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

WITH TABLE OF CASES IN WHICH REHEARINGS HAVE BEEN GRANTED OR DENIED

SEPTEMBER, 1915

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This is a Key-Numbered Volume

Each syllabus paragraph in this volume is marked with the topic and Key-Number section ⚿ under which the point will eventually appear in the American Digest System.

The lawyer is thus led from that syllabus to the exact place in the Digests where we, as digest makers, have placed the other cases on the same point---*This is the Key-Number Annotation.*

RULES

OF THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE

THIRD CIRCUIT

ADOPTED IN OPEN COURT, JUNE 16, 1891. REVISED JANUARY 31, 1910, WITH AMENDMENTS SINCE ADOPTED

1.

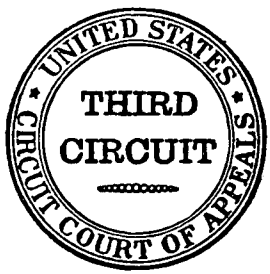
NAME.

1. The court adopts "United States Circuit Court of Appeals for the Third Circuit" as the title of the court.

2.

SEAL.

1. The seal shall contain the words "United States" on the upper part of the outer edge; and the words "Circuit Court of Appeals" on the lower part of the outer edge, running from left to right; and the words "Third Circuit" in two lines in the centre, with a dash beneath.



3.

TERMS.

1. The terms of this court shall commence and be held on the first Tuesday of March and the first Tuesday of October in each year, at the city of Philadelphia.

4.

QUORUM.

1. If, at any term, a quorum does not attend on any day appointed for holding it, any judge who does attend may adjourn the court from time to time, or, in the absence of any judge, the clerk may adjourn the court from day to day. If, during a term, after a quorum has assembled, less than that number attend on any day, any judge attending may adjourn the court from day to day until there is a quorum, or may adjourn without day, and, in the absence of all the judges, the clerk may adjourn the court from day to day.

2. Any judge attending when less than a quorum is present may make all necessary orders touching any suit, proceeding, or process depending in or returned to the court preparatory to hearing, trial, or decision thereof.

5.

CLERK.

1. The clerk's office shall be kept in the city of Philadelphia.

2. The clerk shall not practice either as attorney or counsellor in this court or in any other court while he shall continue to be clerk of this court.

3. He shall, before he enters on the execution of his office, take an oath in the form prescribed by section 794 of the Revised Statutes, and shall give bond in a sum to be fixed, and with sureties to be approved by the court, faithfully to discharge the duties of his office and seasonably to record the decrees, judgments, and determinations of the court. A copy of such bond shall be entered on the journal of the court, and the bond shall be deposited for safe-keeping as the court may direct.

4. He shall not permit any original record or paper to be taken from the court room or from the office, without an order from the court.

6.

MARSHAL, CRIER AND OTHER OFFICERS.

1. The marshal and crier shall be in attendance during the sessions of the court, with such number of bailiffs and messengers as the court may, from time to time, order.

7.

ATTORNEYS AND COUNSELLORS.

1. All attorneys and counsellors admitted to practice in the Supreme Court of the United States, or in any District Court of the United States, shall become attorneys and counsellors in this court, on taking an oath or affirmation in the form prescribed by rule 2 of the Supreme Court of the United States and on subscribing the roll, but no fee shall be charged therefor; and all attorneys and counsellors of

the District Courts of the United States for the Third Circuit, shall be attorneys and counsellors of this court without taking any further oath.

8.

PRACTICE.

1. The practice shall be the same as in the Supreme Court of the United States, as far as the same shall be applicable.

9.

PROCESS.

1. All process of this court shall be in the name of the President of the United States, and shall be in like form and tested in the same manner as process of the Supreme Court.

10.

BILL OF EXCEPTIONS.

1. The judges of the District Courts shall not allow any general exception to the whole of the charge to the jury in a civil or a criminal trial at common law, nor shall a series of exceptions be allowed which produces the same result. But the party excepting shall state distinctly and separately the several matters in such charge to which he excepts, and only such matters shall be included in the bill of exceptions and allowed by the court. Exceptions to the charge or to the judge's action upon the requests for instruction shall be taken immediately on the conclusion of the charge before the jury retire, shall be specified in writing or dictated to the stenographer, and shall be specific and not general.

2. Exceptions to the admission or rejection of evidence shall be specific and not general, and the bill of exceptions to such admission or rejection shall contain only so much of the evidence admitted or offered and rejected as is necessary for the presentation and decision of the questions saved for review. Unless there be saved a question which requires the consideration of all the evidence, a bill of exceptions containing all of it shall not be allowed.

11.

ASSIGNMENTS OF ERROR.

1. The plaintiff in error or appellant shall file with the clerk of the court below, with his petition for the writ of error or appeal, his assignments of error, as required by section 997 of the Revised Statutes, which shall set out separately and particularly each error asserted and intended to be urged. [See rule 14, section 6.] When the error alleged is to the admission or the rejection of evidence, the

assignment shall quote the full substance of the evidence admitted or rejected; when the error alleged is to the charge of the court, the assignment shall set out the part referred to totidem verbis, whether it be in instructions given or in instructions refused; when the error alleged is based on the trial court's refusal to enter a judgment non obstante veredicto for the plaintiff in error on the whole record, the assignment shall state the reasons presented to the trial court for the entry of such judgment; when the error alleged is to a ruling upon the report of a master or referee, the assignment shall state the exception to the report and the action of the court upon it. Such assignments of error shall form part of the transcript of the record and be printed with it. When error is not so assigned, counsel will not be heard, except at the request of the court, and errors not assigned according to this rule will be disregarded. The court, at its option, however, may notice a plain error not assigned.

12.

OBJECTIONS TO EVIDENCE IN THE RECORD.

1. In all cases of equity or admiralty jurisdiction, heard in this court, no objection shall be allowed to be taken to the admissibility of any deposition, deed, grant, exhibit, or translation found in the record as evidence, unless objection was taken thereto in the court below and entered of record; but the same shall otherwise be deemed to have been admitted by consent.

13.

SUPERSEDEAS AND COST BONDS.

1. Supersedeas bonds in the District Courts must be taken, with good and sufficient security, that the plaintiff in error or appellant shall prosecute his writ or appeal to effect, and answer all damages and costs if he fail to make his plea good. Such indemnity where the judgment or decree is for the recovery of money not otherwise secured, must be for the whole amount of the judgment or decree, including just damages for delay, and costs and interest on the appeal; but in all suits where the property in controversy necessarily follows the suit, as in real actions and replevin, and in suits on mortgages, or where the property is in the custody of the marshal under admiralty process, or where the proceeds thereof, or a bond for the value thereof, is in the custody of the court, indemnity in all such cases will be required only in an amount sufficient to secure the sum recovered for the use and detention of the property, and the costs of the suit and just damages for delay, and costs and interest on the appeal.

2. On all appeals from any interlocutory order or decree granting or continuing an injunction in a District Court, the appellant shall, at the time of the allowance of said appeal, file with the clerk of such District Court a bond to the opposite party in such sum as such court shall direct, to answer all costs if he shall fail to sustain his appeal.

14.

WRITS OF ERROR, APPEALS, RETURNS AND RECORDS.

1. Any appeal to this court, or writ of error from this court, allowable by law, may be allowed, in term time or vacation, by the Circuit Justice, or by any of the Circuit Judges within this circuit, or by any District Judge within the district where the case to be reviewed was heard or tried, who may also take the proper security, sign the citation, and, if he deem it proper so to do, grant a supersedeas and stay of execution or of proceedings pending such writ of error or appeal. Whenever an appeal or a writ of error to this court shall be allowed by a District Judge, or shall be issued by the clerk of a District Court, the clerk of the District Court shall give immediate notice thereof to the clerk of this court.

2. The clerk of the court to which any writ of error may be directed, or from which any appeal may be taken, upon being paid or tendered his fees therefor, shall make a return of the same by transmitting a true copy of the record, bill of exceptions, assignment of errors, and all proceedings in the case, under his hand and the seal of the court.

3. In all cases brought to this court, by writ of error or appeal, to review any judgment or decree, the clerk of the court by which such judgment or decree was rendered shall annex to and transmit with the record a copy of the opinion or opinions filed in the case.

4. No case will be heard until a complete record, containing in itself, and not by reference, all the papers, exhibits, depositions, and other proceedings, which are necessary to the hearing in this court, shall be filed.

5. Whenever it shall be necessary or proper, in the opinion of the presiding judge in any District Court, that original papers of any kind should be inspected in this court upon writ of error or appeal, such presiding judge may make such rule or order for the safe-keeping, transporting, and return of such original papers as to him may seem proper; and this court will receive and consider such original papers in connection with the transcript of the proceedings.

6. All appeals, writs of error, and citations must be made returnable not exceeding thirty days from the day of signing the citation, whether the return day fall in vacation or in term time, and be served before the return day; but the citation must be signed, and the bond for costs must be approved and filed, and the assignments of error submitted and filed, with the petition for the appeal or writ of error, immediately after the appeal or writ of error is allowed: Provided, however, that every appeal taken from an interlocutory decree, under the seventh section of the act entitled "An act to establish Circuit Courts of Appeals, and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March 3, 1891, and amendments to said section, shall be made returnable in ten days from the allowance of the appeal and the signing of the citation.

7. The records in cases of admiralty and maritime jurisdiction shall be made up in the same manner, as nearly as practicable, as are the records in equity cases.

15.

BAIL IN ERROR.

1. Where a writ of error has been allowed in a criminal case, the justice or judge who allowed the writ, or any judge of the court which entered the judgment to be reviewed, shall have power to admit the plaintiff in error to bail for his appearance in such court on the determination of the proceedings on the writ of error to abide by and obey any order that may be made therein. The bond or recognizance for such appearance shall be substantially in the following form:

United States of America, ... District of ..... ss.

We (here insert name of defendant), residing at ..... and (here insert the name of surety), residing at ..... in the state of ....., acknowledge ourselves to be jointly and severally indebted to the United States of America in the sum of ..... dollars, lawful money of the United States of America, to be levied of our goods and chattels, lands and tenements, upon this condition: That if the said ....., the defendant, upon whose application a writ of error has been allowed by the United States Circuit Court of Appeals for the Third Circuit and is now pending, shall be and appear at the District Court of the United States for the ..... District of ..... upon the determination of the proceedings on said writ of error, and the receipt and filing of a mandate or other process or certificate showing the disposition thereof by the said Court of Appeals, or, within five days thereafter, to answer and obey whatever final order or judgment, except as to costs, shall be made in the premises, and not depart said court without leave thereof, then this recognizance to be void; otherwise, to remain in full force and virtue.

..... [L. S.]
..... [L. S.]
..... [L. S.]"

Taken, acknowledged and subscribed, this ..... day of ....., A. D. 191.., in open court.

....., Clerk of District Court.

16.

TRANSLATIONS.

1. Whenever any record transmitted to this court upon a writ of error or appeal shall contain any document, paper, testimony, or other proceeding in a foreign language, and the record does not also contain a translation of such document, paper, testimony, or other proceeding made under the authority of the inferior court, or admitted to be correct, the record shall not be printed; but the case shall be reported to this court by the clerk, and the court will thereupon remand it back to the inferior court, in order that a translation may be there supplied and inserted in the record.

17.

FILING RECORDS, DOCKETING CASES AND ENTERING APPEARANCES.

1. The plaintiff in error or appellant shall file the record of the case and cause it to be docketed by the clerk of this court on or before the

return day of the citation, whether in vacation or in term time; but for good cause shown the justice or judge who signed the citation, or any Circuit or District Judge, may extend the return day thereof, the order for extension to be filed with the clerk of this court.

2. If the plaintiff in error or appellant shall fail to comply with the first section of this rule the defendant in error or appellee may cause the case to be docketed without the filing of any record and have it dismissed, whether in term time or vacation, upon due proof of notice to the plaintiff in error or appellant of a motion for such dismissal, and upon producing a certificate from the clerk of the court wherein the judgment or decree was rendered, stating the case, the return day of the citation, and that the writ of error or appeal was duly sued out or allowed; and in no case shall the plaintiff in error or appellant be entitled to file the record or to have it docketed after the defendant in error or appellee shall have had the case dismissed under this section of this rule unless upon special order of the court.

3. Instead of having the case docketed for the purpose of having it dismissed under the provisions of the second section of this rule, the defendant in error or appellee, on payment of the usual fees, may file the record and cause the case to be docketed by the clerk, and if the record be filed and the case docketed, either by the plaintiff in error or appellant, within the time prescribed by the first section of this rule, or by the defendant in error or appellee under the provisions of this section, the case shall stand for argument.

4. On the filing of the record the appearance of the counsel for the party docketing the case shall be entered, and on or before the return day of the citation the counsel for the appellee or defendant in error shall also enter appearance for the appellee or defendant in error.

18.

DOCKET AND ARGUMENT LISTS.

1. Upon the filing of the record in any case by the plaintiff in error or appellant and the payment by him of a deposit fee of forty dollars, the clerk shall enter the case, the record of which is so filed, upon the docket of this court; such docket shall have all its cases arranged in their proper chronological order.

2. The clerk shall prepare and cause to be printed, previous to the opening of each term of this court, an argument list of all cases the records of which shall have been filed with him not less than fifteen days before the opening of the term, which cases shall be put on the argument list in the chronological order of docketing the same, subject, however, to the following system of grouping: The first group shall be composed of the cases in which all the Circuit Judges shall be competent to sit; the second, of the cases in which all the Circuit Judges except the youngest in commission shall be competent to sit; the third, of the cases in which all the Circuit Judges except the next to the youngest in commission shall be competent to sit, and the fourth, of the cases in which all the Circuit Judges except the oldest judge in commission shall be competent to sit.

19.

ARGUMENTS, CONTINUANCES AND DISMISSALS.

1. The cases in the argument list shall be called for argument at each term, or adjourned term, and cases shall be argued on call unless the court shall for good cause otherwise order.

2. If the defendant in error or appellee fails to appear when his case is called for argument, the court may proceed to hear the argument on the part of the plaintiff in error or appellant and to give judgment according to the right of the case.

3. For good cause shown the court may order the continuance of any case for the term.

4. When a case is reached in the regular call, and there is no appearance for either party, it may be dismissed at the cost of the plaintiff in error or appellant.

5. Where no counsel appears for the plaintiff in error or appellant, and no brief has been filed for him, the defendant in error or appellee may have the writ of error or appeal dismissed at the cost of the defaulting party.

6. If a case is called for argument at two terms successively, and upon the call at the second term neither party is prepared to argue it, it will be dismissed at the cost of the plaintiff in error or appellant unless a sufficient cause is shown for further postponement.

7. Whenever the plaintiff and defendant in a writ of error pending in the court, or the appellant and appellee in an appeal, shall, by their attorneys of record, sign and file with the clerk an agreement in writing directing the case to be dismissed, and specifying the terms on which it is to be dismissed, as to costs, and shall pay to the clerk any fees that may be due to him, it shall be the duty of the clerk to enter the case dismissed, and to give to either party requesting it a copy of the agreement filed; but no mandate or other process shall issue without an order of the court.

8. Cases may also be dismissed in accordance with the second section of rule 17, the first section of rule 23 and the fourth section of rule 24 of this court.

9. Except as in the preceding sections of this rule it is otherwise provided, no motion to dismiss a writ of error or an appeal will be heard unless previous notice of the motion has been given to the plaintiff in error or appellant or his counsel.

20.

CERTIORARI.

1. No certiorari for diminution of the record will be awarded in any case, unless a motion therefor shall be made in writing, and the facts on which the same is founded shall, if not admitted by the other party, be verified by affidavit. And all motions for such certiorari must be made at the first term of the entry of the case; otherwise, the

same will not be granted, unless upon special cause shown to the court, accounting satisfactorily for the delay.

21.

DEATH OF A PARTY.

1. Whenever, pending a writ of error or appeal in this court, either party shall die, the proper representatives in the personalty or realty of the deceased party, according to the nature of the case, may voluntarily come in and be admitted parties to the suit, and thereupon the case shall be heard and determined as in other cases; and if such representatives shall not voluntarily become parties, then the other party may suggest the death on the record, and thereupon, on motion, obtain an order that unless such representatives shall become parties within sixty days, the party moving for such order, if defendant in error, shall be entitled to have the writ of error or appeal dismissed, and if the party so moving shall be plaintiff in error, he shall be entitled to open the record, and, on hearing, have the judgment or decree reversed, if it be erroneous: Provided, however, that a copy of every such order shall be personally served on said representatives at least thirty days before the expiration of such sixty days.

2. When the death of a party is suggested, and the representatives of the deceased do not appear within ten days after the expiration of such sixty days, and no measures are taken by the opposite party within that time to compel their appearance, the case shall abate.

3. When either party to a suit in a District Court of the United States shall desire to prosecute a writ of error or appeal to this court, from any final judgment or decree rendered in the District Court, and at the time of suing out such writ of error or appeal the other party to the suit shall be dead and have no proper representative within the jurisdiction of the court which rendered such final judgment or decree, so that the suit cannot be revived in that court, but shall have a proper representative in some state or territory of the United States, or in the District of Columbia, the party desiring such writ of error or appeal may procure the same, and may have proceedings on such judgment or decree superseded or stayed in the same manner as is now allowed by law in other cases, and shall thereupon proceed with such writ of error or appeal as in other cases. And within thirty days after the filing of the record in this court the plaintiff in error or appellant shall make a suggestion to the court, supported by affidavit, that the said party was dead when the writ of error or appeal was taken or sued out, and had no proper representative within the jurisdiction of the court which rendered such judgment or decree, so that the suit could not be revived in that court, and that said party had a proper representative in some state or territory of the United States, or in the District of Columbia, and stating therein the name and character of such representative, and the state or territory or District in which such representative resides; and upon such suggestion he may, on motion, obtain an order that, unless such representative shall make himself a party within ninety days, the plain-

tiff in error or appellant shall be entitled to open the record, and, on hearing, have the judgment or decree reversed if the same be erroneous: Provided, however, that a proper citation reciting the substance of such order shall be served upon such representative, either personally or by being left at his residence, at least thirty days before the expiration of such ninety days; provided, also, that in every such case, if the representative of the deceased party does not appear within ten days after the expiration of such ninety days, and the measures above provided to compel the appearance of such representative have not been taken within the time as above required, by the opposite party, the case shall abate; and provided, also, that the said representative may at any time before or after said suggestion come in and be made a party to the suit, and thereupon the case shall proceed, and be heard and determined as in other cases.

22.

MOTIONS.

1. All motions to the court shall be reduced to writing, and shall contain a brief statement of the facts and objects of the motion.

2. One hour on each side shall be allowed to the argument of a motion, and no more, without special leave of the court, granted before the argument begins.

23.

PRINTING AND DISTRIBUTING RECORDS.

1. It shall be the duty of the clerk, immediately after the record of any case shall have been filed with him and docketed and the deposit fee of forty dollars shall have been paid, to notify counsel for all parties that he will print only the parts of the record mentioned in the second section of this rule, specifying what those parts shall be, and to notify the counsel for plaintiff in error or appellant of his estimate of the cost of printing such parts of the record and of his fee for preparing the parts for the printer, indexing the same and supervising the printing thereof. He shall print no other parts of the record unless, within ten days after such notice, he receives from some one or more of the counsel a written certificate that in his or their judgment other specified parts thereof should be printed in order to enable this court properly to decide the questions raised, in which event the parts so certified as necessary shall also be printed. The court may, in its discretion, direct the printing of other parts of the record, and, in lieu of printing patents or other exhibits, separate printed copies thereof, not less than ten in number, may be filed with the clerk. If other parts of the record than those specified in his notice shall be required to be printed by any of the counsel, or by this court, the clerk shall immediately notify the counsel for the plaintiff in error or appellant of his estimate of the additional cost of preparing, printing and indexing such other parts. The plaintiff in error or appellant shall pay to the clerk, within ten days after notice of any estimate, the amount thereof, in default of which the

writ of error or appeal may be dismissed upon the motion of the opposite party, or by the court of its own motion.

2. By writing filed either with the clerk of this court, or with the clerk of the court below, the plaintiff in error or the appellant may waive the provisions of the act of Congress approved February 13, 1911; and if the act be waived the printing, indexing, supervising, and distributing, shall be done by the clerk of this court as heretofore under the provisions of rule 23; and the clerk shall then be entitled to charge the supervising fee of twenty-five cents per printed page, as provided by rule 29. When the record is printed below, the parties and the clerk of the District Court, and (when the record is printed in the Court of Appeals) the clerk of this court, shall be careful to avoid as far as possible the duplication of material in order to reduce the costs and fees attendant upon the printing the record.

3. Unless additional parts of the record shall be required to be printed under the provisions of the first section of this rule, the clerk shall print, for the use of the court, only the following parts thereof:

In writs of error—

(a) The docket entries.
(b) The pleadings upon which the case was tried.
(c) The bill of exceptions.
(d) The motion and reasons for judgment non obstante veredicto, if any.
(e) The opinion of the court below, if any
(f) The charge to the jury, if any.
(g) The verdict of the jury, if any.
(h) The judgment entered.
(i) The assignments of error.

In appeals—

(a) The docket entries.
(b) The pleadings on which the case was heard and determined.
(c) The evidence, if any, on which it was heard and determined.
(d) The report of the examiner, master, auditor, referee or other officer who first decided the case, if any.
(e) The exceptions to that report, if any.
(f) The opinion of the court, if any.
(g) The judgment or decree entered.
(h) The assignments of error.

In bankruptcy and other cases not being strictly within either of the above classes, the printed record shall conform as nearly as may be practicable to the record in appeals.

4. The clerk shall cause twenty-five copies of the record to be printed, and three copies thereof to be furnished to the counsel of the plaintiff in error or appellant, and also three copies to each of the counsel who shall have entered appearance for any of the other parties, and the remaining copies to be filed in his office, all, if possible, within thirty days after the payment to him of the amount of his estimate made under the provisions of the first section of this rule.

5. The clerk shall supervise the printing of the record, have it prop-

erly indexed and distribute printed copies thereof to the judges of the court from time to time as required.

6. If the actual cost of printing the record and the clerk's fee of twenty-five cents per page for preparing the record for the printer, indexing the same, supervising the printing and distributing the copies, shall be less than the amount estimated and paid, the clerk shall refund the difference to the party paying the same, but if they shall exceed the clerk's estimate the amount of such excess shall be paid to the clerk before he shall file the printed copies of the record or deliver any of them to the parties.

7. In case of reversal, affirmance or dismissal, with costs, the actual cost paid for printing the record by the party in whose favor costs are awarded, and the clerk's fee for supervising the printing, etc., where such fee is paid by the party in whose favor costs are awarded, shall be taxed against the party against whom costs are given and shall be inserted in the body of the mandate or other proper process.

8. Each printed record shall show, by a note or memorandum, the time when each pleading or document was filed, and shall contain at the tops of its pages running titles of its contents.

9. In any case where the record, or any part thereof, has been printed in the court below, the same may be embodied in and used as the printed record of this court: Provided, the manner and style of the printing shall correspond with the requirements of the several sections of this rule for printing done under the supervision of the clerk of this court; but the plaintiff in error or appellant shall pay to the clerk of this court, not only the deposit fee of forty dollars upon filing the record and having it docketed, but also the fee prescribed by rule 29 for preparing the record for the printer, indexing the same, supervising the printing and distributing the copies thereof.

10. The clerk shall, on or before the conclusion of each case, collect and file for preservation in this court three copies of the printed record and of each brief, printed motion and argument submitted in such case, and shall, immediately after the mandate in any case shall have been sent down to the lower court, notify the defeated party in this court that unless he removes the remaining copies of the record and briefs within ten days after notice so to do, the same will be destroyed.

24.

BRIEFS.

1. In each case in which the printed record has been delivered by the clerk to the counsel for the plaintiff in error or appellant sixty or more days before the first day of the term, such counsel shall file twenty copies of his brief with the clerk not less than thirty days before the first day of such term; in each case in which the printed record has been delivered by the clerk to such counsel between thirty days and sixty days before the first day of such term, twenty copies of such brief shall be filed with the clerk not less than twenty days before the first day of such term; and in all other cases twenty copies

of such brief shall be filed with the clerk not more than fifteen days after receipt of such printed record. Within the same time such counsel shall give to counsel for the defendant in error or appellee not less than five copies of such brief.

2. This brief shall contain, in the order here stated—

(a) The names of the parties and the nature of the proceedings.

(b) A short abstract of the bill or declaration or petition, and of the plea or answer.

(c) A statement of the question or questions involved, which shall be in the briefest and most general terms, without names, dates, amounts or particulars of any kind whatever.

(d) A concise abstract or statement of the case.

(e) The assignments of error relied on, and, where any assignment of error is based on any bill of exceptions or any part of a bill of exceptions, a reference to the particular page of the record where the exception may be found.

(f) Argument on the part of the plaintiff in error or appellant, which shall exhibit a clear statement of the points of law or fact to be discussed, with a reference to the pages of the record and the authorities relied upon in support of each point. When a statute of a state is cited, so much thereof as may be deemed necessary to the decision of the case shall be printed at length.

3. At least five days before the case is called for argument, the counsel for the defendant in error or appellee shall file with the clerk twenty printed copies of his brief, and give not less than five copies thereof to the counsel for the plaintiff in error or appellant. His brief shall be of a like character with that required of the plaintiff in error or appellant, except that no specification of errors shall be required, and no statement of the case unless that presented by the plaintiff in error or appellant is controverted.

4. When, according to this rule, a plaintiff in error or an appellant is in default, the case may be dismissed on motion; and when a defendant in error or an appellee is in default he will not be heard, except on consent of his adversary, and by special leave of the court.

5. When no counsel appears for one of the parties, and no printed brief or argument is filed, only one counsel will be heard for the adverse party; but if a printed brief or argument is filed, the adverse party will be entitled to be heard by two counsel.

25.

ORAL ARGUMENTS.

1. The plaintiff in error or appellant in this court shall be entitled to open and conclude the argument of the case. But when there are cross appeals they shall be argued together as one case, and the plaintiff in the court below shall be entitled to open and conclude the argument.

2. Only two counsel will be heard for each party on the argument of a case.

3. Two hours on each side will be allowed for the argument, and no more, without special leave of the court, granted before the argument begins. The time thus allowed may be apportioned between the counsel on the same side at their discretion; provided, always, that a fair opening of the case shall be made by the party having the opening and closing arguments.

26.

OPINIONS OF THE COURT.

1. All written opinions delivered by the court shall be filed by the clerk.

27.

REHEARING.

1. A petition for rehearing a cause may be filed with the clerk at any time within thirty days after the entry therein of the final judgment or final decree of this court, and, if the term within which such judgment or decree shall have been entered shall expire during said period of thirty days, the judgment or decree, and the record on which the same shall have been entered, shall nevertheless remain subject to the control of this court until the full expiration of the time herein allowed for the filing of the petition: Provided, however, that no such petition shall be filed after this court, by any order made within said period of thirty days, shall have directed the immediate issue of a mandate or other process in the nature of a procedendo (see rule 30). The petition shall be printed, shall briefly and distinctly state the reasons for a rehearing, and shall be supported by the certificate of counsel.

28.

INTEREST.

1. In cases where a writ of error is prosecuted in this court, and the judgment of the inferior court is affirmed, the interest shall be calculated and levied, from the date of the judgment below until the same is paid, at the same rate that similar judgments bear interest in the courts of the state where such judgment was rendered.

2. In all cases where a writ of error shall delay the proceedings on the judgment of the inferior court, and shall appear to have been sued out merely for delay, damages at a rate not exceeding ten per cent., in addition to interest, shall be awarded upon the amount of the judgment.

3. The same rule shall be applied to decrees for the payment of money in cases in equity, unless otherwise ordered by this court.

4. In cases in admiralty, damages and interest may be allowed if specially directed by the court.

29.

COSTS.

1. In all cases where any suit shall be dismissed in this court, except where the dismissal shall be for want of jurisdiction, costs shall be

allowed to the defendant in error or appellee, unless otherwise agreed by the parties.

2. In all cases of affirmance of any judgment or decree in this court, costs shall be allowed to the defendant in error or appellee, unless otherwise ordered by the court.

3. In cases of reversal of any judgment or decree in this court costs shall be allowed to the plaintiff in error or appellant, unless otherwise ordered by the court. The cost of the transcript of the record from the court below shall be taxable in that court as costs in the case.

4. Neither of the foregoing sections shall apply to cases where the United States are a party; but in such cases no costs shall be allowed in this court for or against the United States.

5. When costs are allowed in this court, it shall be the duty of the clerk to insert the amount thereof in the body of the mandate, or other proper process, sent to the court below, and annex to the same the bill of items taxed in detail.

6. In all cases certified to the Supreme Court or removed thereto by certiorari or otherwise, the fees of the clerk of this court shall be paid before a transcript of the record shall be transmitted to the Supreme Court.

7. In pursuance of the act of Congress of February 19, 1897 (29 Stat. 536, c. 263), and of the order of the Supreme Court of January 10, 1898, as amended February 28, 1898 (90 Fed. clxxi), the following table of fees and costs is established for this court:

Docketing a case and filing the record	$ 5 00
Entering an appearance	25
Transferring a case to the printed calendar	1 00
Entering a continuance	25
Filing a motion, order, or other paper	25
Entering any rule, or making or copying any record or other paper, for each one hundred words	20
Entering a judgment or decree	1 00
Every search of the records of the court and certifying the same	1 00
Affixing a certificate and a seal to any paper	1 00
Receiving, keeping, and paying money, in pursuance of any statute or order of court, one per cent. on the amount so received, kept and paid.	
Preparing the record for the printer, indexing the same, supervising the printing and distributing the copies, for each printed page of the record and index	25
Making a manuscript copy of the record, when required by the rules, for each one hundred words (but nothing in addition for supervising the printing)	20
Issuing a writ of error and accompanying papers, or a mandate, or other process	5 00
Filing briefs, for each party appearing	5 00
Copy of an opinion of the court, certified under seal, for each printed page (but not to exceed five dollars in the whole for any copy)	1 00
Attorney's docket fee	20 00

30.

MANDATE.

1. In each case finally determined in this court, a mandate or other proper process in the nature of a procedendo shall be issued to the

court below, for the purpose of informing such court of the proceedings in this court so that further proceedings may be had in such court as to law and justice may appertain. Such mandate or other process may issue at any time on the order of the court, and when not otherwise ordered, it shall issue as of course at the expiration of thirty days from the date of entering the final judgment or final decree of this court

31.

CUSTODY OF PRISONERS ON HABEAS CORPUS.

1. Pending an appeal from the final decision of any court or judge declining to grant the writ of habeas corpus, the custody of the prisoner shall not be disturbed.

2. Pending an appeal from the final decision of any court or judge discharging the writ after it has been issued, the prisoner shall be remanded to the custody from which he was taken by the writ, or shall, for good cause shown, be detained in custody of the court or judge, or be enlarged upon recognizance, as hereinafter provided.

3. Pending an appeal from a final decision of any court or judge discharging the prisoner, he shall be enlarged upon recognizance, with surety, for appearance to answer the judgment of the appellate court, except where, for special reasons, sureties ought not to be required.

32.

MODELS, DIAGRAMS AND EXHIBITS OF MATERIAL.

1. Models, diagrams and exhibits of material forming part of the evidence taken in the court below, in any case pending in this court, on writ of error or appeal, shall be placed in the custody of the clerk of this court at least ten days before the case is heard or submitted.

2. All models, diagrams and exhibits of material placed in the custody of the clerk for the inspection of the court on the hearing of a case, must be taken away by the parties within one month after the case is decided. When this is not done, it shall be the duty of the clerk to notify the counsel in the case, by mail or otherwise, of the requirements of this rule, and if the articles are not removed within a reasonable time after the notice is given, he shall destroy them, or make such other disposition of them as to him may seem best.

JUDGES

OF THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE DISTRICT COURTS

FIRST CIRCUIT

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

SECOND CIRCUIT

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

THIRD CIRCUIT

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

FOURTH CIRCUIT

Hon. EDWARD D. WHITE, Circuit Justice.....Washington, D. C.
Hon. JETER C. PRITCHARD, Circuit Judge.....Asheville, N. C.
Hon. CHAS. A. WOODS, Circuit Judge.....Marion, S. C.
Hon. MARTIN A. KNAPP, Circuit Judge.....Washington, D. C.
Hon. JOHN C. ROSE, District Judge, Maryland.....Baltimore, Md.
Hon. HENRY G. CONNOR, District Judge, E. D. North Carolina.....Wilson, N. C.
Hon. JAMES E. BOYD, District Judge, W. D. North Carolina.....Greensboro, N. C.
Hon. HENRY A. MIDDLETON SMITH, District Judge, E. D. S. C.....Charleston, S. C.
Hon. JOSEPH T. JOHNSON, District Judge, W. D. S. C.[1].....Greenville, S. C.
Hon. EDMUND WADDILL, Jr., District Judge, E. D. Virginia.....Richmond, Va.
Hon. HENRY CLAY McDOWELL, District Judge, W. D. Virginia.....Lynchburg, Va.
Hon. ALSTON G. DAYTON, District Judge, N. D. West Virginia.....Philippi, W. Va.
Hon. BENJAMIN F. KELLER, District Judge, S. D. West Virginia.....Charleston, W. Va.

FIFTH CIRCUIT

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

SIXTH CIRCUIT

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

SEVENTH CIRCUIT

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

[1] Recess appointment March 9, 1915.

Hon. JULIAN W. MACK, Circuit Judge.....Chicago, Ill.
Hon. SAMUEL ALSCHULER, Circuit Judge[2].....Chicago, Ill.
Hon. KENESAW M. LANDIS, District Judge, N. D. Illinois.....Chicago, Ill.
Hon. GEORGE A. CARPENTER, District Judge, N. D. Illinois.....Chicago, Ill.
Hon. FRANCIS M. WRIGHT, District Judge, E. D. Illinois.....Urbana, Ill.
Hon. J. OTIS HUMPHREY, District Judge, S. D. Illinois.....Springfield, Ill.
Hon. ALBERT B. ANDERSON, District Judge, Indiana.....Indianapolis, Ind.
Hon. FERDINAND A. GEIGER, District Judge, E. D. Wisconsin.....Milwaukee, Wis.
Hon. ARTHUR L. SANBORN, District Judge, W. D. Wisconsin.....Madison, Wis.

EIGHTH CIRCUIT

Hon. WILLIS VAN DEVANTER, Circuit Justice.....Washington, D. C.
Hon. WALTER H. SANBORN, Circuit Judge.....St. Paul, Minn.
Hon. WILLIAM C. HOOK, Circuit Judge.....Leavenworth, Kan.
Hon. ELMER B. ADAMS, Circuit Judge.....St. Louis, Mo.
Hon. WALTER I. SMITH, Circuit Judge.....Council Bluffs, Iowa.
Hon. JOHN E. CARLAND, Circuit Judge.....Washington, D. C.
Hon. JACOB TRIEBER, District Judge, E. D. Arkansas.....Little Rock, Ark.
Hon. F. A. YOUMANS, District Judge, W. D. Arkansas.....Ft. Smith, Ark.
Hon. ROBERT E. LEWIS, District Judge, Colorado.....Denver, Colo.
Hon. HENRY THOMAS REED, District Judge, N. D. Iowa.....Cresco, Iowa.
Hon. MARTIN J. WADE, District Judge, S. D. Iowa.....Davenport, Iowa.
Hon. JOHN C. POLLOCK, District Judge, Kansas.....Kansas City, Kan.
Hon. PAGE MORRIS, District Judge, Minnesota.....Duluth, Minn.
Hon. WILBUR F. BOOTH, District Judge, Minnesota.....Minneapolis, Minn.
Hon. DAVID P. DYER, District Judge, E. D. Missouri.....St. Louis, Mo.
Hon. ARBA S. VAN VALKENBURGH, District Judge, W. D. Missouri..Kansas City, Mo.
Hon. W. H. MUNGER, District Judge, Nebraska[3].....Omaha, Neb.
Hon. THOMAS C. MUNGER, District Judge, Nebraska.....Lincoln, Neb.
Hon. WM. H. POPE, District Judge, New Mexico.....Santa Fé, N. M.
Hon. CHARLES F. AMIDON, District Judge, North Dakota.....Fargo, N. D.
Hon. RALPH E. CAMPBELL, District Judge, E. D. Oklahoma.....Muskogee, Okl.
Hon. JOHN H. COTTERAL, District Judge, W. D. Oklahoma.....Guthrie, Okl.
Hon. JAMES D. ELLIOTT, District Judge, South Dakota.....Sioux Falls, S. D.
Hon. JOHN A. MARSHALL, District Judge, Utah[4].....Salt Lake City, Utah.
Hon. JOHN A. RINER, District Judge, Wyoming.....Cheyenne, Wyo.

NINTH CIRCUIT

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

[2] Recess appointment August 16, 1915. [3] Died August 11, 1915.
[4] Resigned September 8, 1915.

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CASES REPORTED

CASES ON REHEARING

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

FIFTH CIRCUIT.

James v. Clement.....223 F. 385
Rehearing denied Oct. 4, 1915.

Thompson & Ford Lumber Co. v. Dillingham.....223 F. 1000
Rehearing denied Oct. 4, 1915.

EIGHTH CIRCUIT.

Newton Washing Mach. Co. v. Grinnell Washing Mach. Co.....222 F. 512
Rehearing denied Aug. 23, 1915.

Welty v. Reed.....219 F. 864
Rehearing granted Aug. 23, 1915.

Yost v. Dallas County.....219 F. 1023
Rehearing denied Aug. 23, 1915.

CASES

ARGUED AND DETERMINED

IN THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE DISTRICT COURTS

SMITH v. SMITH.

(Circuit Court of Appeals, Ninth Circuit. May 28, 1915.)

No. 2448.

1. GUARDIAN AND WARD ⟸165—SUIT TO SET ASIDE SETTLEMENT BY GUARDIAN—FRAUD.

That a guardian, who had previously used his ward's money in payment of his own notes, bearing 9 per cent. interest, concealing such fact, obtained an order of the probate court, permitting him to borrow the money at 3 per cent., and settled his accounts on that basis, entitles the ward to relief in equity on the ground of fraud.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 531-537; Dec. Dig. ⟸165.]

2. JUDGMENT ⟸585—RES JUDICATA—IDENTITY OF CAUSE OF ACTION.

An adverse judgment, in a suit by an heir to recover his share of property, sold by the executor and alleged to have been illegally purchased by his guardian in his individual right, is not a bar to a subsequent suit against the guardian to set aside his settlement on the ground of fraud and for an accounting.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1062-1064, 1067, 1073, 1084, 1085, 1092-1095, 1132; Dec. Dig. ⟸585.]

3. EXECUTORS AND ADMINISTRATORS ⟸224—TIME FOR PRESENTATION OF CLAIMS—MONTANA STATUTE.

Rev. Codes Mont. § 7525, providing that claims against the estate of a decedent shall be presented within 10 months after the first publication of notice to creditors, is limited to claims arising on contract and does not apply to a claim against the decedent for misappropriation of funds as guardian.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 768-788; Dec. Dig. ⟸224.]

4. LIMITATION OF ACTIONS ⟸ 85—ABSENCE FROM STATE—ACTIONS AGAINST EXECUTORS.

Rev. Codes Mont. § 6458, which provides that the running of the statute of limitations shall not begin to run or shall be suspended during the time the person against whom a cause of action exists is absent from the state, applies to a cause of action against an executor or administrator.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 449-455; Dec. Dig. ⟸85.]

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5. COURTS ⊂=375—FEDERAL PRACTICE—FOLLOWING STATE STATUTE OF LIMITATIONS.

While a federal court of equity is not found by a state statute of limitations, on a question of laches it is proper for it to follow that statute, unless facts are shown which render its application inequitable.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 983; Dec. Dig. ⊂=375.

State laws as rules of decision in federal courts, see notes to Wilson v. Perrin, 11 C. C. A. 71; Hill v. Hite, 29 C. C. A. 553.]

Ross, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the District of Montana; George M. Bourquin, Judge.

Suit in equity by William Smith against Mary M. Smith, as executrix of the will of John M. Smith, deceased. Decree for complainant (210 Fed. 947), and defendant appeals. Affirmed.

R. Lee Word and H. G. & S. H. McIntire, all of Helena, Mont., for appellant.

T. J. Walsh, C. B. Nolan, Wm. Scallon, and T. H. Hoolan, all of Helena, Mont., for appellee.

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

GILBERT, Circuit Judge. The appellee brought a suit against the executrix of the will of his deceased guardian, alleging that the guardian in his lifetime had appropriated and converted to his own use the money of his ward; that the guardian had presented to the court of his appointment accounts, including his final account, wherein he concealed his misappropriation of the ward's money, and thereby fraudulently procured the court to settle and allow his said accounts; and that thereafter, when the ward attained his majority, the guardian settled with him on the basis of such final account. The appellee alleged matter by way of excuse for his delay in bringing the suit. The prayer of his bill was that the decree of settlement be set aside, and that he recover from the appellant, as such executrix, the sum of $24,700, which was alleged to be the amount due the appellee upon a proper accounting. The answer denied conversion of the money and concealment and misrepresentation on the part of the guardian, and set up the defenses of res judicata, limitations, and laches. The court below, upon uncontradicted evidence, found facts which were sufficient to establish the charge that the guardian had appropriated to his own use funds of his ward. The court found the facts to be that in 1899 the estate of the appellee's deceased father was in administration in the same court in which the guardian was subsequently appointed. The heirs of the estate were the appellee and his two sisters. The property of the estate was sold at executor's sale, and was purchased by the guardian in his individual right for $85,000. To pay for the property he borrowed money upon his notes, with interest at 9 per cent. per annum. Eighteen months later, upon his application, he was allowed by

the court to borrow the funds of his wards then in his hands, amounting to $82,000, at interest at the rate of 3 per cent. per annum. The money so borrowed was used by the guardian to pay his notes upon which he was paying interest at 9 per cent. per annum. The appellee attained his majority in October 1906. The final account of the guardian was settled on December 14, 1906, showing a balance due the appellee of $23,954, which sum was paid him on December 15, 1906. The appellee at that time had no knowledge of the misuse of the funds by the guardian, but in August, 1907, his suspicions were aroused by information received from his sister. He then commenced in the superior court for the state of Montana a suit against the guardian, wherein he alleged that the purchase by the latter of the property of the estate was fraudulent, and prayed for his distributive share of said property and the accrued profits. In October, 1908, the guardian died at Battle Creek, Mich., and the appellant herein was, in November, 1908, appointed the executrix of his will, and was thereupon substituted as defendant in that suit. The cause was decided adversely to the appellee herein, and he appealed to the Supreme Court. The judgment was affirmed. Smith v. Smith, 45 Mont. 535, 125 Pac. 987. Thereupon the appellee moved for a rehearing in the Supreme Court on the ground that at least he was entitled to interest upon the money used by the guardian prior to the order of the court authorizing him to borrow it, and he asked that the suit be remanded, with leave to amend the complaint as a basis for such recovery. On November 14, 1912, the application was denied. On March 14, 1913, the appellee herein presented to the executrix his claim upon which the present suit is based, and thereafter, on May 17, 1913, he commenced the present suit. From the time when the appellee attained his majority until the time of the guardian's death the latter was within Montana but 6 months, and thereafter until the present suit was commenced the appellant, the executrix, was within Montana but 15 months. The appellant and the guardian were citizens of Montana, but at the time of the commencement of the suit the appellee had become a citizen of California.

