even for the recovery of the land itself, was being strenuously resisted, and all liability on the part of the Coal Company denied. It would be doing violence to probabilities to assume that either the Coal Company or the other parties to the agreement had intervener in mind as a beneficiary thereunder. Whether the parties other than the Coal Company even knew of her litigation does not appear. It is doubtless true that, had she already obtained judgment for the coal and timber taken, she not only would have been a creditor within the meaning of the agreement, but the other parties thereto would have desired, for their own interest, to provide for payment of her decree and thus relieve the corporation from embarrassment through its enforcement. It is quite another thing to assume that such solicitude embraced the subject of a recovery which might never take place, or, if it did, might come at a time when the Coal Company would be in position to pay it without embarrassment. There is nothing in our decision in Keech v. Stowe-Fuller Co., 205 Fed. 887, 124 C. C. A. 200, opposed to the conclusion we have above stated, for in the latter case Keech was unquestionably a creditor within the intent of the reorganization agreement, and the case involved only the question whether he had lost his rights by delay in accepting the payment provided thereby.

The coal and timber taken during the receivership stand upon a different basis. Liability for those appropriations was clearly a liability of the receivership in as complete an equitable sense as if the suit had been pending or the claim being made against the receiver, and equally so whether the entire proceeds were used by the receiver or whether they were paid in part to the Coal Company. The plain intention of the reorganization agreement was that all such obligations should be discharged, and it must be conclusively presumed that the parties to the agreement did not intend, and that the court would

not have permitted the receiver's discharge with knowledge of the liability in question, actual or potential. Indeed, the receivership could not properly be discharged until all its liabilities were paid or provided for. The fact that intervener's subsequent recovery against the Coal Company includes the receiver's appropriations is not controlling. The Coal Company's liability was not necessarily inconsistent with a liability on the receiver's part. Pennsylvania Railroad Co. v. Jones, 155 U. S. 333, 350, 15 Sup. Ct. 136, 39 L. Ed. 176; Texas & Pacific Ry. Co. v. Bloom, 164 U. S. 636, 639, 17 Sup. Ct. 216, 41 L. Ed. 580. And a judgment against the Coal Company was not necessarily a release of such equitable security as the Coal Company had provided through the reorganization agreement. Payment of the receivership liability should have been provided for by issue and sale of the necessary amount of unissued class A bonds; and equity will consider that as done which ought to have been done.

The decree of the District Court is accordingly reversed in the respect mentioned, with costs, and the cause remanded for further proceedings not inconsistent with this opinion.

THOMPSON & FORD LUMBER CO. v. DILLINGHAM et al.

(Circuit Court of Appeals, Fifth Circuit. June 5, 1915.)

No. 2589.

1. VENDOR AND PURCHASER ⊂=231—BONA FIDE PURCHASERS—CONSTRUCTIVE NOTICE OF ADVERSE CLAIMS.

The omission from an abstract of title, procured and furnished by a vendor, of any reference to the records of judicial proceedings by which the title might be affected, is sufficient to put an experienced lawyer representing the prospective purchaser on inquiry as to such records, and to charge the purchaser with notice of what they would have disclosed.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 43, 55, 487, 513–539; Dec. Dig. ⊂=231.]

2. VENDOR AND PURCHASER ⊂=229—BONA FIDE PURCHASERS—CONSTRUCTIVE NOTICE OF ADVERSE CLAIMS.

One who executes a contract giving an option for the purchase of lands is to be regarded as the vendor in such sense as to put the purchaser on inquiry as to his relation to the title, although he afterward conveys to others, who execute the deeds in fulfillment of the option contract.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 477–494; Dec. Dig. ⊂=229.]

Appeal from the District Court of the United States for the Southern District of Texas; Waller T. Burns, Judge.

Suit in equity by Chas. Dillingham, receiver of the Houston Oil Company of Texas, and others, against the Thompson & Ford Lumber Company. Decree for complainants, and defendant appeals. Affirmed.

Wm. A. Vinson, of Houston, Tex. (Jonathan Lane, L. A. Carlton, and E. W. Townes, all of Houston, Tex., on the brief), for appellant.

H. O. Head, of Sherman, Tex., and Thomas M. Kennerly, of Houston, Tex. (Oswald S. Parker, of Houston, Tex., and J. R. Davenport, on the brief), for appellees.

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

WALKER, Circuit Judge. We are of the opinion that the evidence adduced before the special master fully supported the conclusion reached by him, and sustained by the District Court, that the appellant was not, as a bona fide purchaser without notice of the claim asserted in the suit, or as a vendee deraigning title through such a purchaser, entitled to be protected against that claim. The deeds disclosing the claim asserted by the suit were of record at the time the appellant made its purchase, and, under the circumstances of its purchase, it could not be entitled to protection against that claim unless it maintained its contention that its vendor, the Kelly Land & Lumber Company, was a bona fide purchaser without notice. If the testimony is consistent with the master's finding against this contention, his report "must be treated as unassailable." Houston Oil Co. of Texas v. Wilhelm, 182 Fed. 474, 104 C. C. A. 618. Many circumstances disclosed by the evidence are adverted to by the master in his report, and their cumulative probative effect was relied upon by him as furnishing support for the conclusions he reached. We do not deem it necessary to make mention of more than one of the groups of circumstances so relied upon.

Some time during the summer of 1905 W. J. Townsend, for himself and associates, took from C. M. Votaw an option for the purchase of the lands in question—more than 17,000 acres—and he and his associates organized the Kelly Land & Lumber Company with the view of exercising that option and having the lands conveyed to that company. While Townsend and others who were associated with him in the contemplated venture were making investigations to determine whether the option would be exercised, and up to within a few days of September 2, 1905, the date of the formal execution of an instrument by which Votaw sold and conveyed the land to Townsend and his associates, and also the date of a number of deeds conveying the several parcels into which the land was subdivided, executed by Votaw and others at his instance to the Kelly Land & Lumber Company, or to grantees who took and held in trust for it, there was pending in a court of record of a county in which a considerable part of the land lay a suit instituted by Votaw against John H. Kirby, the Kirby Lumber Company, and the Houston Oil Company of Texas, the papers in which distinctly disclosed the existence of the claim which is asserted in the suit at bar. To Townsend, who was a lawyer of extensive experience in dealing with land titles and versed in the law applicable to the examination of them, was exclusively committed the task of examining and passing upon the titles to the land. For a long period, and until about the time the properties of John H. Kirby, of the Kirby Lumber Company, and

of the Houston Oil Company of Texas were, under court proceedings which were still pending, placed in the hands of receivers, Votaw was the land commissioner of John H. Kirby, of the Kirby Lumber Company, and of the Houston Oil Company of Texas—each well known to be or to have been the owner of vast tracts of land or the timber thereon—and had complete charge and possession of everything connected with the title to their lands and timber. The personal and business relations existing between Townsend and Votaw were intimate and of long standing, and Townsend was not ignorant of Votaw's confidential relations with the land titles of the parties whose employé he had been.

[1] According to Townsend's own version of his examination of the titles, he was content to rely on abstracts procured and furnished by Votaw. The abstracts so furnished of the titles to the lands in the county in which the suit above mentioned was pending did not indicate that any examination at all had been made of the court records of that county. It may well be inferred that a lawyer of Townsend's experience was fully aware that such an abstract, by reason of its failure to indicate any search of the records of judicial proceedings which might affect the titles in question, was not alone to be relied upon by one really seeking to ascertain the true condition of the titles. The omission from an abstract procured and furnished by a vendor of any reference to the records of judicial proceedings by which the title in question might be affected could itself be regarded as a circumstance likely to suggest to an experienced lawyer representing the prospective purchaser the advisability of a search of such records and the following up of any clue indicative of the existence of an adverse claim they might be found to disclose.