[1] The court below found that the guardian had violated his duty to the ward in using the ward's money to pay his own debts and in failing to charge himself with the profits he thereby derived, and in concealing from the court in probate the fact that 18 months before he applied for leave to borrow the ward's money at the extremely low rate of interest of 3 per cent. he had already appropriated the money to the payment of his own obligations, on which he was obligated to pay interest at 9 per cent. There can be no question that that conclusion is fully sustained by the evidence, and that the court below was justified in decreeing the relief which was prayed for on the ground that the orders of the court in probate were procured by fraud Arrowsmith v. Gleason, 129 U. S. 86, 9 Sup. Ct. 237, 32 L. Ed. 630; Marshall v. Holmes, 141 U. S. 589, 12 Sup. Ct. 62, 35 L. Ed. 870.

[2] We find no merit in the plea res judicata. The suit in the state court of Montana was brought solely to recover specific property and the profits accruing thereon. The judgment of the Supreme Court

establishing the validity of the sale determined all the issues in that suit. The court said:

"It may be that upon settlement of the guardian's accounts he should have been required to pay a greater rate of interest, and for a longer period of time, than was actually required of him, but that question is not before us."

[3] It is contended that the suit is barred for the reason that the appellee failed to present his claim to the executrix within 10 months from the first publication of her notice to creditors of the decedent to present their claims, as required by section 7522, Revised Codes. The provisions of that section, however, do not relate to a claim of the nature of that which is in controversy in this suit. Section 7525 declares:

"All claims arising upon contracts, whether the same be due, not due or contingent, must be presented within the time limited in the notice, and any claim not so presented is barred forever."

This has been understood by the Supreme Court of Montana to relate only to claims arising upon contract. In Re Higgins' Estate, 15 Mont. 474, 39 Pac. 506, 28 L. R. A. 116, the court said:

"The creditor cannot maintain his suit under section 157, against an estate, unless he has presented the claim to the executor. And, by section 150, if the claim be one arising upon a contract, unless presented within the time limited in notice, it is barred forever, except under particular conditions."

The decisions in Melton v. Martin, 28 Mont. 150, 72 Pac. 414, and Dorais v. Doll, 33 Mont. 314, 83 Pac. 884, cited by appellant, are not authority for a different construction, because those were cases of claims arising upon contract. It is said that the statute of Montana was taken from that of California, and that before its adoption in Montana it had received a construction by the Supreme Court of California which would sustain the appellant's contention. We do not find, however, that prior to the adoption of that statute by the state of Montana the Supreme Court of California had construed the California statute in the form in which it was then formulated, and since its adoption by Montana it has been held in Hardin v. Sin Claire, 115 Cal. 460, 47 Pac. 363, that a claim based on a tort need not be presented against the administrator or executor before beginning an action thereon. Section 7532, Rev. Codes Mont., provides that no holder of any claim against an estate shall maintain any action thereon, unless the claim is first presented to the executor or administrator. That statute was complied with in the present case. The appellee presented his claim before beginning the action.

[4] The principal question in the case is whether or not the plaintiff is barred by his delay in bringing the suit. In considering this question we inquire: First, what is the state statute of limitations in reference to such a cause of action? The statute of Montana (section 6449, Rev. Codes) provides that a suit shall be brought within two years for relief on the ground of fraud or mistake, the time to be computed from the discovery by the aggrieved party of the facts which constitute the fraud or mistake. Section 6458 provides:

"If when the cause of action accrues against a person, he is out of the state, the action may be commenced within the term herein limited, after

his return to the state, and if, after the cause of action accrues, he departs from the state, the time of his absence is not part of the time limited for the commencement of the action."

Section 6461 provides that:

"If a person against whom a cause of action exists, dies, without the state, the time which elapses between his death, and the expiration of one year, after the issuing, within the state, of letters testamentary or letters of administration, is not a part of the time limited for the commencement of an action therefor, against his executor or administrator."

The appellant invokes the rule that exceptions to the statute of limitations are to be strictly construed, and that implied and equitable exceptions are not to be ingrafted thereupon, where the Legislature has not made the exception in express words, and contends that the exception expressed in section 6458 refers only to the absent debtor against whom the action originally accrued, and not to his personal representative, and that therefore the time during which the executrix in the present case was without the state of Montana could not be excluded in computing the time within which an action should have been brought (citing State v. Clemens, 40 Mont. 567, 107 Pac. 896). In that case it was held that an exception to the statute of limitations cannot be enlarged beyond what its plain language imports, and that when invoked the case must clearly and unequivocally fall within it. It is to be observed, however, that the court in that case was dealing with a provision of the Penal Code, and in construing it was governed by section 8096 of that Code, which provides that all provisions thereof "are to be construed according to the fair import of their terms." In the present case we have to determine the meaning of a provision of the Civil Code, the construction of which is governed by section 6214 of that Code, which provides:

"The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to this Code. The Code establishes the law of this state respecting the subjects to which it relates, and its provisions are to be liberally construed with a view to effect its objects and to promote justice."

In the case at bar the court below in the opinion said:

"At common law, neither absence from the realm nor death suspended the operation of limitations. This was an evil and tended to defeat justice, in that at such times there could be no service of process and no effective prosecution of a cause of action. The object of section 6458, supra was to furnish a remedy. The evil to be remedied and the object to be accomplished thereby attach no less to the case of absence of a personal representative than to the case of absence of a debtor. Prosecution to effect and justice are hampered equally in both cases. The reason for the statute is as potent in one as in the other. And though the literal reading of section 6458, supra, may support defendant's contention, it must yield to what must be assumed to have been the legislative intent, that is, to suspend limitations whenever absence from the state of the party defendant, be he debtor or personal representative, prevents effective prosecution of a cause of action" (citing Hayden v. Pierce, 144 N. Y. 512, 39 N. E. 638; Smith v. Arnold, 1 Lea [Tenn.] 378; and Wilkinson v. Winne, 15 Minn. 159 [Gil. 123]).

We concur in this view of the meaning and intention of the exception expressed in section 6458, the object of which was to afford a remedy in cases where, on account of absence of the defendant from

the state, obstacles might intervene to the successful prosecution of the plaintiff's right of action. We are of the opinion that the appellant here is within the plain meaning of the statute. The cause of action first accrued against the guardian; the time during which he was out of the state tolled, for that period, the statute of limitations. From and after the appointment of the executrix the cause of action was against her. She was the person against whom it had then accrued, and the time of her absence is to be excluded from the time limited for the commencement of such an action.

[5] While the court below sitting as a court of equity was not bound by the state statute of limitations, it was proper for it to follow that statute, unless facts were shown which rendered its application inequitable. In Kelley v. Boettcher, 85 Fed. 55, 62, 29 C. C. A. 14, Judge Sanborn said:

"The meaning of this rule is that, under ordinary circumstances, a suit in equity will not be stayed for laches before, and will be stayed after, the time fixed by the analogous statute of limitations at law; but if unusual conditions or extraordinary circumstances make it inequitable to allow the prosecution of a suit after a briefer, or to forbid its maintenance after a longer, period than that fixed by the statute, the chancellor will not be bound by the statute, but will determine the extraordinary case in accordance with the equities which condition it. * * * When a suit is brought within the time fixed by the analogous statute, the burden is on the defendant to show, either from the face of the bill or by his answer, that extraordinary circumstances exist which require the application of the doctrine of laches; and, when such a suit is brought after the statutory time has elapsed, the burden is on the complainant to show, by suitable averments in his bill, that it would be inequitable to apply it to his case."

That doctrine has been applied in numerous cases. Broatch v. Boysen, 175 Fed. 702, 99 C. C. A. 278; Boynton v. Haggart, 120 Fed. 819, 57 C. C. A. 301; Cunningham v. Pettigrew, 169 Fed. 335, 94 C. C. A. 457; and Brun v. Mann, 151 Fed. 145, 80 C. C. A. 513, 12 L. R. A. (N. S.) 154. In the case last cited, the court held that the doctrine of laches is an equitable principle, which is invoked to promote, but never to defeat, justice, and that it has no function where the analogous action of law is not barred, and no unusual conditions require its application. We find no conditions in the case at bar which are of such a nature as to constitute through the plaintiff's delay the defense of laches. The considerations which affect that defense are, generally speaking, whether the rights of innocent persons have intervened, whether the witnesses are dead or have disappeared, and whether the situation of the parties has changed to the defendant's prejudice. In McIntire v. Pryor, 173 U. S. 38, 59, 19 Sup. Ct. 352, 360 [43 L. Ed. 606] the court said:

"We do not wish to be understood as holding that the plaintiff, even in the case of actual fraud, may wait an indefinite time, or always so long as the statute of limitations would permit him to bring an action at law before asserting his rights; but where the fraud is clearly proven, the court will look with much more indulgence upon any disability under which the plaintiff may labor as excusing his delay."

The important distinction to be observed between the case at bar and the decision of this court in Newberry v. Wilkinson, 199 Fed.

673, 118 C. C. A. 111, is that in the latter case the statute of limitations at law had run, and the court was therefore dealing with a case which presented a prima facie presumption of laches. The court held that the plaintiff had not shown such facts and circumstances as to excuse his delay beyond the period fixed by the analogous statute of limitations, and that he did not show that the defendant's position was no worse by reason of the delay than it was previously, and the court pointed to certain facts in the case which it said tended to indicate that the delay had been prejudicial to the defendant.

The decree is affirmed.

ROSS, Circuit Judge (dissenting). John M. Smith, deceased, of whose estate the appellant is executrix, was, during his lifetime, the guardian of his brother's three children, the appellee (William Smith) and the latter's two sisters. William A. Smith was a brother of John M. Smith. Those two brothers were engaged in the sheep business in Montana, first as partners, but afterwards caused a corporation to be organized under the name of Smith Bros. Sheep Company, to which they transferred the property, each taking stock in the corporation therefor. Afterwards William A. Smith died, and in the course of time John M. Smith acquired the stock his brother had formerly owned, by purchase from the executor of the estate. In a suit subsequently brought in the court below by one of the daughters of William A. Smith that sale was adjudged by this court fraudulent and was annulled as to her upon certain terms. Those terms and all of the numerous facts and circumstances of the case will be found fully stated in the cases entitled Moore v. Smith et al., 182 Fed. 540, 105 C. C. A. 78, and Smith v. Moore, 199 Fed. 689, 118 C. C. A. 127. It is unnecessary to repeat them here. The brother of that complainant (appellee here) commenced a similar suit in one of the courts of the state of Montana to have set aside, as to him, the sale of the stock of the deceased, William A. Smith, in the Smith Bros. Sheep Company to John M. Smith, and upon the identical evidence that was introduced in his sister's suit the Supreme Court of Montana adjudged the sale without fraud and valid, and directed the dismissal of his bill. Smith v. Smith, 45 Mont. 535, 125 Pac. 987. Thereafter William Smith commenced the present suit in the court below, seeking the reopening of the accounts of his former guardian, John M. Smith, and to recover from his estate certain interest upon the money of his wards, alleged to have been appropriated by the guardian to his own use, the bill alleging, among other things, that the guardian received $82,174.20 of his wards' money, one-third of which was the property of the complainant, and all of which the guardian converted to his own use, 18 months after doing which he made application to the court in which the guardianship matter was pending to borrow the money of his wards at the rate of 3 per cent. per annum, not only concealing the fact of his misappropriation of that money 18 months before, but actually representing that he then had the money on hand, and that it would be a fair and safe investment of the money of the wards to allow him to borrow it at 3 per cent. per annum when the prevailing

rate of interest for money in the state at the time was 9 per cent., which application resulted in this order of the court:

"Probate Minutes, December, 1900.

"Tuesday, the Eleventh day of December, 1900.

"255. Estate and Guardianship of Wm. Smith et al., Minors.

"Max Waterman, counsel for guardianship, asked to have his name withdrawn as counsel in the case. N. B. Smith asked to have his name entered as counsel instead of the Max Waterman's. John M. Smith, the guardian of said minors, having made application to the court for an order authorizing him to borrow the funds in his hands belonging to said minors amounting to the sum of about $82,000 at the rate of three per cent. per annum.

"The court being fully advised in the premises: It is ordered that said guardian be authorized to borrow said sum of $82,000 at the rate of 3 per cent. per annum, and to so hold the same at said interest until the further order of this court.

"Order allowing guardian to use money of estate signed and filed.

"F. K. Armstrong, Judge."

The bill further avers that the guardian subsequently presented to the court various accounts, including his final account, in none of which did he disclose his misappropriation of the said money, nor any excuse for his failure to invest it for his wards' benefit, and in none of which did he charge himself with any interest thereon prior to the said order of the court purporting to authorize him to borrow it, thereby fraudulently procuring the settlement of the said final account by the court; that when the complainant attained his majority, his said guardian, John M. Smith, settled with him on the basis of the said final account so allowed and settled, thereby depriving the complainant of a large amount of interest justly due him. The bill also sets up excuses in avoidance of laches and prays that all orders and decrees of settlement of the guardian's account be held for naught, that a new account be stated, and that complainant have and recover from defendant, as the executrix of the estate of John M. Smith, the balance due thereon, alleged to be $24,700. The answer put in issue the averments of the bill in respect to the misappropriation and conversion of the money of the wards and the alleged concealment from and misrepresentation to the court, denied the alleged indebtedness to the complainant, and set up alleged insufficiences in the bill, laches, and the state statute of limitations, and pleaded in bar of the action the decision of the Supreme Court of the state in the above-mentioned action brought therein by the complainant.

The evidence introduced upon the trial is without substantial conflict. It shows, among other things, that N. B. Smith was the executor of the estate of William A. Smith, and as such sold all of the stock owned by that estate in the Smith Bros. Sheep Company to John M. Smith for $85,000, and that John M. Smith was shortly thereafter appointed guardian of his brother's three minor children, including the complainant in this suit; that to pay for the stock John M. Smith borrowed from one of the Montana banks the money with which he made the purchase at the rate of 9 per cent. per annum; that after turning over the money to and receiving the stock from the executor, the latter redelivered $82,184.20 of it to John M. Smith, with which

he proceeded to pay the notes he had given the bank for the loan; that 18 months later he applied for and obtained the order of the probate court of December 11, 1900, by which, as has been seen, it was "ordered that said guardian be authorized to borrow said sum of $82,000 at the rate of 3 per cent. per annum, and to so hold the same at said interest until the further order" of the said court; that thereafter the said guardian presented to and filed in the said court various accounts, one of them being his final account, in not one of which did he mention his use of his wards' money to pay his own debts, and in not one of which did he charge himself with any interest thereon prior to applying for and obtaining the order of December 11, 1900. The accounts were settled by the probate court in utter ignorance, so far as appears, of the guardian's illegal use of his wards' money. The present complainant attained his majority in October, 1906, the final account of the guardian was settled December 14th of the same year, the balance of $23,954 thereby shown to be due the complainant being paid him the next day, and on the 27th day of the same month of December, 1906, the following decree was entered in the court in which the guardianship was pending:

"In the District Court of the Tenth Judicial District of the State of Montana, in and for the County of Meagher.

"In the Matter of the Estate and Guardianship of William Smith, Minor.

"It appearing that said estate and guardianship has been fully administered, and it being shown by the guardian thereof, by the production of satisfactory vouchers, that said guardian has paid all sums of money due from him, and delivered up under the order of the court all the property of the estate of the party entitled, and performed all acts lawfully required of him: It is ordered, adjudged and decreed that said guardian, John M. Smith, and his sureties be, and they are hereby, released and discharged from all liability to be hereafter incurred; that said estate is fully distributed, and the trust settled and closed.

"Dated this 27th day of December, 1906.

"E. K. Cheadle, Judge of the District Court."

When the complainant received from his guardian the balance shown by the latter's final account to be due, the complainant had no knowledge that the guardian had used his money prior to the order of the probate court authorizing him to borrow it, nor any knowledge of the concealments from and misrepresentations made to that court. The complainant's first information in regard to those matters came from his sister in or about the month of August, 1907, whereupon he commenced the suit already mentioned in the state court to set aside the alleged fraudulent sale to and purchase by the guardian, and to recover his distributive share of the property with accrued profits. The result of that suit being against the complainant, he is, of course, concluded by the final judgment in that cause to the full extent to which it goes. But the question involved in the present suit—the question as to the rate and the amount of interest the guardian should be held liable for during the time he had the use of his wards' money—was not involved in the complainant's suit in the state courts of Montana, as the Supreme Court of that state expressly declared in its decision in that case, saying:

"It may be that upon settlement of the guardian's accounts he should have been required to pay a greater rate of interest, and for a longer period of time, than was actually required of him, but that question is not before us."

That precise question is before us in the present suit; for very shortly after the final determination of his suit in the state court of Montana, in the fall of 1912, the complainant commenced the present one in the court below to reopen the said final account and to recover the amount of interest to which he alleges he is justly entitled, after having presented his claim therefor to the executrix of his guardian's estate and the rejection of that claim. Both ward and guardian, as well as the executrix of the latter's estate, were residents of the state of Montana, but it appears that from the time the complainant attained his majority until his guardian's death, the latter was within that state but 6 months, and that thereafter until the commencement of the present suit the defendant executrix was within the state of Montana but 15 months.

As to the merits of the suit I can see no doubt. That a guardian, whose relations to his ward are in the strictest sense fiduciary, cannot legally or honestly use his ward's money to pay his own debts, and especially when so used surreptitiously, is, to my mind, a proposition too plain for discussion. Had the guardian, when applying to the probate court of Montana for an order authorizing him to borrow his wards' money at 3 per cent. per annum, disclosed to that court that 18 months before he had already used it to pay his own debts, upon which he was paying 9 per cent. per annum to a bank, it is "inconceivable," as said by the court below, that the probate court of Montana would have made the order of December 11, 1900, hereinbefore set out in full, not only upon the most obvious principles of equity and fair dealing, but because of a statute of the state which, in part, reads as follows:

"Certain Transactions Forbidden.—Neither a trustee nor any of his agents may take part in any transaction concerning the trust in which he or any one for whom he acts as agent has an interest, present or contingent, adverse to that of his beneficiary, except as follows:

"1. When the beneficiary, having capacity to contract, with full knowledge of the motives of the trustee, and of all other facts concerning the transaction which might affect his own decision, and without the use of any influence on the part of the trustee, permits him to do so.

"2. When the beneficiary, not having capacity to contract, the proper court, upon the like information of the facts, grants the like permission; or,

"3. When some of the beneficiaries having capacity to contract, and some not having it, the former grant permission for themselves, and the proper court for the latter, in the manner above described." Section 5376, Revised Codes of Montana.

It only remains to consider whether any of the technical defenses set up by the defendant are sufficient to defeat the complainant's cause of action.

The plea of res judicata is, as was held by the court below, obviously without merit; for the suit in the state court involved only the validity of the sale of the property of the wards and the alleged right of the complainant there to rescind and recover his proportion of the property, with accrued profits; while here the suit is based on the

alleged misappropriation by the guardian of the money received by him from such sale, and is brought to recover interest thereon as damages because of such fraud. And that no such question was involved in the complainant's suit in the state court of Montana was expressly declared by the Supreme Court of that state in the clause from its opinion above quoted.

The case showing that the demand of the complainant not having been presented to the executrix of the estate of the deceased, John M. Smith, within 10 months after the publication of notice to creditors, pursuant to the provisions of section 7522 and 7523 of the Revised Codes of Montana, it is contended that it was rightly rejected, and is barred by virtue of sections 7525, 7530, 7531, and 7532 of that code, which sections are as follows:

"Sec. 7522. Every executor or administrator must, immediately after his appointment, cause to be published in some newspaper in the county, if there be one, if not, then in such newspaper as may be designated by the court or judge, a notice to the creditors of the decedent, requiring all persons having claims against him to exhibit them, with the necessary vouchers, to the executor or administrator, at the place of his residence or business, to be specified in the notice; such notice must be published as often as the court or judge shall direct, but not less than once a week for four weeks; the court or judge may also direct additional notice by publication or posting. In case such executor or administrator resigns, or is removed, before the time expressed in the notice, his successor must give notice only for the unexpired time allowed for such presentation.

"Sec. 7523. The time expressed in the notice must be ten months after its first publication when the estate exceeds in value the sum of ten thousand dollars, and four months when it does not."

"Sec. 7525. All claims arising upon contracts, whether the same be due, not due or contingent, must be presented within the time limited in the notice, and any claim not so presented is barred forever; provided, however, that when it is made to appear by the affidavit of the claimant, to the satisfaction of the court or judge, that the claimant had no notice as provided in this title, by reason of being out of the state, it may be presented at any time before an order of distribution is entered; and, provided, further, that nothing in this title contained shall be so construed as to prohibit the right, or limit the time of foreclosure of mortgages upon real property of decedents, whether heretofore or hereafter executed, but every such mortgage may be foreclosed within the time and in the manner prescribed by the provisions of this Code, other than those of this title, except that no balance of the debt secured by such mortgage remaining unpaid after foreclosure, shall be a claim against the estate, unless such debt was presented as required by the provisions of this title."

"Sec. 7530. When a claim is rejected either by the executor or administrator, or the judge, the holder must bring suit in the proper court against the executor or administrator within three months after the date of its rejection, if it be then due, or within two months after it becomes due, otherwise the claim shall be forever barred.

"Sec. 7531. No claim must be allowed by the executor or administrator, or by the judge, which is barred by the statute of limitations. When a claim is presented to a judge for his allowance he may, in his discretion, examine the claimant and others on oath and hear any legal evidence touching the validity of the claim.

"Sec. 7532. No holder of any claim against an estate shall maintain any action thereon, unless the claim is first presented to the executor or administrator, except in the following case: An action may be brought by any holder of a mortgage or lien to enforce the same against the property of the estate subject thereto, where all recourse against other property of the estate is expressly waived in the complaint; but no counsel fees shall be recovered in such action unless such claim be so presented."

As will be seen, the only one of the sections of the state statute relied upon by the appellant that declares claims not presented within the prescribed time to be forever barred is section 7525, which in express terms is limited to "claims arising upon contract." And I agree with the court below that the claim here in question did not arise upon or out of any contract, but wholly out of the alleged fraudulent conduct of the complainant's guardian, and as an obligation imposed, not by contract, but by law, equity, and good conscience.

Section 7530, supra, declares that where suit is not brought within a prescribed period after the rejection of the claim it becomes forever barred, but that provision is inapplicable to the present suit, since the latter appears to have been brought within the prescribed time after the rejection of the claim by the executrix.

Section 7532 declares, with an exception not pertinent here, that:

"No holder of any claim against an estate shall maintain any action thereon, unless the claim is first presented to the executor or administrator"

—but prescribes no other consequence for nonpresentation. In speaking of similar provisions of the Probate Practice Act of Montana, adopted in 1877, and reproduced in the Compiled Laws of that state of 1887, the Supreme Court of the state said, in the matter of the Estate of Higgins, 15 Mont. 474, 39 Pac. 506, 28 L. R. A. 116:

"The creditor cannot maintain his suit, under section 157, against an estate, unless he has presented the claim to the executor. And, by section 150, if the claim be one arising upon a contract, unless presented within the time limited in the notice, it is barred forever, except under particular conditions."

It is strenuously insisted, however, on behalf of the appellant, that as it is conceded that the complainant first learned of the alleged fraud of his guardian in August, 1907, and did not commence the present suit until May 17, 1913, it is barred by that provision of section 6449 of the statute of Montana which prescribes a period of two years for the commencement of an action for relief on the ground of fraud or mistake, computed from the aggrieved party's discovery of the facts constituting such fraud or mistake, as well as on the ground of laches, which courts of equity always give effect to in proper cases. In so far as the appellant's contention is based upon section 6449 of the Montana statute, prescribing a period of two years for the commencement of an action for relief on the ground of fraud or mistake, the counsel for the appellee cites in answer sections 6458 and 6461 of the same statutes, contending that the two-year period was thereby extended, in view of the agreed facts. Sections 6458 and 6461, and such stipulated facts, are as follows:

"Sec. 6458. If when the cause of action accrues against a person, he is out of the state, the action may be commenced within the term herein limited, after his return to the state, and if, after the cause of action accrues, he departs from the state, the time of his absence is not part of the time limited for the commencement of the action."

"Sec. 6461. If a person against whom a cause of action exists, dies, without the state, the time which elapses between his death, and the expiration of one year, after the issuing, within the state, of letters testamentary or letters of administration, is not a part of the time limited for the commencement of an action therefor, against his executor or administrator."

The agreed facts referred to are that John M. Smith was absent from Montana during the whole of the month of December, 1906, and for the first 8 months of the year 1907, being within that state the last 4 months of 1907, and that during the succeeding year, 1908, he was within the state 2 months and absent therefrom the balance of that year until his death on the 6th day of October, 1908, at Battle Creek, Mich.; that the executrix, Mary M. Smith, was absent from the state of Montana during the months of November and December, 1908, and during the year 1909 she was absent during the months of January, February, March, April, October, November, and December, and was also absent for 7 months during the year 1910, and for 7 months during the year 1911, and during the whole of the year 1912, and was likewise absent therefrom during the first five months of 1913, and part of June of that year, during which month she returned to Montana. It is apparent that if the provisions of section 6458 above quoted are applicable to the appellant executrix, the present suit is not barred by the state statute of limitations. The court below sustained the contention of the counsel of the complainant in that behalf, saying in its opinion:

"It is defendant's contention that section 6458, supra, is an exception to the general statute of limitations, to be strictly construed, and not to include personal representatives of debtors, since they are not within its letter. If this be sound, the instant suit is barred. But it is the statute law of Montana that strict construction of statutes derogatory of the common law is abolished, and all statutes are to be liberally construed with a view to effect their objects and to promote justice. Section 6214, R. S. At common law, neither absence from the realm nor death suspended the operation of limitations. This was an evil, and tended to defeat justice, in that at such times there could be no service of process and no effective prosecution of a cause of action. The object of section 6458, supra, was to furnish a remedy. The evil to be remedied and the object to be accomplished thereby attach no less to the case of absence of a personal representative than to the case of absence of a debtor. Prosecution to effect and justice are hampered equally in both cases. The reason for the statute is as potent in one as in the other. And though the literal reading of section 6458, supra, may support defendant's contention, it must yield to what must be assumed to have been the legislative intent, that is, to suspend limitations whenever absence from the state of the party defendant, be he debtor or personal representative, prevents effective prosecution of a cause of action. And so are the cases Hayden v. Pierce, 144 N. Y. 512, 39 N. E. 638; Smith v. Arnold, 1 Lea (Tenn.) 378; Wilkinson v. Winne, 15 Minn. 159 (Gil. 123). And see French v. Davis, 38 Miss. 218; Cotton v. Jones, 37 Tex. 34."

Whether the court below was right in its ruling in that regard, in view of the construction placed on section 6458 of the statutes of Montana by the Supreme Court of that state in the case of State v. Clemens, 40 Mont. 567, 569, 107 Pac. 896, I find it unnecessary to decide, because of the view I take of the laches of the complainant, set up by the defendant in defense of the suit. The complainant admits that he first learned of his guardian's fraud in August, 1907, which was long after he had attained his majority, and yet he did not commence the present suit until May 17, 1913, a period of nearly six years. In a very similar case (Newberry v. Wilkinson, 199 Fed. 673, 118 C. C. A. 111) we held that a delay for a much shorter period constituted

such laches as precluded a recovery; in that case the delay being less than four years.

"A court of equity," said Lord Camden, "has always refused its aid to stale demands, where the party has slept upon his rights and acquiesced for a great length of time. Nothing can call this court into activity but conscience, good faith, and reasonable diligence. Where these are wanting, the court is passive, and does nothing. Laches and neglect are always discountenanced, and therefore, from the beginning of this jurisdiction, there has always been a limitation to suits in this court." Smith v. Clay, 3 Brown's Chy. 639, note.

This doctrine has been repeatedly recognized and acted upon by the Supreme Court. Speidel v. Henrici, 120 U. S. 377, 7 Sup. Ct. 610, 30 L. Ed. 718; Norris v. Haggin, 136 U. S. 386, 10 Sup. Ct. 942, 34 L. Ed. 424, and cases there cited. See, also, Socrates Quicksilver Mines v. Carr Realty Co., 130 Fed. 293, 64 C. C. A. 539; Galbes v. Girard (C. C.) 46 Fed. 500.

It is said, however, in support of the judgment below, that the complainant's long delay in bringing the present suit is excused by the fact that within a reasonable time after the discovery of the fraud on the part of his guardian he brought suit in a court of the state of Montana to vacate the sale of his stock, and to recover the property with accrued profits, and that because he was there trying to get the state court to decide that case in his favor, this court of equity should not count against him the years he was there litigating, when he brings before it a right which confessedly was not involved in that suit. I am not able to so hold and therefore think the judgment appealed from should be reversed and the cause remanded, with directions to the court below to dismiss the suit.

BUCKBEE v. P. HOHENADEL, JR., CO.

(Circuit Court of Appeals, Seventh Circuit. January 5, 1915. Rehearing Denied May 25, 1915.)

No. 2142.

1. APPEAL AND ERROR ⟸997—DIRECTED VERDICT—FINDINGS—CONCLUSIVENESS.

   In an action for breach of contract in failing to furnish the variety of cucumber seed ordered, defendant's request for a directed verdict at the conclusion of plaintiff's evidence, and at the conclusion of all the evidence, operated as a request that the court find the facts, and the facts as found were conclusive upon the parties; the reviewing court being limited to the correctness of the conclusions of law thereon.

   [Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4023, 4024; Dec. Dig. ⟸997.]

2. APPEAL AND ERROR ⟸997—REVIEW—EFFECT OF DIRECTED VERDICT.

   That a motion for a directed verdict operates as a request that the court find the facts, and is conclusive upon the parties upon appeal, does not prevent consideration of the inadmissibility of rejected evidence, nor waive exceptions to the rulings of law thereon.

   [Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4023, 4024; Dec. Dig. ⟸997.]

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3. SALES ⇐445—ACTION FOR BREACH OF WARRANTY—DIRECTED VERDICT.
In an action for breach of contract in failing to furnish the variety of cucumber seed purchased, testimony by some of plaintiff's witnesses that they had not known the name of the brand ordered to be used to designate a certain variety of seed did not make plaintiff's evidence so uncertain as to render the direction of a verdict in his favor erroneous, where numerous witnesses sustained plaintiff's contention as to the designation.
[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1303–1308; Dec. Dig. ⇐445.]

4. SALES ⇐442—BREACH OF WARRANTY—MEASURE OF DAMAGES.
Where seed is sold to a dealer under a warranty that it is of a special variety, and the dealer in turn sends it to a grower, the warranty is carried forward to the ultimate purchaser, if it appears that such understanding was part of the first sale, and the measure of damages for breach of warranty is the difference in market value between the crop produced and such crop as the specified variety of seed would have produced under like conditions.
[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1284–1301; Dec. Dig. ⇐442.]

5. SALES ⇐442—BREACH OF WARRANTY—DAMAGES.
The purchaser of seed warranted to be of a specified variety, and which he resells to a grower, may recover from the dealer the actual loss due to misrepresentation as to the variety although he has not liquidated his liability to the subvendee for breach of warranty.
[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1284–1301; Dec. Dig. ⇐442.]

6. EVIDENCE ⇐460—PAROL EVIDENCE—EXPLANATION OF TERMS OF SALES CONTRACT.
In an action for damages for failing to deliver cucumber seed bought under a written contract as being "Improved Chicago Pickling," evidence that the purchaser was informed as to the kind of seed actually furnished, that it had been developed from seed purchased from a certain company, and that he agreed that it should be labeled "Improved Chicago Pickling," was improperly excluded; it being in explanation, and not in variation, of the terms of the written contract.
[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2115–2128; Dec. Dig. ⇐460.]

7. SALES ⇐440—BREACH OF WARRANTY—SALES BY SAMPLE—EVIDENCE.
In an action for damages for failing to deliver "Improved Chicago Pickling" cucumber seed under a written contract, evidence that the seller produced cucumbers from the seed contracted for as samples and sent them to the purchaser previous to the delivery was admissible to show notice of the actual nature of the seed to be delivered.
[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1261–1276; Dec. Dig. ⇐440.]

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

Action by the P. Hohenadel, Jr., Company against H. W. Buckbee, There was a judgment for plaintiff, and defendant brings error. Reversed and remanded.

The plaintiff in error, Buckbee, was defendant below in the suit of P. Hohenadel, Jr., Company, a Wisconsin corporation, as plaintiff, for recovery of damages upon contract. On trial of the issues to a jury verdict was directed by the trial court and so rendered against

the defendant for $12,921.40 damages assessed in favor of the plaintiff, and this writ of error is brought for reversal of the judgment awarded thereupon. The material questions raised by the assignments of error are stated in the ensuing opinion, and the issues under the pleadings are well summarized in the brief for defendant in error, as follows:

"The declaration set out in hæc verba in the second count two contracts, the first of October 17, 1903, and the second of October 23, 1903. The first contract was in the form of an order and acceptance for 300 pounds of 'Chicago Pickle' cucumber seed at the price of 70 cents per pound for future delivery, f. o. b. Rockford, net cash, 30 days, 1½ per cent. discount for cash in 10 days. The second contract was for 3,500 pounds of cucumber seed, 'Improved Chicago Pickling,' upon the same terms. The declaration then alleged that the plaintiff, at the time of making such contracts, was acting as the agent for P. Hohenadel, Jr., but that the fact of such agency was not disclosed to defendant at the time of making either of said contracts, and further alleged that the cucumber seed mentioned in the contracts as 'Chicago Pickle' and 'Improved Chicago Pickling' were known as and were one and the same, and that the second contract was an extension and further order under the first contract, and said two contracts were treated by the plaintiff and defendant as one order, and the deliveries thereunder were made as if under one and the same contract.

"The declaration then alleged that 2,500 pounds of cucumber seed were delivered under the said contracts on March 4, 1904, and 1,300 pounds on March 9, 1904, and the plaintiff thereupon paid the defendant the purchase price of the said cucumber seed, and that neither at the time of the purchase nor at the time of delivery could the plaintiff, by an examination or inspection of said cucumber seed, tell or ascertain whether said cucumber seed were of the variety or kind known as 'Chicago Pickle' or 'Improved Chicago Pickling,' and that such variety of seed was specially adapted for producing a high grade of cucumbers for pickling, and that the kind of cucumber seed could not be ascertained until the seed were planted and cucumbers grown therefrom; that the defendant did not keep and perform its said contracts and warranties as to the quality of said seed, and the seed delivered were not 'Chicago Pickle' or 'Improved Chicago Pickling' cucumber seed, but said seed were then and there of an inferior variety of cucumber seed, that would not produce, when planted, cucumbers specially adapted to the production of a high grade of cucumbers for pickles; that both P. Hohenadel, Jr., and the plaintiff were engaged in the business of selling cucumber seed, and in the business of planting and growing cucumbers for pickling, and in pickling the same, as defendant then and there well knew, and it was then and there a custom and usage well known to the defendant for the purchasers of seed, in order to sell said seed and obtain a crop therefrom, to contract to take all of the cucumbers produced from such seed, and that, relying upon the warranties aforesaid, P. Hohenadel, Jr., sold said cucumber seed to P. A. Marsh under a like warranty; that Marsh sold said cucumber seed to others, including numerous producers of cucumbers, and at the time of such sale contracted with some of the producers to purchase from them the whole product of said seed; and that, in consequence of the plaintiff's breach of warranty, the said Marsh was compelled to take the product of said cucumber seed, and, in consequence, suffered great damage, and said P. Hohenadel, Jr., incurred large liability and suffered damage in the sum of $30,000. To this declaration the defendant pleaded the general issue, non assumpsit, 'that he did not promise in the manner and form as the plaintiff has * * * in its additional counts * * * complained.'"

James G. Elsdon, of Chicago, Ill., for plaintiff in error.
John M. Zane, of Chicago, Ill., for defendant in error.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

SEAMAN, Circuit Judge (after stating the facts as above). The judgment against the defendant below, plaintiff in error Buckbee, arose under his contracts for sale and delivery to the plaintiff corporation, P. Hohenadel, Jr., Company, of cucumber seed of specified variety, and the verdict in favor of the plaintiff (directed by the trial court) awards recovery pursuant to two propositions, in substance: (1) That the evidence establishes delivery of a different variety of seed, not adapted to the purpose contemplated by the contract; and (2) that damages are proven and recoverable for the difference in market value between the crops produced from the seed so delivered and such crops as the variety of seed specified in the contracts would have produced under like conditions. Thus, in one or another form of presentation, the tenability of both of these propositions requires determination under the assignments of error. Other material questions arise upon rulings against the reception of testimony offered on behalf of the defendant. For consideration, however, of both propositions above stated, involving substantially the merits of the issues under the pleadings, this question arises for settlement at the threshold of inquiries under the assignments, namely: To what extent and for what tests, is the evidence reviewable thereupon?

[1] 1. The verdict against the defendant was directed by the court, and the general rule in such case, both of reviewability of the entire evidence and of the tests to be applied thereto, is unquestionable. But in the present record both the bill of exceptions and assignments of error disclose motions on behalf of the defendant, described in assignments 1, 2, 3, and 4 as denied by the court, as follows:

(1) "To direct a verdict in favor of the defendant, at the conclusion of the plaintiff's case;" (2) "to strike plaintiff's evidence and to direct a verdict in favor of the defendant at the conclusion of all the evidence;" (3) "to direct a verdict for the sum of $300 against the defendant at the conclusion of plaintiff's case;" (4) "to direct a verdict for the sum of $300 against the defendant at the conclusion of all the evidence."

It is manifest, therefore, that the defendant expressly submitted and "affirmed that there was no disputed question of fact which could operate to deflect or control the question of law," and that the rule stated and upheld in Beuttell v. Magone, 157 U. S. 154, 157, 15 Sup. Ct. 566, 567 (39 L. Ed. 654), is applicable and controlling for answer to the foregoing inquiry, namely:

"This was necessarily a request that the court find the facts, and the parties are therefore concluded by the finding made by the court, upon which the resulting instruction of law was given. The facts having been thus submitted to the court, we are limited in reviewing its action to the consideration of the correctness of the finding on the law, and must affirm if there be any evidence in support thereof."

We are not advised of any decision of the Supreme Court which tends to disturb this ruling, and it appears to have been uniformly adopted and enforced by the Circuit Courts of Appeals in the various circuits whenever the effect of such motions has arisen. The following precedents with their citations are deemed sufficient for mention: Chrystie v. Foster, 61 Fed. 551, 9 C. C. A. 606; Magone v. Origet, 70 Fed. 778, 17 C. C. A. 363; United States v. Bishop, 125 Fed. 181,

60 C. C. A. 123; Phenix Ins. Co. v. Kerr, 129 Fed. 723, 64 C. C. A. 251, 66 L. R. A. 569; Love v. Scatcherd, 136 Fed. 1, 77 C. C. A. 1; Bradley Timber Co. v. White, 121 Fed. 779, 58 C. C. A. 55; Century Throwing Co. v. Muller, 197 Fed. 252, 257, 116 C. C. A. 614. Both of the above-mentioned requests for direction of verdict "at the conclusion of all the evidence" were necessarily predicated on the defendant's submission and assurance that the evidence raised no issue of fact for determination within the exclusive province of the jury, that conclusions of law were alone involved therein, and that the ruling of the court accordingly was directly invoked on behalf of the defendant below. On such state of the record, not only administration of justice, but the entire line of authorities referred to, concur in denial of his right, as plaintiff in error, to have that submission reopened for review of the testimony, except to ascertain whether evidence appears in support of the ultimate conclusions of law thereupon in favor of plaintiff below.

[2] We do not understand, however, that these motions affect in any manner the assignments of error for rejection of testimony offered on behalf of the defendant in the course of the trial, and the contentions in support of the judgment, that errors of law therein (if committed) were either waived or otherwise cured by such motions, must be overruled. The submission above described involved alone the effect of the testimony which was received and entered into denial of the motions, so that it can neither embrace the offers of rejected testimony, nor waive exceptions duly preserved to the rulings of law thereupon.