[2] Votaw was the vendor, and manifestly was dealt with as such by Townsend and his associates. In a court of equity he is not any the less to be regarded as the vendor because of his acts, which were disclosed to Townsend, in making conveyances to others and having them, only a few days later, in turn to convey to the Kelly Land & Lumber Company. His contract with Townsend and associates made him a vendor. This was enough to put the vendees on inquiry as to his relation to the titles. Gimon v. Davis, 36 Ala. 589; Creel v. Keith, 148 Ala. 233, 41 South. 780. The information which the papers in the suit above referred to disclosed could not well have been escaped, if there was any examination at all of the records of judicial proceedings in that county to which Votaw was a party. In view of Townsend's intimacy with Votaw and his knowledge of the latter's previous relations, it is not to be supposed that he could have failed to be impressed by the significance of the pendency of litigation between Votaw and the three parties whose land titles had been in his charge. Manifestly that litigation was still pending while such investigation as Townsend made of the titles to the land was in progress. The circumstance did not lose its significance by the dismissal of the suit at such a time as, in the light of facts of which Townsend was aware, indicated that this was done in contemplation of the conveyance of the lands to Townsend and his associates. It well could be inferred from the evidence, either that Townsend was aware of the pendency, after the option was taken,

while the titles were under investigation, and up to within a few days of the consummation of the sale, of the suit above mentioned, or that he collusively or inexcusably abstained from inquiry for the purpose of avoiding information of facts affecting the validity of the titles proposed to be conveyed; in other words, that he either investigated and learned the facts which investigation would have disclosed, or that he elected to avoid sources of probable information as to the title of which he could not have been in ignorance. Either of these inferences would justify the further conclusion that neither Townsend and his associates nor the corporation they organized were entitled to protection against a claim the existence of which would have been ascertained if there had been such an inquiry into the title of their vendor as must have been made if reasonable diligence and good faith had been exercised.

The special master's recommendation was that the appellant be charged with the manufactured value of the timber cut by it after the institution of the suit. As the timber was cut after there was unequivocal notice of the adverse claim, and by a party which failed to sustain its contention that it was an innocent purchaser, it may be that the court would not have been chargeable with error if it had followed the master's recommendation. Wooden-Ware Co. v. United States, 106 U. S. 432, 1 Sup. Ct. 398, 27 L. Ed. 230; Pine River Logging Co. v. United States, 186 U. S. 279, 22 Sup. Ct. 920, 46 L. Ed. 1164. This question, however, is not presented for decision, as the court did not, in its award of damages, follow the recommendation of the master, but awarded an amount considerably less than that recommended by him, and the party adversely affected by this action of the court is not complaining of it. The court awarded $5 per thousand feet as damages for timber cut after the bringing of the suit. We do not discover from the record how this particular figure was arrived at.

Counsel for the appellant contend that the amount awarded was more than that of the profit which the evidence showed was realized by the appellant from the timber so cut. This contention is sought to be supported by an estimate of the profits, arrived at by deducting from the sum of the prices realized from the lumber made from the timber the sum of the cost of its manufacture and adding interest on the amount so ascertained. In the calculation submitted in the argument of the counsel the fact is overlooked or ignored that in the cost of manufacture shown by the evidence which is relied on the stumpage was included as an item of outlay. The appellant has not made that outlay, and, as the timber cut belonged to the appellee, the latter is entitled to have its reasonable value included in the award of damages. The result of adding the amount of that item, as it is shown by the evidence, to the amount shown by the estimate submitted by the counsel for the appellant, is an amount greater than that which the court awarded. The appellant could not have sustained a complaint as to the amount awarded as damages if that amount had been determined by charging the appellant with the prices received by it for the lumber made from the timber so cut, less the cost of the conversion of the timber cut into lumber, as the appellant is not entitled to make a profit

out of what amounted to a trespass. Conn v. Rice, 204 Fed. 181, 122 C. C. A. 417. It follows that it cannot sustain a complaint against an award of damages which is even less in amount than it would have been if it had been made on the basis just mentioned. The record does not make it appear that the amount awarded as damages for timber cut by the appellant after the suit was brought was excessive.

The conclusion is that the record does not show the commission of any error which requires the reversal of the decree appealed from. It follows that that decree should be affirmed; and it is so ordered.

McARTHUR et al. v. CITIZENS' BANK OF NORFOLK, VA.

(Circuit Court of Appeals, Fourth Circuit. May 4, 1915.)

No. 1321.

1. EVIDENCE ⟸129—SIMILAR TRANSACTIONS—INDORSEMENT OF NOTE.

In an action against alleged indorsers of a note, defended on the ground that their indorsements were not genuine, evidence that plaintiff took a nonsuit as to another indorser, and a question asked plaintiff's cashier as to whether it did so because it became convinced that such indorser did not sign the note, were properly excluded; the cashier having expressed no opinion as to the genuineness of defendants' alleged signatures.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 388–393, 395–398; Dec. Dig. ⟸129.]

2. BILLS AND NOTES ⟸502—ACTIONS—EVIDENCE.

In an action against the mother-in-law and a brother-in-law of the president of a corporation on their alleged indorsements of the corporation's note, which they claimed were not genuine, evidence as to the relations between defendants and such president at the time of the trial and "in the last few months" was properly excluded, the note having been negotiated 15 months before the trial, since, even though their relations subsequently became unfriendly, this would not tend to show that the disputed signatures were not genuine.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1708–1716; Dec. Dig. ⟸502.]

3. APPEAL AND ERROR ⟸1048—WITNESSES ⟸268—CROSS-EXAMINATION—SCOPE.

The defendant in an action was cross-examined at some length without objection concerning his property interests and various suits and judgments against him, and among the matters inquired into were his transaction with W., who he said was not of kin to him, though he married W.'s niece. He was further asked whether two of his brothers married daughters of W., and whether he consulted his brother about buying an orange grove. *Held*, that the admission of these questions was not error, and, even though technically incorrect, the error was clearly inconsequential.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4140–4145, 4151, 4158–4160; Dec. Dig. ⟸1048; Witnesses, Cent. Dig. §§ 931–948, 959; Dec. Dig. ⟸268.

Cross-examination of witnesses to show interest or bias, see note to Ammerman v. United States, 108 C. C. A. 7.]

4. TRIAL ⟸27—DEMONSTRATIONS AND EXPERIMENTS—IMITATION OF HANDWRITINGS.

In an action involving the genuineness of alleged indorsements of a note, it was not error to refuse to permit an expert engraver to reproduce

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

by freehand drawing the signatures of the defendants in the presence of the jury, for the purpose of showing that they were easily imitated.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 76; Dec. Dig. ⊂=27.]

5. EVIDENCE ⊂=567 — EXPERTS ON HANDWRITING — CROSS-EXAMINATION — SCOPE—DISCRETION OF COURT.

Where, in an action involving the genuineness of alleged indorsements on a note, a large number of witnesses on the subject of handwriting had been called, and no such test had been suggested in connection with the testimony of previous witnesses, it was within the court's discretion to refuse to permit defendants, in cross-examining almost the last witness called, to test his ability as an expert by submitting genuine and imitated signatures, and asking him to pick out those that were genuine and those that were spurious.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2391; Dec. Dig. ⊂=567.]

6. EVIDENCE ⊂=567—EXPERT TESTIMONY—CROSS-EXAMINATION OF EXPERTS.

Such evidence was properly excluded as incompetent, as a witness may compare the disputed signature only with other signatures which are admitted or proven to be genuine.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2391; Dec. Dig. ⊂=567.]

7. EVIDENCE ⊂=179—DOCUMENTARY EVIDENCE.

In an action on alleged indorsements of a corporation's note, held by a Norfolk bank, defended on the ground that the indorsements were not genuine, a witness testified that one of the defendants asked him to find out how much paper he and his mother and sister were on, and whether $50,000 would relieve them from liability, and that the "Norfolk paper" was referred to; that he took the matter up with the cashier of a Raleigh bank, and received from him a letter to such defendant, which he delivered to him. Such defendant, when called upon to produce the letter, denied receiving it, and the witness then testified that a letter from the cashier to him contained the substance of the letter to defendant. *Held*, that such letter was properly admitted, as against the defendant in question, especially as the contents of it had been fully stated by the witness.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 595–599; Dec. Dig. ⊂=179.]