[3] 2. Whatever of conflict appears in the testimony, therefore, in reference to the first proposition above mentioned as one of fact which was upheld by the trial court for direction of verdict in favor of the plaintiff, the contention of reversible error in such ruling is untenable, as we believe, for the reason that the record exhibits considerable testimony (to say the least) in support of the ruling therein. When the testimony introduced by plaintiff upon that issue is read and analyzed for its bearing within the above-stated rule, we believe sufficient evidence is presented for the required proof of every element embraced in such issue, namely, that the contract specified a distinct variety of seed, well known for production of the quality of cucumbers for pickling purposes thereby contemplated; that instead thereof the defendant delivered a different variety, not ascertainable from inspection of the seed; and that the product thereof was inferior and not adapted to the known purpose of the contract. It is unquestionable that the plaintiff's case (both under its declaration and testimony) rests on these averments of meaning of the terms "Chicago Pickle," as used in one contract, and "Improved Chicago Pickling" as used in the second contract: That both "are one and the same variety, which produces a character of cucumber" as described, and that both were the identical variety of seed which had long theretofore been well known in the trade as "Westfield's Chicago Pickle." While the testimony of numerous witnesses supports each of these contentions, it further appears that four of the witnesses introduced for the plaintiff on that issue

testified in substance that they had not known the term "Improved Chicago Pickling" to be so used; and referring to these instances of failure to sustain the averments, together with testimony adduced by the defendant, the contention is pressed for reversal that uncertainty is thus established in the contract terms, whereby the direction of verdict was erroneous. We are of opinion, however, that neither the instances of failure referred to nor the defendant's testimony can affect the inquiry above defined of support for the direction; and it may well be remarked in this connection that other evidence appears in support thereof, including catalogues published by the defendant which may bear interpretation in favor of the alleged identity of the contract terms. The various contentions of error, therefore, in finding the above-stated premise of fact, must be overruled.

3. The remaining premise upon which verdict was directed, as above mentioned, involves both findings of ultimate fact and the conclusions of law on which the award of damages rests. Upon the questions of fact raised the rule heretofore stated is equally applicable and renders their solution free from difficulty. But the conceded and undisputed state of facts presents a question or questions of law upon the character and measure of damages recoverable thereupon, which may not be clearly settled by the authorities. We proceed, therefore, to their consideration under the finding of fact that the seed delivered were neither of the variety contracted for nor adapted to produce the pickling cucumbers for which the purchase was made within the contemplation of both parties.

[4] The general rule to be applied for recovery of damages in the event thus stated, when the seed is sold to the purchaser as grower of the product, is settled by the authorities (both English and American) as the loss suffered in the production of a crop therefrom; and the great preponderance of authority upholds the measure of damages in such cases, as adopted by the trial court, to be the difference in market value between the crop actually produced and that which would have been produced had the seed been of the variety specified in the contract. We do not understand that this view of the general current of authority is controverted, although precedents are cited as tending to introduce other elements; but we believe the measure above stated to be both well founded and the established rule, so that citation or review of the authorities is not needful thereupon. It proceeds on the reasonable view that the crop actually raised may rightly furnish the prima facie test of the amount of crop which would have been raised from the stipulated variety, and thus becomes neither speculative nor remote for estimation of damages. This rule, however, as above formulated, imposes the element of direct contract between the seller and the grower of the seed, not present in the case at bar, and applicability of like measure of damages to various conditions which are presented raises important questions not entirely involved in any of the authorities called to our attention. Authorities are cited for extension of the rule to sales made to a dealer for resale to growers of the seed, under like representations, for like measure of damages against the primary vendor, when actually incurred through the resale. But the damages

awarded herein are predicated on extension of such measure beyond their direct scope.

The undisputed evidence establishes this state of facts: The seed delivered under the contract was neither planted by the plaintiff, as purchaser, nor were the crops therefrom raised under its direction, nor for its benefit; but the purchase was made by it, without notice thereof to the defendant, for the individual use and benefit of P. Hohenadel, Jr., for purposes of resale to other dealers. It was so sold and delivered by Hohenadel to one Marsh, as "Chicago Pickling seed" —Marsh being engaged in the pickling business and in contracting with producers for cucumber crops and seed furnished by himself. Marsh delivered this seed to numerous growers for such production of crops for his use; and of such deliveries the proof is limited to identification of growers and crops as to 565 pounds of seed planted, together with one lot of seed hereinafter mentioned for which damages were liquidated at $300. The remaining portions of seed delivered under the contract, not thus identified, do not enter into the award of damages. While it is contended on behalf of the defendant that these identifications were not complete, we believe sufficient identification appears to that end. The only proof, however, that damages were actually paid, either by plaintiff or by Hohenadel, to indemnify Marsh for his loss, was a single payment of $300 for loss on the lot of seed above referred to, which constitutes the item for which award of damages in favor of the plaintiff was requested on behalf of the defendant, as hereinbefore stated, so that the proof in that respect is not open to controversy herein. For the remaining amount of damages awarded, the following further facts appear: When the suit was commenced, the corporation was joined with Hohenadel (its undisclosed principal in the contract) as coplaintiffs, and such damages had neither been paid to Marsh, nor had liquidation or adjustment thereof with him occurred in any form. The issues were brought to trial during the lifetime of Hohenadel, without liquidation or adjustment thereof with Marsh, but resulted in a mistrial. Prior to the present trial Hohenadel died, having made no adjustment in any form with Marsh, nor does any specific claim appear to have been made by Marsh for damages (other than the $300 paid as above mentioned) while Hohenadel was living; and the only evidence of specific claim therefor appears as a claim filed by Marsh against the estate of the deceased, pending hearing in the proper county court in probate. The declaration, however, expressly avers, not only grounds for, but fact of, his liability to Marsh.

For application of the measure of damages awarded by the verdict to the above state of facts, the authority mainly relied upon is an English decision (1858) of unquestionable importance—Randall v. Raper, Q. B. 4 Jur. (N. S.) 662, El. B. & El. 84, 120 Eng. Rep. 438—which does not appear to be qualified or disaffirmed in any decision, English or American, called to our notice. The issues presented are thus stated in the head note:

"Defendant sold to plaintiff barley warranted to be 'Chevalier's seed barley.' Plaintiff sold it to other persons with the same warranty. The seed

turned out to be not according to warranty. The subpurchasers, who had sown the seed, made claims on plaintiff for the damages which they had sustained, but such claims had not been paid by plaintiff."

The opinion by Lord Campbell, C. J., clearly and tersely states the rulings thereupon, as follows:

"It has been contended that if the plaintiff had paid to the subpurchasers the full amount of the damages which they have sustained from the breach of the warranty, still he would not have been entitled to recover them. The true rule on the authorities is, that the plaintiff must show that the damage which he seeks to recover naturally arose from the breach of contract complained of. In this the damage sustained by the subpurchasers was the natural—yea, the necessary—consequences from the breach of contract by the defendant. The defendant sold the barley with a warranty that it was 'Chevalier's seed barley'; if it was not, it would not, when sown, produce grain of that quality, quite independently of soil or climate. The difference in value between the inferior crop grown and that which would have been produced if the seed had been as warranted is the natural and necessary loss from the breach of the warranty. Therefore, the defendant having warranted the barley as 'Chevalier's seed barley,' if the plaintiff had been sued by the subpurchasers, he would have been obliged to pay damages to that extent, and these he would have been entitled to recover from the defendant.

"But the main point brought before us is whether the plaintiff can recover as damages an amount which he has not paid to the subpurchasers, and for which they have only made claim not enforced by legal proceedings. We cannot lay down a rule that a mere liability, which has not been enforced, will not give a right to recover damages. Cases of extreme hardship might occur if such were the rule, and no authority has been cited to show that a liability to pay damages is not enough to sustain a right to damages. The cases which were cited are not in point. If liability to pay damages may be a ground of recovering special damage, why should not the liability be estimated by the jury? And that is all that has been done in this case. They have estimated the probable loss which the subpurchasers may recover from the plaintiff. The demand having been made, there is an easy mode of ascertaining the amount; and it is almost an inevitable consequence that the demand would be enforced. Therefore I am of opinion that the verdict ought to stand."

Concurring opinions are strongly expressed by Justices Erle and Crompton; and Justice Wrightman concurs as having "no doubt on the principle enunciated and that if the claims of the subpurchasers had been paid by the plaintiff, he might have recovered them from the defendant," but expresses doubt whether recovery is authorized for a claim of damages neither paid nor liquidated, with this remark: "I do not press this doubt further than to mention it."

In 3 Sutherland on Damages (3d Ed.) § 675, the eminent author thus states the rule as applicable to a purchase for resale:

"Where seeds are sold with a warranty that they are of a kind identified by a particular name, with notice that the purchaser intends to sell them again to persons who will purchase for the purpose of sowing them, if the warranty is untrue there seems to be no difference in principle as to the subject of damages between such a sale and one with such warranty where the purchaser is known to buy for the purpose of sowing them himself. The warranty to one buying seed to sell again justifies him in warranting it accordingly to his customers; and as they have recourse to him for damages estimated by the standard mentioned in the first paragraphs of the preceding section, that is also the measure of his loss as against his vendor."

In Passinger v. Thorburn, 34 N. Y. 634, 639, 90 Am. Dec. 753, the opinion by Davies, C. J., reviews the rulings in Randall v. Raper, supra, and states:

"This is the well-settled law in this country, it having been held that, where an article is sold with a warranty, and the vendee resells with a like warranty, the sum paid by him in an action by his subvendee for a breach of that warranty is prima facie evidence of the amount which he will be entitled to recover from his vendor in an action in his own behalf. Reggio v. Braggiotti, 7 Cush. [Mass.] 166; Armstrong v. Percy, 5 Wend. [N. Y.] 535; Blasdale v. Babcock, 1 Johns. [N. Y.] 518. And this court, in Muller v. Eno, 14 N. Y. (4 Kernan) 597, held that a purchaser may recover for a breach of a warranty, although he has sold the goods and no claim has been made on him, and that it was not necessary for him to show the price on the resale. That price may be evidence of the damages, but does not furnish the rule in respect to them."

We are impressed with no doubt that the doctrine on which damages are awarded for misrepresentation in the sale of seed is equally applicable to both classes of sale, as upheld in Randall v. Raper; that no substantial distinction exists to authorize one rule of just recovery when sale is made directly to the grower, and a different and plainly inadequate measure when sold to a dealer for resale to growers of the seed. The seller who gathers and packs the seed for sale is necessarily required to know its variety for the intended use by growers, and his warranty thereof, whether directly made to the grower or to the intermediate dealer for resale to growers, may justly render him chargeable for the damages suffered by the growers, when the circumstances of his sale authorize the inference that the warranty was to be thus carried forward to the growers. Indemnity for misrepresentations so carried forward is within the contemplation of his contract of sale to the dealer, and allowance thereof is not open to the objection of remote or speculative damages.

Under the facts above stated, the vendee Marsh undoubtedly stands in the relation of producer of the crop, which he obtained through placing out the seed with the actual growers; and the distinction from the facts involved in Randall v. Raper arises out of the intervention of Hohenadel as the actual vendee. Although the purchase was made for his use and benefit, such purpose was not disclosed to the defendant in making the contract. Nevertheless the negotiations were entirely with Hohenadel, who drafted and executed the contract on the part of the corporation, and the question whether the defendant understood that the seed as warranted by him was to be resold to a grower, as averred in the declaration, does not impress us to be materially affected by such personal relation of Hohenadel in the transaction. The crucial inquiry was of defendant's understanding of such purpose of direct resale to the grower, and thereupon we believe the finding, under circumstances in evidence, is not reviewable on the present inquiry.

On the other hand, however, we are of opinion that the principle of the rule for this extraordinary allowance of growers' damages, requires its limitation as defined in the above quotation from Sutherland on Damages. The warranty direct to the growers imposes such liability per se. Not so in the case of sale to a dealer, wherein various interpositions may arise before ultimate sale to growers, all beyond oversight on the part of the original seller; and without his concurrence, either express or implied, for carrying forward the warranty

to a grower, we believe the ordinary liability for breach of contract must arise, which does not extend to loss suffered by the grower. So, in making such sale, he may either decline or accept the extraordinary liability involved in a sale to the grower. But if he warrants to the dealer, with the understanding that resale is to be made directly to growers of the seed, he may rightly become bound for the loss thus brought directly within the contemplation of his sale and warranty. The issue raised herein as to such understanding on the part of the defendant in making the contracts, must be determined from the evidence, circumstantial or direct, with the burden resting on the plaintiff to establish such understanding as an issue of fact. In the event, therefore, of submission to a jury, on retrial of all issues (as hereinafter directed), instructions will become needful, in conformity with the foregoing opinion, upon such issue of fact as may be presented by the evidence for assessment of damages under one or the other rule.

[5] We are of opinion, therefore, that the foregoing considerations authorized the rule of damages adopted herein, unless the above-stated facts, that the plaintiffs had neither paid nor adjusted the damages suffered by the grower of the crops, bar recovery of indemnity on their behalf of the alleged liability incurred through the sale to the grower; and the question of right to recover thereupon, beyond the above-mentioned $300 item of damages which was paid, remains for determination. That such recovery is authorized without prepayment of the plaintiff's liability to the subvendee is expressly decided (as above shown) in Randall v. Raper, supra, but the contentions of error in like ruling herein are in substance: (a) That it is unsupported by any other authority; and (b) that its doctrine is unreasonable and open to serious abuse. We believe neither of these propositions is tenable. Like rule is uniformly recognized and applied for recovery of the amount of medical or other professional services incurred by the injured party, under circumstances which create liability against the defendant therefor, whether actually paid or adjusted or merely an outstanding liability. It is likewise applied for recovery of damages upon breach of warranty in sale of chattels, within the general rule, in Muller v. Eno, 14 N. Y. (4 Kernan) 597, and cases there cited—referred to in Passinger v. Thorburn, supra, as equally applicable to the present inquiry. For analogous application, see Smith v. McNair, 19 Kan. 333, 27 Am. Rep. 117; Denton v. Fisher, 102 Md. 386, 62 Atl. 627, 3 L. R. A. (N. S.) 465; Western Twine Co. v. Wright, 11 S. D. 521, 78 N. W. 942, 44 L. R. A. 438; also citation in 19 Cyc. 641, for like rule under reinsurance contracts between insurance companies. Nor are we advised of any just reason to require payment or adjustment of damages suffered by the subvendee (as grower) in loss of crops prior to the suit against the original seller. The recovery therein must be measured by the actual loss due to the misrepresentation, to be established by proof through the grower and other witnesses. We are of opinion, therefore, that the ruling thereupon was not erroneous.

[6] 4. Assignments of error, however, for rejection of testimony offered on behalf of the defendant, raise questions of vital importance

for submission of the issues, if error is well assigned. The main assignment sets forth the offer as made, as follows:

"45. The court erred in refusing the offer of the defendant (the plaintiff, by his counsel, stating in open court that he made no objection because such proposed testimony was presented in the form of an offer, and such offered testimony having been reduced to writing and filed in the cause and then and there brought to the court's attention before the jury retired) to prove by the witness John T. Buckbee, that at the time of the negotiations for and the making of the contract of October 23, 1903, covering the 3,500 pounds of cucumber seeds and other seeds, made at Janesville, Wis., that the samples of Westerfield Chicago Pickle cucumber seed were presented by him to Mr. Hohenadel; that a sample of the seed which Buckbee was then advertising in his catalogue of 1903 as Improved Chicago Pickling was presented; that this latter seed was the seed developed by Buckbee, defendant, from the seed earlier purchased by him from the Haskell Seed Company of Rockford, Ill., which was going out of business; that the price quoted to Mr. Hohenadel on the Westerfield Chicago Pickle cucumber seed was 85 cents per pound; that the price quoted on the other seed was 70 cents per pound; that the witness told to Mr. Hohenadel the history of the seed secured from Haskell and advertised by Buckbee as Improved Chicago Pickling; that his information was that it had been developed from the same original stock from which the Westerfield had been developed; that the witness described to Mr. Hohenadel the kind of cucumber that it would raise in the pickling stage, and described it as somewhat thicker and lighter shade than the Westerfield Chicago Pickle cucumber; that Mr. Hohenadel asked the witness what they called it; that the witness told him that they were advertising it as Improved Chicago Pickling cucumber seed; that the witness told him that they had grown this seed themselves, Buckbee growing the seed, and the quantity they had; that there was further conversation in regard to other seeds not involved in this suit but covered by the contract; that thereupon Mr. Hohenadel dictated and had written by his stenographer and typewriter the contract of October 23, 1903, in evidence; that, previous to dictating that, Mr. Hohenadel had stated that he would take 3,500 pounds of that seed; that they would label it in the contract 'Improved Chicago Pickling'; that that name was inserted in the contract by Mr. Hohenadel, and it was agreed between the witness and Mr. Hohenadel that the seed was developed from the seed purchased from the Haskell Seed Company, and should be delivered under the contract; that Mr. Hohenadel requested in the same conversation that 300 pounds covered by the contract of October 17, 1903, should be filled with the same kind of seed; that the 3,800 pounds of this kind of seed was afterwards, in the latter part of February or early part of March, shipped to the Hohenadel people under Hohenadel's direction, and invoiced to them as per invoices in evidence; that afterwards, and during the winter of the season following, for the purpose of testing this seed that was delivered in February or March to Hohenadel, the witness planted it in his greenhouse and tested it for germination and for quality; that, as shown by letter in evidence, Mr. Hohenadel was notified of this; that the seed that was germinated was of the variety delivered to Hohenadel; that after the plant grew, and the fruit was set and fully developed, samples of it were sent to Mr. Hohenadel previous to the delivery of the seed; that at that time, in 1903 and 1904, the witness knew of no other strain or variety or kind of cucumber seed that was advertised or being sold under the name of Improved Chicago Pickling. As a part of such offer, and identified by the same witness, page 27 of the Buckbee catalogue of 1903 was offered as defendant's Exhibit 2, and also page 27 of the Buckbee catalogue of 1904 was offered as Defendant's Exhibit 3, copies of which exhibits are set forth and included in the bill of exceptions in the action."

Understanding of the force of these offers requires reference to the following antecedent matters of record. The one contract in suit named the subject-matter thereof as "300 pounds cucumber Chicago Pickle," while the second contract named 3,500 pounds "cucumber

seed, Improved Chicago Pickling." On the part of the plaintiff, the contentions were (as stated in its brief), that one Westerfield had developed, long prior to the contracts, "a certain variety of cucumbers, which are especially desirable for pickling purposes," as described; that eventually "production of this type of cucumber resulted in the sale of cucumber seed, called indifferently, 'Westerfield Chicago Pickle,' or 'Chicago Pickle,' or 'Improved Chicago Pickling' "; and that both contracts intended such "Westerfield" variety as their subject-matter. Many seedmen, introduced as witnesses in support of such contention, so testified, although other witnesses upon the same side testified, in substance, either otherwise or that such other designations of the Westerfield variety were unknown to them in the trade. Numerous witnesses (seedmen) testified on the part of the defendant, in substance, that the contract terms were not understood in the trade as designations of the Westerfield variety. By way of foundation for the above offer, the witness Buckbee had been interrogated as to the negotiations and transactions between the parties on October 23d, when the second contract was made, and the record shows extended discussion, both on the part of court and counsel, upon the admissibility of testimony embraced in the subsequent offer. Thereupon the ruling of the court excluded the testimony, stating, "Whatever transpired prior to the execution of the written contract is absolutely immaterial," and, in substance, that it must be excluded as violative of the cardinal rule against varying the terms of the contract as written. For preservation of all questions raised by such rulings, the trial judge suggested the making of the offer and stated, "Let the record show that there is no objection made to the evidence because it is in the form of an offer," and counsel for plaintiff assented to such entry.

The foregoing immediate circumstances of the offer are material for two purposes: (a) As evidence that all substantial questions involved therein were duly presented and entered into consideration for the ruling to exclude the testimony; and (b) that it clearly meets the objection urged by counsel for plaintiff (elaborately discussed in the oral argument and supplemental briefs), in substance, that it raises no question of error in the exclusion, for the alleged reason that the offer embraces matter which was inadmissible in any view of the rejection of other matters contained therein, and is thus brought within the rule that rejection by the trial court as an entirety was authorized in the absence of segregation of matters so embraced therein. We believe the record is sufficient to present the important question upon the merits, whether the defendant was deprived of substantial rights by such exclusion.

In the enforcement of contracts which have been reduced to writing, either in formal instruments or in letters or memoranda adopted between the parties, one of the most frequent questions of difficulty arises out of tenders of proof of the nature described in the above offer. Issues are numerous in such cases, which both require and authorize proof of negotiations and attending circumstances out of which the contract grew, either for identification of subject-matter not sufficiently described in the writing, or for interpretation of con-

tract terms which are ambiguous or uncertain without explanation of the sense in which they are employed in the contract. Thus, where the writing is "expressed in short and incomplete terms, parol evidence is admissible to explain that which is per se unintelligible, such explanation not being inconsistent with the written terms." 1 Greenleaf on Ev. § 282. For instances of the above-defined character the principle is well recognized, both in law and in equity, that the meaning the parties "intended to convey by the words they employed in the written instrument" may thus be ascertained and enforced. Id. This doctrine is entirely apart from and beyond the range of operation of the other elementary rule, which cannot be departed from in the enforcement of written contracts, that such contract between the parties cannot be varied or set aside by parol testimony, and that all prior negotiations and understanding of the parties (in the absence of fraud or mistake) are presumptively merged in the writing. It neither involves nor permits violation thereof when rightly understood and applied, each being consistent with the other in object and enforcement. In other words the rule invoked for the above-mentioned offer of testimony is exclusively applicable when ambiguity or uncertainty appears in the contract terms, and in such event parol proof is admissible for the sole purpose of ascertaining the meaning of terms so employed on which the minds of the parties presumptively met in making the contract. It thus serves the needful object of placing the court, "in regard to the surrounding circumstances, as nearly as possible in the situation of the party whose written language is to be interpreted." Id. § 295a.

So understood, application of this principle is free from difficulty whenever the controversy over the contract terms is strictly limited as above defined; but confusion is not infrequent, either in presentation of issues upon such terms or in the contentions of counsel in respect thereof, which tends to create difficulty in the way of placing offers of parol proof within one or the other of these cardinal rules, and we believe such confusion appears in the extended argument of counsel (and citations as well) in support of the ruling under consideration. We come, therefore, to the inquiry whether the issues upon the contract in suit render the rejected proof admissible.

Both pleadings and evidence concur in establishing the fact, if otherwise questionable on reading the contracts or orders in suit, that the subject-matter of each—named "Chicago Pickle" in the one contract and "Improved Chicago Pickling" in the other—requires extrinsic evidence for identification as a known variety of cucumber seed, and the entire controversy between the parties hinges primarily on the meaning of these terms as employed in the respective orders. The plaintiff for support of its contention that both were used alike to designate "Westerfield Chicago Pickle"—an old and well-known variety "especially desirable for pickling purposes"—introduced (as heretofore mentioned) various seedmen who testified that the names were so used and known in the trade. This testimony was controverted, but, irrespective of such disagreement, we understand the alleged usage to constitute circumstantial evidence only of the meaning

of the uncertain terms employed in the writing; that, although uniform usage may have strong probative force in the issue of fact thus raised, other circumstances attending the making are equally admissible to ascertain the mutual intention of the parties therein. The foregoing offer of proof by the witness John T. Buckbee (who made the contract on behalf of the defendant for "Improved Chicago Pickling") clearly embraces full explanation to Hohenadel that the variety tendered for purchase was "Haskell" seed described with certainty; that he then quoted the "Westerfield" variety at 85 cents per pound, and the "Haskell" at 70 cents per pound, as optional for purchase; that Hohenadel selected the "Haskell" tender accordingly for purchase; that they then adopted, as designation for the seed so purchased, the arbitrary name "Improved Chicago Pickling," as theretofore applied by the defendant; that "the witness knew of no other strain or variety or kind of cucumber seed that was being sold under" such name; and that the name was so "inserted in the contract by Mr. Hohenadel."

We are of opinion that the testimony thus offered was admissible for submission upon the above-defined issue, and that error is well assigned for its rejection. In reference to objections urged to other matters embraced in the offer, we are not impressed with the alleged defects therein as substantive or requiring specific mention.

[7] Another ground of error in rejection of the offer of proof is discussed in the argument and requires consideration in reference to the issue of damages. The contention in substance is this: That not only in the above-recited features of the offer, but in the further offer to prove that the defendant subsequently produced cucumbers from the variety of seed contracted for, which were sent to Hohenadel "previous to the delivery of the seed" under the contract, such evidence was admissible to prove notice to the plaintiff of the actual nature of the seed to be delivered, that the party "damnified by the other party's breach" of the contract "is bound to use all reasonable means not to enhance his damages," and that proof of such notice would bar recovery of the special damages sought and awarded by the verdict. We believe these propositions (which were raised as well before the trial court) must be upheld for admissibility of the testimony so offered on that issue, irrespective of applicability of the offer for interpretation of the contract, and that the ruling was erroneous for that cause.

Other errors are assigned for rulings in rejection or reception of testimony, but none of these rulings impresses us to require specific mention. Those rejecting testimony in line with the above-mentioned offer are covered by the foregoing ruling of admissibility for interpretation of the contract, and the remaining objections are believed to be without substantial merit.

The judgment of the District Court is reversed accordingly, and the cause remanded, with direction to grant a new trial.

HEGNESS v. CHILBERG.

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

No. 2523.

1. CONTRACTS ⊜132—LEGALITY OF OBJECT—PARTNERSHIP TO BID FOR MAIL CONTRACTS.

A contract of partnership to bid for certain mail contracts, and if obtained to carry out the same and divide the net profits on an agreed percentage basis, is not illegal as against public policy, where it does not appear that its purpose or effect was to prevent or lessen competition in bidding.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 659–661; Dec. Dig. ⊜132.]

2. CONTRACTS ⊜113—MAIL CONTRACTS—VALIDITY—PARTNERSHIP.

Such a contract is not invalid for fraud merely because it provides that the bids shall be made and the contracts taken in the name of one only of the partners.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 521–541; Dec Dig. ⊜113.]

3. UNITED STATES ⊜71—GOVERNMENT CONTRACTS—PROHIBITION OF TRANSFER.

Rev. St. § 3737 (Comp. St. 1913, § 6890), which prohibits the transfer of any government contract or any interest therein by the party to whom such contract is given to any other party, under penalty of annulment of the contract "so far as the United States are concerned," is for the protection of the United States only, and does not affect the rights of the parties to any such transfer.

[Ed. Note.—For other cases, see United States, Cent. Dig. § 54; Dec. Dig. ⊜71.]

4. UNITED STATES ⊜111—ASSIGNMENT OF CLAIM AGAINST UNITED STATES—VALIDITY.

A contract of partnership to bid for a mail contract in the name of one partner and to carry out the same, if obtained, is not invalid under Rev. St. § 3477 (Comp. St. 1913, § 6383), as an assignment of a claim against the United States because of a provision therein requiring the partner in whose name the contract was to be taken to indorse the warrants received and deliver the same to the other partner.

[Ed. Note.—For other cases, see United States, Cent. Dig. §§ 94–98; Dec. Dig. ⊜111.]

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.

Suit in equity by Eugene Chilberg against John Hegness. From orders granting a preliminary injunction and appointing a receiver, defendant appeals. Affirmed.

The appellee, who was the plaintiff in the court below, brought a suit against the defendant for an accounting of the business of a partnership which was formed by written agreement between the parties as follows:

"Memorandum of agreement made and entered into this 25th day of August, 1909, by and between Eugene Chilberg, of Nome, Alaska, party of the first part, and John Hegness, also of Nome, Alaska, party of the second part, witnesseth:

"That, whereas, the parties hereto are desirous of securing mail contract to carry the United States mail between Nome, Alaska, and Unalakleet, Alaska,

and are desirous of bidding upon proposal route No. 78136 and proposal route No. 78137, in the name of the party of the second part; and

"Whereas, the parties are desirous of forming a copartnership for the purpose of operating the said mail routes, or either of them, should the said contracts be obtained, and are desirous of evidencing the terms of their said copartnership in writing:

"Now, therefore, for and in consideration of the mutual promises and other good considerations, it is agreed between the parties hereto as follows:

"First. That each of the parties hereto shall endeavor so far as he can to obtain the said contracts above mentioned, or either of them, and to that end the party of the first part agrees to advance all necessary funds needed for such purposes, and to obtain the bond required in the proposals for said mail routes, and, if either or both of said contracts are secured, party of the first part agrees to furnish the necessary bond required by the government therefor, and to advance the necessary money to begin and operate the said mail route or routes under the said contract or contracts until the payments are made by the government according to the contract or contracts.

"Second. Party of the second part agrees to furnish his own dog team, sled, and equipment, and give his personal service as a carrier on said route or routes, and shall reside, when not on the mail route, in the town of Nome, and give his personal attention and supervision to the fulfillment and carrying out of said contract or contracts, if the same is obtained in his name as bidder.

"Third. That the party of the second part shall receive the same compensation for his personal services for his attention to the said work as the other carriers employed by this partnership, and shall receive in addition thereto fifteen per cent. (15%) of the net profits derived or made from the said contract or contracts, after all other expenses are paid.

"Fourth. That the party of the first part for his share shall receive eighty-five per cent. (85%) of the net profits derived or made from the said contract or contracts, after all expenses are paid for operating the same.

"Fifth. That all warrants issued and delivered by the government in payment under the said contract or contracts shall be signed by the party of the second part and delivered to the party of the first part, or his representative or agent, who shall keep a strict and accurate account of the same and act as treasurer of the partnership.

"In witness whereof, the said parties hereto have hereunto set their hands and seals the day and year first above written.

"[Signed] Eugene Chilberg. [Seal.]
"[Signed] John Hegness. [Seal.]

"Signed, sealed, and delivered in the presence of:
"[Signed] William A. Gilmore.
"[Signed] Mabel Searl."

The complaint alleged that the contract was obtained for carrying mail between Unalakleet and Nome, Alaska, for a period of four years, at the rate of $16,000 per year, and alleged that the defendant had retained, and was threatening to retain, more than his share of the money paid and to be paid by the government. The plaintiff prayed for an accounting and for an order restraining and enjoining the defendant from secreting or cashing any of the warrants thereafter received by him from the United States in payment on the mail contract until the final hearing and determination of the suit. The defendant demurred to the complaint, and affidavits were filed by both parties. A restraining order was obtained as prayed for, and thereafter an order was made appointing a receiver, with authority to demand, receive, and hold, subject to the further order of the court, all postal warrants received in payment for services rendered under the mail contract, or warrants thereafter received, and that all such warrants be delivered to the receiver. From the restraining order, and from the order appointing the receiver, the defendant appeals.

G. J. Lomen, of Nome, Alaska, and Ira D. Orton and Thomas R. Lyons, both of Seattle, Wash., for appellant.

William A. Gilmore, of Seattle, Wash., for appellee.

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

GILBERT, Circuit Judge (after stating the facts as above). [1] The defendant contends that the contract of partnership which is sued upon is against public policy and void, for the reason that it tends to prevent or diminish competition. The defendant relies upon the decision of this court in Hoffman v. McMullen, 83 Fed. 372, 28 C. C. A. 178, 45 L. R. A. 410, affirmed by the Supreme Court in 174 U. S. 639, 19 Sup. Ct. 839, 43 L. Ed. 1117, and Atcheson v. Mallon, 43 N. Y. 147, 3 Am. Rep. 678. In Hoffman v. McMullen this court held that a contract to prevent competition and bidding for public works is contrary to public policy and cannot be enforced. The court said:

"The rule is universal that agreements which, in their necessary operation upon the action of the parties, tend to restrain their natural rivalry and competition, and thus to result in the disadvantage of the public or third parties, are against the principle of sound public policy, and are void."

And the Supreme Court said:

"It might readily be surmised that, if these parties had bid in competition, one or both of the bids would have been lower than their combined bid."

The law as applied to contracts to carry the mails is expressed in section 3950, Rev. Stats. (Comp. St. 1913, § 7437), which provides:

"No contract for carrying the mail shall be made with any person who has entered, or proposed to enter, into any combination to prevent the making of any bid for carrying the mail, or who has made any agreement, or given or performed, or promised to give or perform, any consideration whatever to induce any other person not to bid for any such contract."

1. The statute and the decisions in Hoffman v. McMullen and Atcheson v. Mallon would be applicable and controlling here, if there were any evidence in the case tending to show that the contract between the plaintiff and the defendant had a tendency to prevent competition in bidding. But there is no evidence, either in the contract or elsewhere in the record, that the plaintiff ever at any time contemplated bidding for the mail contract, or would have made a bid, or ever thought of making a bid, on his own behalf. Nor is there any fact or circumstance from which such a purpose on his part might be inferred. If any inference is to be drawn from the evidence and from the circumstances, it is that the plaintiff would not have applied for the contract for himself alone. He was a banker, a man of means, and it is not to be supposed that he would think of undertaking to contract to carry mail between Nome and Unalakleet through the winter months. In Hoffman v. McMullen this court said:

"There is no valid objection to such voluntary combinations, if the joint action of the parties is done honestly and in good faith. In all contracts secured in such a manner, the courts should never hesitate to protect parties in their agreements with each other, and compel them to comply with the terms thereof. It is only where the facts and circumstances surrounding the case clearly show that illegal means or improper and deceptive influences and methods were used to procure the contract that the maxim 'in pari delicto' applies."

In 9 Cyc. 492, it is said:

"On familiar principles, an agreement that one should bid for several for a public contract is not illegal per se."

In Bellows v. Russell, 20 N. H. 427, 51 Am. Dec. 238, it was held that an agreement that one shall bid for several for a mail contract is not void, unless made for some illegal purpose affecting public policy. We agree with the conclusion of the court below, which is thus stated in the opinion:

"The contract here shows on its face nothing more or less than an agreement that the parties shall endeavor to obtain a contract for carrying the mail in Alaska, and that they shall divide the net profits upon an agreed percentage basis, after the objects of the contract are completed, and after the money due on same is paid by the United States. There is no suggestion of a purpose to lessen the bids, nor is that the effect or tendency of the contract."

2. Nor is there anything in the case to show that the contract contemplated that the plaintiff would, or that he ever did, employ funds in any improper way, or exert influence in any improper manner to obtain the contract. It is not seen how it was possible to use money or exert influence for that purpose. The contract was necessarily and according to law let to the lowest bidder. The case differs totally from Tool Co. v. Norris, 2 Wall. 45, 17 L. Ed. 868, cited by the defendant. That was a case in which the contract was not let to the highest bidder, but was obtained by personal solicitation. The Civil War having just begun, the government was in need of arms. The Tool Company was a manufacturer of arms. Norris set to work to concentrate influence upon the War Department. He got senators to go with him to the War Office. By one means and another he got influential introduction to the Secretary of War, and secured the contract. There was nothing of that kind in the present case. The agreement provided that each party should endeavor to obtain the mail contract, and to that end the plaintiff agreed to advance all necessary funds and to obtain the bond; and although he alleged in his complaint that the contract was secured through his efforts, and without any aid or assistance from the defendant, and that he obtained and furnished the bond required by the government of the United States, and advanced the necessary money and made such financial arrangements that he and the defendant were able to and did comply with the terms and conditions of the said contract, it nevertheless does not appear, and it is not shown, that the agreement contemplated, as preliminary to engaging in the mail carriage contract, that the plaintiff should expend any sum of money, except such as might be necessary to obtain the bond. The evidence shows that he did this at a cost of $1,200.

[2] 3. Nor is there anything in the case to show that the plaintiff is not entitled to recover for the reason that his connection with the mail contract was concealed. There is no evidence that it was agreed that it should be concealed. The contract does not so provide, nor is there anything in the record to indicate that such was the intention. On the other hand, the agreement was openly signed in the presence of two witnesses, and one of the affidavits states that the post office of-

ficials were aware of the plaintiff's connection with the mail contract. There was nothing fraudulent in the mere fact that the agreement contemplated that the mail contract should be taken in the name of the defendant. A considerable sum of money was needed to finance the mail contract, and this the plaintiff agreed to furnish, while the defendant agreed to do the work. The fact that the plaintiff was to receive 85 per cent. of the net profits, and the defendant 15 per cent. is not ground for setting aside the orders appealed from. As a matter of fact, so far as the facts are shown, the stipulated division of the profits does not seem to have been inequitable. A large portion of the gross profits was received by the defendant in the way of wages, thereby reducing the sum of the net profits to be divided. The contract was to carry the mails only during the winter months, from November to May, inclusive. The first year the defendant received $3,600 as his wages; the second year, $3,600; and the third year $3,675; and at the end of that year it is said that he appropriated the additional sum of $1,800, claiming it as extra compensation. The sums advanced by the plaintiff to carry out the contract during those years ranged from $10,833 to $14,000 each year.

4. There is no evidence that either the plaintiff or the defendant violated any of the regulations of the Post Office Department. Counsel for the defendant refers to the new postal laws and regulations of 1913, issued under the act of Congress approved August 24, 1912 (37 Stat. 539, c. 389), in which, in section 1414, it is provided that proposals for carrying the mails shall be made on forms prescribed by the Postmaster General, and he states in his brief that the forms prescribed under that authority contain the following, to which the bidder must certify:

"This proposal is made in my own interest, and not by me as the agent of any other person or company, with full knowledge of the distance of the route, the weight of the mail to be carried, and all other particulars with reference to the route and service, and also upon careful examination of the instructions attached to said advertisement."

And he argues that the defendant must have signed such a certificate, and that therefore the contract he made with the plaintiff was in violation of the postal rules and regulations. To this there are two answers:

First. It nowhere appears in the record that the defendant signed such a certificate. What were the rules and regulations in force in 1909 is not shown. Nor do the postal laws and regulations of 1913 contain any specification of such a form to be signed by bidders. All that the volume contains on that subject is the statute of the United States (18 Stat. 235 [Comp. St. 1913, § 7433]), which provides that no proposal shall be considered unless—

"there shall have been affixed to said proposal the oath of the bidder, taken before an officer qualified to administer oaths, that he has the ability, pecuniarily, to fulfill his obligations, and that the bid is made in good faith, and with the intention to enter into contract and perform the service in case his bid is accepted."

If anything in the proposal which the defendant signed stands in the way of the plaintiff's right to recover in this suit, it has not yet

been shown in the record, and for that reason, if there is anything in the proposal that affects the controversy, its consideration should await the final hearing on the merits.

Second. But, even if it should be shown that the defendant signed the certificate which the defendant quotes, there is nothing in the facts to impeach its verity; for it was true that the proposal was made by the defendant in his own interest, and not by him as the agent of any other person or company.

5. The contract between the parties is not void by virtue of section 3963 of the Revised Statutes (Comp. St. 1913, § 7451), which provides that:

"No contractor for transporting the mails within or between the United States and any foreign country shall assign or transfer his contract, and all such assignments or transfers shall be null and void."

There is in this case no assignment or transfer of the mail contract. It remained at all times in the name of the original bidder, and for the benefit of the partnership. The statute prohibits only the transfer of a mail contract that has been made and entered into.

[3] 6. Nor is the contract made void by section 3737, which prohibits the transfer of any government contract or order or any interest therein "by the party to whom such contract or order is given, to any other party," and provides that:

"Any such transfer shall cause the annulment of the contract or order transferred so far as the United States are concerned."

That statute is for the protection of the United States only, and does not affect the rights of the parties to such a transfer. Dulaney v. Scudder, 94 Fed. 6, 36 C. C. A. 52; Goodman v. Niblack, 102 U. S. 560, 26 L. Ed. 229.

[4] 7. Nor is the reversal of the order of the court below required by the provisions of section 3477, which prohibits the transfer or assignment of any claim upon the United States, unless the assignment is executed and attested in the manner prescribed in the section, and after the allowance of the claim and the issuance of the warrant. It is contended that this statute is violated by two provisions of the partnership contract: First, in that it provides that all warrants issued and delivered by the government in payment under the mail contract shall be signed by the defendant and delivered to the plaintiff; second, in that the agreement makes the plaintiff the owner of a large interest in the mail contract.

In answer to the first proposition, it is sufficient to say, so far as the case here on appeal is concerned, that if it be conceded that the provision in the agreement for the indorsement of the warrants from the defendant to the plaintiff is void, it does not make void the entire contract. It is still a valid partnership agreement, calling for division of profits in the proportions therein specified, and the case comes within the principle announced in Nutt v. Knut, 200 U. S. 12, 26 Sup. Ct. 216, 50 L. Ed. 348, in which the court gave effect to a similar agreement, and said:

"Such an agreement did not give the attorney any interest or share in the claim itself, nor any interest in the particular money paid over to the claim-

ant by the government. It only established an agreed basis for any settlement that might be made, after the allowance and payment of the claim, as to the attorney's compensation. It simply created a legal obligation upon the part of the estate, which, if not recognized after the collection of the money, could have been enforced by suit for the benefit of the attorney, without doing violence to the statute or to the public policy established by its provisions."

Such being the equitable right of the plaintiff, the court below did not abuse discretion in enjoining, pendente lite, the defendant from secreting or disposing of the postal warrants, or sending the same without the jurisdiction of the court. In National Bank of Commerce v. Downie, 161 Fed. 839, 843, 88 C. C. A. 657, 661, this court said:

"Hence, where a claim has been allowed by the accounting officers of the United States, a warrant issued therefor and delivered to the claimant, the government is no longer concerned with his disposition of the draft, or the funds which it represented"—citing York v. Conde, 147 N. Y. 486, 42 N. E. 193, and Farmers' National Bank v. Robinson, 59 Kan. 777, 53 Pac. 762.

Second. The provision of the agreement by which the plaintiff is given an interest in the profits of the mail contract is not an assignment of a claim against the United States. Hobbs v. McLean, 117 U. S. 567, 6 Sup. Ct. 870, 29 L. Ed. 940, is decisive of that question. In that case, in considering the effect of section 3477, the court said:

"When the contract of partnership was made, Peck had no claim which he could present for payment, or on which he could have brought suit. He therefore had no claim the assignment of which the statute forbids. It is so clear that the articles of partnership do not constitute such an assignment as is forbidden by the section under consideration that it would be a waste of words further to discuss the point."

The orders are affirmed.

ROSS, Circuit Judge (dissenting). This is a suit in equity brought upon a written instrument which is as follows:

"Memorandum of agreement, made and entered into this 25th day of August, 1909, by and between Eugene Chilberg, of Nome, Alaska, party of the first part, and John Hegness, also of Nome, Alaska, party of the second part, witnesseth:

"That, whereas, the parties hereto are desirous of securing mail contract to carry the United States mail between Nome, Alaska, and Unalakleet, Alaska, and are desirous of bidding upon proposal route No. 78136 and proposal route No. 78137, in the name of the party of the second part; and

"Whereas, the parties are desirous of forming a copartnership for the purpose of operating the said mail routes, or either of them, should the said contracts be obtained, and are desirous of evidencing the terms of their said copartnership in writing:

"Now, therefore, for and in consideration of the mutual promises and other good considerations, it is agreed between the parties hereto as follows:

"First. That each of the parties hereto shall endeavor so far as he can to obtain the said contracts above mentioned, or either of them, and to that end the party of the first part agrees to advance all necessary funds needed for such purpose, and to obtain the bond required in the proposals for said mail routes, and, if either or both of said contracts are secured, party of the first part agrees to furnish the necessary bond required by the government therefor, and to advance the necessary money to begin and operate the said mail route or routes under the said contract or contracts until the payments are made by the government according to the contract or contracts.

"Second. Party of the second part agrees to furnish his own dog team, sled, and equipment, and give his personal service as a carrier on said route or routes, and shall reside, when not on the mail route, in the town of Nome, and give his personal attention and supervision to the fulfillment and carrying out of said contract or contracts, if the same is obtained in his name as bidder.

"Third. That the party of the second part shall receive the same compensation for his personal services for his attention to the said work as the other carriers employed by this partnership, and shall receive in addition thereto fifteen per cent. (15%) of the net profits derived or made from the said contract or contracts, after all other expenses are paid.

"Fourth. That the party of the first part for his share shall receive eighty-five per cent. (85%) of the net profits derived or made from the said contract or contracts, after all expenses are paid for operating the same.

"Fifth. That all warrants issued and delivered by the government in payment under the said contract or contracts shall be signed by the party of the second part and delivered to the party of the first part, or his representative or agent, who shall keep a strict and accurate account of the same and act as treasurer of the partnership.

"In witness whereof, the said parties hereto have hereunto set their hands and seals the day and year first above written.

"[Signed] Eugene Chilberg. [Seal.]
"[Signed] John Hegness. [Seal.]

"Signed, sealed, and delivered in the presence of:
"[Signed] William A. Gilmore.
"[Signed] Mabel Searl."

The bill alleges, among other things, that thereafter the complainant and the defendant obtained, in the name of the defendant, the United States mail contract for carrying the mail between the points named, for a period of four years, for the sum of $16,000 a year; that the contract was secured under the terms of the said agreement through the efforts of the complainant, and without any aid or assistance from the defendant, and that the complainant furnished the bond required by the government, and advanced the money necessary to enable the complainant and defendant to comply with the terms of the said contract throughout its term; that immediately after the contract was obtained the complainant and defendant agreed that the Pacific Cold Storage Company, a corporation doing business at Nome, Alaska, should act as the agent and treasurer of the complainant and defendant, and as their auditor, and should receive all warrants from the government, to be properly indorsed by the defendant, and should pay all of the bills against the alleged copartnership, and render an accounting to the complainant and defendant at the end of each mail season in accordance with the terms of the alleged agreement; that thereafter the defendant took charge of the delivery of the mails under the contract, and in addition to carrying the regular amount of mail imposed by the weight limit of the said mail contract, the defendant, using the carriers, teams, equipment, and credit of the alleged copartnership, carried excess mail amounting to several thousand dollars, for which he refuses to account; that in or about the month of June, 1913, the defendant, in violation of the alleged agreement, indorsed one of the warrants issued by the government in the sum of $3,406.11, and instead of depositing the same with the Pacific Cold Storage Company, cashed it at a bank in Nome, and from the proceeds thereof took the sum of $1,800, and subsequently, and in the month of May, 1914, drew from the Pacific Cold

Storage Company $600, claiming that amount to be due him, in violation of the alleged agreement; that the said mail contract had been completed, and that there remained due from the government to the alleged copartnership for services rendered during the then past year $9,551.55, besides a large amount for carrying excess mail during that year, all of which would soon be paid by the government in warrants made payable to the order of the defendant; that the alleged copartnership remained indebted to the Pacific Cold Storage Company in about the sum of $8,500, for advances made by it during the then past year, and that the defendant had admitted taking $2,400 during that year in excess of what was due him under the terms of the alleged agreement, and threatened to appropriate to his own use all warrants received from the government for excess mail carried during the four year term, and otherwise violated the terms of the alleged copartnership, and is wholly insolvent and unable to respond to any judgment that the complainant might recover against him. The prayer of the bill was for an accounting, and for a restraining order and injunction, and such other relief as might be proper.

A demurrer to the bill was overruled by the court below, after which the defendant filed an answer thereto, in which, while admitting the execution, set up the invalidity, of the alleged agreement between him and the complainant upon various grounds therein stated, and, among other things, alleged therein that before and at the time of the making of the alleged agreement between the complainant and the defendant the former was negotiating with one Chester, who was a man of means, and represented to the latter that he (complainant)—

"was in favor of bidding for such contract to carry the mails aforesaid under contract with said plaintiff, or said Chester, or both, then and there knowing that defendant would also be a bidder for such contract; that defendant had no knowledge of said negotiations of plaintiff and said Chester at the time of making said pretended agreement with plaintiff; that plaintiff at all times before entering into said agreement, to wit, said paper writing set forth in the complaint, enjoined the defendant and demanded of him absolute secrecy in regard to their negotiations, and failed and neglected to inform the said Chester of the negotiations pending between himself and defendant, intending then and there to cause said Chester to neglect bidding for said mail contract and for the purpose of stifling the bids for said contract and preventing competition in the bidding therefor; that by reason of the premises the said H. S. Chester and said plaintiff, so defendant is informed and believes, did in fact neglect to bid for said mail contract or contracts, and the bidding for said contract was thereby in fact stifled, and the government of the United States was thereby in fact deprived of competition in the bidding for said contracts to carry mail, and prevented from knowing that a stranger to the contract, to wit, said plaintiff, was also interested in said mail contract awarded to the defendant."

The answer contained various other allegations, admissions, and denials. On the filing of the bill, together with an affidavit of the complainant's attorney, the court made an order directing the defendant to show cause why a restraining order should not be granted, and subsequently granted an injunction pendente lite, and thereafter, on motion of the complainant, made an order appointing a receiver in the cause, from which orders the present appeals are taken.

I am unable to take the view of the agreement upon which the

suit is based that was taken by the court below and that is taken by the majority of this court. It is declared by statute that:

"All contracts for carrying the mail shall be in the name of the United States, and shall be awarded to the lowest bidder tendering sufficient guarantees for faithful performance," etc. R. S. § 3949 (Comp. St. 1913, § 7436).

And section 3963 of the same statutes (section 7451) reads as follows:

"No contractor for transporting the mail within or between the United States and any foreign country shall assign or transfer his contract, and all such assignments or transfers shall be null and void."

There may be nothing in the statutes nor in public policy which would have prevented the complainant and the defendant from forming a partnership and openly making a joint bid for carrying the mail. In McMullen v. Hoffman, 174 U. S. 639, 652, 19 Sup. Ct. 839, 844 (43 L. Ed. 1117), the Supreme Court quoted with approval this from the opinion of Judge Folger in Atcheson v. Mallon, 43 N. Y. 147, 151, 3 Am. Rep. 678:

"But a joint proposal, the result of honest co-operation, though it might prevent the rivalry of the parties, and thus lessen competition, is not an act forbidden by public policy. Joint adventures are allowed. They are public and avowed, and not secret. The risk, as well as the profit, is joint, and openly assumed. The public may obtain at least the benefit of the joint responsibility, and of the joint ability to do the service. The public agents know, then, all that there is in the transaction, and can more justly estimate the motives of the bidders, and weigh the merits of the bid."

And the Supreme Court added:

"We have here nothing to do with a combination of interest which is open and avowed, which appears upon the face of the bid and which is therefore known to all. Such a combination is frequently proper, if not essential, and, where no concealment is practiced and the fact is known, there may be no ground whatever for judging it to be in any manner improper."

In the case in hand, however, there was nothing open and aboveboard in the dealings with the government, but, on the contrary, there was concealed from it the fact, appearing upon the very face of the bill in the present suit, that the bid for carrying the mails, while made in the name of Hegness, was in truth made mainly in the interest of one who was to receive 85 per cent. of the net profits of the undertaking, and who had agreed "to advance all necessary funds needed" for the procuring of the contract or contracts, the "necessary money to begin and operate the said mail route or routes under the said contract or contracts, until the payments are made by the government according to the contract or contracts," as well as to furnish the required bond to the government.

It is, in my opinion, wholly unimportant whether the agreement entered into between the complainant and the defendant was or was not detrimental to the government. If its natural tendency was to injuriously affect the public interests, it was against public policy and void. That is the well-established law. The case of Hoffman v. McMullen, 83 Fed. 372, 28 C. C. A. 178, 45 L. R. A. 410, in this court—afterwards affirmed by the Supreme Court, 174 U. S. 639, 19 Sup. Ct.

839, 43 L. Ed. 1117—was in principle quite similar to this. There the city of Portland, through its water committee, having advertised for bids for the construction of a pipe line, Hoffman and McMullen entered into an agreement by which Hoffman put in a bid for the work in the name of Hoffman & Bates, and McMullen put in a higher one in the name of the San Francisco Bridge Company. The contract having been awarded to Hoffman & Bates, that firm and McMullen entered into a partnership agreement by which each party to it should pay one-half of the cost of executing the contract and receive one-half of the profits or bear one-half of the loss resulting therefrom. The contract having proved profitable, Hoffman refused to account to McMullen for any part of the profits, and in the suit brought by the latter against the former therefor the agreement was held by this court, as well as by the Supreme Court, against public policy and absolutely void. A large number of authorities were cited by both courts in that case, and it is useless to again cite them here.

It is true that in the present case only one bid was made, while there two actually fraudulent bids were submitted. Here, however, the direct tendency of the agreement and of the actions of the parties was to prevent competitive bids, and to thus injure the interests of the government, besides which there was a concealment and fraud practiced upon it in misrepresenting the actual bidder and in evading and violating the statutory provisions of the government, if not its postal regulations, which have the force and effect of law. Moreover, the provisions in the agreement of these parties that Chilberg, in the event the bid made in the name of Hegness should be accepted, was to furnish the necessary bond, "advance the necessary money to begin and operate the said mail route or routes under the said contract or contracts until the payments are made by the government according to the contract or contracts," was to receive 85 per cent. of the net profits resulting therefrom, and was "to advance all necessary funds needed" for procuring the contract or contracts, are very significant and suspicious. I find it difficult to understand how any funds should be needed to procure a contract which the law expressly requires shall be let to the lowest bidder, beyond the trifling cost of putting in the bid. In my opinion the case is one which a court of equity should not entertain, and, accordingly, that the orders appealed from should be reversed, and the court below directed to sustain the demurrer to the bill and dismiss the suit, at the cost of the complainant. See Tornanses v. Melsing et al., 109 Fed. 710, 47 C. C. A. 596.

IDAHO-OREGON LIGHT & POWER CO. et al. v. STATE BANK OF CHICAGO et al.

PRIEST et al. v. IDAHO RY., LIGHT & POWER CO. et al.

(Circuit Court of Appeals, Ninth Circuit. July 12, 1915.)

No. 2524.

1. CORPORATIONS ⊂⊃471—MORTGAGE BONDS—DELIVERY AFTER DEFAULT.
Where a corporate deed of trust neither expressly nor impliedly prohibited the certification and delivery by the trustee of bonds thereby authorized after default in the payment of interest on bonds already sold, bonds were duly and legally certified after such default.
[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1833–1836, 1838, 1840; Dec. Dig. ⊂⊃471.]

2. CORPORATIONS ⊂⊃471—MORTGAGE BONDS—ISSUANCE.
Where the full amount of the bonds authorized by a corporate deed of trust had not been issued, the execution of a second mortgage to secure a bond issue, the proceeds of which were intended in part to be used in refunding the first mortgage bonds, did not prevent the corporation from thereafter issuing first mortgage bonds; the second mortgage expressly providing that all bonds issued thereafter were under and pursuant to the terms of the first mortgage.
[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1833–1836, 1838, 1840; Dec. Dig. ⊂⊃471.]

3. CORPORATIONS ⊂⊃471—MORTGAGE BONDS—VALIDITY—SUFFICIENCY OF EVIDENCE.
In a suit to foreclose a corporate mortgage, involving a controversy between two groups of bondholders, evidence *held* to show that the corporation needed $250,000 at the time it released a syndicate of bankers controlling the corporation from their obligation to purchase second mortgage bonds in consideration of their agreement to procure a loan to the corporation of $250,000 secured by second mortgage bonds exchangeable for first mortgage bonds.
[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1833–1836, 1838, 1840; Dec. Dig. ⊂⊃471.]

4. CORPORATIONS ⊂⊃473—MORTGAGE BONDS—ISSUANCE OF BONDS—COMMON DIRECTORATE.
A power company, whose property was covered by a first mortgage securing bonds, all of which had not been issued, executed a second mortgage to secure bonds which it experienced difficulty in selling. A syndicate of bankers agreed to purchase 1,500 of the second mortgage bonds at 80, taking stock as a bonus, and a railway and power company was organized, to which certain property was transferred; a majority of the stockholders of the power company exchanging their stock for stock in the railway company, which acquired control of the power company and had its directors and officers made directors and officers of the power company. When the bankers had taken 1,325 of the bonds, it became apparent that the power company was in failing circumstances, that its income was insufficient to meet its current obligations, and that immediate insolvency could not be escaped, unless by a reorganization or consolidation with a competing company, and subsequent events showed that it was then hopelessly insolvent. The directors then authorized an agreement with the bankers, releasing them from their obligation to take the remaining 175 bonds; the bankers agreeing to procure for the corporation a loan of $250,000, secured by second mortgage bonds to twice the amount of the loan, exchangeable for first mortgage bonds. *Held* that, while the power company was authorized to issue the first mortgage bonds so

exchanged for second mortgage bonds, and while it apparently needed $250,000, the act of the directors was constructively fraudulent as to the holders of outstanding first mortgage bonds, and the court properly decreed that the bonds securing such loan should be held only for the amount advanced thereon above the amount which the bankers were owing under their contract to purchase second mortgage bonds.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1842–1853, 1855; Dec. Dig. ⊂⊃473.]

5. CORPORATIONS ⊂⊃472—MORTGAGE BONDS—ISSUANCE—COMMON DIRECTORATE.

The directors of a corporation, in selling the bonds of their company to raise money for its benefit, act in a fiduciary capacity, and any transaction whereby they become possessed of such securities, in order to be valid, must in all respects be free from fraud or the suspicion of wrongdoing or unfair dealing.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1839, 1841; Dec. Dig. ⊂⊃472.]

6. CORPORATIONS ⊂⊃472—MORTGAGE BONDS—ISSUANCE—COMMON DIRECTORATE.

A power company, controlled by a railway company, had outstanding a first mortgage, all of the bonds authorized by which had not been issued, and a second mortgage. It was indebted to contractors, who were willing to take $20,000 in first mortgage bonds at the then selling price; but the common directors of the two companies arranged a settlement by which the railway company was to deliver to the contractors second mortgage bonds of the power company and its own stock, agreeing to purchase the bonds at a specified price after a date fixed, and the power company agreed to deliver first mortgage bonds to the railway company in exchange for second mortgage bonds. *Held* that, as it did not appear that the stock and bonds so surrendered to the contractors by the railway company were of any value, and there was therefore no proof that the railway company parted with anything of value, it had no substantial equities with respect to first mortgage bonds received by it under this arrangement.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1837, 1839, 1841; Dec. Dig. ⊂⊃472.

Identity of governing officers or agents in different corporations as affecting the transactions thereof, see note to Marks v. Merrill Paper Co., 123 C. C. A. 385.]

Appeal and Cross-Appeal from the District Court of the United States for the Southern Division of the District of Idaho; Frank S. Dietrich, Judge.

Suit by the State Bank of Chicago against the Idaho-Oregon Light & Power Company and others, in which A. W. Priest and others, personally and as a bondholders' committee, intervened. From a decree (219 Fed. 583), the interveners and certain defendants appeal. Affirmed.

On or about April 1, 1907, the Idaho-Oregon Light & Power Company, hereinafter named the Power Company, executed to the State Bank of Chicago, as trustee, a mortgage upon all of its property, consisting chiefly of hydro-electric power plants and power and light distributing systems in Idaho and Oregon, to secure an issue of 7,000 bonds, of the par value of $7,000,000. Of that issue, $3,319,000 in bonds were thereafter certified and were outstanding. In the fall of 1911 the Power Company, having already expended large sums of money upon its Ox Bow plant on the Snake river, from which it expected to procure its power, was in need of funds for the completion thereof. On or about November 21, 1910, it executed a second mortgage on the properties cov-

ered by the first, to secure a bond issue of $10,000,000. A portion of the money expected to be realized thereon was to be used in refunding the first mortgage bonds, and $3,000,000 of it was intended to be used for the completion of the Ox Bow plant. Difficulty having been met in selling the second mortgage bonds, a scheme of reorganization was devised. On September 19, 1911, the banking house of Kissel, Kinnicutt & Co., with the co-operation of other capitalists in New York City, called in the record the bankers, entered into an agreement to purchase $1,500,000 of the second mortgage bonds at 80, and to take as a bonus a large portion of the capital stock of the company, together with certain options and privileges. To carry out their plans, the Idaho Railway, Light & Power Company, hereinafter named the Railway Company, was organized, and to it were transferred one of the Power Company's power plants and certain electric railway lines and lighting systems, and in exchange for the railway company's stock and bonds there were transferred to it all the bonds and stock of the Power Company in the agreement above referred to, and the majority of the stockholders of the Power Company exchanged their stock in that company for stock in the Railway Company. The Railway Company thereby acquired control of the Power Company, and the directors and officers of the Railway Company were made the directors and officers of the Power Company, and by January 1, 1912, the Power Company had passed into the complete control of the Railway Company. The trustee of the first mortgage brought a suit to foreclose. In that suit intervened A. W. Priest and his associate interveners, constituting a bondholders' committee, which, at the time of the intervention, controlled about 400 of the first mortgage bonds, and at the time of the hearing represented 2,000 of the bonds. The interveners sought at first to prevent foreclosure on the ground that the Railway Company, which had obtained control of the Power Company, was promoting the foreclosure for the purpose of wrecking the latter, to the injury of the holders of first mortgage bonds, who had no corresponding interest in the Railway Company. The interveners alleged that in the early part of 1913 the Railway Company was in possession of and claimed to own certain of the second mortgage bonds of the Power Company, and demanded of the Power Company that it receive back these bonds and deliver to the Railway Company an equal amount of first mortgage bonds, being part of the $3,319,000 of said bonds alleged to be outstanding, and the Power Company, being under the control and domination of the Railway Company necessarily acceded to the demand, and delivered to the Railway Company $718,000 of the first mortgage bonds, and the interveners alleged that the second mortgage bonds had no market value, and were worthless, and that the exchange was without consideration, and was as to the interveners and the Power Company wrongful and fraudulent, and that the said bonds should be canceled.

Cavanah, Blake & MacLane and Alfred A. Fraser, all of Boise, Idaho (John F. MacLane, of Boise, Idaho, of counsel), for appellants.

Eldon Bisbee, of New York City, Amicus Curiæ, in support of appellants.

Joseph Cummins, of Chicago, Ill., and Richards & Haga, of Boise, Idaho, for appellees and cross-appellants Priest and others.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). [1] The controversy in the court below concerned the disposition of 825 of the first mortgage bonds claimed to be owned by the Railway Company. Its right to hold 107 of those bonds was attacked on the ground that the certification of the trustee and delivery of the same to the Power Company were unauthorized under the terms of the trust deed, in that they were certified and delivered after default in the payment of an installment of interest due on the bonds already

sold. There is no prohibition in the trust deed against issuing the bonds under those circumstances, and such a prohibition is not fairly to be implied from its terms. We find no error in the conclusion which the court below reached upon that branch of the case; the court ruling that those bonds were duly and legally certified, and delivered as collateral, and were held by the Railway Company as collateral, and reserving the right to determine the status, title, and ownership of those bonds in another proceeding. The remainder of the 825 bonds in controversy were issued in two groups, one of 440 and one of 278, in September and December, respectively, 1912.

By September, 1912, Kissel, Kinnicutt & Co. with their associates, who were in control of the Railway Company, had taken over 1,325 of the 1,500 second mortgage bonds which they had agreed to purchase. They were still under obligation to take the remaining 175 at the stipulated price of $140,000. On September 25, 1912, a meeting of the directors of the Power Company and the Railway Company was held in New York. A resolution was adopted under which a written agreement was executed between Kissel, Kinnicutt & Co. and the Power Company and Mainland Bros. of Oshkosh, who formerly had dominated the Power Company. That agreement referred to the contract of the year before, recited that 175 of the bonds then agreed to be taken were still to be purchased; that Kissel, Kinnicutt & Co. were ready to complete their purchase, but were unwilling thereafter to take any additional bonds under their option; that the Power Company would, in the course of six months, need $250,000; that Kissel, Kinnicutt & Co. had offered to procure for the Power Company a loan of that amount in consideration of their being released from the obligation to take the remaining 175 second mortgage bonds; and that the Power Company had accepted the offer. Whereupon it was agreed that Kissel, Kinnicutt & Co. would procure a loan of $250,000, $100,000 of which was to be furnished immediately, and the remainder at any time within six months upon demand, the loan to be secured by the second mortgage bonds of the Power Company, equal at their face value to twice the amount of the loan, for which loan the Power Company was to sign a note, which should be due and payable at any time upon default of the payment of interest on any of the outstanding bonds of the company, or upon commencement of proceedings against it for the appointment of a receiver. The agreement further stipulated that the Power Company at any time upon demand of the Railway Company would exchange its first mortgage bonds up to $500,000 for an equivalent amount of its second mortgage bonds so held by the Railway Company. Following that agreement, $220,000 was furnished to the Power Company by the Railway Company, and 440 of the second mortgage bonds were turned over to the Railway Company as collateral. Thereafter an equal amount of the first mortgage bonds was substituted as collateral.

As to the 278 bonds, the facts are briefly as follows: In December, 1912, the Power Company desired to settle with Bates & Rogers, a construction company which had a contract for work on the Ox Bow plant. That settlement was consummated at a meeting of the executive

committee of the Power Company held in New York. According to the records, Bates & Rogers were to receive in the settlement 25 of the second mortgage bonds and 50 shares of the preferred stock and 100 shares of the common stock of the Railway Company, and that company's promise to buy from them within 60 days after May 29, 1914, the 25 bonds at 80 and accrued interest. The records show that the Power Company and the Railway Company ratified this arrangement, and in consideration of the Railway Company's agreement to deliver to Bates & Rogers 100 shares of its common stock and 50 shares of its preferred stock, and its promise to buy the bonds on May 29, 1914, at 80, the Power Company agreed that it would, upon demand of the Railway Company, deliver its first mortgage bonds up to $500,000, face value, in exchange for second mortgage bonds, and in carrying out that agreement 278 of the bonds were delivered by the Power Company to the Railway Company.

The trial court concluded that the Railway Company should be recognized as having an equity in the group of 440 bonds corresponding to the consideration paid out, of which the Power Company had received the benefit, and ordered an accounting for the purpose of determining the extent of its equity, and upon such accounting found that the Railway Company had advanced $250,000, and no more, for which it was entitled to credit, and that from that amount should be deducted the $140,000 due the Power Company under the original contract, and that it be decreed an equitable lien upon the 440 first mortgage bonds for the balance of $110,000, with interest, and that it be decreed the right to receive the 175 second mortgage bonds contracted for. As to the Bates & Rogers transaction, the court held that it was not shown by the record that the Railway Company had parted with anything of value on account thereof, or has any substantial equities in the premises.

It is the contention of the appellants that the interveners' bill cannot be maintained, for the reasons that the transactions by which the Railway Company acquired the 825 bonds were at most voidable, and that the interveners have no right to avoid them on grounds available to the company, namely, want of proper corporate authorization, the common directorate of the Power and Railway Companies, and lack of benefit to the Power Company; that neither that company, nor its stockholders, nor any person in privity with it, was injured by the transactions, and that that company, its privies and successors in interest, have ratified the same, or are estopped to avoid them, and that the suit, regarded in the light of a proceeding by bondholders to cancel alleged fraudulent bonds as prejudicial to their own right to distribution, or on the ground of preference to directors, must fail, because the interveners expressly contracted for such use of the bonds in controversy, and received every consideration upon which they could be so used; that it was not illegal for the directors to prefer themselves, that the interveners have not objected to the transaction on the ground of preference, and that the said bonds did not give a preference but participation; and it is finally contended that, in any view of the case, the appellants are entitled to hold the 718 bonds as security for $250,000 and interest, and $20,000 on account of the settlement with Bates & Rogers.

[2] There can be no question of the authority of the Power Company to issue under the first mortgage the bonds which are in controversy here. The total amount of bonds permissible under that mortgage was $7,000,000. At the time when the second mortgage was made, the outstanding bonds under the first mortgage were $2,799,000. The second mortgage expressly provided that all bonds issued thereafter are under and pursuant to the terms of the first mortgage. In the leading case of Claflin v. South Carolina R. Co. (C. C.) 8 Fed. 118, Mr. Chief Justice Waite said:

"The mortgages provide for the security of the particular bonds they describe, and the company puts the bonds out from time to time as occasion requires. When a dealer finds such bonds not yet due in the hands of the company, with the proper certificate of the mortgage trustee upon them, it has, I think, always been understood in the commercial world that he might buy in good faith with safety. The security has been considered a continuing one, and the bonds negotiable by the company, so as to carry the mortgage security until they have become commercially dishonored, or something else has been done to deprive the company of its power of putting them out. In my opinion a subsequent mortgage is not sufficient for this purpose, unless it in terms limits the lien of the prior mortgage to bonds actually out and provides against reissues."

[3] Nor do we find that the evidence, fairly considered, sustains the charge that in September, 1912, the company was not in need of a sum so large as $250,000, or that in default of the money which was owing it from the bankers under their contract to purchase bonds it was unnecessary to borrow $250,000. Markhus, the general manager of the Power Company, prepared on September 1st of that year a memorandum for the "purpose of showing the cash required for the last four months of 1912," in which were specified in detail the cash on hand, the estimated cash receipts for that period, the money needed for construction which was then contemplated, also money needed to pay interest on bonds at $95,176, and showing that the cash deficit for those four months would be $203,180. The minutes of the meeting of September 25, 1912, recite that Mr. Watson, the manager director at New York, made a statement of the financial condition of the company, and recommended that $250,000 be raised to meet the requirements of the company "for the next seven months." Watson's testimony, given in November, 1913, states that, as he remembered it:

"We were being pressed for moneys for the corporate purposes of the company, and the necessity that we had to provide money for making extensions and buying electrical apparatus, etc., to handle our business. * * * We had a financial program that required that sum of money. I don't remember in detail."

[4] But while the Power Company was authorized to issue the bonds under the first mortgage, and while that company apparently was in need of the full sum of $250,000, the question remains: What are the equities of the Railway Company in those bonds, in view of the circumstances under which it acquired them? It appears that the appellants conceded in the court below that on September 25, 1912, the directors of the Railway Company had come to the conclusion that the Power Company could not go on with its business, and that the course then inaugurated and subsequently pursued was adopted by the di-

rectors for the purpose of protecting themselves, "as they had a right to do." On the appeal the amicus curiæ takes the position that the insolvency of the Power Company at that time was neither alleged by the interveners nor proven on the trial. It is true that there is in the record no direct or positive testimony that at any time in the year 1912 the directors of the Power Company admitted its insolvency, or that they then contemplated immediate insolvency; but there is sufficient to show that the company, to their knowledge, was in financial embarrassment and in failing circumstances, that its income was insufficient to meet its obligations and current expenses, and that, in view of the competition which was presented, its directors saw no way of escape from immediate insolvency, unless by a scheme of reorganization or possible consolidation with the competing company. The competition so referred to was that of the Beaver River Power Company, which had obtained its franchise and built its line to Boise City, and in the fall of 1912 had entered into contracts with consumers under which, by December of that year, it began furnishing power at about 40 per cent. lower than the existing rate of the Idaho-Oregon Company. Watson testified that there was a great deal of uncertainty at that time as to what the company's future was to be in connection with competition that was staring it in the face, and that he felt that there was uncertainty about the company being able to keep going, "in view of the competition and everything." Another director of the company, called by the interveners, testified that his understanding of the need of the $250,000 at that time was that it was simply to keep the company going, and that a part of it was for debts already incurred; that they understood that they needed the money, and that, if they did not get it, they would fail—fail at once. Subsequent events proved that in September, 1912, the Power Company was hopelessly insolvent.

[5] The directors of a corporation, in selling the bonds of their company to raise money for its benefit, act in a fiduciary capacity, and any transaction whereby they become possessed of such securities, in order to be valid, must in all respects be free from fraud or the suspicion of wrongdoing or unfair dealing on their part. In Twin-Lick Oil Co. v. Marbury, 91 U. S. 588, 589, 23 L. Ed. 328, Mr. Justice Miller said:

"That a director of a joint-stock corporation occupies one of those fiduciary relations where his dealings with the subject-matter of his trust or agency, and with the beneficiary or party whose interest is confided to his care, is viewed with jealousy by the courts, and may be set aside on slight grounds, is a doctrine founded on the soundest morality, and which has received the clearest recognition in this court and in others."

While the directors of a corporation are not trustees for bondholders in the sense that they are trustees for stockholders, it does not follow that bondholders shall be denied protection against the acts of directors, the intention and effect of which is to depreciate the bonds, contrary to the terms of the mortgage under which they are issued. The first mortgage in this case conveyed to the trustee all property, real and personal, and all rights, franchises, and privileges, of the Power Company which it then owned, and which it might thereafter acquire. The

interveners here could not, of course, object to the action of the directors of the Power Company in issuing bonds under the first mortgage up to the full amount permitted thereby, so long as the proceeds were used in the ordinary course of the business of the corporation and in constructing and equipping its plant. On September 25, 1912, the bankers were under obligation to purchase from the Power Company certain second mortgage bonds for the sum of $140,000. They were released from that obligation by the agreement made on that date under which they were to procure the Railway Company to loan $250,000 to the Power Company. Under the circumstances disclosed in the record, the act of the directors was at least constructively fraudulent as to the bondholders, and it was one which the latter had the right to impeach.

This is not the case of security given for money advanced only to keep the corporation a going concern. Back of the transaction and affecting its bona fides is the release of the bankers from an obligation under which the Power Company was entitled to realize $140,000. The right to relief in such a case is not limited to the corporation or its stockholders. It extends to creditors, both secured and unsecured, and it is held that contracts made by directors who represent opposing interests, while not void ab initio, are "voidable in a proper proceeding taken for that purpose by the corporation, its shareholders, or its creditors." 10 Cyc. 791; Richardson v. Green, 133 U. S. 30, 10 Sup. Ct. 280, 33 L. Ed. 516.

In Thomas v. Brownville & R. R. Co., 109 U. S. 522, 3 Sup. Ct. 315, 27 L. Ed. 1018, the court said:

"Such contracts are not absolutely void, but are voidable at the election of the parties affected by the fraud."

In McGourkey v. Toledo & Ohio Railway, 146 U. S. 536, 566, 13 Sup. Ct. 170, 180, 36 L. Ed. 1079, the court said:

"A contract of this kind is clearly voidable at the election of the corporation; and when such corporation is represented by the directors against whom the imputation is made, and the scheme was in reality directed against the mortgagees, and had for its very object the impairment of their security by the withdrawal of the property purchased from the lien of their mortgage, it would be manifestly unjust to deny their competency to impeach the transaction. The principle itself would be of no value if the very party whose rights were sacrificed were denied the benefit of it."

See, also, Consolidated Tank Line Co. v. Kansas City Varnish Co. (C. C.) 45 Fed. 7; Bosworth v. National Bank, 64 Fed. 615, 12 C. C. A. 331.

It is but equitable, and it was within the power of the court below to decree, and we think it properly did decree, that the first mortgage bonds transferred to the Railway Company as collateral be held only for the sum of money thereupon advanced over and above the amount which the bankers were then owing under their contract to purchase second mortgage bonds.

[6] The court below, in considering the equities of the Railway Company in the bonds which were taken in settlement of the contract with Bates & Rogers, subjected the question of those equities to fur-

ther examination, and afforded the Railway Company an opportunity to adduce testimony to sustain them, and thereafter, upon consideration of the fact that no additional evidence had been offered, decided upon the record that the Railway Company had parted with nothing of value on account of that settlement, and had no substantial equities in the premises. We are not convinced that there was error in that conclusion. Bates & Rogers stood ready to adjust their claim upon the payment to them of $20,000. They were willing to take in payment first mortgage bonds of the Power Company at the then selling price. But the manager of that company, who was also a director of the Railway Company, refused to give first mortgage bonds, because he said:

"Their claim was not good against a company that ought to be in the hands of a receiver."

The result was that Bates & Rogers received in settlement of their claim second mortgage bonds of the face value of $25,000, 50 shares of the preferred and 100 shares of the common stock of the Railway Company, and its promise, unsecured, to purchase from them within 60 days from May 29, 1914, the $25,000 bonds at 80 and accrued interest. In consideration of that undertaking on the part of the Railway Company, it eventually acquired from the Power Company the 278 first mortgage bonds in controversy. The record does not show that the stock and second mortgage bonds so surrendered to Bates & Rogers by the Railway Company for the benefit of the Power Company were of any value, and, such being the case, it was not error to hold, as the court below did, that there was no proof that the Railway Company had parted with anything of value in that transaction, or that it had in equity a lien upon the 278 first mortgage bonds.

We find no error. The decree is affirmed.

ARTHUR v. G. W. PARSONS CO.

(Circuit Court of Appeals, Sixth Circuit. June 30, 1915.)

No. 2747.

1. SALES ⇐465—CONDITIONAL SALES—VALIDITY—FILING OF CONTRACT.

Under Gen. Code Ohio, § 8568, making conditional sale contracts void as to subsequent purchasers and mortgagees in good faith, and creditors, unless the conditions are evidenced by writing, signed by the purchaser, and a verified statement thereon, made by seller of the amount of the claim, deposited with recorder of proper county, the filing of a contract, which contains the conditions as to payment of the price, and that notes have been given therefor, and which gives the amounts of the notes, the periods they are to run, where payable, and rate of interest, is sufficient, though the notes containing the additional provision that, on failure to pay interest at maturity, both principal and unpaid interest shall draw interest at a higher rate, and the additional provision waiving demand of payment, protest, and for payment of attorney's fees and collection expenses, are not filed for record.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1353; Dec. Dig. ⇐465.]

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2. SALES ⊂=465—CONDITIONAL SALES—FILING OF CONTRACT.

Where machinery sold under a conditional sale contract was delivered March 10, 1913, and notes for the unpaid price were given on that date, and the contract was filed April 3d, an affidavit indorsed thereon, bearing the same date and stating that the purchasers named "in the within contract are indebted to" the seller in a specified sum, and that the claim is just and unpaid, and that the contract was entered into in good faith, was sufficient as against the objection that interest had accumulated on the notes from their date, which fact was not stated, and as against the objection that it did not appear that the specified sum was due on the contract filed.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1353; Dec. Dig. ⊂=465.

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

3. SALES ⊂=465—CONDITIONAL CONTRACTS—FILING FOR RECORD—RENEWAL NOTES—EFFECT.

The rights preserved to a seller in a conditional sale contract, duly filed under Gen. Code Ohio, § 8568, are unaffected by the fact that the buyer gave renewal notes for the unpaid price, in the absence of any provision in the statute for refiling of contract on giving of renewal notes.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1353; Dec. Dig. ⊂=465.]

4. STATUTES ⊂=194—CONSTRUCTION—RULE OF EJUSDEM GENERIS—APPLICABILITY.

The rule of ejusdem generis is invoked merely as an aid to the ascertainment of legislative intent in construing a statute.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 272; Dec. Dig. ⊂=194.]

5. STATUTES ⊂=188—CONSTRUCTION—MEANING OF WORDS.

Statutes, must, where possible, be construed according to the natural and usual acceptation of terms therein, and where a word has acquired a common and popular meaning, such meaning is prima facie the meaning intended.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 266, 267, 276; Dec. Dig. ⊂=188.]

6. SALES ⊂=479—CONDITIONAL SALES—STATUTES—CONSTRUCTION—"CONTRACTOR."

A corporation constructing a water-belt line for a city is a contractor within Gen. Code Ohio, § 8570, providing that a seller in a conditional contract may not retake possession without tendering the money paid on the price, if in excess of 25 per cent., after deducting a reasonable compensation for the use of the property not to exceed 50 per cent., but declaring that this provision shall not apply to machinery, equipment, and supplies for railroads and contractors, for manufacturing brick, cement, and tiling, and for quarrying and mining purposes, for a contractor is one who contracts with another to furnish supplies, or to construct works or erect buildings, or to perform any work or service at a fixed price or rate, and a seller need not tender the price paid to recover machinery used by a contractor in performing the work, and held by it under a conditional sale contract (citing Words and Phrases, Contractor).

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

7. SALES ⊂=479—CONDITIONAL SALES—STATUTE — CONSTRUCTION—"MACHINERY."

A trench-excavating machine and appurtenances used by a contractor to construct a water-belt line for a city are within the general class of "ma-

chinery" within Gen. Code Ohio, § 8570, providing that the section shall not apply to machinery for contractors.

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

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

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

Petition by the G. W. Parsons Company against Edwin L. Arthur, trustee in bankruptcy of Fidler & Brock, bankrupts. There was an order granting the relief prayed for in the petition, and the trustee in bankruptcy appeals. Affirmed.

W. W. Keifer, of Springfield, Ohio, for appellant.

P. C. Martin, of Springfield, Ohio, for appellee.

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

KNAPPEN, Circuit Judge. Appellee filed in the bankruptcy court an intervening petition, asking that it be allowed to repossess itself of a certain traction trench-excavating machine, with its boiler, engines, and other appurtenances, then in possession of the court through its trustee in bankruptcy. The property had been sold by appellee to the bankrupts by a conditional contract in writing, whereby the title remained in the seller (appellee) until the purchase price ($6,000) and the promissory notes given therefor should be fully paid. Two thousand dollars had been paid upon the purchase price; the remaining $4,000 was past due and unpaid. The referee ordered the surrender of the property to appellee. Upon review, the district court affirmed the action of the referee, upon condition of the surrender to the trustee of the unpaid purchase-money notes. Reversal is asked upon four grounds.

[1] 1. By section 8568 of the General Code of Ohio conditional sales of personal property, whereby the title remains in the seller until the purchase price is paid, are declared void as to all subsequent purchasers and mortgagees in good faith, and creditors, unless—

"the conditions are evidenced by writing, signed by the purchaser, * * * and also a statement thereon, under oath, made by the person so selling, * * * of the amount of the claim, * * * be deposited with" the recorder of the proper county.

The contract was in writing and was duly recorded. It contained all the conditions regarding payment of purchase price, including the fact that promissory notes were to be given therefor, the amounts of the respective notes, the periods they were to run, where payable, and that they drew "interest from date at the rate of six per cent. per annum." The notes themselves were not recorded. They contained the additional provision whereby failure to pay interest when due precipitated the maturity of the entire note, both principal and interest, the entire amount to draw interest thereafter at 8 per cent., payable semiannually, with provision waiving demand of payment,

protest, etc., and for payment of attorney's fees and collection expenses.

It is urged that all the conditions of the sale contract were thus not filed, and that the contract is therefore void as against the trustee in bankruptcy. We cannot agree with this contention. The purpose of the statute regarding record was to protect third parties dealing with the property by imparting notice to them of the condition of its title. Burbank v. Conrad, 96 U. S. 291, 292, 24 L. Ed. 731; Register Co. v. Lesko, 77 Conn. 276, 280, 58 Atl. 967. The contract itself gave complete information of the payments necessary to be made to vest title in the purchaser. It omitted only certain results following a default. As was well said by the referee:

"If the vendee had complied with all the terms of the conditional contract as filed, the title to the machine would have passed, and there is nothing in the notes that would have imposed any additional obligation. * * * The notes * * * merely imposed penalties on a failure to fulfill the conditions. At the time the contract was filed none of these penalties had attached, and the only conditions the vendee had to meet in order to acquire full title were those set out in the contract as filed."

We agree with the referee's conclusion that recording of the notes was unnecessary. This conclusion is sustained by Cable Co. v. Stewart (C. C. A. 5) 191 Fed. 699, 702, 112 C. C. A. 289.

[2] 2. The machine was delivered March 10, 1913, and notes were given on that date (as required by the contract), and bore interest therefrom. The contract itself was filed April 3, 1913. The affidavit which was indorsed thereon bore the same date, and stated that the partnership purchasers—

"all of which are named in the within contract, are indebted to said the G. W. Parsons Company in the sum of $5,000, and that said claim is just and unpaid, and that the foregoing and within contract was entered into in good faith."

It is urged that this affidavit was insufficient: First, because untrue, in that interest had accumulated upon the notes from their date, and that fact was not stated; and, second, that it does not appear that the $5,000 referred to was due "upon the contract then filed." It is not clear that these objections to the affidavit have been saved; but, assuming that they are properly here, we have no hesitation in saying that we see no merit in them. The criticism respecting the nonmention of accrued interest impresses us as too refined. The authorities cited in support of the other objection to the affidavit are not, in our opinion, in point. The affidavit lacks, at most, only the word "thereon" following "indebted"; but we think the only natural inference from the reference to the contract, both preceding and following the statement of indebtedness, is that the indebtedness referred to is under that contract.

[3] 3. The two notes for $2,000 each, representing the last two payments upon the contract, fell due, respectively on July 24, 1913, and September 24, 1913. The one first maturing "was renewed by new note for like amount, to become due September 24, 1913." The other note, maturing on the date last named, "was added to the last

above-mentioned renewal note, and on September 29, 1913, both notes renewed by a new note for $4,000 to become due December 1, 1913." This last renewal note was on December 15, 1913, renewed by eight notes for $500 each, which matured, respectively, on the 12th day of each of the following eight months. It is contended that thereby "the contract of conditional sale was changed by the parties after the filing," and thus appellee's priority over general creditors lost.