8. EVIDENCE ⊂=213—EFFORT TO COMPROMISE.

The facts did not bring the evidence within the doctrine of privilege relative to a proposed compromise.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 745–751, 753; Dec. Dig. ⊂=213.]

9. APPEAL AND ERROR ⊂=1051—HARMLESS ERROR—ADMISSION OF EVIDENCE.

In an action on a note, in which defendant denied indorsing the note, he was cross-examined without objection concerning other suits against him, in which he denied his liability under oath, and the papers containing such denials were read to him in full in connection with the examination. *Held* that, the contents of the papers having thereby been fully disclosed, he was not harmed by the admission of the papers themselves in evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4161–4170; Dec. Dig. ⊂=1051.]

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

Action by the Citizens' Bank of Norfolk, Va., against Adam Mc-

Arthur and another. Judgment for plaintiff, and defendants bring error. Affirmed.

Before KNAPP and WOODS, Circuit Judges, and WADDILL, District Judge.

J. A. MacLean, Jr., of Fayetteville, N. C., and L. R. Varser, of Lumberton, N. C. (Shaw & MacLean, of Fayetteville, N. C., James H. Pou, of Raleigh, N. C., and McLean, Varser & McLean, of Lumberton, N. C., on the brief), for plaintiffs in error.

J. Crawford Biggs, of Raleigh, N. C. (Winston & Biggs, of Raleigh, N. C., on the brief), for defendant in error.

KNAPP, Circuit Judge. The plaintiffs in error (defendants below and hereinafter so called) were sued as indorsers of a promissory note for $25,000 executed by the Newton-McArthur Lumber Company, a North Carolina corporation, under date of March 14, 1913, and payable four months thereafter, which the defendant in error (plaintiff below) discounted, in the ordinary course of business. They deny indorsing the note, and the genuineness of their signatures was the sole question submitted to the jury. The trial occupied a full week, a great number of witnesses being sworn, and resulted in a verdict that the note was in fact indorsed by defendants. Judgment was entered against them accordingly, and the case comes here upon assignments of error which will be briefly examined in this opinion. They will be taken up in the order in which they are discussed in the briefs of counsel.

[1] 1. The note in question was also indorsed by J. Sprunt Newton, president of the corporation maker, and by Mrs. Eliza Newton, his wife, who is a daughter of the defendant Mrs. M. C. McArthur. The defendant Adam McArthur is her son. The suit was against all four of the indorsers, but J. Sprunt Newton suffered default and the plaintiff at a previous term submitted to a judgment of nonsuit as to Mrs. Newton. On the cross-examination of plaintiff's cashier the defendants' counsel asked the witness if his bank did not take a nonsuit as to her because it became convinced that she did not sign the note, and later in the trial he offered the judgment of nonsuit. The evidence was excluded.

We are of opinion that this ruling is not open to objection. The bank had the right to sue one or more of the indorsers, and the fact that it took a nonsuit as to Mrs. Newton, whether for the reason implied in the question of counsel or otherwise, had no legitimate bearing upon the issue submitted to the jury, namely, whether the note in suit was indorsed by Adam McArthur and his mother. Moreover, the question involved indirectly the opinion of the witness as to the genuineness of the signature of an indorser against whom the bank was not then proceeding. But he knew nothing about any of the signatures in dispute, and had not undertaken to express any opinion as to their genuineness, and it was immaterial whether he thought that Mrs. Newton did or did not indorse the note. It also appears of record that at least one reason why the bank submitted to the nonsuit was that the court at a previous term had refused to allow an amendment of the complaint to the effect that Mrs. Newton had adopted or ratified her

alleged indorsement. It seems clear to us that the offered evidence was properly rejected.

[2] 2. It is claimed that the trial court erred in refusing to allow the defendant Adam McArthur, as a witness in his own behalf, to answer questions as to what were the relations between himself and his mother on the one part, and J. Sprunt Newton, "now"—that is, at the time of the trial—and "in the last few months."

We are quite unable to see any error in the exclusion of this testimony. Newton had indorsed the note and procured its discount by the plaintiff, but neither side saw fit to call him as a witness. The note was negotiated some 15 months before the trial, and there is no suggestion that the relations between these parties were not entirely friendly at that time. If they subsequently became unfriendly, as the questions might imply, the fact in no way tended to show that the disputed signatures were not genuine.

[3] 3. It is alleged that the court below erred in allowing plaintiff's counsel to ask Adam McArthur whether two of his brothers married two of N. G. Wade's daughters, and in allowing him to ask the witness whether he consulted his brother Dan about buying an orange grove in Florida. It appears from the record that the witness had been interrogated at some length without objection concerning his property interests and the various suits and judgments against him. Among the matters inquired into were his transactions with Wade, who he said was not of kin to him, although he married his niece.

Even if it be conceded that the allowance of these questions was technically incorrect, though we think otherwise, the answers were harmless, and the error so clearly inconsequential as not to be worthy of discussion.

[4] 4. One of the defendants' witnesses was an expert in steel and copperplate engraving, who testified that he had been reproducing autographs for a number of years and could make a fac simile of a "comparatively easy signature" by free-hand drawing, and who stated that the signatures in dispute were of that class. He was then asked if he was prepared to reproduce by free-hand the signatures of the defendants, and if he would do so in the presence of the jury. The stated purpose of this request was to show that the signatures in question were easily imitated, and that it was desired to have this demonstrated by an actual performance to be submitted to the jury in connection with the witness' testimony. The trial court refused to allow the demonstration.

Upon principle and authority it seems clear to us that the ruling should be upheld. The ability of this expert to counterfeit the disputed signatures did not tend to show that they were not genuine. As an exhibition of skill the proposed performance might have been interesting, but we fail to see how it could aid the jury in deciding whether the note in suit was indorsed by the defendants. None of the cases cited by defendants' counsel sustains his contention, as will be readily seen upon examination, while decisions directly in point are to the contrary effect. Thomas v. State, 18 Tex. App. 213; Holmes v. Goldsmith, 147 U. S. 150, 13 Sup. Ct. 288, 37 L. Ed. 118.

[5, 6] 5. It is insisted that the court below erred in refusing to permit the defendants to test the ability as an expert in handwriting of the plaintiff's witness Ramsey, by submitting to him both genuine and imitated signatures of the defendants and asking him to pick out those that were genuine and those that were spurious.

It would be sufficient to sustain the refusal as a matter of discretion under the circumstances existing at that stage of the trial. This witness was called in rebuttal, and was almost the last of a large number of witnesses on the subject of handwriting. No test of this sort had been suggested in connection with the testimony of any previous witness on either side, and it can hardly be said in reason that the ruling, as the case then stood, was not clearly within the discretion of the trial court. Assuming that the witness would have failed in one or more instances to distinguish the true from the false, the effect would have been negligible, in view of the mass of testimony which had already been submitted. Moreover, if the defendants had been allowed to test the witness in this way, the plaintiff could well have claimed the right to recall the defendants' witnesses of the same class for the purpose of subjecting them to a like test, and the trial would have been indefinitely prolonged. In the nature of the case a considerable latitude of discretion must be allowed in respect of cross-examination, and we have no hesitation in holding that it was a proper exercise of discretion to reject the test proposed, when the question had not been raised with any previous witness and the evidence was brought nearly to a close.

But we are also of opinion that the evidence was properly excluded as incompetent. We are satisfied that the law is well settled, or at least that the clear weight of authority is to the effect, that a witness in a case like this is permitted to compare the disputed signature only with other signatures which are admitted or proven to be genuine. This question has been thoroughly discussed by the Supreme Court of North Carolina in a recent opinion which sustains fully the ruling here under consideration. Fourth National Bank of Fayetteville, Appellant, v. Adam McArthur et al. (N. C.) 84 S. E. 39, August term, 1914. Other authorities to the same purport are: Hickory v. U. S., 151 U. S. 303, 14 Sup. Ct. 334, 38 L. Ed. 170; People v. Patrick, 182 N. Y. 176, 74 N. E. 843; Wilmington Savings Bank v. Waste, 76 Vt. 331;[1] Bacon v. Williams, 13 Gray (Mass.) 525; Gaunt v. Harkness, 53 Kan. 405, 36 Pac. 739, 42 Am. St. Rep. 297; Andrews v. Hayden, 88 Ky. 455, 11 S. W. 428; State v. Griswold, 67 Conn. 290, 34 Atl. 1046, 33 L. R. A. 227.