The statute, however, makes no provision for a refiling of the contract, and in the absence of such provision we cannot believe that it was the intention of the Legislature to accomplish a result so inequitable as the loss of the vendor's lien or title through the mere renewal (in accordance with what the Legislature must have known was not uncommon practice) of unpaid promissory notes given for purchase price. Had the Legislature intended such result, the natural evidence of such intention would be the requiring of record of a new notice of every change in the amount or form of indebtedness subsequent to the original filing of the contract.

[4-6] 4. Section 8570 of the Ohio Code provides generally that the seller under a conditional contract may not retake possession without tendering or refunding the money paid on the purchase price (if in excess of 25 per cent. of the contract price), after deducting a reasonable compensation for the use of the property, not to exceed 50 per cent. of the amount paid thereon, "unless such property has been broken, or actually damaged, when a reasonable compensation" therefor shall be allowed. The section, however, expressly excepts from its operation "machinery, equipment and supplies for railroads and contractors, for manufacturing brick, cement and tiling, and for quarrying and mining purposes." As already said, $2,000 had been paid on the purchase price, the amount was not refunded or tendered, and the trustee asks that if the conditional sale be held valid, appellee be required to repay at least $1,000, as 50 per cent. of the amount paid. Unless bankrupts are within the exception mentioned, a refund should be made. Register Co. v. Cervone, 76 Ohio St. 12, 80 N. E. 1033.

Assuming that the allegation in the petition that the entire sum paid "is not sufficient to cover a reasonable compensation for the use of said trench machine, and the damage to same by breakage and use" is not covered by the admission in the answer of the allegations of the first four paragraphs of the petition, the only question is one of law, viz., whether bankrupts are "contractors" within the meaning of the section. Appellant contends, in effect, that under the rule of ejusdem generis the term "contractors" must be limited to "railroad contractors." But the rule invoked, like other rules of construction, is merely an aid to the ascertainment of legislative intent. It is also a rule of interpretation that statutes are to be construed, where possible, according to the natural and usual acceptation of terms, and that where a word has acquired a common and popular meaning, such meaning is prima facie within the legislative mind.

The word "contractor" has acquired a specific meaning as applied to a business. It is defined, according to the Century Dictionary:

"Specifically—(2) One who contracts or covenants, whether with a government or other public body or with private parties, to furnish supplies, or to construct works or erect buildings, or to perform any work or service, at a certain price or rate: as, a paving contractor; a labor contractor."

As expressed in Webster's International Dictionary:

"Specifically, one who contracts to perform work, or supply articles on a large scale, at a certain price or rate, as in building houses or provisioning troops."

See to the same general effect 2 Words and Phrases, p. 1535; Brown v. Trust Co., 174 Pa. 443, 462, 34 Atl. 335; Ex parte Unger, 22 Okl. 755, 98 Pac. 999, 1000, 132 Am. St. Rep. 670.

That bankrupts were contractors engaged in construction work is apparent. The machine was for trench excavating. In the agreed statement of facts it is said that, at the time of the execution of the eight promissory notes above referred to:

"Bankrupts were engaged in the construction of a water-belt line for the city of Springfield, Ohio, in which work said machine was used, and payments were made to said bankrupts by said city on monthly estimates."

In Potter v. Arthur, Trustee, 220 Fed. 843, 136 C. C. A. 589 (decided by this court March 2, 1915), which likewise involved the purchase from another seller of a trench-excavating machine, the same bankrupts were spoken of as "contractors * * * engaged in construction work at Troy, Ohio." The referee, who presumably was informed of the facts, states:

"There can be no doubt that the bankrupts were engaged in a business that falls within the ordinary meaning of the word [contractors]."

[7] We are impressed with the thought that the reason for the statutory exemption from liability to refund purchase price was not improbably that machinery used in railroad construction, in contracts for constructing works and erecting buildings on a large scale, the manufacture of brick, tile, and cement, and in mining and quarrying, is devoted to rough work—that engaged in out-of-door work, exposed to the elements—and so subject to rapid deterioration. Trench-excavating machines belong to this general class of machinery, and, indeed, seem as equally applicable to railroad construction as to sewer and waterworks trenches. In that sense machinery of this class is of the same general class as railroad machinery; and, without finding it necessary to define the limitations upon the general term "contractor," we think it clear that the exemption should be construed as extending to the machinery in question as used in the bankrupt's business.

We find no error in the record, and the order appealed from is accordingly affirmed with costs.

HICKS v. SECOND NAT. BANK OF CINCINNATI, OHIO, et al.
In re HETZELL GELATINE PRODUCTS CO.
(Circuit Court of Appeals, Sixth Circuit. June 30, 1915.)

No. 2742.

1. PRINCIPAL AND AGENT ⊂=14—EXISTENCE OF RELATION—CONTRACT.
Where a bankrupt refused to make a loan to a corporation on the securities of a real estate mortgage, but did make it to a director, taking as collateral security the note of the corporation to him, secured by its mortgage, the director was not the agent of the bank to record the mortgage, but his obligation to do so was purely contractual.
[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 26–33; Dec. Dig. ⊂=14.]

2. BANKRUPTCY ⊂=345—SECURED CLAIMS—WITHHOLDING FROM RECORD—NOTICE TO ASSIGNEE.
Where a bank loaned money to a corporate director, taking as collateral security a note given by the corporation to him, which stated that it was secured by first mortgage on real estate, and, though the mortgage and note were in regular form, there was a resolution by the directors authorizing the execution of the mortgage, which provided that it should not be recorded for 20 days, and an agreement with the directors that it should not be at all unless the corporation became financially involved, the bank was not put on inquiry which would have disclosed the existence of the fraudulent agreement not to record, so as to lose its priority after the bankruptcy of the corporation as against unsecured creditors who extended credit to the corporation between the dates of the execution and the recording of the mortgage.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 531, 532, 534, 539, 540; Dec. Dig. ⊂=345.]

3. MORTGAGES ⊂=175—RECORDING—NEGLIGENCE—EFFECT.
The negligent failure of a mortgagee to record his mortgage does not, in the absence of a statute or a showing of fraudulent intent, invalidate the mortgage as against subsequent creditors who have not obtained a specific lien on the property.
[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 417, 418; Dec. Dig. ⊂=175.]

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

Bankruptcy proceedings against the Hetzell Gelatine Products Company. From a decree of the District Court allowing the Second National Bank of Cincinnati, Ohio, and another a preferred claim against the real estate of the bankrupt, W. A. Hicks, trustee in bankruptcy, appeals. Affirmed.

L. R. Hicks and W. A. Hicks, both of Cincinnati, Ohio, for appellant.

Ferdinand Jelke, Jr., and L. L. Forchheimer, both of Cincinnati, Ohio, for appellees.

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

SESSIONS, District Judge. On January 7, 1913, a creditor's petition in bankruptcy was filed against the Hetzell Gelatine Products

Company, an Ohio corporation, and on January 28, 1913, the company was adjudged bankrupt. Later appellant was duly appointed trustee of the bankrupt estate. In February, 1912, the Hetzell Company was in need of funds, and through Joseph Glascock, one of its directors, applied to the Second National Bank of Cincinnati, Ohio, for a loan of $5,000 for one year to be secured by a mortgage on its real estate. The bank declined to make the loan directly to the company, but offered to loan the money to Glascock on his four-months note and to take as collateral the company's note for one year secured by the proposed mortgage. The bank's refusal and offer were reported by Glascock to the officers of the company, and thereupon its board of directors adopted a resolution accepting the offer and authorizing the making of the loan and the execution of the required note and mortgage, subject to an agreement that the mortgage was not to be recorded for 20 days after its date.

The trustee claims there was, then or later, a further oral understanding and agreement between Glascock and his codirectors that the mortgage should not be recorded at all unless the company became financially involved and the security thus jeopardized. The witnesses differ somewhat as to the reason why delay in the recording was desired. The bank had no dealings with any one representing the company except Glascock, and had no actual knowledge of the agreement or resolution that the mortgage should not be recorded at once. To effect the loan, Glascock gave to the bank his personal note for $5,000 payable in four months, and as collateral thereto delivered to the bank the company's note for the same amount, due in one year and payable to and indorsed by him, and also an assignment of the mortgage. Across the face of the collateral note was written in red ink the words, "Secured by First Mortgage on Real Estate." The bank credited Glascock's account with the proceeds of the note and certified his check to the company for the amount, less a commission amounting to a little more than $200, charged by him to the company. The mortgage to Glascock was executed forthwith by the company and delivered to and retained by him. The mortgage remained in his possession, without demand therefor or inquiry by the bank, until the afternoon of September 6, 1912, when he placed it on record. He claims to have forgotten the mortgage until that time in the stress of his own financial troubles and difficulties and to have found it while looking over other papers. On the other hand, the trustee claims that during the morning of September 6th Glascock was notified of the imminence of the failure of the company and that he immediately caused the mortgage to be recorded pursuant to his agreement with the other directors.

Be this as it may, 11 days later a receiver was appointed for the company by a state court. Between February 14, 1912, when the mortgage was given, and September 6, 1912, when it was recorded, the company bought material on credit in the regular course for the conduct of its business to the amount of about $6,000. The indebtedness so contracted has not been paid. However, during that time and up to the commencement of the bankruptcy proceedings, four months and one day later, no creditor secured or obtained any lien upon the mort-

gaged property through legal proceedings or otherwise. By order of the referee, made pursuant to an agreement of the parties, the mortgaged property has been sold free from liens and all rights transferred to the proceeds of the sale. The issue thus presented is narrow, and relates solely to the right of priority in and to the proceeds of the sale of the real estate covered by the mortgage as between the trustee, representing general unsecured creditors of the bankrupt mortgagor, on the one side, and the bank, as assignee and owner of the mortgage, on the other. The referee held the mortgage valid and entitled to priority of payment from the proceeds of the sale of the land. The District Court affirmed the referee's decision, and the case is brought here by appeal.

Appellant concedes that, in the first instance, the bank took the mortgage for value and free from all equities and defenses which the company might have had against Glascock; that, inasmuch as the mortgage was for a present consideration and more than four months elapsed between the date of its recording and the time of filing the petition in bankruptcy, the transaction was not a voidable preference within the purview of the Bankruptcy Act; and that, in the absence, as here, of either active fraud or bad faith, no Ohio statute exists which gives general creditors without a lien rights of preference or priority in and to mortgaged property over those of the owner of an unrecorded mortgage upon the same property.

[1] Assuming that the mortgage was withheld from record by Glascock pursuant to agreement with his codirectors and for the purpose of enabling the company to obtain credit to which it was not entitled, and further assuming, but not deciding, that he, as mortgagee, could not enforce the mortgage against creditors of the mortgagor whose claims arose and accrued during the time when the instrument was kept from record, does it follow that the bank, which is conceded to have been an innocent purchaser for full value, is in the same predicament, and is likewise precluded from asserting its apparent rights? The contention of the trustee in bankruptcy comes at last to the asserted proposition that his claim upon the proceeds of the sale of the mortgaged property is better than that of the bank because the mere passive negligence of the latter made it possible for Glascock to keep the mortgage from record and thus to defraud those extending credit to the mortgagor, or because, under the circumstances, and by reason of the relations between them, the bank must be presumed to have known of Glascock's alleged fraudulent purpose and is bound by his acts. That Glascock was not the agent of the bank is clear. It made the loan directly to him. It dealt and treated with him at arm's length and as an officer and agent of the company. His duty to record the mortgage was purely contractual, and the whole trouble has arisen from the breach of his agreement.

[2] Neither can it be said that the bank had notice of such facts, or was so put upon inquiry as to make it responsible for the fraudulent acts and purposes, if any, of Glascock and his fellow directors. To sustain the contention of appellant in this regard would require the building of inference upon inference without a sufficient founda-

tion of fact. In substance the argument is this: The collateral note which was delivered to the bank referred to the mortgage which it was agreed should be given to secure its payment; the mortgage recited that it was made pursuant to authority conferred by the resolution of the mortgagor's board of directors; the resolution authorized the execution and delivery of the mortgage upon the condition or agreement that it should not be recorded for 20 days after its date; a further oral agreement was made that the mortgage was not to be recorded at all unless the mortgagor became financially involved; these agreements to withhold the mortgage from record were fraudulent as to subsequent creditors without notice; the writing across the face of the note bound the bank to a knowledge of the contents of the mortgage; the recital in the mortgage called for an examination of the resolution; a perusal of the resolution would have put the bank upon inquiry as to the purpose of the agreement therein contained; diligent inquiry would probably have revealed the existence of the additional oral agreement; therefore, in law, if not in fact, the bank had notice and knowledge of the fraudulent intent and purpose of the officers of the company and the rights which it otherwise would have had are barred by their acts. To state the argument so made is to demonstrate its fallacy. The collateral note and mortgage were couched and drawn in the usual and ordinary language and terms of such instruments. They contain no reference to any plan or agreement not to record the mortgage. Neither common prudence, caution, or custom, nor any rule of law, required the bank to look outside of and beyond these instruments, and to examine the records of the mortgagor company, and to make inquiries suggested by those records. Hotchkiss v. National Bank, 21 Wall. 354, 359, 22 L. Ed. 645; Union National Bank v. Neill, 149 Fed. 711, 714, 79 C. C. A. 417, 10 L. R. A. (N. S.) 426; Washington & Cannonsburg Ry. Co. v. Murray, 211 Fed. 440, 447, 128 C. C. A. 112; Young v. Lowry, 192 Fed. 825, 113 C. C. A. 149; Reilly v. McKinnon, 159 Fed. 78, 86 C. C. A. 268; Perris Irrigation District v. Thompson, 116 Fed. 832, 837, 54 C. C. A. 336; In re Hopper-Morgan Co. (D. C.) 156 Fed. 525, 530.

[3] The bank is charged with negligence, and not with fraud, in permitting the mortgage to be withheld from record. Negligence necessarily implies a lack of purpose. In the absence of statutory provision and fraudulent intent, the negligent or inadvertent failure to record a deed or mortgage does not make the conveyance invalid as to subsequent creditors who have not obtained a specific lien or hold upon the mortgaged premises. In 20 Cyc. 447, the rule is thus stated:

"Where it is either found that all the acts of the parties were done honestly and in good faith, or it is not found that they were dishonest or fraudulent, a deed or mortgage cannot be adjudged fraudulent and void solely on the ground that it was not recorded, and that in ignorance of the existence of the instrument assailed credit was given to the grantor upon the faith of his supposed ownership of the property."

Again, in 27 Cyc. 1157, it is said:

"The failure to record the mortgage does not render it invalid as to general creditors of the mortgagor or creditors who have not acquired a specific lien upon or interest in the property, unless they can impeach it for fraud."

This doctrine has been uniformly sustained by the decisions of both the Ohio and the federal courts. Stewart v. Hopkins, 30 Ohio St. 502; Bercaw v. Cockerill, 20 Ohio St. 163; Dow v. Bank, 87 Ohio St. 173, 100 N. E. 328; Holt v. Crucible Steel Co., 224 U. S. 262, 32 Sup. Ct. 414, 56 L. Ed. 756; In re Shirley, 112 Fed. 301, 50 C. C. A. 252; In re Klein, 197 Fed. 241, 247, 248, 116 C. C. A. 603; Carey v. Donohue, 209 Fed. 328, at 335, 126 C. C. A. 254; In re Watson (D. C.) 201 Fed. 962; In re Charles Town Light and Power Co. (D. C.) 199 Fed. 846.

The decree of the District Court is affirmed, with costs to appellees.

NORTHERN CENTRAL COAL CO. v. HUGHES.

(Circuit Court of Appeals, Eighth Circuit. May 21, 1915.)

No. 4307.

(Syllabus by the Court.)

1. MASTER AND SERVANT ⟸228—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—UNGUARDED MACHINERY—MISSOURI STATUTE.

   A statute of Missouri (Rev. St. 1909, § 7828), which requires certain machinery dangerous to employés when engaged in their ordinary duties to be guarded, does not exempt them from the duty to exercise reasonable care to avoid injury from such machinery, nor deprive their employers of the defense of contributory negligence to actions for injuries caused thereby.

   [Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 670, 671; Dec. Dig. ⟸228.]

2. TRIAL ⟸213—REQUESTED INSTRUCTIONS—APPLICATION OF GENERAL LAW TO FACTS—RIGHT TO A CHARGE ON SPECIFIC ISSUES.

   Where a charge states general rules of law governing the case, but fails to state the specific issues the jury is called upon to determine and to apply the law to them, either party, upon request, is entitled to additional instructions which tersely and clearly state the crucial issues which the jury must determine and the law applicable to those issues.

   [Ed. Note.—For other cases, see Trial, Cent. Dig. § 480; Dec. Dig ⟸213.]

3. EVIDENCE ⟸123, 244—RES GESTÆ—ADMISSION BY SUPERINTENDENT.

   Testimony to a statement by a superintendent of a corporation to the witness, made three or four days after an injury to an employé relative to his action at and prior to the injuries, is incompetent. It is too remote in time to be a part of the res gestæ. The superintendent is without authority from the company to admit or create liability on its part, and the testimony is mere hearsay.

   [Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 351–368, 916–936; Dec. Dig. ⟸123, 244.]

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

Action by John Calvin Hughes against the Northern Central Coal Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded, with instructions to grant a new trial.

C. F. Howell, of Centerville, Iowa (Major Lilly, of Moberly, Mo., and Mahan, Smith & Mahan, of Hannibal, Mo., on the brief), for plaintiff in error.

B. E. Cowherd, of Huntsville, Mo., and A. R. Hammett, of Moberly, Mo. (F. W. Neeper, of Hannibal, Mo., on the brief), for defendant in error.

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

SANBORN, Circuit Judge. The plaintiff below, defendant in error here, recovered a judgment upon a complaint that the defendant below, the Northern Central Coal Company, a corporation and his employer, was negligent, in that it maintained a set screw on a collar of a shaft near a bearing which it was his duty to oil, without any guard about the set screw to protect its employés from injuries therefrom; that this negligence caused his injury by the catching of his clothing by the set screw while the shaft was rapidly revolving and while he was oiling its bearing. One of the defenses pleaded by the defendant in its answer was that, if the plaintiff was injured while oiling the bearing of the shaft, his own negligence directly contributed to cause his injury, and in support of this defense it introduced testimony that it was a rule of the company, and that the plaintiff had been repeatedly instructed by his superior officer, the defendant's superintendent, never to oil the bearing of the shaft when the latter was in motion.

The evidence at the trial was conclusive that the plaintiff had the power and duty to start and to stop the machinery; that when he was ready it was his duty and he customarily discharged that duty, to give the signal to start the machinery, and that the engineer obeyed that signal, and that the defendant had the power to stop the machinery at any time; that the shaft revolved in bearings in boxes on posts about 24 feet above the floor, and carried on each side of the bearing he was oiling when he was injured fixed sprocket wheels, which dragged chains that passed over other sprocket wheels several feet distant horizontally and several feet below the plane in which the shaft revolved. It was the custom, practice, and rule to grease these chains when in motion with thick oil or grease as they passed over the lower sprocket wheels, and the place where they were so greased was guarded to protect the employés from danger. In order to oil the bearing of the shaft where the injury occurred it was necessary for the plaintiff to ascend about 20 feet from the floor, and then to walk along a plank or planks, which were a foot or more wide, horizontally to the box bearing on the post, and then to pour into an oil hole therein a thin oil from the spout of an oil can. As the defendant was thus oiling this bearing, while the shaft was in motion, his clothing on his arm was caught by the set screw on the collar of the shaft and he was injured.

The plaintiff testified that he knew of no rule and that he was never instructed not to oil the bearings on this shaft, or the machinery, other than the sprocket chains, when they were in motion, and that several times, and on the morning of the accident, he had been instructed by his superintendent to oil them while they were in motion. No other

witness came to corroborate this testimony. Lou Robinson, the superintendent, testified that he had never directed the plaintiff to oil the machinery, other than the sprocket chains, when in motion, and that he had repeatedly instructed him never to do so, but always to oil them when they were stationary. The great preponderance of the evidence, the testimony of the superintendent, and of the witnesses Minor, Bowls, and Earl Robinson, was that the plaintiff was so instructed, and no one but the plaintiff denied it. Four witnesses testified that it was a rule of the company that none of the machinery, except the sprocket chains, should ever be oiled while in motion, and there was no witness but the plaintiff to the contrary.

In this state of the evidence, at the close of the trial, the defendant requested the court to charge the jury that if they found that it was the rule of the company and if the plaintiff had been instructed that he should not oil the machinery, with which he was working at the time he was injured, when it was in motion, and that he should oil it only when it was stationary, they should return a verdict for the defendant. The court denied this request. In its general charge the court instructed the jury that they could not find for the plaintiff, even though they found that the defendant had been guilty of negligence in failing to guard the machinery, if they should find by the preponderance of evidence that the plaintiff was guilty of some negligence on his part which contributed to the accident which caused his injury. But the court nowhere mentioned the issue over the rule of the company, or over the instructions to the plaintiff, or the defense based thereon. The refusal to give the requested instruction is assigned as error.

[1] The statute of Missouri (Revised Statutes 1909, § 7828) which requires certain machinery dangerous to employés when engaged in their ordinary duties to be guarded does not exempt them from the duty to exercise reasonable care to avoid injury from such machinery, nor deprive their employers of the defense of contributory negligence to actions for injuries caused thereby. Huss v. Heydt Bakery Co., 210 Mo. 44, 108 S. W. 63, 66, 67; Austin v. Bluff City Shoe Co., 176 Mo. App. 546, 158 S. W. 709, 713, 716.

[2] The refusal of the court to give the instruction requested, therefore, violated the salutary rule that where the charge of a court states general rules of law governing the case, but fails to set forth the specific issues which the jury is called upon to determine and to apply the law to them, either party upon request is entitled to additional instructions which tersely and clearly state the crucial issues which the jury must determine and the law applicable to those very issues. A charge which presents to a jury specific issues which they are to decide, and applies to them the rules of law, makes the duty of the jury more perceptible, its discharge easier, and is more conducive to the just and speedy administration of justice than the statement of correct abstract legal propositions. Western Union Telegraph Co. v. Morris, 105 Fed. 49, 54, 55, 44 C. C. A. 350, 355, 356, and cases there cited; Frizzell v. Omaha Street Ry. Co., 124 Fed. 176, 180, 59 C. C. A. 382, 386; Cleveland, C., C. & St. L. Ry. Co. v. McClintock, 91 Fed. 223, 227, 33 C. C. A. 466, 470; Railway Company v. Johnson, 90 Ga. 500, 16 S. E. 49.

Counsel for the plaintiff argue that the request was rightly denied: (1) Because it failed to submit the question whether or not the rule of the company was known to the plaintiff; but if the rule existed, and he was instructed to comply with its terms, as the request reads, his disregard of them was fatal to his case. (2) Because it fails to submit the questions: (a) Whether or not the rule was abrogated by a common custom of oiling when the machinery was in motion; but there was no substantial evidence of any such custom. (b) Whether or not the rule had been superseded by special order of the superintendent; but the requested instruction necessarily required the determination of that question by the jury. The instruction requested clearly and correctly stated a crucial issue in the case, the law applicable to it, and the duty of the jury regarding it, and it was fatal error to refuse to give it.

[3] It is specified as error that the court admitted the testimony of a witness to an oral statement made to him by the superintendent of the defendant, three or four days after the accident, relative to his action at and prior to the day of the accident in regard to the oiling of the machinery. The specification is well founded. The superintendent's statement was too remote in time to be a part of the res gestæ. There is no testimony in the case that he had authority from the company by any such statement to admit or create a liability on its part, and his general authority of superintendent gave him no such power. The testimony was mere hearsay, and it was error to receive it. Vicksburg & Meridian R. R. Co. v. O'Brien, 119 U. S. 99, 105, 106, 7 Sup. Ct. 118, 30 L. Ed. 299; Fidelity & Casualty Co. v. Haines, 111 Fed. 337–340, 49 C. C. A. 379–382; Marande v. Texas & Pacific Ry. Co., 124 Fed. 42, 46, 59 C. C. A. 562, 566; Goehrig v. Stryker (C. C.) 174 Fed. 897, 900.

Let the judgment be reversed, and let the case be remanded to the court below, with instructions to grant a new trial.

WEAR v. IMPERIAL WINDOW GLASS CO.

(Circuit Court of Appeals, Eighth Circuit. May 21, 1915.)

No. 4316.

(Syllabus by the Court.)

1. APPEAL AND ERROR ⇐1012—REVIEW—FINDINGS OF FACT—ACTION AT LAW —"ERROR OF FACT."

When an action at law is tried without a jury by a federal court, and it makes a general or a special finding of facts, the act of Congress forbids a reversal by the appellate court of that finding, or of the judgment based thereon, "for any error of fact" (Rev. St. § 1011 [U. S. Comp. St. 1913, § 1672, p. 700]), and a finding of fact contrary to the weight of the evidence is an error of fact.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3990–3992; Dec. Dig. ⇐1012.

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

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2. APPEAL AND ERROR ⟸237—PRESENTING QUESTIONS BELOW—WANT OF EVIDENCE TO SUSTAIN FINDINGS.

The question of law whether or not there was any substantial evidence to sustain such a finding is reviewable, as in a trial by jury, only when a request or a motion is made, denied, and excepted to, or some other like action is taken, which fairly presents that question to the trial court and secures its ruling thereon before the close of the trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1302½; Dec. Dig. ⟸237.]

3. APPEAL AND ERROR ⟸273—EXCEPTIONS—NECESSITY AND SUFFICIENCY.

An exception to any ruling which counsel desire to review, which sharply calls the attention of the trial court to the specific error alleged, is indispensable to a review of such a ruling.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1590, 1606, 1620–1623, 1625–1630, 1764; Dec. Dig. ⟸273.]

In Error to the District Court of the United States for the Western District of Missouri; Arba S. Van Valkenburgh, Judge.

Action by the Imperial Window Glass Company against Frank E. Wear. Judgment for plaintiff, and defendant brings error. Affirmed.

The plaintiff below, the Imperial Window Glass Company, a corporation of the state of West Virginia, sued F. E. Wear, a citizen and resident of the state of Missouri, for a balance of $4,037.77 due it on account of the sale and delivery to him of window glass, office furniture, and fixtures. The defendant answered that the plaintiff had failed to comply with certain provisions of the statutes of Missouri relative to foreign corporations doing business in the state of Missouri, and that the plaintiff, at the time it sold and delivered to the defendant the property for which the action was brought, was violating the anti-trust statutes of the United States and of the states of West Virginia and Missouri, and that the property was sold and delivered to him in furtherance of the violation thereof. The defendant further answered that the plaintiff was indebted to him in the sum of about $18,000 on a contract between them for commissions which he had earned selling window glass pursuant to the contract, and prayed for judgment in his favor upon this counterclaim. The plaintiff replied, first, that it never complied with the laws of Missouri mentioned in the answer, but that it was engaged solely in conducting interstate business, that it had an office in Missouri in furtherance of that business and for no other purpose, and that it was not amenable to the laws of Missouri governing the rights of foreign corporations doing business in that state; second, that, although the plaintiff may have been at certain times engaged in business in violation of the anti-trust laws cited in the complaint, the sales of property for payment of which this action was brought were not in any manner connected with or made in furtherance thereof, but were wholly collateral thereto, and were not in violation of any of these laws; and, third, that the plaintiff never made any contract to pay the defendant the commissions which he demands in his counterclaim, and, if it did, that contract grew out of and was based upon an unlawful agreement and combination in violation of the anti-trust laws.

The case was tried by the court without a jury. At the close of the evidence Mr. Stanford, one of the attorneys for the plaintiff, said: "If your honor please, there is just one thing we ask: That your honor make findings of fact and conclusions of law." The court replied: "Of course, I can indicate now what I find, and I suppose, in order to protect the interest of the parties, it may be understood that the entry will be withheld, until such findings, in accordance with the findings of the court, may be prepared. But I think it probably better that I indicate, in a general way, what my findings are. It may be that I will overlook some matters, but I will state them, in a general way, for the guidance of counsel." The court then proceeded to state orally some of the findings it intended to make. It then said: "I do not know but

there may be some other matters that will be found necessary and proper to incorporate in the findings, and I make these, not formally, but as an indication to counsel what my findings are. I further find that the amount due under the petition is the amount prayed for therein and itemized as by agreement of parties, using that term advisedly, although, of course, it is not agreed by the parties that any amount is due, in the sense of being recoverable. I do not think of anything else. Has counsel any suggestions to make further as to any material matter that should be found by the court? If not, it may be suggested by suggestions from counsel in support of the findings." Thereupon a discussion followed about the date of a certain plea an account of which occupies a page of the printed transcript, and the court then overruled the demurrer to the evidence of the plaintiff, which had been interposed at the close of the plaintiff's evidence, and which the court had held under consideration while the defendant was introducing his evidence, and then made remarks on the law and the facts of the case which occupy a page of the printed transcript. At the close of these remarks the following colloquy occurred between the court and counsel for the defendant:

"Mr. Cooper: Do we understand there will be formal findings of fact and conclusions of law filed?

"The Court: If it is desired, that can be done. If this is desired, and you can get together as to what they should be, as evidencing your various theories, I will O. K. them; otherwise, I shall have to see which of them I shall accept.

"Mr. Neel: For the benefit of the record, we want it to show that we save our exceptions to the remarks, and any conclusions the court may make.

"The Court: I have made these remarks informally, and in that case let the transcript of what I have said be made and submitted to me, and I will see that it accords with my views.

"To which remarks and conclusions of the court the defendant, by his counsel, excepted and still excepts."

These proceedings at the trial were had in February, 1914. No special finding of the facts was thereafter filed, but on April 4, 1914, the court made a general finding in these words: "The court, being fully advised in the premises, finds all the issues herein joined in favor of the plaintiff and against the defendant, and finds that there is due the plaintiff from the defendant upon the account sued on and set forth in plaintiff's petition, the sum of $4,764.56," and it then rendered a judgment against the defendant for that amount. The defendant's assignment of errors contains three, and only three, specifications. These specifications are in the same words, except that in the second the words "defendant's answer," and in the third the words "defendant's counterclaim," appear where the words "plaintiff's petition" appear in the first specification, which reads in this way:

"(1) The trial court erred in finding the issues on plaintiff's petition in favor of the plaintiff and against the defendant, for the reason that the evidence and the law did not justify it, and that same is not in accordance with the evidence and the law in the case, but is contrary thereto."

E. A. Neel, of Kansas City, Mo. (Hadley, Cooper & Neel, of Kansas City, Mo., on the brief), for plaintiff in error.

T. H. Stanford, of Independence, Kan. (G. T. Stanford, of Independence, Kan., on the brief), for defendant in error.

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

SANBORN, Circuit Judge (after stating the facts as above). [1] This case was argued and submitted on the supposition that there were exceptions to rulings of the court below upon questions of law and an assignment of errors which presented some legal question to this court for review, but a reading of the record and the briefs subsequently disclosed the fact that this was a mistake. The only question the speci-

fications of error attempt to present is whether or not the evidence, which is conflicting, sustains the finding and judgment of the court. They invite this court, in other words, to retry this case and to determine whether or not under the applicable law the weight of the evidence sustains the finding and judgment. But the case was tried by the court below without a jury, and its decision of that issue is not reviewable in this court. It is, like the verdict of a jury, assailable only on the ground that there was no substantial evidence in support of it, and then it is reviewable only when a request has been made to the trial court before the close of the trial that it adjudge, on the specific ground that there was no substantial evidence to sustain any other conclusion, either all the issues or some specific issue in favor of the requesting party. No such request was made in this case, and the specifications of error, therefore, present no question reviewable by this court. When an action at law is tried without a jury by a federal court, and it makes a general finding, or a special finding of facts, the act of Congress forbids a reversal by the appellate court of that finding, or the judgment thereon, "for any error of fact" (Revised Statutes, § 1011 [U. S. Comp. Stat. 1913, § 1672, p. 700]), and a finding of fact contrary to the weight of the evidence is an error of fact.

[2] The question of law whether or not there was any substantial evidence to sustain any such finding is reviewable, as in a trial by jury, only when a request or a motion is made, denied, and excepted to, or some other like action is taken which fairly presents that question to the trial court and secures its ruling thereon during the trial. United States Fidelity & Guaranty Co. v. Board of Com'rs, 145 Fed. 144, 150, 151, 76 C. C. A. 114, 120, 121, and cases there cited; Mercantile Trust Co. v. Wood, 60 Fed. 346, 348, 349, 8 C. C. A. 658, 660, 661; Barnard v. Randle, 110 Fed. 906, 909, 49 C. C. A. 177, 180; Barnsdall v. Waltemeyer, 142 Fed. 415, 417, 73 C. C. A. 515, 517; Bell v. Union Pacific R. Co., 194 Fed. 366, 368, 114 C. C. A. 326, 328; Seep v. Ferris-Haggarty Copper Min. Co., 201 Fed. 893, 894, 895, 896, 120 C. C. A. 191, 192, 193, 194; Pennsylvania Casualty Co. v. Whiteway, 210 Fed. 782, 784, 127 C. C. A. 332, 334.

[3] There is another reason why no reviewable question of law is presented to this court in this case. A trial court is entitled to a clear specification by exception of any ruling or rulings which a party challenges and desires to review, to the end that the trial court itself may correct them if so advised, and, if it fails to do so, that there may be a clear record of the rulings and the challenges thereof. For this purpose a rule has been firmly established that an exception to any ruling which counsel desire to review, which sharply calls the attention of the trial court to the specific error alleged, is indispensable to the review of such a ruling. Block v. Darling, 140 U. S. 234, 11 Sup. Ct. 832, 35 L. Ed. 476; Webb v. National Bank of Republic, 146 Fed. 717, 719, 77 C. C. A. 143; Union Pacific R. R. Co. v. Thomas, 152 Fed. 365, 372, 81 C. C. A. 491, 498; Armour Packing Co. v. United States, 153 Fed. 1, 16, 82 C. C. A. 135, 150, 14 L. R. A. (N. S.) 400. The only exceptions taken by counsel for defendant that might possibly have related, in their mind, to any ruling of the court below on any question of law

which they discussed in this case, are those set out in the foregoing statement, which were taken at the conclusion of the trial court's oral statement of its intended finding of facts and opinion. They are so general, indefinite, and clearly insufficient to sustain any right to a review of any ruling of the court below in this case that it would be useless to discuss them, because they fail to point out to or to inform the court below of any specific ruling he has made, or would in the future make, that counsel claim was or would be erroneous. They amount to nothing more than a statement that the defendant excepted to everything that the court had said and done, and to everything that it might thereafter say and do, in the trial of the case, or the entry of judgment therein.

Because no exceptions were taken and no specifications of error were made in this case, which present to this court for review any questions of law discussed by counsel in this case, the judgment below is affirmed.

WEEKS v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. May 13, 1915.)

No. 243.

1. FOOD ⟸15—"MISBRANDED"—STATUTORY PROVISIONS.

Under Food and Drugs Act June 30, 1906, c. 3915, § 8, 34 Stat. 771 (Comp. St. 1913, § 8724), subhead "In the Case of Food," declaring that an article shall be deemed "misbranded" where it is labeled to mislead the purchaser, or purports to be a foreign product when not so, and where the package containing it or its label shall bear a false or misleading statement, provided that an article of food which does not contain any added poisonous or deleterious ingredients, shall not be deemed to be adulterated or misbranded in the case of compounds known as articles of food under their own distinctive names, and not in imitation of or offered for sale under the distinctive name of another article, and in case of articles labeled so as to plainly indicate they are compounds, and the word "compound" is stated on the package in which it is offered for sale, an article labeled "Fruit Wild Cherry Compound," but not composed of any "Fruit Wild Cherry," nor any added poisonous or deleterious ingredients, is not misbranded.

[Ed. Note.—For other cases, see Food, Cent. Dig. § 14; Dec. Dig. ⟸15.

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

2. FOOD ⟸5—"ADULTERATED"—ACTS CONSTITUTING.

The provision in Food and Drugs Act, § 8, that an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated in enumerated cases, qualifies section 7, declaring that an article shall be deemed adulterated if it be mixed, colored, powdered, coated, or stained in a manner whereby damage or inferiority is concealed, and an article labeled "Fruit Wild Cherry Compound," and containing no "Fruit Wild Cherry," but containing a coal tar color giving to the mixture the genuine color of wild cherry juice, but not any added poisonous or deleterious ingredients, is not adulterated.

[Ed. Note.—For other cases, see Food, Cent. Dig. § 1; Dec. Dig. ⟸5.

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

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3. FOOD ⊂=15—"MISBRANDED"—ACTS CONSTITUTING.
An article labeled: "Special Lemon. Lemon Terpene and Citral"—but not derived from lemon, but a mixture containing alcohol and citral, derived from lemon grass and an imitation of lemon oil, is not "misbranded."
[Ed. Note.—For other cases, see Food, Cent. Dig. § 14; Dec. Dig. ⊂=15.]

4. CRIMINAL LAW ⊂=1159—VERDICT—CONCLUSIVENESS.
A conviction on conflicting evidence will not be disturbed on writ of error.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074-3083; Dec. Dig. ⊂=1159.]

5. FOOD ⊂=15—"MISBRANDED."
An article composed of alcohol and citral, derived from lemon grass and an imitation of lemon oil, and labeled "Special Lemon," and represented by the seller's agent to the buyer as pure lemon oil, was misbranded, within Food and Drugs Act, § 8, defining misbranding as offering an article for sale under the distinctive name of another article, though no label describing it as such other article is affixed to it.
[Ed. Note.—For other cases, see Food, Cent. Dig. § 14; Dec. Dig. ⊂=15.]

6. FOOD ⊂=15—MISBRANDING—OFFENSES—ACTS OF SALES AGENT.
A seller of an article of food so represented by his agent to the buyer as to be misbranded, within Food and Drugs Act, § 8, is liable for misbranding, since intent is not an element of the offense.
[Ed. Note.—For other cases, see Food, Cent. Dig. § 14; Dec. Dig. ⊂=15.
What constitutes a violation of pure food regulations, see note to Brina v. United States, 105 C. C. A. 559.]

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 convicting plaintiff in error, who was defendant below of violation of the Food and Drugs Act of June 30, 1906.

There were three informations, and two counts under each. The first information dealt with an article of food called "Fruit Wild Cherry Compound." The first count of this information was quashed before trial. The second count charged shipment of such an article, which was misbranded because it was labeled "Fruit Wild Cherry Compound," whereas it consisted chiefly of imitation wild cherry essence, artificially colored.

The second information, in its first count, charged the shipping of the article which "was adulterated in that it was artificially colored with a coal tar dye in such manner as to simulate a fruit wild cherry and in a manner whereby its inferiority was concealed." The second count charged the selling and offering for sale of the article under the distinctive name of another article The article and the label in all these counts were the same.

The third information in its fruit count charged the shipment of an article of food labeled: "Special Lemon. Lemon Terpene and Citral." This label was charged to be false and misleading, because the statement in it would indicate that the article was a product derived from lemon, whereas it was in fact not a product derived from lemon, but was a mixture containing alcohol and citral derived from lemon grass, and was an imitation of lemon oil The second count charged the offering of such article for sale under the distinctive name of another article, to wit, a product derived from lemon.

Defendant was convicted under all five counts.

Walter J. Carlin, of New York City, for plaintiff in error.

H. Snowden Marshall, U. S. Atty., and Robert P. Stephenson, Asst U. S. Atty., both of New York City.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

LACOMBE, Circuit Judge. The case calls for the construction of sections 7 and 8 of the Pure Food and Drugs Act. Prior sections forbid in general terms the manufacture and shipment in interstate commerce of any article of food or drugs which is adulterated or misbranded. Those two sections (7 and 8) undertake to define the words "adulterated" and "misbranded" as used in the statute. Had they been phrased in general terms, it might not be difficult to construe and apply them to the concrete facts of each case as they are developed on a trial. But the draftsman apparently thought that the more words he used the more plainly would he express the meaning intended. Not unnaturally an opposite result has been accomplished. The sections are most difficult of construction; possibly the phrasing of some of their provisions may operate to defeat the object probably intended. But we cannot rewrite the sections; if amendment be needed to make the act effective, that will be a matter for the consideration of Congress.

[1] Considering now the charges as to the "Fruit Wild Cherry Compound," the labeling of which it is contended violates the provisions of section 8, subhead "In the Case of Food." The label indicates, we should suppose, to any intelligent mind that the article is a compound into which "Fruit Wild Cherry" has entered, at least in sufficient quantity fairly to warrant the use of these quoted words. The testimony of defendant's own witness shows that the article contains absolutely no "Fruit Wild Cherry." It is therefore clearly within section 8, "Food" subdivision, paragraph second, because it is "so labeled as to mislead the purchaser" and also within paragraph fourth, because its label bears "a statement regarding the ingredients or the substance contained therein, which statement [is] false or misleading in [the particular] that the compound contains Fruit Wild Cherry." If this were all, one might leave the subject with a conviction that the statute, in its application to this case, had accomplished its apparent object. But the act contains an important proviso, apparently tacked onto the bill to protect various combinations on the market at the time. In order to appreciate the full force of this proviso, which concludes section 8, it is here quoted:

"Provided, that an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be adulterated or misbranded in the following cases:

"First. In the case of mixtures or compounds which may be now or from time to time hereafter known as articles of food, under their own distinctive names, and not an imitation of or offered for sale under the distinctive name of another article, if the name be accompanied on the same label or brand with a statement of the place where said article has been manufactured or produced.

"Second. In the case of articles labeled, branded, or tagged so as to plainly indicate that they are compounds, imitations, or blends, and the word 'compound,' 'imitation,' or 'blend,' as the case may be, is plainly stated on the package in which it is offered for sale: Provided, that the term blend as used herein shall be construed to mean a mixture of like substances, not excluding harmless coloring or flavoring ingredients used for the purpose of coloring and flavoring only: And provided further, that nothing in this act

shall be construed as requiring or compelling proprietors or manufacturers of proprietary foods which contain no unwholesome added ingredient to disclose their trade formulas, except in so far as the provisions of this act may require to secure freedom from adulteration or misbranding."

Now there is not a scintilla of evidence in the case to show that defendant's article contains "any added poisonous or deleterious ingredients"; therefore it is covered by the proviso (second clause), because it is "labeled to plainly indicate that it is a compound," and the word "compound" is plainly stated on the package. In consequence it cannot, under the proviso, "be deemed to be misbranded."