[7, 8] 6. The further contention is made that it was error to allow W. M. Walker, a witness for the plaintiff, to identify a certain letter purporting to have been written to him by one W. B. Drake, cashier of the Merchants' National Bank of Raleigh, which appears to have held some of the McArthur paper, and to state that it contained the substance of a letter from Drake to Adam McArthur, and that it was also error to allow this letter to be introduced.

Walker had testified at some length to conversations with Adam McArthur, in which the latter had asked him, as he asserted, to find out how much paper he and his mother and sister were on, and whether $50,000 would relieve them from liability. He averred that McArthur

[1] 57 Atl. 241.

in these conversations had referred to the "Norfolk paper," and as the note in suit was the only one held in Norfolk the alleged reference to it by McArthur tended to show an admission on his part that he had indorsed it. Walker took the matter up with Drake, and received from him a letter to McArthur, which he said he delivered in person. The latter was called upon to produce it, but denied that he had ever received such a letter. In view of this denial, the letter in question, which Walker said contained the "same proposition," was allowed in corroboration of his testimony. The court carefully pointed out that this evidence was not competent as against Mrs. McArthur, and that it was admitted solely as affecting Adam McArthur. Under the circumstances, we are of opinion that the letter was admissible for the purpose stated, and that the objection to its introduction is without substantial merit. Moreover, we are unable to see that this defendant was prejudiced by the admission of a letter the contents of which had been fully stated by the witness.

The point is also made that the evidence of Walker should have been excluded because it pertained to a proposed compromise, but we are satisfied that the doctrine of privilege does not apply to the facts of this case and cannot be invoked to support the contention.

[9] 7. On his cross-examination as a witness in his own behalf Adam McArthur was interrogated at length and without objection concerning a suit brought against him by the American National Bank, in which he allowed a judgment to be taken against him because, as he said, he was without money to contest the case, although he had denied under oath his liability for the debt on which he was sued. It was also brought out that he had been sued by the Bank of Commerce & Trusts of Richmond as guarantor of certain bonds of the Newton-McArthur Lumber Company, that judgment was taken against him by default, that he made an affidavit for the purpose of opening the default and later filed a verified answer, in both of which he denied that he had signed the bonds in question, although he afterwards admitted that he had done so. The record indicates that these papers were read to him in full in connection with his examination concerning the transactions to which they referred, but error is alleged because they were allowed in evidence.

As McArthur had denied indorsing the note in suit, the obvious purpose of this examination was to discredit him as a witness, and that the inquiries addressed to him were legitimate for that purpose is not questioned. The objection raised goes only to the ruling which permitted the documents themselves to be put in evidence. In view of the extent to which this line of inquiry had gone without objection, with the result that the contents of these papers were already known to the jury, it seems plain to us that he has no just ground of complaint because they were included in the record. The verified statements made by him in these other suits had been fully disclosed, apparently with the consent of his counsel, and it is impossible to see how he was harmed by putting the documents in evidence. A careful review of this feature of the trial convinces us that no reversible error can be predicated upon the ruling here considered.

8. The remaining assignments are based upon objections to the charge delivered to the jury. We are satisfied after thorough examination that none of these exceptions presents a question of substantial merit, and it would serve no useful purpose to discuss them in detail. The charge was a full and adequate presentation of the case, which failed in no respect to state with clearness and impartiality the contentions of the respective parties. In its specific references to the testimony, as well as in its general tenor, it was quite as favorable to the defendants, in our estimation, as the evidence warranted. In a word, it was an elaborate and unbiased review which clearly explained to the jury the question for them to determine, and called their attention with judicial fairness to the proofs and arguments on both sides; and we fail to find anything said or omitted which could mislead their deliberations or improperly influence their decision.

The record discloses no ground for reversal, and the judgment will therefore be affirmed.

UNITED STATES, to Use of MORRIS, v. RICHARDSON et al.

(Circuit Court of Appeals, Fourth Circuit. May 4, 1915.)

No. 1324.

1. PRINCIPAL AND SURETY ⊂=144—RIGHT OF SURETY TO SET-OFF—STATUTORY PROVISIONS.

Under Code Va. 1904, § 3298, authorizing a surety to assert as a set-off any claim which his principal would have had against plaintiff, suing the surety, a surety of plaintiff and a defendant may, when sued with defendant for a debt due from defendant to plaintiff, assert as a set-off a claim due from plaintiff to defendant, though the transactions out of which the debts arose are distinct, and though defendant is bankrupt.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 393-396; Dec. Dig. ⊂=144.]

2. PRINCIPAL AND SURETY ⊂=144—RIGHT OF SURETY TO SET-OFF—STATUTORY PROVISIONS.

Under this statute, a surety of two contractors with the government for distinct public works, conditioned on the contractors' faithfully executing their contracts, may, when sued by one contractor for a debt due from the other contractor, set up as a set-off a claim due the latter contractor from the former contractor, in the absence of anything to show that there are persons asserting claims for supplies and materials protected by the bond of the latter contractor, or that there are such claims to be paid.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 393-396; Dec. Dig. ⊂=144.]

3. COURTS ⊂=342—EQUITABLE DEFENSES IN ACTIONS AT LAW—STATUTORY PROVISIONS.

Act Cong. March 3, 1915, authorizing equitable defenses in actions at law, substantially abolishes all technical distinctions between proceedings at law and in equity.

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

Equitable defenses in actions at law, see note to Standard Portland Cement Co. v. Evans, 125 C. C. A. 5.]

In Error to the District Court of the United States for the Eastern District of Virginia, at Norfolk; Henry G. Connor, Judge.

Action by the United States of America, to the use of W. G. Morris, against R. H. Richardson and others. Judgment for defendants, and plaintiff brings error. Affirmed.

S. Gordon Cumming, of Hampton, Va., for plaintiff in error.

Harry K. Wolcott, of Norfolk, Va. (Wolcott, Wolcott, Lankford & Kear, of Norfolk, Va., on the brief), for defendants in error.

Before KNAPP and WOODS, Circuit Judges, and WADDILL, District Judge.

WADDILL, District Judge. W. G. Morris and the firm of R. H. Richardson & Sons, were each general contractors engaged in government work in this community. On the 8th of July, 1910, Morris entered into a contract with the United States for the construction of a building at Portsmouth, Va., known as the "Naval Hospital Building," and on the 30th of May, 1911, Richardson & Sons contracted with the government for the construction of a building at Fortress Monroe, Va., known as the "Marine Officers' Quarters." The two contractors each gave bond to the government for the faithful execution of their contracts; the appellee the American Surety Company becoming surety on each bond. Morris did work and furnished materials as subcontractor under R. H. Richardson & Sons for the Marine Officers' Quarters at Fortress Monroe, and Richardson & Sons furnished labor and materials as subcontractors under Morris for the Naval Hospital Building at Portsmouth. Upon the completion of these contracts, which occupied some months, Morris owed Richardson & Sons $1,598.59 for work and supplies furnished the Naval Hospital building, and Richardson & Sons owed Morris $1,611.60 for work and supplies in connection with the Marine Officers' Quarters. At this stage, Richardson & Sons were duly adjudged involuntary bankrupts, and in their schedules in bankruptcy made no reference to the indebtedness between themselves and Morris, though as a matter of fact there was a balance of $13.01 due Morris.

The appellees Lackey, Wolcott & Liphart were duly elected trustees in bankruptcy of Richardson & Sons, and subsequent to their appointment and qualification this suit was instituted by the United States of America, suing for the use of W. J. Morris, against Richardson & Sons, their trustees in bankruptcy, and the American Surety Company, setting up a claim of $3,224. The American Surety Company appeared and filed its pleas of payment, condition performed, and two special pleas of set-off. Plaintiff thereupon joined issue on the first plea, admitted payment on account of said debt, whereby its claim was reduced to $1,611.60, with interest, and moved to reject the two special pleas of set-off. A jury was waived, and the case submitted to the judge, upon motion to reject said pleas and upon the merits, resulting in the judgment complained of; that is to say, the court denied the motion to reject said pleas, and gave the plaintiff judgment for $13.01, the difference between the balance due on the claim sued on and the amount due by Richardson & Sons and set up in the

offset. To this judgment the writ of error in this case was sued out, which presents mainly for the consideration of the court the question of the propriety of the court's action in overruling the defendant's motion to reject said pleas; the contention being that the pleas set up matters wholly independent of the contract sued on, and as the cause of action accrued to the plaintiff under a contract with the government of the United States, for the faithful performance of which the bond sued on was executed, the contract and bond being entered into pursuant to an act of Congress, that no defense by way of set-off of a claim arising under an independent contract, or growing out of some other transaction, could be offered as a defense.

[1] The pleas of set-off were filed pursuant to section 3298 of the Code of Virginia, which is as follows:

"Payment or set-off may be allowed, if described in plea or account; when allowed, though claim against several, and debt only to part of them. In a suit for any debt, the defendant may at the trial prove, and have allowed against such debt, any payment or set-off which is so described in his plea, or in an account filed therewith, as to give the plaintiff notice of its nature, but not otherwise. Although the claim of the plaintiff be jointly against several persons, and the set-off is of a debt not to all but only to a part of them, this section shall extend to such set-off, if it appear that the persons, against whom such claim is, stand in the relation of principal and surety, and the person entitled to the set-off is the principal."

This statute provides in terms that, where the relation of principal and surety exists, the surety may assert any claim which its principal would have had against the person seeking to recover against such surety, which is this case precisely. The defendant in error was surety for both Morris and Richardson & Sons. Morris sought to make it liable for what Richardson owed him. The surety replied that, while it was true Richardson owed the plaintiff, still the plaintiff also owed Richardson approximately the amount sued for, and that therefore it should not be required to pay money to Morris for Richardson until the former paid to the latter the amount he owed. This is clearly what should be done in the absence of some apparent and overwhelming reason to the contrary. It is what the statute of offset is intended for, and because of its reasonable and equitable character is entitled to be liberally considered. Allen v. Hart, 18 Grat. (Va.) 722; Tidewater Quarry Co. v. Scott, 105 Va. 160, 52 S. E. 835, 115 Am. St. Rep. 864, 8 Ann. Cas. 736.

The position of the plaintiff in error that this plea of set-off should not be entertained, because the same arises out of a transaction extrinsic of the plaintiff's demand, and for which an action on contract might be maintained by the defendant against the plaintiff, is not well taken. On the contrary, it is just what could be done, and this is especially true under the Virginia statute, where it is sought to make a surety pay money for its principal, which in point of fact is not due, upon an adjustment of transactions between the parties themselves. 34 Cyc. 625; Burks on Plead. & Prac. 435.

The right of a surety, when sued, to set off any debt due his principal from the plaintiff, is well settled under the Virginia authorities; the cases having gone so far as to allow this to be done, even though

the principal had become bankrupt. Wartman et al. v. Yost, 22 Grat. (Va.) 595; Edmunds' Assignee v. Harper, 31 Grat. (Va.) 637.

[2] The plaintiff in error mainly relies upon the fact that because these are government contracts, and subcontractors and all others who furnish supplies and materials are protected thereby, that this would prevent the defendants here from interposing the plea of set-off under the Virginia statute, or at all. Whatever force there may be in this position, if any, it should not be received here, since there is no suggestion that there are persons asserting or making, or that there are such claims to be paid, and to reject this defense would result in a surety having to pay money not due, because of the apprehension of the assertion of claims that have no existence.

[3] It may not be amiss to say that since the trial of this case Congress, by act of March 3, 1915, has expressly authorized the interposition of equitable defenses in actions at law, and substantially abolished all technical distinctions between proceedings at law and in equity.

The decision of the lower court is plainly right, and should be affirmed.

Affirmed.

OATES v. UNITED STATES.

(Circuit Court of Appeals, Fourth Circuit. May 4, 1915.)

Nos. 1326, 1329, 1330, 1331.

1. CONTEMPT ⇐63—PROCEEDINGS—EVIDENCE—DECREE.
Where hearsay evidence was received at a hearing on a charge of contempt in violating an injunction, it is not sufficient that the decree recite that the findings are based only on legal evidence, rejecting the irrelevant and improper parts thereof, but it should indicate what evidence was rejected.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 195, 197–201; Dec. Dig. ⇐63.]

2. CONTEMPT ⇐66—PROCEEDINGS—EVIDENCE—DECREE.
A decree sentencing for contempt of court in violating an injunction, which recites that the court took judicial notice of the facts found in a similar case, some of which findings were not reversed on appeal, will be reversed for new conclusions of fact, in view of the opinion in the other case.

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

8. INJUNCTION ⇐230—CONTEMPT—SENTENCE—SEPARATE ACTS.
Where defendants were found guilty of separate acts of disobedience to an injunction, the sentence should not be imposed generally for all offenses; but the punishment for each offense should be specified, so that it could be reviewed on appeal.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 502–516; Dec. Dig. ⇐230.]

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

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

James Oates, Frank Ledvinski, Hiram Stephens, and Fanny Sullens were each found guilty of contempt of court in separate proceedings, and they bring error. Reversed and remanded.

Joseph R. Curl and John C. Palmer, Jr., both of Wheeling, W. Va. (Erskine, Palmer & Curl, of Wheeling, W. Va., on the brief), for plaintiffs in error.

Stuart W. Walker, U. S. Atty., of Martinsburg, W. Va., and J. F. Cree, of Wellsburg, W. Va. (John A. Howard, of Wheeling, W. Va., on the brief), for the United States.

Before KNAPP and WOODS, Circuit Judges, and CONNOR, District Judge.

WOODS, Circuit Judge. In these contempt proceedings the plaintiffs in error were found guilty of violation of a temporary restraining order of September 29, 1913, made in the case of West Virginia-Pittsburgh Coal Company v. John P. White et al. The tenor of the order was to enjoin interference with plaintiff's business by using threats, force, intimidation, or persuasion to induce its employés to break their contracts or leave their work, or by using like means to induce any person to refuse to accept employment with plaintiff, and to enjoin trespassing on plaintiff's premises for the purposes above indicated. The District Judge made specific findings of a number of acts of disobedience of the order by each of the parties charged, and the sentence imposed on each defendant was the payment of the costs and imprisonment for six months. The questions here made, recently considered and decided in Schwartz v. U. S., 217 Fed. 866, 133 C. C. A. 576, and Scoric v. U. S., 217 Fed. 871, 133 C. C. A. 581, will not be reconsidered.

[1] There was before the District Judge competent evidence sufficient to warrant a finding of contempt in disregarding the orders of the court against all of the plaintiffs in error. As to some of these findings there was, indeed, no conflict of evidence. As to others, however, there was conflicting evidence, and hence it was important that irrelevant and incompetent evidence should be excluded from consideration. Numerous objections were made to testimony as hearsay which were either overruled or left for future consideration. It is true the court in its decree recites that it bases its finding upon "the legal evidence produced upon the trial rejecting all improper and irrelevant parts thereof," but hearsay evidence was admitted, and it is impossible for this court to say from the record what the District Judge ultimately rejected and whether any of the incompetent testimony influenced his findings or the extent of the punishment inflicted.