[2] In the second information the charge is brought under section 7 of the act, which enumerates the conditions which will constitute adulteration of an article for the purposes of the act. The charge is that "Fruit Wild Cherry Compound" was adulterated, in that it was "artificially colored with a coal tar dye in such a manner as to simulate a true fruit wild cherry and in a manner whereby its inferiority was concealed." Section 7 contains this clause:

"Fourth. If it be mixed, colored, powdered, coated or stained in a manner whereby damage or inferiority is concealed."

The shipment is the same as that covered by the first information. The label is the same "Fruit Wild Cherry Compound." Manifestly the label does not state that the article is "Fruit Wild Cherry," but only that it is a *compound,* which contains fruit wild cherry. Defendant's witness, who was familiar with the manufacture of the compound, testified that they soak wild cherry bark in water, filter the infusion, dilute it with alcohol, add benzaldehyde or oil of bitter almonds, fruit juice of raspberries, and some extract of orris and oil of rose. No fruit wild cherry enters into the compound. There was testimony from which the jury might find that the compound also contained a coal tar color known as amaranth, that genuine fruit wild cherry has a red color, that the compound described by defendant containing fluid extract of wild cherry bark would not have this color, and that the amaranth gave to the mixture the genuine color of wild cherry juice. The testimony seems to indicate that the bark infusion of wild cherry is inferior to the fruit juice, and we should be inclined to sustain the verdict, were it not for the proviso as to "compounds" above quoted.

That proviso is found at the close of section 8, which section undertakes exhaustively to define "misbranding." Under ordinary rules of construction the operation of the proviso might be restricted to the section in which it appears, and it might be held not to qualify section 7, which defines "adulterations." But the draftsman of the act has been careful not thus to restrict it, because the proviso begins:

"That an article of food which does not contain any added poisonous or deleterious ingredients shall not be deemed to be *adulterated or misbranded* in the following cases."

Then follows the enumeration above set forth. The article in question is an article of food, and the information does not charge, nor does the testimony show, that there have been added to the compound "poisonous or deleterious ingredients." The proviso, therefore, requires a reversal of the conviction under this count.

[3] The second information deals with a different article, labeled: "Special Lemon. Lemon Terpene and Citral." The first count charged that the article was misbranded; that the label was misleading, in that the statement would indicate that the article was a product derived from lemon, whereas the product was not a product derived from lemon, but was a mixture containing alcohol and citral derived from lemon grass and an imitation of lemon oil. The article seems not to be covered by the proviso, because the *word* "compound" is not "plainly stated on the package in which it is offered for sale."

The question is: Was the label false and misleading? It obviously indicated that the so-called "Special Lemon" was a compound of which Lemon Terpene and Citral were components. The words "Special Lemon" do not, of course, import that the article was "lemon," a word which in ordinary speech denotes the fruit of a well-known citrous tree. There is no testimony that this word, standing by itself, has any distinctive trade meaning; there are lemon oils, lemon extracts, lemon juice, lemon essence, etc. The use of the words "Special Lemon" does not import any representation that the article is a variety of lemon oil. The testimony shows that lemon terpenes are the oily part—the hydrocarbon oils of the lemon, of the lemon peels; they are a by-product from the manufacture of lemon flavor. Citral is derived from lemon grass, a grass that grows in the East Indies. Where we have a label which indicates that the contents of the package consists of a compound of lemon terpene and citral, which compound the manufacturer designates as "Special Lemon," and the contents agree with the designation, we do not see how it can be held that there has been a misbranding within the meaning of the act.

[4, 5] The second count charges that the same article was offered for sale as a product derived from lemon. A witness called by the government, who was engaged in the manufacture of crackers at Atlanta, Ga., testified that he was visited there by a salesman of defendant; that the salesman showed him a sample in a bottle and told him it was pure lemon oil, which he was able to sell at a low price because it was "second pressing." The witness ordered some of it, which was sent to him by defendant. The salesman, called by defendant, denied the making of any statements as to the article being lemon oil. Upon this conflict of evidence the finding of the jury that the representations were made is controlling here, and it must be held that there was a misbranding under the statute, because section 8 defines misbranding as, inter alia, "offering an article for sale" under the distinctive name of another article, even though no label describing it as such other article be actually affixed to it.

[6] Since intent is not an element of the offense, defendant must be held liable for the act of his sales agent, although he had told him not to misdescribe the article.

The judgment under this count is affirmed.

WEEKS v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. May 13, 1915.)

No. 244.

1. FOOD ⊂=6—SALE OF ARTICLES INJURIOUS TO HEALTH—STATUTORY PROVISIONS—"ADULTERATED."

A seller of an article of food labeled "Grain Alcohol Varnish," and composed of shellac, containing arsenic, dissolved in alcohol, for use for glazing candy, with knowledge of the use, may be convicted of violating Food and Drugs Act June 30, 1906, c. 3915, § 7 (Comp. St. 1913, § 8723), declaring that an article of food is "adulterated" where it contains any added ingredients which may render the article injurious to health, though all shellac imported into the United States contains the added arsenic, and though the seller supposed that the amount of arsenic consumed with varnished candy would be too minute to injure any one.

[Ed. Note.—For other cases, see Food, Cent. Dig. § 6; Dec. Dig. ⊂=6.

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

What constitutes a violation of pure food regulations, see note to Brina v. United States, 105 C. C. A. 559.]

2. CRIMINAL LAW ⊂=1159—WRIT OF ERROR—VERDICT—CONCLUSIVENESS.

A conviction justified by evidence, though conflicting, will not be disturbed on writ of error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074–3083; Dec. Dig. ⊂=1159.]

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 from a judgment of conviction of violation of the Pure Food and Drugs Act of June 30, 1906.

Walter Jeffreys Carlin, of New York City, for plaintiff in error.

H. Snowden Marshall, U. S. Atty., and Robert P. Stephenson, Asst. U. S. Atty., both of New York City.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

LACOMBE, Circuit Judge. A much simpler case is here presented than that considered in action No. 1, opinion in which is filed herewith, 224 Fed. 64, —— C. C. A. ——. There is but one information in a single count. Concededly defendant shipped an article of food labeled "Grain Alcohol Varnish"; it was shellac dissolved in alcohol, and was used for a glazing on cheap candies. Shellac is a resinous material derived from a secretion caused by an insect biting the bark of certain trees in India and Southern Asia. This resinous material is separated from the twigs and other refuse material by being warmed in bags. Arsenic is added to it for the purpose of brightening its natural orange color, making it, in the opinion of the trade, more desirable. All shellac imported into this country during the year in question contains this added article; defendant so concedes. The shellac is dissolved in alcohol to produce the varnish; no arsenic is added here.

[1, 2] The act provides (section 7) that an article of food is adulterated if it "contain any added poisonous or other added deleterious ingredient which may render such article injurious to health." The amount of this arsenic which could possibly be consumed by a person eating the candy glazed with the varnish would be minute. The only question is: Was there sufficient arsenic in the varnish to make it an article which "may be injurious to health"?

Upon this point there was conflicting testimony. In accordance with the holding of the Supreme Court in U. S. v. Lexington Mill Co., 232 U. S. 399, 34 Sup. Ct. 337, 58 L. Ed. 658, the question whether the added ingredient would "reasonably have a tendency to injure health" was left to the jury. We see no reason to disturb their finding; it makes no difference whether the arsenic was added to the shellac, or to the varnish, nor whether it was added by the defendant, or by some one else. He testified with commendable frankness that he understood at the time that one "could not buy shellac commercially—I mean outside of a laboratory—that was arsenic free." He supposed undoubtedly that the amount consumed with varnished candy would be too minute to injure any one. Of course, he could sell this varnish, with its added arsenic, for use in the arts; but he admitted, with entire frankness, that he sold it to be used in glazing confectionery. We regret to have to sustain a conviction where the defendant has been so entirely frank and honest in giving his testimony, and had no reason to suppose he was likely to injure any one's health by selling his varnish for the indicated purpose; but intent so to do is not an element of the offense charged, and the evidence as to what effect the added arsenic may have was such that this question had to go to the jury for decision. Had they decided that question contrary to the contention of the government experts, we certainly could not set their decision aside; nor can we do so when they find such contention persuasive. We are not the triers of the facts.

It seems unnecessary to discuss various technical points which have been argued. We cannot see that it makes any difference whether the package shipped was labeled "Grain Alcohol Varnish," or "White Shellac Varnish, Grain Alcohol." It is proved that shellac varnish was sent by defendant to the candy manufacturer in Providence, R. I., and that what the government experts tested was a sample from the can. We do not understand that defendant disputes the fact that he sent the can.

Judgment affirmed.

T. L. SMITH CO. v. ORR.

(Circuit Court of Appeals, Eighth Circuit. May 12, 1915.)

No. 4232.

(Syllabus by the Court.)

1. RECEIVERS ⟸77—CONDITIONAL SALE—UNRECORDED CONTRACT—CREDITORS —RECEIVER'S POWER TO AVOID.

A receiver appointed in a suit in equity instituted by a creditor against his insolvent debtor to administer and convert into money the property of the debtor, and distribute the proceeds thereof among his creditors, has the power of creditors "armed with process" to disregard or avoid, under section 2889, Revised Statutes of Missouri 1909, the unrecorded condition in a contract of conditional sale to the debtor of personal property, which the receiver finds in his possession and there seizes, even though no creditor had sued out any process before the receiver made the seizure.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 91, 138–144; Dec. Dig. ⟸77.]

2. COURTS ⟸365—LOCAL LAW—DECISION OF STATE COURT—FEDERAL COURTS.

The question whether or not such a receiver has such power is a question of local law, of the construction of a statute of the state, and of the determination of its judicial practice thereunder, and the decision of this question by the highest judicial tribunal of the state is controlling in the federal courts.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 950, 952, 955, 969–971; Dec. Dig. ⟸365.

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.]

Appeal from the District Court of the United States for the Eastern District of Missouri; David P. Dyer, Judge.

Suit by Isaac H. Orr, receiver, against the T. L. Smith Company. Decree for complainant, and defendant appeals. Affirmed.

Edwin C. Luedde (Augustus L. Abbott and John B. Edwards, both of St. Louis, Mo., on the brief), for appellant.

George H. Williams, of St. Louis, Mo., for appellee.

Before SANBORN and SMITH, Circuit Judges.

SANBORN, Circuit Judge. In a suit in the court below by Kemmerer and others, creditors of the St. Louis Blast Furnace Company, a corporation of Missouri, to secure the appointment of a receiver, the administration and conversion into money of the property of the Furnace Company, and the distribution of the proceeds thereof among its creditors, a receiver was appointed on September 24, 1912, who found in the possession of the Furnace Company and seized a No. 5 Symonds vibratory crusher, which the Furnace Company held under a contract of sale with its vendor, the T. L. Smith Company, a corporation, which was conditioned that the title to the crusher should remain in the vendor until the purchase price was paid. No part of that price had ever been paid, and in view of these facts the Smith

Company applied to the court below for an order on the receiver to deliver the crusher to it. The fact was, however, that the statutes of Missouri, where the vendee received and held the crusher, and where the suit was pending, provided that in every case in which personal property should be sold on condition that the property should belong to, or that the title should remain in, the vendor until the purchase price was paid, that condition should "be void as to all subsequent purchasers in good faith, and creditors, unless such condition shall be evidenced by writing executed, acknowledged and recorded as provided in cases of mortgages of personal property" (Revised Statutes of Missouri 1909, § 2889), and this condition of the sale of the crusher had never been recorded. The Smith Company met this situation with the contention that the receiver was neither a purchaser in good faith, nor a creditor, nor a representative of any creditor of the Furnace Company, and that he had no greater rights than that company. The court below held that the receiver was the representative of and was endowed with the rights of the creditors, and it adjudged the sale absolute as to him, and denied the application of the vendor. The vendor then appealed to this court, and has assigned this ruling as error.

[1, 2] The question is whether or not a receiver appointed in a creditors' suit in Missouri to administer and convert into money the property of an insolvent debtor, and to distribute the proceeds thereof among its creditors, has the right and power to avoid an unrecorded condition of a contract of conditional sale which the creditors might have disregarded if no receiver had been appointed. This is a question of local law, of the construction of a statute of Missouri, and of the determination of the judicial practice under it in that state, and if there were a decision of this question by the highest judicial tribunal of that state it would be controlling in the federal courts. No such decision, however, has been cited or found, but the following rules of law and practice seem to prevail in the courts of that state: Under a statute which declares an unrecorded chattel mortgage void against any other person than the parties thereto, strangers may not, but creditors of the mortgagor prior to the mortgage who levy process upon the mortgaged property before the mortgagee takes possession thereof, subsequent creditors without process, and subsequent purchasers in good faith may, disregard or avoid the mortgage. First Nat. Bank v. Connett, 142 Fed. 33, 38, 73 C. C. A. 219, 224, 5 L. R. A. (N. S.) 148; Landis v. McDonald, 88 Mo. App. 335, 340; Williams v. Kirk, 68 Mo. App. 457, 461. Creditors who are "armed with process" may, and those who are not thus armed may not, disregard or avoid the unrecorded condition of a contract of conditional sale under section 2889 of the Statutes of Missouri. Thompson & Co. v. Massey, 76 Mo. App. 197, 204. An assignee of the mortgagor for the benefit of his creditors may not disregard or avoid an unrecorded chattel mortgage. Jacobi v. Jacobi, 101 Mo. 507, 512, 14 S. W. 736; Riddle v. Norris, 46 Mo. App. 512, 515; Tufts v. Thompson, 22 Mo. App. 564, 568. The same rule governs the right of an assignee for the benefit of the creditors of a vendee in an unrecorded contract of conditional sale to disregard or avoid the unrecorded condition. Thomas Mfg. Co. v. Huff, 62 Mo.

App. 124, 126. But an administrator or an executor of an insolvent estate may disregard or avoid an unrecorded chattel mortgage, because by virtue of the law and practice in Missouri he represents and acts for the creditors. Hughes v. Menefee, 29 Mo. App. 192; Hemley v. Harmon, 103 Mo. App. 233, 238, 239, 77 S. W. 136. Thus far, but no farther, the decisions of the courts of Missouri clearly lead; but they leave the decision of the exact question under consideration to reason and to other authorities.

The reason, however, for the decisions of those courts that an assignee of the vendee for the benefit of his creditors may not, and the administrator or executor of the estate of an insolvent vendee may, disregard or avoid the unrecorded condition of a sale, is that the powers of the former are conferred by the voluntary act of the vendee, and they cannot be greater than those which the vendee possessed, while the powers of the latter are conferred by the law and the appointment of the court, and include, not only the powers of the vendee, but the powers and rights of his creditors. The position of a receiver in a suit brought by a creditor against an insolvent debtor for the appointment of a receiver, the administration and sale of his property, and the distribution of its proceeds among his creditors is more nearly analogous to that of an administrator of the estate of a deceased person than that of an assignee for the benefit of creditors. He is appointed, his powers are conferred, and his duties are imposed by the court and the law, and not by the voluntary conveyance of the debtor. His primary duty is to hold, administer, convert into money, and distribute the proceeds of the property for the benefit of the creditors, for they have the larger, and generally the entire, pecuniary interest in it. He is appointed on the petition of a creditor for the benefit of the creditors, and is in fact their representative far more than he is the representative of the debtor. At the time this receiver was appointed the creditors of the Furnace Company had the right to procure and levy attachments or executions upon the vibratory crusher here in controversy, and thereby to avoid the condition of its sale. The appointment of the receiver and his seizure of the crusher thenceforth prevented them from exercising that right. It is just and equitable that the receiver whose appointment prevented the creditors from exercising their right to avoid the condition should exercise that right for them. The courts of Missouri declare that a creditor "armed with process" may avoid or disregard the condition of his debtor's unrecorded contract of sale, and they have held that a creditor who has sued out an attachment or execution against the property of such a debtor, placed it in the hands of a sheriff, and caused him to levy it upon the property sold, is such a creditor.

A creditor who has sued out an order of a court of equity that a receiver be appointed, and that he take possession of all the property of the debtor for the purpose of its administration, sale, and distribution among his creditors, who has placed this order in the hands of the receiver, and has caused him to seize the property, is not less armed with process. Indeed, he is armed with a more comprehensive and effective process—a process by which all the property of the debtor may be seized, administered, sold, and distributed. In view of these con-

siderations, the conclusion is that a receiver appointed in a suit in equity instituted by a creditor against his insolvent debtor to administer, convert into money the property of the debtor, and distribute the proceeds thereof among his creditors, has the power of creditors armed with process to disregard or avoid, under section 2889, Revised Statutes of Missouri 1909, the unrecorded condition in a contract of conditional sale to the debtor of personal property which the receiver finds in his possession and seizes there, even though no creditor had sued out any process before the seizure. In re Wilcox & Howe Co., 70 Conn. 220, 39 Atl. 163, 166; Duplex Printing Press Co. v. Clipper Publishing Co., 213 Pa. 207, 62 Atl. 841, 842, 843; H. K. Porter Co. v. Boyd, 171 Fed. 305, 313, 96 C. C. A. 197.

The portion of the decree below challenged by this appeal was in accord with this conclusion, and it is affirmed.

RUSHING et al. v. MANHATTAN LIFE INS. CO. OF NEW YORK.

(Circuit Court of Appeals, Eighth Circuit. May 12, 1915.)

No. 4204.

(Syllabus by the Court.)

1. CONTRACTS ⊜153, 162—CONSTRUCTION—VALIDITY—INCONSISTENT PROVISIONS.

Every part of a contract must be so construed, if possible, as to be consistent with every other part and effective. It is only when parts of a contract are so radically repugnant that there is no rational interpretation that will render them effective and accordant that any part must perish.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 734, 744; Dec. Dig. ⊜153, 162.]

2. INSURANCE ⊜175—LIFE INSURANCE POLICY—CONSTRUCTION.

The true meaning of the provisions of a policy of insurance signed by the officers of the company June 19, 1903, "that there shall be no contract of insurance until a policy shall have been issued by the company and manually received and accepted * * * during the good health of the person whose life is to be insured," and that "this policy is to date from June 1, 1903," is that there shall be no contract of insurance until and unless the policy is manually delivered to and accepted by the insured during his good health, and that if it is so delivered the term of insurance and the time of payment of the premiums shall be reckoned from June 1, 1903.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 362–371; Dec. Dig. ⊜175.]

3. CONTRACTS ⊜24—PROPOSAL—ACCEPTANCE—MODIFICATION.

The material modification of the terms of a proposal of a contract by the party to whom it is offered is a rejection of the proposal and the tender of a new offer, which cannot become a contract until it has become known to and has been accepted by the first proposer.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 100–103; Dec. Dig. ⊜24.]

In Error to the District Court of the United States for the Eastern District of Oklahoma; John C. Pollock, Judge.

Action by G. M. Rushing and another, administrators of the estate of M. D. Sowell, deceased, against the Manhattan Life Insurance Company of New York. Judgment for defendant, and plaintiffs bring error. Affirmed.

Marcus M. Parks, of Dallas, Tex. (Charles A. Cook, of Muskogee, Okl., on the brief), for plaintiffs in error.

Harry L. Seay and Lee Richardson, both of Dallas, Tex., and B. Broaddus, of Muskogee, Okl. (Samford, Rapallo & Kennedy, of New York City, on the brief), for defendant in error.

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

SANBORN, Circuit Judge. This is a writ of error to reverse a judgment in favor of the insurance company in an action on a policy upon the life of M. D. Sowell. The case was tried by a jury, and it is specified as error that the court, at the close of the trial, directed a verdict for the insurance company upon the facts proved, on the ground that the company never made the alleged contract of insurance. Those facts were these:

On June 1, 1903, M. D. Sowell made a written application to the company for a policy of insurance on his life for $10,000, gave it to the local agent of the company, deposited with him $550, the amount of the first annual premium, and took a receipt therefor, to the effect that this deposit should be applied on account of the first premium if the application should be accepted by the company and a policy should be issued and delivered in accordance with the terms of the application, but that otherwise the $550 should be returned to the applicant upon the surrender of the receipt. One of the terms of the application was:

"It is expressly agreed as follows, viz.: (1) That there shall be no contract of insurance until a policy shall have been issued by the company and manually received and accepted, subject to the conditions therein and herein contained, during the good health of the person whose life is to be insured, and the first premium paid."

The application, which was taken by the local agent in the Indian Territory, was forwarded to the home office of the company in New York. On the 18th day of June, 1903, the company made and signed a printed policy of insurance on this application which contained these words in writing, "This policy is to date from June 1, 1903," and mailed the policy to its general agent at Dallas, Tex., A. A. Green, who had authority, in the absence of special instructions, to deliver, or to refuse to deliver, the policy as he thought right and proper. On June 19, 1903, the company was informed that Mr. Sowell was not in good health, and it telegraphed and wrote to Mr. Green to hold the policy until he got well, and, if he failed to do so, to return it for cancellation. Green obeyed these instructions. The policy was never presented to, accepted by, or delivered to Mr. Sowell, who died on June 29, 1903.

[1, 2] Counsel for the plaintiffs below concede that the agreement of the parties "that there shall be no contract of insurance until a

policy shall have been issued by the company and manually received and accepted subject to the conditions therein and herein [in the application] contained during the good health of the person whose life is to be insured," was one of the terms of the application and of the policy, and that the policy never was manually received or accepted by Mr. Sowell during his good health, or at all. They contend, however, that this stipulation of the contract was abrogated by the facts that it was in print, while the provision that "this policy is to date from June 1, 1903," was in writing, and that one of the rules for the construction of contracts is that, where the printed and the written provision thereof are in conflict, the writing prevails, that the policy also contained these words:

"It is expressly stipulated that this contract is made and to be performed in the state of New York, and shall be in all respects construed and controlled by the laws of said state. In witness whereof, the Manhattan Life Insurance Company has hereunto affixed its corporate seal, and by its president and secretary signed and delivered this contract at the city of New York, this eighteenth day of June, one thousand nine hundred and three"

—and that these terms are repugnant to the stipulation that there should be no contract until the policy was manually delivered to and accepted by the insured while he was in good health. If the fact were established that the receipt, the application, and the policy constitute a contract of insurance between the parties, these arguments might be pertinent to the interpretation of that agreement. But they would not even then be unanswerable. The sole purpose of the interpretation of a contract is to ascertain the intention of the parties when they made it. If possible, every part of a contract must be so construed as to be consistent with every other part and to have effect. It is only when the parts of a contract are so radically repugnant that there is no rational construction that will render them effective and accordant that any part must perish. And the intention of the parties must be deduced, not from specific provisions or fragmentary parts of the agreement, but from the entire contract, because the intent is not evidenced by any part or stipulation of it, nor by the contract without any part or provision, but by every part and term so construed, if possible, as to be consistent with every other part and with the entire agreement. American Bonding Co. v. Pueblo Inv. Co., 150 Fed. 17, 27, 80 C. C. A. 97, 107, 9 L. R. A. (N. S.) 557, 10 Ann. Cas. 357; Jacobs v. Spalding, 71 Wis. 177, 188, 36 N. W. 608; Boardman v. Reed, 6 Pet. 328, 8 L. Ed. 415; Canal Co. v. Hill, 15 Wall. 94, 21 L. Ed. 64; O'Brien v. Miller, 168 U. S. 287, 297, 18 Sup. Ct. 140, 42 L. Ed. 469; Pressed Steel Car Co. v. Eastern Ry. Co., 57 C. C. A. 635, 637, 121 Fed. 609, 611; Uinta Tunnel, etc., Co. v. Ajax Gold Min. Co., 141 Fed. 563, 73 C. C. A. 35; U. S. Fidelity & G. Co. v. Board of Com'rs, 145 Fed. 144, 148, 76 C. C. A. 114, 118.

The court below deduced from the receipt, the application, and the policy the intention of the parties that there should be no contract of insurance until the policy was manually delivered to and accepted by the assured during his good health. Counsel for the plaintiffs below argue that these instruments disclose the intention of the parties to agree that a contract of insurance was made between them on June

1, 1903, when the receipt was issued, and this because the ninth provision of the policy is in writing and reads, "This policy is to date from June 1, 1903." But there are two permissible interpretations of that provision, warranted by its terms and by its common use—one that it specifies the date from which the term of insurance and the premiums shall be reckoned if the policy becomes a contract, and the other that it fixes the date when the minds of the parties met on the terms of their agreement and the policy became a contract. It is a practice so common as to be within judicial cognizance to make promissory notes, deeds, mortgages, policies of insurance, and contracts of many kinds date from their own dates, or from specific dates named therein, which are generally a few days earlier than the dates when by execution and delivery they actually become agreements, and an interpretation in accordance with this practice of the provision in question makes it consistent with the receipt of June 1, 1903, the application, and the policy, all of which expressly condition the existence of the contract of insurance and fix the time when it shall come into existence by the manual receipt and acceptance by the insured of the policy while he is in good health.

This construction also makes the provision consistent with the formal statement in the policy that it is signed, sealed, and delivered in New York on June 18, 1903. On the other hand, the theory that the intention of the parties was to evidence by this provision the making of the contract of insurance between them on June 1, 1903, is inconsistent with all the other terms of the writings which have been specified and contrary to the actual fact. The result is that the interpretation of the agreement that there should be no contract of insurance unless nor until the policy was manually delivered and accepted by the insured while in good health; but, if such a contract were so made, it should date, and the term of insurance and times of payment of annual premium should be reckoned, from June 1, 1903, is rational, in accordance with a quite general practice, renders all the provisions of the contract consistent and effective, and declares the true intention of the parties to the agreement, while the construction adopted by counsel for the plaintiffs below renders some of the terms of the agreement unnecessarily repugnant and the abrogation of some of them unavoidable. So it is that under familiar canons of interpretation the former is the only permissible construction.

The considerations to which reference has now been made also deprive of persuasive force the contention of counsel that the insertion in writing of the provision that "this policy is to date from June 1, 1903," constituted an agreement of the parties to waive the stipulation that there should be no contract of insurance until a policy was manually delivered and accepted by the insured during his good health. As the former provision was susceptible of a rational and customary interpretation which rendered it effective and consistent with the latter, they must both stand, be read, and be given effect together, and neither was waived nor abrogated.

The case has thus far been discussed upon the hypothesis that the question in it is the true construction of a contract between Sowell

and the company, evidenced by the receipt, the application, and the policy. But that is not the real issue. The crucial question is: Was there ever any contract of insurace between these parties? Did their minds ever meet and agree upon the same terms of any contract of insurance? Sowell, on June 1, 1903, proposed to the insurance company to take a policy of insurance on the terms expressed in his application that the policy to be issued under it and the negotiations for it should constitute no contract of insurance unless the policy was manually delivered to and accepted by him while he was in good health. The company signed, sealed, and mailed to its general agent in Texas a policy which in its printed part expressly stipulated that these terms proposed in the application were made a part of the terms of the policy. But the company inserted in the policy in writing the provision that "this policy is to date from June 1, 1903," and counsel for the plaintiffs stake their right to recover on the position that this insertion was so inconsistent with the provision of the application and the policy that there should be no contract of insurance until and unless the policy was manually received and accepted by the insured during his good health that it abrogated or waived that provision.

[3] But if that position is well taken, if the written stipulation was so inconsistent with the latter provision that it abrogated or waived it, then the policy was not an acceptance of Sowell's offer, but so radically modified his proposition that it was a rejection thereof, and the offer of a new proposal, which the insured never received or accepted, so that the minds of the parties never met upon it. The material modification of the terms of a proposal of a contract by the party to whom it is offered is a rejection of the proposal and the tender of a new offer, which cannot become a contract until it has become known to and has been accepted by the first proposer. McNicol v. New York Life Ins. Co., 149 Fed. 141, 143, 79 C. C. A. 11, 13; Mohrstadt v. Mutual Life Ins. Co., 115 Fed. 81, 83, 52 C. C. A. 675, 677; Travis v. Nederland Life Ins. Co., 104 Fed. 486, 488, 43 C. C. A. 653, 655. If, on the other hand, the written stipulation was not so inconsistent with the provision that there should be no contract until nor unless the policy was manually delivered to and accepted by the insured in good health as to waive or abrogate it, then that stipulation governed the negotiations and conditioned the existence of the contract of insurance and the time of its making, and as the policy never was received or accepted by the insured in good health, or at all, there never was any contract of insurance between these parties. In either case no contract of insurance was ever made, and there was no error in the court's instruction to the jury to return a verdict for the company.

This conclusion renders the consideration of other alleged errors at the trial unnecessary, and the judgment below must be affirmed.

It is so ordered.

MISSOURI & K. I. RY. CO. v. EDSON.

(Circuit Court of Appeals, Eighth Circuit. May 12, 1915.)

No. 4225.

(Syllabus by the Court.)

1. RECEIVERS ⟸99—COUNSEL FEES—RIGHT TO ALLOWANCE—UNFOUNDED CHARGES OF MALFEASANCE.
   A receiver is entitled to the allowance and payment out of the trust estate of the reasonable fees of his counsel for defending him against unfounded charges of malfeasance and breach of trust in the discharge of his duties as receiver, in the absence of dishonesty, bad faith, or fraudulent intent on his part, notwithstanding the fact that, if the claims were well founded, they would entail liabilities upon him individually and would not be payable out of the trust estate.
   [Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 183–186; Dec. Dig. ⟸99.]

2. RECEIVERS ⟸99—COUNSEL FEES—RIGHT TO ALLOWANCE.
   A receiver or trustee is entitled to the reasonable fees of counsel to defend him against claims arising out of mistakes and errors he makes in the discharge of his duties as receiver in good faith and without any fraudulent or dishonest intent.
   [Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 183–186; Dec. Dig. ⟸99.]

Appeal from the District Court of the United States for the District of Kansas; John C. Pollock, Judge.

Petition by J. A. Edson, receiver, against the Missouri & Kansas Interurban Railway Company, for final discharge and an allowance to pay fees of counsel and expenses in defeating certain claims. From a decree for the receiver, the Railway Company appeals. Affirmed.

Justin D. Bowersock, of Kansas City, Mo. (Lester W. Hall and Inghram D. Hook, both of Kansas City, Mo., on the brief), for appellant.

Cyrus Crane, of Kansas City, Mo. (Samuel W. Moore, of Kansas City, Mo., on the brief), for appellee.

Before SANBORN, ADAMS, and SMITH, Circuit Judges.

SANBORN, Circuit Judge. This case presents a single question. May a court of equity lawfully allow and pay out of the trust funds in the hands of a receiver it has appointed his necessary counsel fees for defending himself against baseless charges of malfeasance in the discharge of his duties as receiver, which, if they had been well founded, would have entailed liabilities upon him as an individual and no liabilities against the trust estate? The question arises in this way:

The parties in interest are the Missouri & Kansas Interurban Railway Company, a corporation, the Strang Land Company, a corporation, J. A. Edson, the receiver, and William B. Strang, who owned the majority of the stock of the Railway Company and all the stock of the Land Company and had a judgment against the Railway Company. In June and July, 1908, Strang, as judgment creditor of the Railway

Company, caused the court below to appoint Mr. Edson receiver of the property of the Railway Company and to authorize him to issue receiver's certificates to an amount not exceeding $350,000 for the purpose, among other things, of equipping the railroad, which had been operated by gas electric motor cars, with an overhead trolley system including cars for its operation by electricity. One of the conditions, which was complied with, of the issue of the certificates, was that as security for their payment all the capital stock of the Land Company should be indorsed in blank and delivered to the receiver, with free power to vote it. After the indorsement and delivery thereof Edson elected himself president of the Land Company and as receiver of the Railway Company availed himself of options, due to expire November 10, 1908, to purchase at specified prices four 40-acre tracts of land near the railway which the Land Company held, and failed to avail himself of like options to purchase at specified prices two 40-acre tracts of land held by the Land Company, which his wife bought at the option prices when they were worth more than those prices. These transactions of the receiver became known to Strang as early as December, 1908, but he made no complaint or objection regarding them until November 4, 1909. Meanwhile Edson, as receiver, had issued receiver's certificates, had substituted for the unsuccessful motor car system of operation the overhead trolley system, had provided the requisite cars and equipment for it, and had put the railway in active and remunerative operation; the Railway Company had, on September 24, 1909, filed its petition for the restoration of its property; and the court, on October 21, 1909, had entered its decree that the property of the Railway Company be restored to it, and that the stock of the Land Company be returned to Strang, that the receiver be allowed $17,000 for his services and $8,000 for the services of his counsel and that he file his final account within 30 days thereafter. The receiver immediately restored the property and the stock, and on November 15, 1909, filed his final account. On the same day Strang filed a petition for an order on the receiver to show cause, if any there were, "why he should not be adjudged guilty of a breach of trust and malfeasance in the performance of his duties as receiver, and why he should not be punished as and for a contempt of the authority of the court" because he had failed as receiver to avail himself of the options to purchase the two 40-acre tracts of land which he had permitted his wife to purchase at the option prices. Such an order was issued, the receiver answered, the issues presented were heard and decided on their merits in favor of the receiver by the court below, Strang appealed to this court, the decree in favor of the receiver was affirmed on the grounds (1) that Strang was estopped by his knowledge of the transaction in December, 1908, and his failure to object to it prior to November 4, 1909, to insist upon his claim, and (2) that he was only a stockholder of the Land Company, which was the party injured, if any one was, and that he could not maintain any claim on account of that injury until he first made an unsuccessful effort to induce the Land Company to prosecute its claim. Strang filed a petition for a rehearing in this court which was denied. Strang v. Edson, 198 Fed. 813, 117 C. C. A. 455. He ap-

plied to the Supreme Court for a writ of certiorari to review the action of this court, and the Supreme Court refused to grant it.

On December 11, 1909, the Railway Company filed exceptions to the final report of the receiver, whereby (1) it sought to compel him to pay $14,500 because, as it alleged, he had compelled it to pay that amount to obtain an extension of a note, by failing to borrow the full amount of $350,000 and to issue the receiver's certificates for that amount, and by issuing a smaller amount under a contract that the certificates so issued should be prior and senior to any other certificates that should be subsequently issued, and whereby (2) it sought to compel him to pay $3,933.64 because, as it alleged, he paid Arnold & Co. that amount more than they were entitled to receive under their contract for installing the overhead trolley system. The receiver denied liability for any of these amounts. The issues regarding the claims were heard and decided in the receiver's favor upon their merits in the court below and on appeal in this court. Missouri & Kansas Interurban Ry. Co. v. Edson, 198 Fed. 819, 117 C. C. A. 461.

After the litigation of the claims of Strang and the Railway Company against the receiver which have been described was concluded, the receiver filed a petition for his final discharge, which had been delayed during this litigation, and for an allowance to pay the fees of his counsel and his own expenses in defeating these claims. The parties stipulated that the reasonable value of the services of counsel was $2,500, but the Railway Company opposed any allowance on account thereof, or on account of the receiver's expenses in the litigation of those claims, on the grounds (1) that those services and expenses were not for the defense or benefit of the trust estate, but for Edson's personal defense against charges of personal malfeasance in the administration of the trust, on account of which he personally would have been liable and the trust estate would not have been liable, if they had been sustained, and (2) that his allowance of $8,000 for counsel fees was adequate compensation for all the services of his counsel before and after that date. Testimony was taken on the issues thus made, and the court below decreed an allowance to the receiver of $2,500 for his counsel fees and $107 for his expenses. From this decree the Railway Company has appealed.

[1] In support of their appeal counsel for the company contend that the allowances of $17,000 for services of the receiver and $8,000 for the services of his counsel by the decree of October 21, 1909, were in full payment of all services and expenses of the receiver and his counsel thereafter rendered, as well as of those theretofore rendered, and that, if this were not so, those allowances gave adequate and ample compensation for all their services before and after the date of that decree, so that no more should have been allowed. But neither the receiver nor the court below had any knowledge or notice on October 21, 1908, when that decree was rendered, of the long and strenuous litigation against the receiver which Strang and the Railway Company instituted in the November and December following. The District Court was of the opinion that the allowances of October 21st were not made in payment of the subsequent services of counsel for the re-

ceiver, and that they did not constitute adequate compensation for those services together with their services prior to that date. That court was in a far better situation than this court can be rightly to determine those questions, because it conducted the receivership proceedings prior and subsequent to October 21, 1908, and necessarily had a more intimate and exact knowledge of the character and value of the services rendered than the records can disclose to us. His conclusions upon these questions, therefore, ought not to be set aside, unless the records in hand clearly show that they were induced by some error of law or by some mistake of fact, and a careful review of these records has failed to convince us that they were.

Counsel for the company have cited, among others, Speiser v. Merchants' Exchange Bank, 110 Wis. 506, 86 N. W. 243, Fidelity Ins. Trust & Safe Deposit Co. v. Roanoke Iron Co. (C. C.) 91 Fed. 19, 21, Burroughs v. Toxaway Co., 185 Fed. 435, 441, 107 C. C. A. 505, 511, People v. New York Building Loan Banking Co. (Sup.) 117 N. Y. Supp. 450, 454, Barker v. Southern Building & Loan Ass'n (C. C.) 181 Fed. 636, 638, and Farmers' Loan & Trust Co. v. Green, 79 Fed. 222, 226, 24 C. C. A. 506, and the opinions in these cases have been examined and considered. In reliance upon them counsel contend that no allowance may lawfully be made and paid out of the trust estate in the hands of the court below for the services of receiver's counsel defending him against the claims of Strang and the Railway Company.

They invoke the general rule that each litigant must pay his own counsel fees and that he cannot be permitted to impose the burden of them upon his opponent, whether that opponent be a private individual or an estate held in trust for one or many beneficiaries. There is, however, another rule of at least equal dignity, the rule that a receiver or trustee appointed by a court to hold in trust and administer the property of parties within its jurisdiction is empowered to employ counsel, not only to bring suits and litigate claims for and against the estate, but also to defend himself against claims and suits growing out of acts done or omitted by him in good faith as receiver, and that in the settlement of his accounts he is entitled to the allowance and payment out of the funds or property of the trust estate of the reasonable fees of such counsel for their services. The former rule is not controlling, and the latter governs the disposition of the questions which this case presents.

It is a well-established principle of equity that where one voluntarily goes into a court of equity, takes the risk of litigation upon himself, and recovers a fund in which others are entitled to share, he is entitled to payment of the fees of his counsel out of the fund before its distribution. Counsel cite this principle, and argue that, since the defeat of the claims against the receiver neither recovered nor protected any fund in which the beneficiaries of the trust estate in the receiver's hands were interested, he is entitled to no allowance on account of the services of his counsel in defeating the charges against him. But the principle invoked is inapplicable. The cases in which allowances may be lawfully made out of the trust fund for the services of counsel for a receiver are not limited to those in which those services have effected

a recovery of a fund or the protection or preservation of the trust estate. They include cases in which legal services are rendered to defend receivers against actions for torts as well as upon contracts, against actions in which they are defeated, as they often are in suits on account of personal injuries caused by their negligence in the operation of railroads, and as they sometimes are in actions for breach of contracts, as well as against actions in which they are successful. They include, and they ought to include, all cases arising out of acts done or omitted by receivers honestly and in good faith in the exercise of the authority derived from their appointment and in an honest endeavor to discharge their duties as officers of the courts.

And here is the answer to the contention that the claims defeated by the services of counsel for the receiver were not claims against the trust estate, but claims against the receiver as an individual. It may be that, if these claims had been well founded, Mr. Edson would have been personally liable for the damages which Strang and the Railway Company alleged were sustained by the trust estate on account of the acts and omissions charged against the receiver. But a receiver, an officer of the court, is human and liable to err, and if he makes an honest mistake, or in good faith commits an error, that fact ought not to, and does not, deprive him of the right to the services of counsel at the expense of the trust estate to protect him personally, as well as as an officer, against excessive liability. He is entitled to the services of counsel at the expense of the estate to defend him personally against the unduly injurious effect of all his honest acts or omissions in the exercise of the powers of his office. Opinion of Mr. Justice Bradley in Cowdrey v. Railroad Co., 6 Fed. Cas. 660, 663, 664; opinion of Mr. Justice Paxson in Biddle's Appeal, 83 Pa. 340, 346, 24 Am. Rep. 183; Thome v. Allen (Ky.) 70 S. W. 410, 412; Lycan v. Miller, 56 Mo. App. 79, 85.

[2] Finally, counsel argue that the receiver's omission to exercise the option held by the Land Company to purchase the two 40-acre tracts, which he permitted his wife to buy at the option prices, was a breach of trust and of duty, and that it is fatal to his claim for an allowance for the services of his counsel in defeating the charges against him. They insist that his omission to purchase for the trust estate and his allowance of the purchase by his wife was a corrupt and fraudulent transaction, intended by him to take from the trust estate and to transfer to his wife a pecuniary benefit. If this statement of the transaction were clearly established by the proof, no allowance for counsel fees to defend the receiver against the claim of the Railway Company on account of that transaction ought to be or would be allowed to him or paid out of the trust estate. But although, on account of the moral obligation not to place himself in a position which may excite a conflict between self-interest and integrity, it is a breach of trust and of duty for a receiver or trustee to buy for himself, or for his wife or friend, property of a trust estate in his control, it does not follow from such a transaction that the receiver or trustee was guilty of any fraudulent or dishonest intent therein, for such a transaction works a breach of trust and of duty when done with an honest, as well as when com-

mitted with a fraudulent and corrupt, intent. A fraudulent intent or a dishonest purpose is not to be presumed. The legal presumption is that men, officers of courts, as well as private citizens, intend to heed the moral and the civil law and faithfully to discharge their duties. At the time of the transaction under consideration it was uncertain whether or not the operation of the railroad could be made remunerative or successful, and the value of the land under the options was in large measure dependent upon the future answer to that question. Its operation under the motor car system had been unsuccessful, it would be many months before the trolley system could be substituted, and what its operation would thereafter produce was unknown. A careful consideration of the record and of the situation of the parties at the time of the transaction has failed to convince that the receiver was guilty of any bad faith or fraudulent intent therein, and it is certain that he was guilty of no such intent or purpose in the transactions on which the claims of the Railway Company were based, on account of which at least a part of the allowance for fees and expenses was made.