[2, 3] The decree further recites:

"This court takes judicial notice of the fact that in the chancery cause of Hitchman Coal & Coke Co. v. John Mitchell et al., on January 18, 1913, it filed an opinion found in 202 Fed. 512, wherein, based upon record and oral evidence of some 8,000 pages, it determined that the United Mine Workers of America as an organization was an unlawful one, for that by its obligation, constitution, by-laws, rules, and regulations it undertakes (a) to require its members to surrender their individual freedom of action; (b) to coerce non-union miners to join the union, whether wishing to do so or not, for they must be members 'who work in and around the mines'; (c) to control or rather abrogate and destroy the right of the employer to contract with the men independent

of the organization; (d) to exclude his right to employ nonunion labor if he desires; (e) to limit his right, in the absence of contract, to discharge whom he pleases, when he pleases, and for what reason he sees fit; and (f) to assume the right on the part of the organization, through its officers, to control the employer's business, to shut down his mine by calling out the men in obedience to their obligation, whenever it is deemed to the interests of the union, regardless of the employer's interests or the effect that such action may have upon him, as regards loss, damage, and necessary violations, on account thereof, of his existing contracts with others. To such extent in this direction does such assumption of power and control go, that it is directly provided by the laws of the organization that such suspension of operations may be ordered, even though there be no dispute between the employer and the union, but solely because such dispute exists between the union and some one or more of his rival operators in business in the same district. It was therein further judicially ascertained and determined that this organization was an unlawful and criminal conspiracy both under common law and the federal Sherman Anti-Trust Act, in that, by express contract with coal operators and employers of mine laborers in Ohio, Indiana, Illinois, and Western Pennsylvania, it had agreed and undertaken by means of its organization to suppress, if not destroy, the coal trade of West Virginia, whereby the competition of such coal trade of this state with that of these other states would be removed, and that by the voluntary admission of its officers hundreds of thousands of dollars had been expended and human lives sacrificed by it to fulfill this its contract and purpose. Further this court will take judicial notice that on said January 18, 1913, a final decree based upon this opinion was entered in said cause enjoining it perpetually from any effort to 'organize the mines or miners of the plaintiffs in said suit, which decree, although appealed from, to this date stands unreversed.' "

Some of these conclusions were held to be erroneous in the case of John Mitchell et al. v. Hitchman Coal Company, 214 Fed. 685, 131 C. C. A. 425, and it is impossible to determine from the record to what extent the erroneous views of the District Judge as to the legality of the labor union influenced his findings of fact or his infliction of punishment. Following the rule laid down in Gompers v. Buck's Stove & Range Company, 221 U. S. 418, 31 Sup. Ct. 492, 55 L. Ed. 797, 34 L. R. A. (N. S.) 874, we are obliged to hold, further, that it was not in accordance with law to impose a general sentence for the separate acts of contempt alleged and found against the defendants. The punishment for distinctly different offenses should have been so separated that this court on review could analyze the evidence and determine which, if any, of the charges were sustained.

The judgment of the District Court must be reversed, and the causes remanded, so that the District Judge may reconsider them, indicating in his finding the evidence rejected as hearsay, announcing his conclusions of fact in view of the judgment of this court in Mitchell v. Hitchman Coal Co., and imposing sentence in accordance with the view of the Supreme Court of the United States in Gompers v. Buck's Stove & Range Company.

Reversed.

BROOKS v. KERR.

(Circuit Court of Appeals, Fourth Circuit. June 10, 1915.)

No. 1294.

1. INTEREST ⟸20—DEPOSITS IN COURT.
The interest recoverable by a complainant on the sum paid by defendant into the registry of the court to meet complainant's demand pending the suit, resulting in a decree for complainant in a sum less than the amount of the deposit, is the amount realized by the court on the fund.
[Ed. Note.—For other cases, see Interest, Cent. Dig. § 41; Dec. Dig. ⟸20.]

2. APPEAL AND ERROR ⟸1022—FINDINGS—CONCLUSIVENESS.
Findings of the master, who took much of the testimony orally and saw the witnesses, as approved by the trial court, will not be disturbed on appeal.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4015–4018; Dec. Dig. ⟸1022.]

Cross-Appeals from the District Court of the United States for the Northern District of West Virginia, at Philippi; Alston G. Dayton, Judge.

Suit by Mary S. Kerr against Arthur Brooks. From a decree granting relief, both parties appeal. Affirmed.

D. H. Hill Arnold, of Elkins, W. Va. (E. H. Arnold, of Elkins, W. Va., on the brief), for complainant.

Arthur S. Dayton, of Philippi, W. Va., and W. T. Talbott, of Webster Springs, W. Va., for defendant.

Before KNAPP and WOODS, Circuit Judges, and WADDILL, District Judge.

WADDILL, District Judge. This is an appeal and cross-appeal from a decree of the United States District Court for the Northern District of West Virginia, rendered on the 9th day of December, 1913. The case may be briefly stated as follows:

The complainant in the court below, appellee here, and her brother, the defendant, appellant here, agreed verbally to purchase together the timber on a tract of land in Randolph county, W. Va., on the waters of Gladdys fork and Svahers Mountain, containing some 900 acres, and hereinafter referred to as the "Leonard tract," and to cut the timber therefrom and divide the profits equally. The purchase was made at the price of $5,000, $3,000 of which was to be paid in cash, of which complainant paid $2,500 and the defendant $500, and executed his note for the deferred payment of $2,000. A sawmill was placed upon the tract, and a small portion of timber cut. A deed was taken in the name of the defendant alone, though complainant insists that it should have been made to her and her brother jointly. Shortly after taking the deed, the defendant gave to the complainant a paper showing her interest in the timber purchased. At the time of this purchase, the defendant owned the timber on the adjoining tract of land, also containing about 900 acres, and hereinafter referred

to as the "Peck tract." About two years after the acquisition of the Leonard tract, he sold all the timber from the two tracts for $32,000. A disagreement arose between the complainant and the defendant as to the apportionment of the purchase money arising from the sale of the timber on the two tracts of land, as between said tracts, including certain improvements and a sawmill on the Leonard tract, and this suit was instituted to settle the controversy.

The complainant contended, briefly, that the timber on the Leonard tract was the more valuable of the two and that she was entitled to share in the profits arising from the manufactured lumber therefrom, as well as in the enhanced value of the property from the sawmill and other improvements placed thereon by them jointly; whereas, the defendant insisted that complainant had agreed to accept $4,500 in full of her one-half interest in the entire property, to which she was entitled from the Leonard tract and the improvements thereon; that the Peck timber was much more valuable than the Leonard, and that he had incurred considerable expense and costs in connection with the acquisition of the property, and in securing by law the purchase price therefor, as well as expense in cutting timber before the sale, all of which he claimed his sister should share in arriving at the amount due her, and that, in any event he had paid her more than her full interest.

The pleadings fully and distinctly set forth the claims of the parties, and thereupon the case was referred by agreement, to a master, with directions to make sundry inquiries involving the several contentions made. The master rejected the defendant's claim that his sister had agreed to accept a lump sum of $4,500 in full of her one-half interest, and also that she had been paid in full. Further, he reached the following conclusions: (a) That the timber on the Leonard tract was not the more valuable of the two tracts, and, on the contrary, the value was as 4 to 11 in favor of the Peck tract. (b) That the defendant was entitled to an allowance for some of the expenses incurred and claimed by him, in connection with the purchase of the property and the handling thereof, as well as for certain expenses incurred in connection with the lawsuit to recover the unpaid balance due by the purchaser on the property sold; and he made an allowance therefor, fixing the proportion which the complainant should bear at the same ratio of 4 to 11. (c) That there was due the complainant, as of the 1st day of April, 1913, after deducting three general payments made to her, aggregating $4,256.75, on account of her one-half interest, the sum of $2,076.73.

[1] To this report both parties excepted, the complainant filing 4, all of which were overruled, and the defendant 16, all save one of which, the twelfth, were overruled. The twelfth exception raised the propriety of the charge by the master of 6 per cent. per annum interest on a sum in the registry of the court to meet complainant's demands pending the contest, instead of 3½ per cent., the amount realized by the court upon the fund. This exception was sustained, and 3½ per cent., instead of 6 per cent., allowed on the balance due from the 19th of November, 1907, until the date of the decree on the

9th of December, 1913, thereby reducing the amount due from the defendant from $2,076.73 to $1,977.57, for which last-named sum, less certain costs apportioned against the complainant, a decree was entered; the court holding that the suit was in effect to settle a partnership transaction, and dividing the costs between the parties, save as to those incurred by reason of the exceptions to the master's report, and assessing those upon the basis of the exceptions filed.