The conclusion is that there was no error or mistake in the decree which allowed them. Let that decree be affirmed.

GLASER, KOHN & CO. v. UNITED STATES.

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

No. 2151.

1. FOOD ⇐2—REGULATIONS—CONSTRUCTION.

Food and Drugs Act June 30, 1906, c. 3915, 34 Stat. 768 (Comp. St. 1913, §§ 8717–8728), should be construed in the light of its purpose, to secure the purity of food and drugs, and to inform the purchasers of what they are buying, and as between the dealer, to whom the purity of food is guaranteed, and the manufacturers, the act throws the ultimate responsibility on the manufacturers, and the act should be interpreted, if reasonably possible, so as to carry out this purpose.

[Ed. Note.—For other cases, see Food, Cent. Dig. § 2; Dec. Dig. ⇐2.]

2. FOOD ⇐18—REGULATIONS—CONSTRUCTION—"CONTINUING GUARANTY."

Food and Drugs Act, § 9 (Comp. St. 1913, § 8725), providing that no dealer shall be prosecuted under the act when he can establish a guaranty signed by the wholesaler, jobber, manufacturer, or other party from whom he purchases articles to the effect that the same is not adulterated or misbranded and that the guaranty, to afford protection, shall contain the name and address of the party making the sale of the article to the dealer, includes continuing guaranties, as well as those given at the time of a sale and in reference to specific goods; and a guaranty of a manufacturer that all goods furnished a wholesale dealer "hereafter will comply with the Food and Drugs Act" until notice of revocation is a "continuing guaranty," sufficient under the section, and the guaranty attaches to every item of sale made by the manufacturer to the wholesaler until the guaranty is revoked, and it furnishes a basis for an information against the manufacturer for selling an adulterated article of food, since where, by the terms of a written guaranty, it appears that the parties look to a

future course of dealing for an indefinite time, or a succession of credits to be given, it should be deemed a continuing guaranty.

[Ed. Note.—For other cases, see Food, Cent. Dig. § 20; Dec. Dig. ⟸18.

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

3. GUARANTY ⟸27—LETTERS OF GUARANTY—CONSTRUCTION.

A letter of guaranty should receive a liberal, fair, and reasonable interpretation, and attain the object designed and the purpose to which it is applied.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. § 28; Dec. Dig. ⟸27.]

4. CRIMINAL LAW ⟸1159—EVIDENCE—SUFFICIENCY.

Though expert opinion should be received with caution, it is within the province of the jury to determine its weight; and a conviction, sustained by opinion evidence not inherently impossible nor improbable, together with other evidence, will not be disturbed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074–3083; Dec. Dig. ⟸1159.]

5. FOOD ⟸14—INTERSTATE COMMERCE—STATUTORY REGULATIONS—VIOLATION—ACTS CONSTITUTING.

A manufacturer, who delivers adulterated food to a wholesaler with knowledge that the latter is engaged in interstate commerce, is within the Food and Drugs Act, punishing the sale and delivery in interstate commerce of adulterated food.

[Ed. Note.—For other cases, see Food, Cent. Dig. §§ 10–13; Dec. Dig. ⟸14.

What constitutes a violation of pure food regulations, see note to Brina v. United States, 105 C. C. A. 559.]

In Error to the District Court of the United States for the Eastern Division of the Northern District of Illinois; Kenesaw M. Landis, Judge.

Glaser, Kohn & Co., a corporation, was convicted of selling adulterated food, and it brings error. Affirmed.

On or about January 15, 1907, plaintiff in error executed and delivered to Steele-Wedeles Company, of Chicago, Ill., a guaranty in writing signed by it, which guaranty reads:

"Steele-Wedeles Co., City—Gentlemen: Replying to your favor 10th inst., would say we hereby guarantee that all goods as furnished you hereafter will comply with the Food and Drugs Act of June 30, 1906, with the understanding, however, that if we at any time use labels or packages furnished by you, or gotten up as per your instructions, we shall not be responsible for the form or wording of the same, but only guarantee that goods covered by same are not adulterated. It is expressly understood that the above shall hold good until notice of revocation be given in writing.

"Truly yours,

Glaser, Kohn & Co.,
"G. D. Glaser, Pres."

Afterwards, and on or about September 15, 1910, and while said guaranty, by its terms, was in full force, plaintiff in error sold and delivered to said Steele-Wedeles Company two dozen jars of preserves, described as "Herald Brand Fruit Preserves Blackberry Flavor, Apple Preserves 74%, Blackberry Preserves 26%," which jars of preserves Steele-Wedeles Company shipped in interstate commerce from Chicago to Rock Springs, in the state of Wyoming, on or about October 14, 1910. On or about October 20, 1910, an inspector of the United States Bureau of Chemistry purchased a sample of these preserves and sent the same, properly sealed, to the Bureau of Chemistry of the Depart-

ment of Agriculture, where it was duly examined by experts on or about December 8, 1910, who pronounced the sample analyzed to contain mold, and to be partly decomposed, and made from partly decomposed fruit. Thereafter the United States filed its information, containing six counts, against plaintiff in error, of which only the fourth count is here involved, which charges plaintiff in error with unlawfully knowingly selling and delivering to Steele-Wedeles Company the said jars of preserves, contrary to the provisions of the so-called Pure Food Law of the United States, approved June 30, 1906, entitled "An act for preventing the manufacture, sale or transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines and liquors, and for regulating traffic therein, and for other purposes," in that said jars of preserves, when and where they were so sold and delivered, were an adulterated article of food within the meaning of the act, and consisted in part of decomposed vegetable substance, and further charging that Steele-Wedeles Company shipped said jars contrary to law, by way of a common carrier in interstate commerce to Rock Springs, Wyo., as aforesaid, basing said information upon said guaranty as having been given and received under the terms of section 9 of said act of June 30, 1906.

On the trial the formal facts were stipulated into the record, and evidence of the condition of the preserves when delivered to Steele-Wedeles Company was introduced. This evidence consisted of the opinions of experts, based on the conditions found at the time of the Washington analysis, that the fruit was partly decomposed, not only at that time, but also at the time of the sale and delivery by defendants to Steele-Wedeles Company. Plaintiff in error offered no evidence, but saved exceptions to the introduction of the said letter of guaranty and to the sufficiency of the expert testimony. At the close of the evidence plaintiff in error moved the court to direct the jury to find plaintiff in error not guilty, which motion the court denied, and an exception was taken. Exception was also taken to that part of the court's instruction which charged the jury that the said guaranty was a legal guaranty. The jury found plaintiff in error guilty, and the court assessed a fine of $200 and costs, to reverse which sentence this writ of error was sued out.

The errors relied on are: (1) The court held that the alleged guaranty was legal and sufficient to hold plaintiff in error under said section 9. (2) The evidence was insufficient to show that the preserves were adulterated at the time they were delivered to Steele-Wedeles Company.

Thomas E. Lannen, of Chicago, Ill., for plaintiff in error.
Frederick Dickinson, of Chicago, Ill., for defendant in error.

Before BAKER, KOHLSAAT, and MACK, Circuit Judges.

KOHLSAAT, Circuit Judge (after stating the facts as above). [1-3] Section 9 of the act approved June 30, 1906, reads as follows, viz.:

"Sec. 9. That no dealer shall be prosecuted under the provisions of this act when he can establish a guaranty signed by the wholesaler, jobber, manufacturer, or other party residing in the United States, from whom he purchases such articles, to the effect that the same is not adulterated or misbranded within the meaning of this act, designating it. Said guaranty, to afford protection, shall contain the name and address of the party or parties making the sale of such articles to such dealer, and in such case said party or parties shall be amenable to the prosecutions, fines and other penalties which would attach, in due course, to the dealer under the provisions of this act."

It will be seen that this section does not, in terms, seem to comprehend a general continuing guaranty, but seems to apply to the specified article contemplated at the time. Such, indeed, is plaintiff in error's contention. That construction, however, is narrow, and not in accord with the spirit of the act, which should be construed in the light of its

purpose, as said by the Supreme Court in McDermott v. Wisconsin, 228 U. S. 115–128, 33 Sup. Ct. 431, 433 (57 L. Ed. 754, 47 L. R. A. [N. S.] 984, Ann. Cas. 1915A, 39), "and of the power exerted in its passage." This purpose the court, in United States v. Antikamnia Co., 231 U. S. 654–665, 34 Sup. Ct. 222, 225 (58 L. Ed. 419, Ann. Cas. 1915A, 49), declares "is to secure the purity of food and drugs and to inform purchasers of what they are buying. Its provisions are directed to that purpose and must be construed to effect it." As between a dealer, to whom the purity of the goods is guaranteed, and the manufacturer, who has the better opportunity of ascertaining the facts, the act aims to throw the ultimate responsibility on the latter, and it should therefore be interpreted, if reasonably possible, so as to carry out this purpose to the fullest extent. In our judgment it is therefore not only a fair, but the most reasonable, construction of the act to include within the scope of section 9 continuing guaranties, as well as those given at the time of the sale and in reference to specific goods. The belated position of plaintiff in error as to the meaning of the statute with regard to a continuing guaranty comes to us undermined with its earlier construction, contained in the letter wherein it says, "We hereby guarantee that all goods as furnished you hereafter will comply," etc., and "it is expressly understood that the above shall hold good until notice of revocation be given in writing." There is no reason in law for the claim that a continuing guaranty is invalid.

When by the terms of a written guaranty it appears that the parties look to a future course of dealing for an indefinite time, or a succession of credits to be given, it is to be deemed a continuing guaranty. Am. & Eng. Ency. of Law (2d Ed.) vol. 14, p. 1139. Letters of guaranty should receive a liberal, fair, and reasonable interpretation, so as to attain the object for which the instrument is designed and the purpose to which it is applied. Lawrence v. McCalmont, 2 How. 426–449, 11 L. Ed. 326. We are clearly of the opinion that the letter of January 15, 1907, constituted a good, valid, and sufficient guaranty under the provision of said section 9, and that said guaranty attached to every item of sale made by plaintiff in error to Steele-Wedeles Company, after the sale thereof until revoked in accordance with the terms thereof, and that it furnished a basis for the filing of the information against plaintiff in error herein.

[4] With regard to the sufficiency of the proof to sustain the verdict of the jury to the effect that the preserves in question were adulterated at the time they were delivered to Steele-Wedeles Company, and not prepared in accordance with said act of June 30, 1906, we find no such situation as would warrant us in substituting our opinion for that of the jury. While expert opinion evidence should be received with caution, it is solely within the province of the jury to determine its weight. They saw and heard the witnesses. In cases such as this much of the evidence must necessarily be opinion evidence. In the present case there is nothing in the evidence inherently impossible, or even improbable. The error is not well assigned.

[5] With regard to the objection that the transaction does not, so far as plaintiff in error is concerned, come within interstate commerce,

plaintiff in error does not in its brief include it among the errors relied on. We are, however, satisfied that the point is not well taken. Steele-Wedeles Company was a wholesale grocer engaged in interstate commerce, as plaintiff in error well knew. By selling and delivering the preserves to that corporation upon the terms of the guaranty, it deliberately placed them in interstate commerce channels.

The judgment of the District Court is affirmed.

YORK v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. May 19, 1915.)

No. 4300.

(Syllabus by the Court.)

1. WITNESSES ⟸201—PRIVILEGED COMMUNICATION—ATTORNEYS.
   Confidential information, which a client is induced to give to his attorney by that relation, which is relevant to the subject of the latter's professional engagement, and necessary and proper to enable him to perform his office of attorney in relation to that subject, is a privileged communication, which he may not be required to disclose.
   [Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 754, 755; Dec. Dig. ⟸201.]

2. WITNESSES ⟸199—"PRIVILEGED COMMUNICATION"—ATTORNEYS.
   Indispensable elements of a "privileged communication" between attorney and client are (1) the professional relation of attorney and client at the very time the communication is made, (2) the making of the communication on account of that relation, and (3) the necessity or relevancy of the communication to the subject of the attorney's professional engagement in order to enable him to use his ability, skill, and learning in the discharge of his office as attorney in relation thereto.
   [Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 749–751, 766, 767; Dec. Dig. ⟸199.
   For other definitions, see Words and Phrases, First and Second Series, Privileged Communication.]

3. WITNESSES ⟸206—PRIVILEGED COMMUNICATION—ATTORNEY AND CLIENT—PRESENCE OF THIRD PERSON.
   The presence of a third party at the time of a communication between client and attorney, particularly if he is an opposing party, indicates that the communication is not privileged or confidential.
   [Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 761, 764, 765; Dec. Dig. ⟸206.]

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

G. H. York was convicted of inducing a woman to go from one state to another in interstate commerce, for immoral purposes, and brings error. Reversed and remanded, with directions to grant a new trial.

G. M. Tripp, of Colfax, Iowa (Tripp & Tripp, of Colfax, Iowa, and Parsons & Mills, of Des Moines, Iowa, on the brief), for plaintiff in error.

Claude R. Porter, U. S. Atty., of Centerville, Iowa.

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

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

SANBORN, Circuit Judge. The plaintiff in error, the defendant below, was indicted, tried, convicted, and sentenced to imprisonment for a year and a day on the charge that he induced and caused Mrs. Jackson to go from Kansas City, Mo., in interstate commerce as a passenger on a train of the Chicago Great Western Railroad Company, a common carrier, to Des Moines, Iowa, for the purpose of prostitution, debauchery, and other immoral purposes. There was evidence at the trial that in April, 1913, Mrs. Jackson was living in Kansas City, Mo., that on April 11, 1913, and again on December 1, 1913, the defendant and Mrs. Jackson were registered, and occupied rooms together, at the Savery Hotel in Des Moines; that the dead body of one Wheelock was found in or near Des Moines about December 2, 1913, and some suspicion arose that the defendant had killed him on the night of December 1, 1913. There was also evidence that Mrs. Jackson, in order to protect him from a possible charge of manslaughter or murder, had told the coroner and the district attorney at Des Moines that he spent the night with her at the Savery Hotel. There was evidence that on April 17, 1913, she went from Kansas City to Des Moines. She testified that the defendant asked her to go to Des Moines, and sent her $15 between July, 1912, and April, 1913, and that afterwards in August, 1913, she moved to Des Moines and went into the millinery business there. The defendant testified, on the other hand, that he never asked her to come to Des Moines and never sent her a dollar. The uncontradicted testimony of Mrs. Jackson and Mr. Mulvaney was that, some time after Mrs. Jackson had told the coroner and district attorney that the defendant spent the night of December 1, 1913, with her, she went to Mr. Mulvaney, who was, and for some time had been, the attorney of the defendant, and who she knew was his attorney, told him that her business was gone, and asked him whether or not she should return to Kansas City; that some time afterwards she went to Kansas City, was thereafter arrested on a certain Friday, and released on the following Monday. After Mrs. Jackson had testified that the plaintiff in error had paid her $15 between July, 1912, and April, 1913, and asked her to go to Des Moines in April, 1913, she testified that on the Monday after her arrest Mr. Mulvaney came to the jail where she was confined and got her released, that she knew Mrs. Monday, the police matron there, and that Mrs. Monday was present part of the time when she had a talk with Mr. Mulvaney. Her cross-examination then proceeded in this way:

"Q. Didn't you say there to Mr. Mulvaney, in the presence and hearing of Mr. Gresham and Mrs. Monday, the police matron, that Mr. York had never given you any money to come to Des Moines; that Mr. York had never furnished you transportation from Kansas City to Des Moines? A. No, sir; I don't remember anything of that kind. Q. Or that in substance? A. No, sir. Q. Didn't you further state, in the presence of Mr. Mulvaney, Mr. Gresham, and Mrs. Monday, that Mr. York didn't have anything at all to do with your coming from Kansas City, Mo., to Des Moines, Iowa; that you came of your own free will and at your own expense? A. If I said anything of that kind, it was in August; for I did come here at that time of my own free

will and expense, when I moved here. Q. Did you not say to them that Mr. York never had contributed any money, and that when you came you always came of your own free will and at your own expense? A. No, sir. Q. And that you came up here to go into the millinery business?"

After the testimony for the government had been closed, Mr. Mulvaney testified on behalf of the defendant that he lived in Des Moines, that he was the defendant's attorney, that Mrs. Jackson knew he was the defendant's attorney, and for that reason came to him to ask about her going to Kansas City, that he went to Kansas City after her arrest there, as the defendant's attorney, to secure her release, that he did not go there to consult Mrs. Jackson, or as her attorney to procure her release, that he did not have any conversation with her about getting her release, that after he had obtained permission for her release from the United States marshal and the chief of police he talked with Mrs. Jackson in the presence of the officers, and thereupon the court below sustained the objection that the conversation referred to in the following questions constituted a privileged communication and was therefore not competent evidence:

"Q. * * * Is it or is it not a fact that in that conversation in the jail there in Kansas City, Mo., in the presence of Mrs. Monday, the police matron, and Officer Gresham of the police force of Kansas City, Mrs. Jackson said to you in substance that Mr. York never sent her any money to come to Des Moines at any time, and that she came to Des Moines on her own business? * * * I will ask you whether it was after she had been released that you talked with her as York's attorney and had the conversation I have just asked about."

[1-3] "The general rule" said Mr. Justice Story in Chirac v. Reinicker, 11 Wheat. 278, 294, 6 L. Ed. 474, "is not disputed that confidential communications between client and attorney are not to be revealed at any time. The privilege, indeed, is not that of the attorney, but of the client; and it is indispensable for the purposes of private justice. Whatever facts, therefore, are communicated by a client to counsel, solely on account of that relation, such counsel are not at liberty, even if they wish, to disclose; and the law holds their testimony incompetent. The real dispute in this case is whether the question did involve the disclosure of professional confidence." And that is the question in the case at bar. Indispensable elements of a privileged communication between attorney and client are: (1) The professional relation of attorney and client at the very time the communication is made (Harless v. Harless, 144 Ind. 196, 41 N. E. 592, 594; Brady v. State, 39 Neb. 529, 532, 533, 58 N. W. 161; Farley v. Peebles, 50 Neb. 723, 728, 70 N. W. 231; Turner's Estate, 167 Pa. 609, 610, 31 Atl. 867); (2) the making of the communication on account of that relation (Chirac v. Reinicker, 11 Wheat. 278, 294, 6 L. Ed. 474); and (3) the necessity or relevancy of the communication to the subject-matter of the attorney's engagement, in order to enable him to use his ability, skill, and learning in the discharge of his office of attorney in relation thereto. 1 Greenleaf on Evidence (16th Ed.) § 244; Jones on Evidence (2d Ed.) § 751; Denunzio's Receiver v. Scholtz, 117 Ky. 182, 77 S. W. 715, 716, 4 Ann. Cas. 529.

The evidence rejected was proper impeaching testimony, unless it constituted a privileged communication. It was therefore competent,

unless the evidence in the case when the communication was rejected established the fact that it possessed the three essential elements of the confidential communication. Did it establish that fact? Mrs. Jackson testified that she came to Des Moines in August, 1913, and went into the millinery business; that some time after December 1, 1913, she had given up that business; that she knew Mr. Mulvaney was the attorney of the defendant; that she went to him at Des Moines, "and employed him as my lawyer. I knew Mr. Mulvaney was York's attorney, went to see him, told him my business in Des Moines was gone, and asked him about going to Kansas City." She did not testify that she employed him in regard to any other matter than the question whether or not, in view of the loss of her business, she should return to Kansas City. Mulvaney testified that afterwards, when at Kansas City he procured her release from arrest, and when thereafter the communication in question was made by her, he had gone there and procured her release as the attorney for the defendant; that he did not go there to consult Mrs. Jackson, did not procure her release as her attorney, and did not have any conversation with her in connection with her release. One or two persons besides Mrs. Jackson and Mr. Mulvaney were present when the communication rejected was made, and the presence of a third party, particularly if he is an opposing party, indicates that the communication is not confidential or privileged. 1 Greenleaf on Evidence (16th Ed.) § 246; Goddard v. Gardner, 28 Conn. 172, 174, 175; People v. Buchanan, 145 N. Y. 1, 26, 39 N. E. 846; Hummel v. Kistner, 182 Pa. 216, 37 Atl. 815, 816; Wyland v. Griffith, 96 Iowa, 24, 27, 64 N. W. 673; David Adler & Sons Clothing Co. v. Hellman, 55 Neb. 266, 75 N. W. 877, 883. There is no escape from the conclusion, when the evidence in this case is carefully considered and analyzed, that there was no substantial testimony at the trial that the relation of attorney and client existed between Mrs. Jackson and Mr. Mulvaney at the time of the communication, that the communication was made by Mrs. Jackson on account of that relation, or that it was either necessary or relevant to the subject-matter of any such relation between them, or to its consideration or treatment. The communication rejected, therefore, was not privileged, and it was a fatal error to deny the defendant an opportunity to prove it.

This conclusion renders it unnecessary to consider other questions discussed by counsel in their briefs. Let the judgment below be reversed, and let the case be remanded to the court below, with directions to grant a new trial.

In re FINKS.

(Circuit Court of Appeals, Sixth Circuit. June 30, 1915.)

No. 2635.

1. BANKRUPTCY ⟸268—SALES—INJURY TO PROPERTY—LIABILITY OF PURCHASER.

Bankr. Act July 1, 1898, c. 541, § 70b, 30 Stat. 565 (Comp. St. 1913, § 9654), provides that property of a bankrupt estate shall not be sold otherwise than subject to the approval of the court for less than 75 per cent. of its appraised value. A bankrupt's property was sold for $1,800. less than 75 per cent. of the appraised valuation, and thereafter and before the confirmation of the sale was so damaged by a flood as to be worth only $150. *Held*, that this loss was not sustainable by the purchaser, since a loss occurring between a judicial sale and its confirmation cannot be visited upon the purchaser, especially as the confirmation of a judicial sale involves the exercise of judicial discretion, and it would be an improper exercise of such discretion to confirm the sale after the property has been substantially destroyed by an act of God and without the purchaser's fault.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 372–379; Dec. Dig. ⟸268.]

2. JUDGMENT ⟸273—ENTRY NUNC PRO TUNC.

The principle on which judgments nunc pro tunc are sustained is that such action is necessary in furtherance of justice, and to save a party from unjust prejudice through delay caused by the act of the court or the course of judicial procedure, and the delay in entering the judgment must either be solely the fault of the court, or at least not attributable to the laches of the party in whose favor the practice is resorted to.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 525–541; Dec. Dig. ⟸273.]

3. BANKRUPTCY ⟸264—SALE—CONFIRMATION—ENTRY NUNC PRO TUNC.

On the day the sale of a bankrupt's property for less than 75 per cent. of its appraised value was had, the trustee reported to the referee, who told him that the sale would be confirmed, and directed the trustee's attorney to prepare the appropriate entry. A memorandum of the entry was left at the referee's office by the attorney, but was not signed by the referee, because of his absence from his office until after the property was damaged by a flood. The purchaser had no notice or knowledge of the referee's statement that the sale would be confirmed. *Held*, that the order of confirmation could not be treated as made of the date of the sale and subsequently entered nunc pro tunc in order to make the purchaser bear the loss, as the failure to enter the order on that date was not due to the court's fault or to its inadvertence, but was more properly due to the delay of the attorney in failing to draft it and have it entered.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 368, 369; Dec. Dig. ⟸264.]

Petition to Revise an Order of the District Court of the United States for the Southern District of Ohio; Howard C. Hollister, Judge.

In the matter of Fried Bros., bankrupts. On petition by Ralph B. Finks, trustee, to revise an order reversing an order of the referee. Affirmed.

John Dineen, of Dayton, Ohio, for petitioner.

Henry Bentley, of Cincinnati, Ohio, for respondent.

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

PER CURIAM. This is a proceeding to revise, in matter of law, the action of the District Court reversing the referee's action holding a purchaser of goods at the trustee's sale guilty of contempt in not paying the balance of the purchase price.

The purchaser bid $1,800 for the stock (women's apparel), and this was the highest bid. It was, however, less than 75 per cent. of the appraised valuation, and thus the sale was ineffective until actually confirmed by the referee. Bankruptcy Act, § 70b. The sale was had March 22, 1913, and was reported to the referee that day. No formal order of confirmation was entered until April 5th. Meanwhile the Dayton flood occurred, so damaging the property that it brought, under sale by agreement (without prejudice), but $150. The question is, on whom must the loss fall—on the trustee, representing creditors, or on the purchaser?

[1] The rule is settled by the better weight of authority that a loss occurring between the sale and its confirmation cannot be visited upon the purchaser at the judicial sale. Ex parte Minor, 11 Vesey, Jr., 559, 562; Taylor v. Cooper, 37 Va. 317, 319, 34 Am. Dec. 737. It is also settled that the confirmation of a judicial sale involves the exercise of judicial discretion. Tennessee v. Quintard (C. C. A. 6) 80 Fed. 829, 835, 26 C. C. A. 165, and cases there cited. And clearly it would be an improper exercise of judicial discretion to confirm the sale in question after the property had been substantially destroyed by the "act of God" and without the fault of the purchaser. The order of confirmation was therefore improper, and the purchaser wrongfully held in contempt for failing to pay the balance of the purchase price, unless there was an effective confirmation previous to the flood. The trustee stands, and must stand, upon such alleged prior confirmation.

[2] His claim is that the confirmation was legally and finally made March 22d, and that the entry of April 5th was merely nunc pro tunc, and so related back to the date of actual confirmation. If the premises are correct, the conclusion follows. The underlying principle on which judgments nunc pro tunc are sustained is that such action is necessary in furtherance of justice and in order to save a party from unjust prejudice through a delay caused by the act of the court or the course of judicial procedure. In other words, the practice is intended merely to make sure that one shall not suffer for an event which he could not avoid. 1 Black on Judgments, §§ 126–137. The delay in entering must either be solely the fault of the court, or, at least, not attributable to the laches of the party in whose favor the practice is resorted to.

[3] As applied to the circumstances here existing, the entry of the nunc pro tunc judgment necessarily presupposes an actually pre-existing judgment which has failed of entry. The record before us, which is thought to evidence an actual confirmation by the court on March 22d, is this: The report of the referee to the District Court states that, "at the time this sale was reported to the referee, he confirmed it and directed the trustee to furnish an entry. The sale had been conducted apparently in conformity to law, and the trustee was able

to satisfy the referee that he had obtained the best price possible for it." This statement does not appear under the heading "Findings of Fact," but as one of the paragraphs under the title "Conclusions of Law." [1] The following pencil memorandum made by the referee appears upon the form of entry which was placed on file April 5th:

"This entry was filed in the office of the referee on Monday, March 24, 1913, but not signed by the referee because of him being out of the city on that day, and out of his office till April 5th account flood, when it was signed. However, the sale was reported to the referee on Saturday, the 22d of March, and approved, and Mr. Sigler was instructed to prepare appropriate entry at that time."

Mr. Sigler was, presumably, the trustee's attorney, and it seems to be conceded that the referee was not in his office on March 24th, when the memorandum of the entry was left there by the trustee's attorney. The general rule is that an order takes effect from the time of its entry, and an appeal does not ordinarily lie from an order until it is entered; it is otherwise where the order is announced in open court and is understood by the parties, and the failure to enter results from clerical oversight. In this case, the more natural inference from this record is that, while the referee announced his approval of the sale and in that sense confirmed it, it was not understood that the order was regarded as then and there entered; on the contrary, such entry was purposely delayed until the trustee's attorney should draft a form of entry. The latter seems to have taken upon himself that duty, and later performed it. The failure to enter on March 22d was thus not, as between the court and the trustee, the fault of the former, and certainly not due to the court's inadvertence. It was more properly due, as between the court and the trustee, to the delay of the latter's attorney in failing then and there to draft an order and have it entered. The purchaser was not notified of the confirmation, either actually or constructively, as would naturally be the course taken if the action was regarded as a definite and formal confirmation of the purchase and sale. To treat the order in question as one actually made on March 22d, and entered on April 5th, nunc pro tunc as of the earlier date, is not in furtherance of justice, but would result in injustice; for it is not claimed that the purchaser at the trustee's sale had any notice or knowledge of the referee's action of March 22d, and he was thus in no position to complete the purchase and thereupon take the goods into his possession and protect them. They remained in the possession of the trustee, not merely constructively, but actually.

The District Court reached the proper conclusion, and its order should be affirmed.

[1] That the statement so made by the referee that he confirmed the sale at the time it was reported to him was a conclusion of law, and not a finding of fact, is further and plainly to be deduced from his certificate, which as respects the sale merely states: "On March 22, 1913, the trustee reported the sale of same (stock of merchandise), to the E. & J. Margolis Company, and the trustee was advised that the referee considered it proper to confirm such sale, and counsel for the trustee was instructed to prepare an appropriate entry, which was done, and the entry was left in the office of the referee on March 24, 1913, but not signed or docketed by him until April 5, 1913."

MOORE v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. May 12, 1915.)

No. 4221.

(Syllabus by the Court.)

1. INDIANS ⊂⊃38—UNLAWFUL INTRODUCING—SUFFICIENCY OF EVIDENCE.
Evidence that intoxicating liquor was found in a defendant's residence in the Eastern district of Oklahoma, without any evidence when that liquor had been brought into that district from without the state, or how long it had been in the district, met by the testimony of the defendant that he had bought it of a third person and paid him for it at the defendant's place of business in that district, that the defendant had not introduced it into that district, or into Oklahoma, or employed or requested the vendor, or any one, to introduce it, and that he had not made any prearrangement with the vendor, or any one, to take or buy it, and by the uncontradicted testimony of two other witnesses of the defendant's purchase of the liquor of the third person and his payment for it, presents no substantial evidence of the charge that the defendant introduced the liquor into the Eastern district of Oklahoma, or into the state of Oklahoma, from without the state.

[Ed. Note.—For other cases, see Indians, Cent. Dig. §§ 22, 66; Dec. Dig. ⊂⊃38.

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—PRESENTATION BELOW—SUFFICIENCY OF EVIDENCE.
In criminal cases, in which the life or the personal liberty of the defendant is at stake, the courts of the United States, in the exercise of a sound discretion, may notice such a grave error as the absence of substantial evidence to sustain the conviction, although the question it presents was not properly raised in the trial court by motion, request, objection, exception, or assignment of error.

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

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

"Fannie" M. Moore was convicted of unlawfully introducing intoxicating liquors into the Eastern district of Oklahoma, and brings error. Reversed and remanded for new trial.

S. M. Rutherford, of Muskogee, Okl., for plaintiff in error.

D. H. Linebaugh, U. S. Atty., and W. P. McGinnis, Asst. U. S. Atty., both of Muskogee, Okl.

Before SANBORN, ADAMS, and SMITH, Circuit Judges.

SANBORN, Circuit Judge. [1] The defendant below has sued out this writ of error to review a judgment that he be imprisoned for two years and pay a fine of $250, because on October 3, 1913, in the county of Creek, Okl., in the Eastern district of Oklahoma, he did, as his indictment reads, "introduce and carry into the county and district aforesaid, from without the said state of Oklahoma, one quart of vinous, malt, fermented, and intoxicating liquor, to wit, beer and whisky."

The evidence on which this judgment rests was, on the part of the government, that the defendant resided for about 18 months before October 3, 1913, and on that day resided, at Keifer, in Creek county, Okl.; that he was a gambler, and had a room back of a restaurant operated by W. E. Hoyle, in the town of Keifer, where he carried on his business and sold liquor; that on October 3, 1913, the officers searched his residence, found there and destroyed 3 kegs of whisky and 200 to 300 bottles of beer, which appeared to have been manufactured without the state of Oklahoma. The government introduced no evidence, and there was none in the case, that the defendant introduced into Oklahoma, or employed any one to introduce into Oklahoma, this or any other liquor; and it introduced no evidence tending to show when this liquor had been introduced into the Eastern district of Oklahoma, or how long it had been there.

The defendant testified that he did not introduce the liquor into the Eastern district of Oklahoma, or into the state from without the state; that he did not send any one for it, or have any prearrangement or advice with any one that he would take it when it was brought in; that on October 1, 1913, Ernest Lynch came into Hoyle's restaurant, where the defendant was sitting, told him that he had some liquor to sell, and asked him if he wanted some, and the defendant told him that if it was good, and the price was right, he would buy it; that he did buy it; that he caused it to be delivered at his home; that he had bought whisky and beer of Lynch several times before when he wanted it; that he got liquor from others; that Lynch was not a regular hauler for him, but he hauled liquor in and sold it to any one he could get to buy it; that he (Moore) got the money out of the safe in the restaurant where he kept it and paid Lynch, on October 1, 1913, $318 for the liquor which he bought on that day; and that the transaction was had about 9 or 10 in the evening.

The defendant also introduced in evidence the testimony of Hoyle that Lynch came into his restaurant, where Moore was sitting, on the evening of October 1, 1913, said he had some whisky and beer to sell, and asked Moore if he would buy it, that Moore said he would, if it was the right kind of stuff, and told him to take it up and unload it, that they went out, but came back later during that evening, when Moore went to the safe, took out some currency, and paid Lynch $318, that he was pretty well acquainted with Lynch, that he never knew exactly what his business was, except selling whisky, and that was all he ever heard of his doing; the testimony of Charles Williams that on October 1, 1913, he had just had his lunch in the restaurant, that Moore was sitting there reading a paper, when Lynch came in and told Moore he had a load of whisky he would like to sell him, and Moore answered that he would take it, if it was good stuff and the price was right, that they went out, came back later, Moore went to the safe, took out some currency, and counted it, and gave to Lynch $318; and the testimony of Orville Knight that he knew Lynch, that he did not know what he was doing, that about all the business he had with him was to get a little liquor of him, that he bought a gallon of whisky of him in October, when he went fishing over on the Verdix river, and another gallon about Christmas.

This was all the material evidence there was in this case. It comprises no substantial evidence that Moore ever introduced any liquor into the county of Creek, or into the Eastern district of Oklahoma, from without the state of Oklahoma, no evidence how long the liquor he had had been in the state, or when or by whom it was brought into the state, and uncontradicted evidence that Moore bought it of Lynch in the county and district, and paid Lynch, whom he had not employed to bring it in, and with whom he had made no prearrangement to buy or take it, for it, at his place of business, where he bought it. The result is that there was no substantial evidence to sustain the verdict, and the judgment must be reversed. Chambliss v. United States, 218 Fed. 154, 132 C. C. A. 112; Silva v. United States, 218 Fed. 793, 134 C. C. A. 528; Collier v. United States, 221 Fed. 64, 137 C. C. A. 86.

[2] Counsel for the United States have objected to the consideration of the error which has been discussed, and have invoked the general rule that the court may not review the existence of evidence to sustain a verdict, in the absence of a motion or request, after the close of the evidence, for a peremptory instruction. Rimmerman v. United States, 186 Fed. 307, 311, 108 C. C. A. 385, 389. But there is an exception to this general rule. It is that in criminal cases, where the life, or, as in this case, the liberty, of the defendant is at stake, the courts of the United States, in the exercise of a sound discretion, may notice such a grave error as his conviction without evidence to support it, although the question it presents was not properly raised in the trial court by request, objection, exception, or assignment of error. Sykes v. United States, 204 Fed. 909, 914, 123 C. C. A. 205, 210, and the cases there cited.

Let the judgment below be reversed, and the case be remanded to the District Court, with instructions to grant a new trial.

ARMSTRONG v. FISHER et al.

(Circuit Court of Appeals, Eighth Circuit. May 19, 1915.)

No. 137.

(Syllabus by the Court.)

1. BANKRUPTCY ⇐⇒149—PARTNERSHIP—BANKRUPTCY COURT—JURISDICTION.

Where a partnership composed of two members and one of the members are adjudicated bankrupt, and the other member is not so adjudicated, the bankruptcy court may draw to itself and administer the property of the latter to the extent necessary to pay the debts of the partnership.

Section 5h of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 547, [Comp. St. 1913, § 9589]), is inapplicable to such a case. It is limited in its effect to cases in which the partnership is not adjudicated bankrupt and one or more, but not all, the members are so adjudicated.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 229; Dec. Dig. ⇐⇒149.]

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2. BANKRUPTCY ⊜28—PARTNERSHIP—SCHEDULE AND INVENTORY.
Under General Order No. VIII (89 Fed. vi, 32 C. C. A. xi), to the effect that where a partnership and one of its members has been, and the other member has not been, adjudged bankrupt, the latter is required to file a schedule of his debts and an inventory of his property within 10 days after the adjudication.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 27; Dec. Dig. ⊜28.]

3. BANKRUPTCY ⊜28—PARTNERSHIP—SCHEDULE AND INVENTORY—ORDER TO FILE—VALIDITY.
The fact that, without complying with General Order No. XXIII (89 Fed. xi, 32 C. C. A. xxvi), the referee made an order on the unadjudicated member of a partnership, after it and the other member had been adjudicated bankrupt, to file the schedule of his debts and the inventory of his property on or before 19 days after the adjudication, is not fatal to the order of the court confirming such an order, because the unadjudicated member was required by the bankruptcy law and General Order No. VIII to make these filings within 10 days after that adjudication.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 27; Dec. Dig. ⊜28.]

Petition to Revise Order of the District Court of the United States for the District of Kansas; John C. Pollock, Judge.

Petition by T. E. Armstrong against Hugh T. Fisher, as trustee in bankruptcy, etc., and others, to revise and avoid an order of the District Court. Dismissed.

A. L. Quant, of Topeka, Kan. (W. S. McClintock, of Kansas City, Kan., on the brief), for petitioner.

T. M. Lillard, of Topeka, Kan., for trustee.

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

SANBORN, Circuit Judge. George H. Fleischman and T. E. Armstrong were partners as Armstrong & Fleischman. Fleischman filed a petition in bankruptcy, and prayed therein that he, the partnership, and T. E. Armstrong individually, be adjudged bankrupts. T. E. Armstrong demurred to the petition against him individually, his demurrer was sustained, and the petition as to him individually was dismissed. He answered the petition as to the partnership, Fleischman demurred to his answer, that demurrer was sustained, and on April 15, 1913, the partnership and the individual, Fleischman, were adjudged bankrupt. On April 24, 1913, the referee, without notice to Armstrong and without hearing, ordered him to file with the referee within 10 days a list of his creditors and a schedule of his assets. On a petition of Armstrong to revise this order, the District Court affirmed it. Thereupon Armstrong filed a petition to revise and avoid this order of the court below, and his counsel now contend that this order is erroneous: First, because the referee gave no notice of the hearing of the question whether or not he should make this order, failed to have any hearing upon that question, and failed to recite in the order anything about the notice or hearing as required by General Order in Bankruptcy No. XXIII; and, second, because inasmuch as

Armstrong never consented to the administration of the partnership property, or his individual property, in bankruptcy, the referee and the bankruptcy court had no jurisdiction to draw to itself and administer his individual property, and therefore no jurisdiction to require him to file a list of his creditors or a schedule of his assets.

[1] The second objection raises this question: May a court of bankruptcy which has adjudged a partnership, composed of two members, and one of its members, bankrupt, draw to itself and administer the property of the other member, and require him to file a list of his individual creditors and a schedule of his assets? There was a time when this question was debatable. Vaccaro v. Security Bank, 103 Fed. 436, 442, 43 C. C. A. 279, 285; In re Bertenshaw, 157 Fed. 363, 373, 377, 85 C. C. A. 61, 71, 75, 17 L. R. A. (N. S.) 886, 13 Ann. Cas. 986. But it is so no longer. The Supreme Court of the United States has decided that the provision of section 5h of the Bankruptcy Law (Act July 1, 1898, chap. 541, 30 Stat. 547 [U. S. Comp. Stat. 1913, § 9589, p. 4367]), that "in the event of one or more but not all of the members of a partnership being adjudged bankrupt, the partnership property shall not be administered in bankruptcy, unless by consent of the partner or partners not adjudged bankrupt," which counsel for the petitioner invoke, is inapplicable to a case of this character, is limited in its effect to those cases in which one or more but not all of the partners have been, and the partnership has not been, adjudged bankrupt, and that, even if such a case as that in hand were governed by section 5h, the failure of the petitioner to object to the administration of the partnership property in bankruptcy and himself to settle the partnership business, would estop him from successfully claiming that his individual estate could not be drawn into and administered by the bankruptcy court. Francis v. McNeal, 228 U. S. 695, 700, 701, 33 Sup. Ct. 701, 57 L. Ed. 1029.

[2] As the individual property of the petitioner was subject to administration and application by the court of bankruptcy so far as necessary in order to pay in full the partnership debts he was required by General Order in Bankruptcy No. VIII (89 Fed. vi, 32 C. C. A. xi) to file a schedule of his debts and an inventory of his property within 10 days after his adjudication in bankruptcy. In re Solomon & Carvel (D. C.) 163 Fed. 140; In re Junck & Balthazard (D. C.) 169 Fed. 481; Dickas v. Barnes, 140 Fed. 849, 851, 72 C. C. A. 261, 263, 5 L. R. A. (N. S.) 654.

[3] Conceding that in issuing, without notice to the petitioner or a hearing, its order on him on April 24, 1913, to file a list of his creditors and the inventory of his assets within 10 days thereafter the referee failed to comply with the provisions of General Order in Bankruptcy No. XXIII (89 Fed. xi, 32 C. C. A. xxvi), nevertheless, this mistake is not fatal to the decree of the court below affirming that order, because the only effect of the order of the referee was to require the petitioner to make his filings by May 4, 1913, when section 7 of the Bankruptcy Law and General Order No. VIII required him to make them on or before April 25, 1913, and error without prejudice is no ground for reversal.

The petition to revise must be dismissed; and it is so ordered.

ARMSTRONG SEATAG CORPORATION v. SMITH'S ISLAND OYSTER CO.

(Circuit Court of Appeals. Second Circuit. May 12, 1915.)

No. 252.

TRADE-MARKS AND TRADE-NAMES ⊂70—UNFAIR COMPETITION—TAGGING OYSTERS.

The first company to adopt the practice of marking oysters by affixing a metal tag to the shell cannot restrain, on the ground of unfair competition, another company from adopting that practice, where the wording and color of the subsequent company's tag was different from that of the former, though it was of metal and affixed to the same part of the shell, and there was some confusion thereby caused to customers, who erroneously believed all tagged oysters to be those shipped by the former company.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 81; Dec. Dig. ⊂70.