[2] The questions involved were almost entirely of fact, and upon the well-settled principles governing this court, where findings have been made by the master, who took much of the testimony orally and saw the witnesses, and the court below concurred therein, they will not be disturbed by this court. After a careful consideration of the testimony, and full investigation of all the questions involved, this court concurs in the ruling of the lower court, and finds no error, certainly of which the appellant can complain.

It follows that the decree of the lower court should be affirmed, at the cost of the appellant and cross-appellee, and it is so ordered.

Affirmed.

AMERICAN BRAKE SHOE & FOUNDRY CO. v. PERE MARQUETTE R. CO.

(District Court, E. D. Michigan, S. D. June 21, 1915.)

No. 5467.

1. COMMERCE ⟸8—LIMITATION OF CARRIER'S LIABILITY—VALIDITY—LAW GOVERNING—"FEDERAL QUESTION."

The validity of a contract between a shipper and a carrier, limiting the carrier's liability in case of the loss of an interstate shipment to the declared value of the shipment, is a "federal question," to be determined under the general common law, and is not within the field of state law or regulation.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 5; Dec. Dig. ⟸8.

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

2. CARRIERS ⟸158—DECLARING VALUE OF SHIPMENT—ESTOPPEL.

Where a carrier, under its tariffs filed with the Interstate Commerce Commission, has two rates on a certain commodity, one applicable when the value of the commodity is declared by the shipper not to exceed a specified amount, and the other when the value is declared to exceed that amount, or is not declared at all, a shipper, who has declared the lower value and thereby obtained the lower rate, is estopped, in case the property is lost, from recovering on the basis of a higher valuation.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 663–667, 699–703½, 708–710, 718, 718½; Dec. Dig. ⟸158.]

3. PRINCIPAL AND AGENT ⟸155—AUTHORITY OF SHIPPER'S AGENT—LIMITATION OF LIABILITY.

An interstate carrier's tariffs, filed with the Interstate Commerce Commission, provided two rates on household goods; the lower being based on a declared value not exceeding a specified amount, with a limitation of liability to that value. Unknown to the carrier, a shipper's agent tendering property for transportation had no authority to declare its value for the purpose of obtaining such lower rate; but he neverthe-

less signed a household goods release, declaring their value not to exceed the value on which such rate was based. *Held*, that the carrier was justified in relying upon the authority of the agent tendering the shipment to sign such contracts concerning the transportation as were provided for in its published tariffs, and the shipper was bound by such contract.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 574–582; Dec. Dig. ⟸155.]

At Law. Action by the American Brake Shoe & Foundry Company against the Pere Marquette Railroad Company. On intervening petition by Newell Leonard. Claim of the intervening petitioner allowed in part only.

Newell Leonard, of St. Louis, Mich., in pro. per.
Parker, Shields & Brown, of Detroit, Mich., for receivers.

TUTTLE, District Judge. On June 3, 1913, the intervening petitioner, then residing in Chicago, Ill., employed the Bristol Express Company of that city to take two packages of goods for him to the depot of the Pere Marquette Railroad Company in Chicago, for shipment to St. Louis, Mich. The express company was authorized by the intervening petitioner to pay the freight charges on this shipment, but was not authorized by him to declare the valuation of the goods for the purpose of shipment, or to sign any release of the common carrier's liability in respect to the shipment. The agent of the express company took the goods to the Pere Marquette depot in Chicago and shipped them as directed, signing a shipping order and procuring a bill of lading from the railroad, and signing also a "household goods release," declaring that the value of this shipment did not exceed $10 per hundredweight. The agent of the receivers of the Pere Marquette Railroad Company, receiving such shipment, had no knowledge of any lack of authority on the part of the agent of the intervening petitioner to sign this household goods release.

This shipment was properly classed as household goods, and the rate of 37 cents per hundredweight assessed and paid thereon was assessed in accordance with the tariff of the receivers of the Pere Marquette Railroad Company duly published and on file with the Interstate Commerce Commission. If the agent of the shipper had not signed the household goods release above mentioned, a rate would have been assessed upon the shipment equal to 1½ times the rate that was assessed; such increased rate being duly published and on file with the Interstate Commerce Commission and assessed on household goods in all cases where the aforesaid releases were not signed.

When this shipment arrived at destination, a package described on the bill of lading as "one crate," weighing 100 pounds, and which the intervening petitioner now claims to have been worth $141.50, was missing, and the receivers of the Pere Marquette Railroad Company have never delivered the same to the intervening petitioner. The issue in this case is as to the validity of the household goods release above described, assuming to limit the amount of recovery by the shipper,

in case of loss, to $10 per hundredweight of the goods shipped plus the freight charges on the lost portion of the shipment, if the same were prepaid.

[1] The shipment involved in this case was an interstate shipment, and the validity of the contract made between the shipper and the carrier in case of loss is therefore, under the decisions of the Supreme Court of the United States, a federal question, to be determined under the general common law, and is not within the field of state law or regulation. Adams Express Co. v. Croninger, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257; Michigan Central Railroad v. Vreeland, 227 U. S. 59, 33 Sup. Ct. 192, 57 L. Ed. 417, Ann. Cas. 1914C, 176.

[2] It is well settled that when, as in the case at bar, a carrier has two rates assessable on a certain commodity, one applicable when the value of the commodity is declared by the shipper not to exceed a certain sum per hundredweight, and the other when the value is declared to exceed that sum, or is not declared at all, a shipper who has declared the lower value, and thereby obtained the advantage of the lower rate, is estopped, in case the property is lost, from recovering on the basis of a higher valuation than he has declared. Kansas, etc., Ry. v. Carl, 227 U. S. 639, 33 Sup. Ct. 391, 57 L. Ed. 683; Missouri, etc., Ry. Co. v. Harriman, 227 U. S. 657, 33 Sup. Ct. 397, 57 L. Ed. 690.

[3] Nor can it be permitted to avail the intervening petitioner to show that, unknown to the carrier, the authority of the shipper's agent, who tendered the property for transportation, did not include the authority to declare its value for the purpose of obtaining a freight rate and defining the liability of the carrier in case of loss. In the absence of knowledge as to lack of authority in the person bringing a shipment to a railroad station to sign shipping contracts, the carrier is justified in relying upon the authority of the person tendering the shipment to sign such contracts concerning its transportation as are provided for in the published tariffs of the carrier, and the owner of the property is bound by such contracts. Great Northern Ry. Co. v. O'Connor, 232 U. S. 508, 34 Sup. Ct. 380, 58 L. Ed. 703.

In the O'Connor Case a transfer company in Minneapolis was employed by the plaintiff to take her goods to a railroad station and ship them. The transfer company signed an agreement declaring the value of the shipment to be $10 per hundredweight. The goods were destroyed in transit, and plaintiff sued for a sum much in excess of the declared valuation. The court said:

"At the trial the plaintiff testified she did not know that there had been any valuation of her goods, as the agent of the Boyd Company in soliciting the shipment had stated that it had a through car, but said nothing to her about shipping her effects as household goods, and she understood that they were to be shipped as a separate consignment. She testified that she had stated to the transfer company that her goods were new, and, as she had no insurance, she was willing to pay the regular rates. * * * But the transfer company had been intrusted with goods to be shipped by railway, and, nothing to the contrary appearing, the carrier had the right to assume that the transfer company could agree upon terms of the shipment, some of which were embodied in the tariff. The carrier was not bound by her pri-

vate instructions or limitation on the authority of the transfer company, whether it be treated as agent or forwarder. If there was any undervaluation, wrongful classification, or violation of her instructions, resulting in damage, the plaintiff has her remedy against that company."

This decision in my opinion controls the case at bar. An order will be entered authorizing the receivers of the Pere Marquette Railroad Company to pay the intervening petitioner $10.37 in satisfaction of his claim; such payment being based on the declared value of the portion of the shipment lost, plus the freight charges prepaid on that portion.

MEMORANDUM DECISIONS

ANATOMIK FOOTWEAR CO. v. COWARD. (Circuit Court of Appeals, Second Circuit. May 2, 1915.) No. 266. Appeal from the District Court of the United States for the Southern District of New York. James H. Griffin, of New York City, for appellant. Louis W. Southgate and O. Ellery Edwards, Jr., both of New York City, for appellee. Before COXE, WARD, and ROGERS, Circuit Judges.

WARD, Circuit Judge. The opinion of Judge Rose dismissing the bill in this case founded on United States letters patent No. 812,920, issued to one Cole, for anatomical footwear, will be found at 220 Fed. 342. It may be conceded that Dr. Galloway did not describe in his article published in 1898 the complainant's shoe, because he used a heel higher on one side than on the other, and also that Kohn's patent, being merely for design, shows nothing material and that Tillottson's patent does not claim the features that Dr. Cole relies on. Still these documents and the proof of prior practice taken together do show that before Dr. Cole applied for his patent it was known that a wide sole and shank and heel, the heel being longer than usual and projecting forwardly on one side, were beneficial, whether the anatomical reasons were appreciated or not. We do not think that what the patentee did under these circumstances amounted to invention. Decree affirmed.

AUTOSALES GUM & CHOCOLATE CO. et al. v. RYEDE SPECIALTY WORKS. (Circuit Court of Appeals, Second Circuit. June 22, 1915.) No. 283. Appeals from the District Court of the United States for the Western District of New York. This cause comes here upon appeal from a decree of the District Court, Western District of New York. The suit is for infringement of United States patent No. 665,977, issued January 15, 1901, to Walter H. Pumphrey, for a coin-controlled mechanism. Validity and infringement of claims 5 and 6 were found, and defendant appeals from so much of the decree. Noninfringement of claim 24 was also found, and complainant appealed therefrom. The opinion of Judge Mayer will be found in 222 Fed. 956. A. A. Thomas, of New York City, for complainants. Frederick F. Church and G. W. Rich, both of Rochester, N. Y., for defendant. Before LACOMBE, COXE, and ROGERS, Circuit Judges.

PER CURIAM. The use of slot machines by which small articles may be sold automatically antedates Pumphrey's invention by many years and the art is a crowded one. The claims under consideration must be strictly construed, if validity is to be found. To attempt a description of these complicated machines would accomplish no useful purpose, since we concur in Judge Mayer's discussion of the record and it seems unnecessary to add anything to what he has written. The decree is affirmed, but since both sides appealed, and neither side wholly prevailed, there will be no costs of appeal to either party.

EATON v. CONNECTICUT GENERAL LIFE INS. CO. SAME v. CONNECTICUT MUT. LIFE INS. CO. (Circuit Court of Appeals, Second Circuit. June 8, 1915.) Nos. 257, 258. In Error to the District Court of the United States for the District of Connecticut. Each of these causes comes here upon appeal from a judgment of the District Court, District of Connecticut, in favor of defendant in error who was plaintiff below. (D. C.) 218 Fed. 188, 206. The causes were tried by the court without a jury. F. A. Scott, U. S. Atty., of Hartford, Conn., for plaintiff in error. L. F. Robinson, of Hartford, Conn., for defendants in error. Before LACOMBE, COXE, and ROGERS, Circuit Judges.

PER CURIAM. The controversies arose under the Corporation Excise Tax Act of August 5, 1909, the action being brought to recover taxes that had been collected under section 38 (Comp. St. 1913, § 6301), which sets forth how the net income of insurance companies shall be ascertained for purposes of taxation. The precise question presented is whether certain sums of money are "dividends" within the meaning of such section. In companies, conducted on the mutual plan policies are issued providing for a definite yearly premium, which is usually fixed somewhat above the amount required to insure safety. When a certain time has passed, and it is found that a less sum may safely be taken for a specific year, the premium for that year is reduced to the lower sum, and the insured is allowed to invest the difference, if he care to do so, in additional paid-up insurance without further medical examination. In company bookkeeping the premiums are frequently entered at their full amount and the amounts of rebate are entered as "dividends." They are in no true sense dividends, however they may be called, but are in fact partial abatements of premium. It is unnecessary to discuss the points raised in argument. The precise question was decided by Judge Cross in Mutual Benefit L. I. Company v. Herold (D. C.) 198 Fed. 199, his decision was affirmed by the Court of Appeals of the Third Circuit, 201 Fed. 918, 120 C. C. A. 256, and a writ of certiorari to review the decision last cited was denied by the Supreme Court. Comity calls for a like decision here, which, indeed, is fully in accord with our views of the merits of the controversy. The judgments are affirmed.

In re FOX. (Circuit Court of Appeals, Second Circuit. June 26, 1915.) Petition to Revise Order of the District Court of the United States for the Eastern District of New York. See, also, 222 Fed. 135. Before LACOMBE, WARD, and ROGERS, Circuit Judges.

PER CURIAM. Upon consideration of the application for a stay of all proceedings until next term, we think the creditors should not be thus precluded from considering and putting through, if they can, any compromise which will satisfy the majority of them. The motion is denied, and temporarily stay vacated.

PORTER v. F. M. DAVIES & CO. (Circuit Court of Appeals, Eighth Circuit. March 11, 1915.) No. 4327. Appeal from the District Court of the United States for the District of South Dakota. Frank McNulty, of Aberdeen, S. D., and Howard Babcock, of Sisseton, S. D., for appellant. H. V. Mercer, of Minneapolis, Minn., for appellee. Before ADAMS and CARLAND, Circuit Judges, and AMIDON, District Judge.

PER CURIAM. Appeal dismissed, with costs, for want of jurisdiction, on authority of opinion in Clement F. Porter, Jr., Receiver, etc., v. F. M. Davies & Co. (No. 4314) 223 Fed. 465, decided March 11, 1915.

READ MACHINERY CO. v. JABURG et al. (Circuit Court of Appeals, Second Circuit. June 22, 1915.) No. 281. Appeal from the District Court

of the United States for the Southern District of New York. This cause comes here upon appeal from an order of the District Court, Southern District of New York. The suit is for infringement of letters patent No. 966,765, issued August 9, 1910, to Harry Read, for a mixing machine. It came on for hearing upon pleadings and proofs before Judge Hunt, who held the patent valid and infringed and entered decree for injunction and accounting. (D. C.) 212 Fed. 951. Upon appeal to this court the decree was affirmed upon Judge Hunt's opinion. 218 Fed. 989, 133 C. C. A. 672. Defendants thereupon made a modification in the device which had been held to be an infringement, and continued to sell the modified machine. Instead of instituting a proceeding to punish defendants for contempt, complainants moved for an order extending the injunction to cover the new machine, which motion was granted. (D. C.) 221 Fed. 662. W. H. Kenyon and A. G. N. Bermilya, both of New York City, for appellants. O. W. Jeffery, of New York City (Edmund Wetmore, of New York City, of counsel), for appellee. Before LACOMBE, COXE, and ROGERS, Circuit Judges.

PER CURIAM. Judge Hunt carefully considered the testimony and arguments in support of the modified machine, and has fully discussed them in a comprehensive opinion. As we concur with his findings and conclusions, the order appealed from is affirmed, with costs.

SAFETY CAR HEATING & LIGHTING CO. v. UNITED STATES LIGHTING & HEATING CO. et al. (Circuit Court of Appeals, Second Circuit. June 22, 1915.) No. 282. Appeal from the District Court of the United States for the Western District of New York. This cause comes here upon appeal from a decree of the District Court, Western District of New York, finding infringement by defendants of United States patent No. 747,686, granted December 22, 1903, to J. L. Crevelling, assignor to complainant. The patent is for a "system of electrical regulation." It discloses a storage battery charging system adapted for use in connection with what are called axle car-lighting systems, in which the generator is driven from the car axle. The opinion of the District Judge will be found in (D. C.) 222 Fed. 310. W. Clyde Jones, of Chicago, Ill., and A. B. Siebold and Charles Oakes, of New York City, for appellants. Duell, Warfield & Duell, of New York City (C. H. Duell, F. P. Warfield, H. S. Duell, and T. J. Johnston, all of New York City, of counsel), for appellee. Before LACOMBE, WARD, and ROGERS, Circuit Judges.

PER CURIAM. We fully concur with Judge Hazel in his discussion of the questions presented and in his conclusion. The decree is affirmed, with costs.

END OF CASES IN VOL. 223