Imitation or simulation of trade-mark or trade-name as unfair competition, see note to John H. Rice & Co. v. Redlich Mfg. Co., 122 C. C. A. 447.]

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

Charles K. Offield, of Chicago, Ill. (McLanahan, Burton & Culbertson, of Washington, D. C., of counsel), for appellant.

Samuel Owen Edmonds, of New York City, for appellee.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

WARD, Circuit Judge. This is an appeal from an order of Judge Hough denying complainant's petition for a preliminary injunction. The bill sets forth that Armstrong Bros. were the first persons to attach a tag to the shell of their oysters as a trade-mark to indicate their origin; that the tag is a flat octagonal piece of metal bearing the following inscription, "Seatag Virginia Oyster Armstrong Bros.," which is fastened into the lower shell near the hinge; that they began to do this in the season of 1913–14, registering their trade-mark in the United States Patent Office May 12, 1914; that subsequently they sold their business of buying, tagging, and selling oysters, together with the trade-mark, to the complainant.

The bill goes on to allege that the defendant in the season of 1914–15 began to tag its oysters at the same place with a flat triangular piece of metal bearing the inscription "Smith's Island Va."; that it sells its oysters at a lower price, and that confusion is made by the similarity of tagging, especially when the tags have been exposed to sea water, so that the defendant's oysters may be and have been sold to consumers, who wanted the complainant's, as and for the complainant's oysters.

The relief prayed is that the defendant may be enjoined from using a tag like the complainant's, or in such a position upon the shells of the oysters as to mislead the unwary into confusing its oysters with the complainant's oysters. The bill proceeds, not upon the technical trade-mark, but upon unfair competition. Indeed, so far as the technical

trade-mark is concerned, the two tags are so unlike each other in shape and wording that they are not likely to be confused.

The oysters sold by both parties are sea oysters, coming from the open sea off the eastern shore of Northampton county, Va. If it had been usual to tag oysters, no one would have thought the defendant guilty of unfair trade because of what it does. The idea, however, was a novel one and an excellent advertisement. It appealed strongly to the consumer, indicating to him that each oyster had been separately handled, so that it is not surprising that as soon as the complainant began to use the tag its sales increased enormously. But because their assignors were the first persons to tag oysters, the complainant cannot claim a monopoly of doing so; nor a monopoly of tagging them on the lower shell at the hinge, which is obviously the best place; nor a monopoly of using metal for the tag. All it has a right to insist upon is that the defendant shall not tag its oysters in such a way that they may be substituted for the complainant's.

We think it quite likely that some confusion has occurred, and will for a time still occur, although the defendant is acting strictly within its rights. This is for reasons that would be as likely to cause substitution of the defendant's for the complainant's oysters if they were sold at or near the same price as vice versa. The chief reason is that many consumers have supposed, and for some time will continue to suppose, that there is on the market only one kind of tagged oyster, and if they see a tag on the shell that they are getting that oyster. This error is assisted by the no doubt innocent circumstance that the complainant incorporated the word "tag" into its trade-mark "Seatag." When, however, the habit of tagging oysters becomes better known or more general, the consumer will learn the various trade-marks, and will look to see that he gets what he wants. If he does this, there will be no danger of confusing complainant's tag with the defendant's.

The defendant's business is older and larger than the complainant's. It has always sold and advertised, and continues to sell and advertise, its oysters as "Smith's Island Oysters." We do not discover any evidence of fraud, or dishonesty, or unfair dealing in its conduct, and therefore the order of the court below is affirmed.

MUTUAL FILM CORPORATION v. CITY OF CHICAGO et al.

H. & H. FILM SERVICE CO. et al. v. SAME.

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

Nos. 2131, 2132.

CONSTITUTIONAL LAW ⟸90—THEATERS AND SHOWS ⟸2—REGULATION—CENSORSHIP OF MOVING PICTURES.

The Chicago ordinance, prohibiting the exhibition of any moving picture in any public place without having first submitted the same to the censorship of the police, does not violate Const. U. S. Amend. 1, or Const. Ill. art. 2, § 4, guaranteeing freedom of speech, of the press, and of publication, or Const. U. S. Amend. 14.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 172; Dec. Dig. ⟸90; Theaters and Shows, Cent. Dig. § 2; Dec. Dig. ⟸2.]

Appeals from the District Court of the United States for the Eastern Division of the Northern District of Illinois; William H. Seaman, Judge.

Separate suits by the Mutual Film Corporation and by the H. & H. Film Service Company and others against the City of Chicago and others. From decrees of the District Court denying preliminary injunctions, complainants appeal. Affirmed.

Walter N. Seligsberg, of New York City, and John H. S. Lee, of Chicago, Ill., for appellants.

George L. Reker, of Chicago, Ill., for appellees.

Before BAKER and KOHLSAAT, Circuit Judges, and LANDIS, District Judge.

KOHLSAAT, Circuit Judge. Appellants filed their respective bills in the District Court, asking the court to declare the ordinance of said city which prohibits the exhibition of any moving picture in any public place in the city of Chicago without having first submitted the same to the censorship of the police thereof, to be in contravention of amendments 1 and 14 to the federal Constitution and also of section 4, article 2, of the Constitution of the state of Illinois, and therefore null and void, and for other relief. The former clauses need not be recited here. The latter, so far as pertinent here, reads as follows:

"Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that liberty."

On application made to the District Court for a preliminary injunction, based upon the bill and affidavits produced, the motion was denied. Whereupon these appeals were taken. Appellants respectively assign as error the said several orders of the District Court refusing to grant the injunction in limine. The records raise no question of jurisdiction.

Since the submission of these causes, and on February 23, 1915, the Supreme Court of the United States, in the cases of Mutual Film Corporation v. Industrial Commission of Ohio et al., 236 U. S. 230, 35 Sup. Ct. 387, 59 L. Ed. —, Id., 236 U. S. 247, 35 Sup. Ct. 393, 59 L. Ed. —, and Mutual Film Corporation of Missouri v. George H. Hodges, Governor of the State of Kansas, et al., 236 U. S. 248, 35 Sup. Ct. 393, 59 L. Ed. —, has decided the questions herein presented, and has held that statutes and ordinances such as is herein assailed, involving the identical questions, are not amenable to the objections herein raised against them and constitute a valid exercise of the police power under constitutional inhibitions practically synonymous with those of Illinois.

The decree of the District Court is therefore affirmed.

HALL v. REYNOLDS et al.†

In re LEWIS PUB. CO.

(Circuit Court of Appeals, Eighth Circuit. May 24, 1915.)

No. 154.

1. BANKRUPTCY ⊂=439—PETITION TO REVISE ORDER OF DISTRICT COURT—REVIEW.

The appellate court, on petition to revise under Bankr. Act July 1, 1898, c. 541, § 24b, 30 Stat. 553 (Comp. St. 1913, § 9608), is limited to questions of law only, and it cannot review findings of fact made by the District Court.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 915; Dec. Dig. ⊂=439.]

2. BANKRUPTCY ⊂=440—PETITION TO REVISE ORDER OF DISTRICT COURT—REVIEW.

An allowance by the District Court for the services of two attorneys of petitioning creditors instituting involuntary bankruptcy proceedings involves only questions of fact as to whether the allowance is a reasonable compensation for the services, and whether the services are of such a nature that the allowance should be apportioned by the court, and a petition to revise the allowance will be denied.

[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 Revise Order of the District Court of the United States for the Eastern District of Missouri; Elmer B. Adams, Judge.

Petition by Claud D. Hall to revise an order of the District Court, affirming an order of the referee in bankruptcy allowing the petitioner and S. H. King a fee jointly for their services as attorneys for petitioning creditors instituting involuntary proceedings in bankruptcy against the Lewis Publishing Company, bankrupt. Petition denied.

Claud D. Hall, of St. Louis, Mo., in pro. per.

W. C. Marshall and W. W. Henderson, both of St. Louis, Mo., for respondent King.

Stern & Haberman and Eugene H. Angert, all of St. Louis, Mo., for respondent Reynolds.

Before TRIEBER and REED, District Judges.

PER CURIAM. [1] It is the settled rule of this court, based upon decisions of the Supreme Court, that in a petition to revise, under the provisions of section 24b of the Bankruptcy Act, the power of the appellate court is limited to questions of law only, and it cannot review findings of facts made by the District Court. In re Rosser, 101 Fed. 562, 41 C. C. A. 497; In re Baum, 169 Fed. 410, 94 C. C. A. 632; In re Frank, 182 Fed. 794, 105 C. C. A. 226; Johansen Bros. Shoe Co. v. Alles, 197 Fed. 274, 116 C. C. A. 636.

[2] As the only questions involved in this proceeding are questions of fact, whether the allowance made was a reasonable compensation

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

† Rehearing denied July 9, 1915.

for the services rendered, and whether the services rendered by the two attorneys were of such a nature that the allowance to them should be apportioned by the court, there are no questions of law for this court to revise.

The petition is denied.

In re KOBRE et al.

(Circuit Court of Appeals, Second Circuit. March 9, 1915.)

Nos. 200–202.

BANKRUPTCY ⊜69—PARTNERSHIPS—DETERMINATION OF MEMBERSHIP.

Various orders made in bankruptcy proceedings against related partnerships, determining who were members of such partnerships, considered and affirmed.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 51–53, 56; Dec. Dig. ⊜69.]

Petitions to Revise and Appeal from the District Court of the United States for the Eastern District of New York.

In the matter of Max Kobre and Moses Ginsberg, individually and as copartners doing business as Max Kobre's Bank, 1783 Pitkin avenue (Brownsville), Brooklyn, alleged bankrupts; also, Max Kobre and Sarah Kobre, partners, doing business as Max Kobre's Bank, Williamsburg and Manhattan, alleged bankrupts, and Max Kobre and Sarah Kobre, alleged bankrupts. On appeals and petitions to revise by Bessie Weinstein, petitioning creditor, to review certain orders. Affirmed.

See, also, 224 Fed. 106.

Three banking institutions were conducted in New York City under the name of "Max Kobre's Bank." The parent bank was on Canal street, Manhattan, with two branches in Brooklyn—one at Williamsburg and the other at Brownsville. Each was conducted as a separate institution, although the banks at Canal street and Williamsburg were clearly under the same ownership, which at least up to the spring of 1914 was that of Max Kobre and Sarah Kobre, his wife, as partners. The Brownsville Bank was established in 1906, with Moses Ginsberg as manager. It had no independent capital, but conducted business on its deposits and its connection with the Canal Street Bank. In 1914, a petition in bankruptcy was filed in the Southern District of New York, against Max Kobre and Sarah Kobre as partners and as individuals. Two petitions were also filed in the Eastern district—one against Max Kobre and Moses Ginsberg as partners in the Brownsville Bank, and one against the same defendants as general partners in all the banks. In the first proceeding it was shown that Ginsberg had been in sole charge and the active manager of the Brownsville bank since it was established, subject perhaps to a general supervision by Max Kobre; that, while he was known to the public as manager only, he had received an increasing share of the profits, his share in 1913 being one-half, amounting to $23,000; that the remaining profits were divided between Max Kobre and Sarah Kobre. On such facts Judge Chatfield held that Max Kobre, Sarah Kobre, and Ginsberg were partners in the Brownsville Bank, and directed that Sarah Kobre be made a party defendant. In the second proceeding, the question of Ginsberg's general partnership was submitted to Judge Veeder on evidence showing, in addition to the above facts, that in the spring of 1914 there was talk of such a partnership between Max Kobre and Ginsberg, Mrs. Kobre to retire from the business, and that during the following three months Ginsberg spent consider-

able time at the Canal Street and Williamsburg Banks, examining their books and business, and that he gave directions for changes in certain accounts and methods of transacting business therein and between the two banks. On the other hand, it was shown that at Ginsberg's request his attorney prepared a partnership agreement which was submitted to Max Kobre; that, while both parties expected the partnership to be formed, Kobre objected to the terms of the agreement, and it was never signed by either party; also, that the directions given by Ginsberg respecting the business of the other banks were not carried out, some of them being countermanded by Kobre. On such evidence the court held that no partnership was actually formed, but that the acts of Ginsberg were explained by his expectation that one would be formed when the parties agreed on its terms and by his desire to that end to learn the condition of the other banks, and that the only partners in the Canal Street and Williamsburg Banks were Max and Sarah Kobre. On application therefor, Judge Chatfield made an order consolidating the second proceeding with that against the Kobres in the Southern district. From these several orders, a petitioning creditor in the second proceeding, who had been permitted to intervene in the first proceeding, appealed and also filed a petition to revise.

In the first of these proceedings, Judge Chatfield held that Max Kobre and Moses Ginsberg were copartners doing business as Max Kobre's Bank at Brownsville, in the borough of Brooklyn.

In the second, Judge Veeder held that Max Kobre and Sarah Kobre were copartners (and the only copartners), doing business as Max Kobre's Bank in Williamsburg, Brooklyn, and at 41 Canal street, Manhattan, New York City.

In the third, Judge Chatfield consolidated the two proceedings in bankruptcy, one as to the business conducted in Williamsburg, the other as to the business conducted in Manhattan.

By appeals and petitions to revise it is sought to reverse these decisions.

Morrison & Schiff (Leo Oppenheimer, of counsel, and Sidney Rossman, on the brief), for appellants.

Leon Sanders (L. E. Schlechter, of counsel), amicus curiæ for and on behalf of Samuel Pecker and others.

Simon & Weinstein, for appellees Joseph Kline and others.

Solomon S. Schwartz (James A. Sheehan, of counsel), for intervening creditors.

S. A. Telsey, for other appellees.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

PER CURIAM. The petition to revise in the Brownsville proceeding is brought by Bessie Weinstein, one of the petitioning creditors in the other proceedings. We think she had no right to intervene in the first proceeding, nor to review the order made therein. However, as the throwing out of her petition would probably only lead to a re-presentation of the same questions subsequently by some one else, we think it best to dispose of them on the merits.

We concur fully with Judge Veeder's reasoning and conclusion; no one seems to dispute the proposition that Max and Sarah were partners, and there is certainly nothing in the evidence which would sustain a finding that, in the general business of Max Kobre's bank, conducted in Williamsburg or Manhattan by Max and Sarah, Ginsberg was a partner.

The testimony as to the Brownsville Branch, however, is quite different. Ginsberg was apparently the moving spirit of that branch, managing the business and regulating the affairs; moreover, concededly, he

shared in the profits. That by itself might not be sufficient, but would be conclusive if he also shared in the losses. Of course, when no losses were made there would be none for him to share. But in one year there was a loss. Instead of charging that up to the firm of Max and Sarah, and leaving Ginsberg free to divide the profits of the next year, the loss was carried along and half of it paid the next year by taking it from his share of the profits for that year. There seems to be every element present to make out partnership, except the signature of written articles. We fully concur with Judge Chatfield in his finding that Ginsberg was a partner in this Brownsville Branch.

We are also satisfied that the order of consolidation was a proper one.

The three orders are affirmed.

In re KOBRE et al.

(District Court, E. D. New York. May 10, 1915.)

1. BANKRUPTCY ⟸54—INSOLVENCY—"FAIR VALUATION" OF PROPERTY—REAL ESTATE.

The "fair valuation" of real estate for the purpose of determining insolvency under Bankr. Act 1898, c. 541, § 1a(15), 30 Stat. 544 (Comp. St. 1913, § 9585), where no definite market value can be established and expert testimony must be relied on, is the amount which the property ought to give to a going concern as a fair return, if sold to some one who is willing to purchase under ordinary selling conditions, and not what it might probably bring at a forced sale or an auction sale.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 54, 84, 85; Dec. Dig. ⟸54.

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

2. BANKRUPTCY ⟸54—INSOLVENCY—FAIR VALUATION OF PROPERTY—MORTGAGE SECURITIES.

The fair valuation of mortgage securities held by a bank, in determining the question of insolvency in bankruptcy proceedings, is to be based on what could be realized therefrom by the bank as a going concern in the usual course of business, and not the so-called market value which could be obtained by treating them as quick assets.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 54, 84, 85; Dec. Dig. ⟸54.]

3. BANKRUPTCY ⟸62—PARTNERSHIP—ACTS OF BANKRUPTCY.

Where a partnership as such is found insolvent at the time of the commission of acts which are specified in the statute as acts of bankruptcy, such acts constitute acts of bankruptcy as to the partnership, but would not be such as to a solvent partner whose estate is sufficient to meet the partnership deficit.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 57; Dec. Dig. ⟸62.]

4. BANKRUPTCY ⟸54—PARTNERSHIP—INSOLVENCY.

No partnership can be compulsorily adjudicated a bankrupt in which any partner appears to be solvent to the extent of having a surplus of property over his personal debts and those for which he is liable as a member of the firm.

[Ed. Note—For other cases, see Bankruptcy, Cent. Dig. §§ 54, 84, 85; Dec. Dig. ⟸54.]

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5. BANKRUPTCY ⇐54—PARTNERSHIP—SOLVENT AND INSOLVENT PARTNERS—CONSENT TO ADJUDICATION.

Where a partnership as such is insolvent, as are two of the three partners, while the assets of the solvent partner, although sufficient in amount at a fair valuation are admittedly or probably, as administered in bankruptcy, insufficient with the partnership assets to pay all the partnership debts in full, under Bankr. Act 1898, § 5h (Comp. St. 1913, § 9589), and with the consent of the solvent partner, the firm and the other two partners may be adjudicated bankrupt and the firm and individual assets all administered by the bankruptcy court; the solvent partner being permitted to share in such administration by his appointment as a trustee.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 54, 84, 85; Dec. Dig. ⇐54.]

In the matter of Max Kobre, Sarah Kobre, and Moses Ginsberg, copartners doing business as Max Kobre's Bank, alleged bankrupts. Adjudication against the partnership and Max Kobre and Sarah Kobre individually.

See, also, 224 Fed. 104, —— C. C. A. ——.

Carmody, Blauvelt & Kellogg, of New York City (A. G. Thorne, of counsel), for Max Kobre and Sarah Kobre.

Samuel A. Telsey, of Brooklyn, N. Y. (I. R. Oeland, of New York City, of counsel), for Ginsberg.

Simon & Weinstein, of Brooklyn, N. Y. (Abraham H. Simon, of Brooklyn, N. Y., of counsel), for petitioning creditors.

Solomon S. Schwartz, of Brooklyn, N. Y., for intervening creditors.

Joseph Goldstein, of Brooklyn, N. Y., for intervening creditors.

Morrison & Schiff, of New York City (I. D. Morrison, of New York City, of counsel), for intervening creditors.

Albert A. Levin and Jacob A. Freedman, both of Brooklyn, N. Y., for intervening creditors.

Leon Sanders, of New York City (L. E. Schlechter, of New York City, of counsel), for Canal Street creditors.

Jeremiah T. Mahoney, of New York City, for the receiver and for the Superintendent of Banks.

CHATFIELD, District Judge. The changing situations presented with almost every hearing in this case require frequent recurrence to the fundamental relations of the parties and the bearing of those relations upon the evidence with respect to the questions under consideration at the moment.

The original petition, filed in the Southern district of New York, the residence of Max Kobre and Sarah Kobre, alleged them to be copartners and insolvent. The first petition in this district alleged the same parties to be copartners and insolvent. The next petition in this district alleged one Moses Ginsberg to be a partner with Max Kobre, and Sarah Kobre was not included as a partner. This petition was limited to the institution known as the Brownsville Branch of Max Kobre's Bank. Yet another petition was filed alleging that Max Kobre, Sarah Kobre, and Moses Ginsberg were insolvent and were copartners in the Brownsville Branch, the Williamsburg Branch, and even in the busi-

ness in New York, which was affected by the petition filed in the Southern district.

It immediately appeared upon the taking of testimony that the business had been started in the Southern district of New York, at the Canal Street Bank, by Max Kobre, and that later his wife had been joined as a partner but with an apparently limited share in the proceeds of the business. It then appeared that Ginsberg, who had been suspected of, and charged with, acts indicating a proprietary interest in or concealment of the property of the Brownsville Branch, and in certain funds of the New York Bank, which had been transferred to Brooklyn for investment, had acted like a partner as well as manager, and in ways justifiable only upon an apparent showing of insolvency. These transactions would not bear scrutiny if the bank was plainly insolvent and if Ginsberg were acting for his own interest or that of Kobre rather than for the depositors.

It appeared that the Brownsville Branch had been started with no capital whatever; that all the work had been done by Ginsberg, except for purely casual and nominal conference with Kobre, and with acquiescence by Ginsberg in such matters as Kobre insisted upon, i. e., the retention of one Frankel as a clerk, the making of a loan to one Oppenheim, and occasionally a real estate investment which Ginsberg was indifferent to, but in which Kobre took particular interest. Ginsberg soon began to share the losses and each year to insist upon a greater share of the profits.

It appeared that the profits of this institution were figured out by determining at the end of the year the amount which might, as it were, be used for the purpose of dividends. From this, $2,000 was paid to Mrs. Kobre (it does not appear whether she received anything at all from Canal Street), and then Max Kobre and Moses Ginsberg divided the balance, giving Ginsberg the least amount which he would take. Usually considerable adjustment was necessary to reach a satisfactory basis to stand as the arrangement for the succeeding year.

By 1913, Ginsberg was demanding an equal share in this balance, and by 1914 he finally was recognized as having equal rights with Kobre. In the meantime, he had changed from a straight salary to a drawing account, and the intervention of the new banking law of the state of New York caused an entire change in the situation.

None of the banks had its surplus or assets properly safeguarded for the benefit of the depositors. Kobre considered himself the owner, and Ginsberg considered that his control over much of Kobre's property furnished security to Brownsville. The bank account used for extraordinary needs was in Kobre's name, and he made withdrawals therefrom which have not been explained and which depleted the Brownsville institution. Ginsberg had a power of attorney over this account and used it when he needed funds for investments.

Upon these facts, the question of partnership having been determined by a holding that Moses Ginsberg was a partner in the Brownsville Bank, and also that the Brownsville Bank had been conducted by Kobre and Ginsberg as an entirely separate institution from the bank in New York, and there being no apparent difficulty in separating the

two institutions, the issue of solvency in Brownsville became of more importance.

An appeal to the Circuit Court of Appeals from the holding that Ginsberg was a partner in the Brownsville institution, and a petition to review the order of the court directing him to defend the action as a partner, was heard in conjunction with an appeal from another order of this court consolidating the petition filed in this district against the Williamsburg Branch, but denying that petition for consolidation so far as Brownsville was concerned, and also from an order determining that Ginsberg was not a partner in the New York bank. 224 Fed. 104, — C. C. A. —.

In the testimony leading up to these determinations, it has appeared that Ginsberg had entered upon the books of the Brownsville Bank valuations for the real estate (held by the bank as an institution) largely in excess of the figures previously shown upon those books as the cost price thereof. Ginsberg had also had prepared partnership agreements with Mr. Kobre, under which he and Kobre were to become partners in all the institutions on equal terms. It appeared that Mrs. Kobre was to retire from the business and to receive certain real estate in lieu of any claim of dower in the properties in which her husband might be interested as a partner.

In the meantime Ginsberg had gone over to the Canal Street institution in the latter part of May and in the month of June, 1914, and in anticipation of July 1, 1914, when the new banking law went into effect, had been arranging matters with the evident idea that if he shared the responsibilities of a partner, in case the new agreement went through, he should have control of the assets, and that those assets should be so shown upon the books as to prove the solvency of the three institutions, and so that he (Ginsberg) should receive proper compensation for the work which he expected to undertake in managing the institutions. He also invested large amounts in real estate for the New York bank.

He had previously reached the point of an equal share in Brownsville, which was apparently making money. He was insisting upon an equal share in the entire institution, while Kobre was seeking to satisfy Ginsberg and to obtain the benefits of the Brownsville assets, in order to make a showing of solvency in the Canal Street Bank, but yet to also persuade Ginsberg to give up his one-half share in Brownsville, and to be satisfied with a one-third share in the whole for the increased work and trouble of what might not furnish an increased amount of profit.

Pending the hearing of the petitions to review, and assuming that a further hearing of the issue and a final adjudication in bankruptcy or dismissal of the petition against one or all of the alleged bankrupts might present an entirely different record than that which the intervening creditor sought to have reviewed at that time, the petitioning creditors, who were claiming Ginsberg to be a partner, insisted upon proceeding with the hearings to determine the insolvency of the Brownsville Bank and consequent commission of acts of bankruptcy therein.

It then became apparent that Max Kobre, who had offered a composition in the Southern district of New York, in which he purposed using the Brownsville assets, was unable to show any condition approaching solvency in the Canal Street institution by itself. The disappearance of the assets of that institution and of those withdrawn from Brownsville by Kobre have not been explained, and we have nothing to do with that question in this case.

Mrs. Kobre appeared to have no assets except the house in which she lived, so far as this record was concerned, and the answer of Mr. Kobre having been withdrawn for the purpose of presenting the offer of composition, the offer of composition having failed, and the answer of Kobre having been reinstated only to the extent of allowing him to participate in the hearing of the issues in connection with the answer interposed by Ginsberg, it was admitted upon the record that the individual properties of Mr. and Mrs. Kobre in the Canal Street Bank would fall far short of paying its debts, and that their liabilities could not be met from their share of the assets of Brownsville, even in case Brownsville should be shown to be solvent, with a surplus large enough to partially overcome the deficit of Canal Street.

It also appeared that the completion of the arrangement by which Ginsberg was to become a partner in the entire institution had been prevented, even if it might otherwise have occurred, by the effect of a run upon other banks on the East Side of Manhattan, which resulted in the visit of the Superintendent of Banks of the state of New York to all of the Kobre institutions and his taking charge thereof upon August 3, 1914. Since that time the Superintendent of Banks, as receiver appointed by this court, has had charge of the assets of the Brownsville Bank and of the Canal Street Bank, so far as they were in possession of the Brownsville Bank in this district.

The further taking of testimony upon the issue of insolvency proceeded before the argument of the appeals above referred to, and before the determination thereof. It appeared from the testimony that Moses Ginsberg not only controlled and managed the affairs of the Brownsville Bank, but that he, with the acquiescence of Mr. Kobre, held himself out to the public as having a personal interest therein. The transactions ratified by both were conducted by Mr. Ginsberg as principal, but always apparently with an accounting to the bank and for the benefit thereof. The management of certain properties and investments from New York were conducted by Ginsberg individually, and corporations were formed for the development and sale of property in which Kobre and Ginsberg were equally interested, but which again were entered upon the books of the Brownsville Bank, were there treated as matters which that bank must account for, and in which the individual responsibilities of Kobre and Ginsberg were actually involved, even though the name of "Moses Ginsberg, manager of the Brownsville Branch" (like that of a managing partner), kept from public gaze the real relations of the parties.

It has appeared from the testimony that a certificate was filed by Max Kobre and his wife, that they were doing business as copartners in the Brownsville Branch, and that this certificate was filed long after

the branch was opened and after Moses Ginsberg was sharing in the profits and losses.

It happens that no losses, in the ordinary sense, have occurred, and that in but one year had it been necessary to deduct any items for failure to show a net profit over expense in the preceding year. But such deductions as were made, even for expenses in running the bank, were shared proportionately by both men and would have been shared by Mrs. Kobre if her interest had not been fixed in amount. No certificate was ever filed in behalf of Moses Ginsberg, doing business under any name, and the question of partnership seems not to have been discussed between the two men until Moses Ginsberg was needed by Kobre in New York.

The testimony taken on the hearing with respect to solvency has further shown many additional instances where Brownsville and Canal Street have accorded favors to one another, but where their actual business transactions have been as strictly conducted and expenses or charges as accurately entered up as if they had been institutions conducted under a separate bank charter. Moses Ginsberg looked after the assets in which he was having a share as jealously, so far as allowing Canal Street to have any claim thereon, as he would if a certificate had been on file in the county clerk's office showing his equal ownership therein.

It further appeared that certain items in the books of the Canal Street Branch, for which corresponding real estate properties and securities were not physically evidenced in the Canal Street Branch, and certain moneys expended by Kobre (to replace which he was anticipating profits from the increase of value in the real estate held for him by Brownsville) were actually entered in the Canal Street books after the first visit of the Superintendent of Banks and by a telephone conversation (traced to Kobre alone) corresponding charges against Brownsville, or credits to Canal Street, were entered upon the books of the Brownsville Branch, either just before or just after the visit of the superintendent.

These charges have been disavowed by Mr. Ginsberg, who testified that he had no knowledge thereof, although one of the bookkeepers testified that Ginsberg instructed him to make some of the charges. This testimony, however, was not persuasive and showed even more distinctly the separate nature of the institutions and the difference of Ginsberg's interest in Brownsville from his prospective connection with New York.

It has ultimately become apparent that, so far as the business of Brownsville was concerned, Ginsberg treated its assets, excepting those in the possession of Kobre, as if they were his own, but always with an eye to their use for the Brownsville Bank. His control thereof was in every respect that of a partner or owner, and the effect of the advertisements, which continued up to August, 1914, and the nominal conduct of the business by Ginsberg as manager, apparently were exploited so as to call attention to the well-known name of "Kobre" and to the local reputation of Ginsberg, as the two elements going to make up the solidity of the business which Ginsberg managed.

Much testimony was devoted to following up certain properties or

classes of assets, and some of these must be referred to later. Various appraisals were presented, using as a standard the list of properties and the general alignment of assets made by the Banking Department upon the closing of the bank on August 3, 1914.

It appeared in the course of the hearing that Mrs. Kobre had never been served with a subpœna in this proceeding because of the reported surrender by her of all claim to any partnership assets and her supposed lack of property as an individual. But when it became apparent that Mrs. Kobre was, so far as the creditors were concerned, at least a nominal partner, and that she was a necessary party to the bankruptcy proceedings, she was brought in upon a proper petition, interposed an answer raising the issues of insolvency, etc., and facilitated the conduct of the case to a legal conclusion.

The taking of testimony terminated upon the 23d of February, 1915, since which time the writing out of the minutes and submission of briefs has been going on.

Upon the 19th day of April, 1915, exhibits were presented and added to the record, by order of the court, showing that upon the 24th day of December, 1912, Max Kobre and Sarah Kobre entered into a formal partnership agreement with relation to Canal Street, Brownsville, and Williamsburg, by which Mrs. Kobre was to become a limited partner and to release all claims of dower in the properties of the partnership. This also provided for her rights in case of Kobre's death, and this seems to have been one of the purposes of the agreement. It was pursuant to the terms of this agreement that the certificate was filed by Max Kobre and his wife in the county clerk's office of Kings county, showing their partnership also and their doing of business in the name of "Max Kobre's Bank, Brownsville Branch." But, at the time when Ginsberg was negotiating with Kobre to become a general partner in the three institutions, Mrs. Kobre agreed to release her interest in the partnership properties and to withdraw from her limited partnership therein, to release her claim of dower in any property held by the institutions known as "Max Kobre's Bank," and also to take in return therefor the house in which she lived.

It appears that upon the 3d of July, 1914, Mrs. Kobre executed the papers by which she released her interest in the partnership and her claim to any of the business properties, and in one of these papers she declared Max Kobre to be the sole owner of the banking business known as "Max Kobre's Bank." This agreement was drawn by the attorney for Mr. Ginsberg and was subsequent to the time when Ginsberg is claimed by the New York creditors to have become a partner in all three institutions, but long before any suggestion that he was in fact responsible to the creditors of Brownsville as a partner in that branch.

On the 30th of July, 1914, Max Kobre deeded to his wife, by an instrument recorded in section 7, Liber 172, p. 180, register's office of New York county, upon the 10th of August, 1914, the house in which they were living, and thus apparently concluded, so far as he and she were concerned, the transaction by which she ceased to share in the profits or losses of the partnership, if the institutions were solvent. It is evident that as against creditors these papers make no difference,

and that the proceedings in this district, including Mrs. Kobre as a partner but leaving open for consideration in the bankruptcy proceedings in the Southern district the determination of the validity of the conveyance to her, show the correct idea of the rights of the parties from the standpoint of their creditors.

At the close of the entire case, motion was made on behalf of the alleged bankrupts to dismiss the proceeding, because of the claimed solvency of the Brownsville Bank or the partnership of Kobre and Ginsberg therein, and because of the alleged failure of the creditors to show any independent act of bankruptcy which would give the bankruptcy court jurisdiction. Subsequently Ginsberg withdrew the motion to dismiss if he should be held to be the solvent partner in an insolvent bank.

The creditors have presented numerous acts which would be sufficient to constitute an act of bankruptcy if insolvency be predicated. They have shown what would be preferences, and what would be apparent concealment of assets with intent to hinder the creditors, if insolvency be admitted or shown. But treating Brownsville as a separate institution, and with an admission or finding of solvency, no one of these acts would be a sufficient cause for jurisdiction in bankruptcy, and the issue therefore narrows down to the question of insolvency alone.

But, as a result of the evidence upon this issue of insolvency, a number of complications are presented. No party to this proceeding has attempted to claim solvency for the Canal Street Bank as independent of Brownsville, nor for Max Kobre and Sarah Kobre as partners in Brownsville, even if their interest in the properties of the Brownsville Bank be used for the payment of their debts from the Canal Street Branch, over and above the assets thereof.

It is therefore beyond dispute that Max Kobre and Sarah Kobre, so far as their creditors are concerned, must be adjudged insolvent as individuals in the proceeding in this district. If Sarah Kobre can show a withdrawal from the business and an entire accounting for any assets for which she is responsible to the business, prior to the 3d of August, the ultimate effect would be to relieve her from the proceedings, but not to change the result.

The Brownsville institution was either solvent or insolvent upon August 3, 1914, the date as of which all computations are made. Moses Ginsberg is admitted to be solvent so far as his debts outside of those of the Brownsville Bank are concerned, and he has assets admitted by himself, and not disputed by the creditors, amounting in value to $40,000.

There is a suggestion in the testimony that other assets are available to Ginsberg; but, even though the creditors might realize upon those assets, they cannot be used by Ginsberg to show solvency, when he disputes the existence of such assets, and we therefore have the sum of $40,000 as the total of his contribution in passing upon the question of solvency.

The finding of acts of bankruptcy, therefore, cannot be made against Ginsberg as an individual or apart from his transactions as partner.

As a partner, even though able to pay his own individual debts, the commission of acts of bankruptcy depends upon the solvency of the partnership. What would be the result of such acts, as well as the effect of Ginsberg's solvency as an individual, and the showing which would be made by applying his assets to the payment of partnership debts, will be considered later.

A determination of the condition of the partnership and a valuation of its assets and liabilities are necessary as premises for further consideration. [Here followed itemized statements of assets and liabilities at the valuations claimed by the different parties in interest, which are summarized below.]

The foregoing table follows the classification of assets and liabilities used by the Superintendent of Banks in making his inventory which was intended to show the condition of the bank at the close of business on August 3, 1914.

There has been included in the first column of this statement the amount of all items as to which no question is raised, and such parts of certain other items as are admitted by the various parties hereto to be correct according to the books of the bank or the testimony in the case. This column contains also items from the superintendent's statement for the values of the real estate, and of the mortgages held by the bank. As to these items, the parcels and the mortgages included have been agreed upon, and it is admitted that the figures shown by the Superintendent of Banks is a correct arithmetical total of the parcels included by him, at the amounts shown by his appraisal. But each party has included in his own valuation either additions or deductions, as the case may be.

The second column shows items entirely omitted in the compilation by the Superintendent of Banks, but which the various creditors and the alleged bankrupts agree should have been included.

The third column of assets sets forth the additional amounts which the alleged bankrupts, Kobre and Ginsberg, seek to have added to the assets.

The fourth column shows the claims of the petitioning creditors with respect to the same items, and also the deductions from the real estate and mortgage valuations claimed by the petitioning creditors.

The fifth column shows the claim of one of the intervening creditors, who agrees with the Superintendent of Banks as to the valuation of the real estate, but makes a different reduction in the valuation of the commercial paper and of the bonds and mortgages. He also adds two items shown by the testimony to have been paid to or used for the benefit of the Brownsville Bank from the cash account of the Canal Realty Company which was transferred to Brownsville on June 22, 1914.

The total of the assets in column 1 is	$1,398,207.99
The items to be added from column 2, and as to which there seems to be no dispute, amount to	21,022.17
This total includes the amount charged against Kobre from the Oppenheim transaction and the amount paid on Nos. 38 and 75 of the New York properties, but leaves out for the time being the	19,000.00
mortgage of the Canal Realty Company, and the	17,360.80
commissions claimed by Ginsberg.	

Of the items claimed in column 3, it is impossible to include the $181.91 which Ginsberg seeks to add to the amount of foreign currency. This item arises from an improvement in the rate of exchange, but the value of the funds at the rate of exchange upon August 3d must be used as the basis for finding insolvency as of that date.

The next item of $4,000, upon stocks and bonds, represents the difference between the purchase price of those stocks and their value upon the floor of the Exchange on the 3d of August. As a matter of fact, they are worth much more at the present time than their cost value, but again their market value was indicated by the Exchange prices as of August 3, 1914.

The item of $570.96 is claimed by Ginsberg to be possible of collection, but the evidence does not seem to justify using it as a probable asset.

The item of $15,132, used to pay life insurance policies which according to the testimony so far produced are assets of Kobre as an individual, and available only to the creditors of the New York Bank, is a proper charge against the individual funds of Kobre in the hands of the Brownsville Bank, and therefore should be set off and treated as an asset.

In the same way, the item of $932.07 is collectible and appears now to be a proper asset.

The item of $637.40 belongs in the Canal Realty Company's account, and will be considered later.

The item of $3,338.47, added to the commercial paper (or bills discounted) by Ginsberg and by the creditors, should be included in the total of assets.

It appears that the Superintendent of Banks deducted certain items amounting to $10,659.46 as in his opinion uncollectible. Of this, $3,743.19 was one of the items of the Oppenheim account which appears to have been guaranteed by Mr. Kobre. This item has been included in column 2, and the balance of $3,338.47 which the creditors show in the testimony should first be added, and then, whatever amount may be fixed for general uncollectibility, subtracted from the total.

The items of $48,500 and $7,000, representing the values of Nos. 44 and 45, should be added. These two parcels of real estate seem to have belonged to Brownsville at all times, but they were acquired in connection with transactions which involved the use of moneys belonging to the New York Bank, and, in the absence of testimony tracing to the Brownsville Bank the repayment of the funds so used, it is apparent that the Superintendent of Banks was justified in leaving them out of his inventory.

On the present condition of the case, these items have been properly traced to Brownsville and seem to be its property.

The other items of real estate go into the transaction with reference to the Canal Realty Company and will be disposed of later.

The item of $1,103.72, foreign department surplus, is claimed by Ginsberg to be explainable; but the cash representing this item has not appeared, and it would seem to be a question of bookkeeping, which does not add to the visible assets.

We have therefore, as above stated, to add from column 3, $75,539.94. The total of assets exclusive of the items reserved therefore equals $1,494,770.10.

Returning then to the items that have been passed, we will take up, in order: (1) The value of the real estate; (2) the value of the bonds and mortgages; (3) the property of the Canal Realty Company; (4) the question of commissions; and (5) the deductions upon the commercial paper. But, before so doing, it is possible to fix the amount of liabilities exclusive of the items going into the Canal Realty situation.

In the table of liabilities, column 1, again, shows the amounts either found upon the books or ascertained by the Superintendent of Banks and admitted by the creditors to be correct. This makes a total of $1,494,308.94.

In column 2, the item of $26,800 mortgage against the property No. 44 and 45 should be included, as also the sum of $328.33 accrued interest, and $4,038.04 taxes, etc., of which the Superintendent of Banks did not have information at the time of making up his inventory.

An item of $630 claimed by Mr. Frankel, against the bank because of some alleged promise to give him a bonus or net payment on account of salary, based upon the earnings of the bank, is disputed by Ginsberg; but certainly was a claimed obligation which would have to be met, if valid, and therefore must have been entered as a liability on August 3, 1914, in considering the question of solvency.

The item of $1,046.66 is claimed by Ginsberg to have been more than met by taxes and other payments which can be figured out as chargeable against Canal Street, but according to the showing of the books, and upon the testimony as it now stands, this general denial does not meet the specific compilation of the Superintendent of Banks, and it would seem that this item must stand as a liability.

We have therefore to be added from column 2 a total of $32,843.03. This makes the aggregate liability outside of the Canal Realty Company matters, which will be disposed of as a net balance one way or the other, $1,527,151.97. Upon its original inventory, the Banking Department showed an excess of liabilities over assets of $96,877.61; but the inclusion of the additional items makes this apparent deficit useful only in so far as it shows the apparent condition to the Bank Examiner on his first cursory examination.

The testimony contains a number of appraisals of the real estate and of the bonds and mortgages owned by the bank, and valuation of the negotiable paper yet uncollected.

The first question arises as to the value of the real estate. As has been said, Mr. Ginsberg, with Mr. Kobre's knowledge, changed upon the books of the bank the inventory values at which this real estate was carried, and placed thereupon book values corresponding to what he thought the bank could realize therefor. These figures total $1,070,633.66. But, upon the trial, Ginsberg and his experts have presented as their opinion of an actual market value for this property, $942,650. Of this, $128,500 is an increase over the amount of the inventory by the Superintendent of Banks, and $222,500 is the value of

property not included in the bank's inventory, but upon which mortgages are outstanding and includes the land owned by the Canal Realty Company.

It will be seen that the property not included, if allowable at these figures, would wipe out any deficit shown by the Bank Department's figures.

The appraisers produced by the creditors generally value this real estate at figures below those of the Banking Department.

[1] The statute says that "insolvency" exists when the property is not at a fair valuation sufficient in amount to pay the debts. Section 1, subd. 15. Market value is frequently used (where a definite market value can be fixed for the product) as a standard of fair valuation. With respect to real estate, market value must be assumed to depend on whether a market exists or can be created by an attempt to sell the property, and expert opinion of market value must necessarily be intended to fix the value which the property ought to give as a fair return, if sold to some one who is willing to purchase under the ordinary selling conditions. If property is not worth this amount to a going concern, then no fair valuation could be entered upon the firm's books, for a valuation based only upon what could be obtained at a forced sale or an auction sale, or which might be realized under some accidental or unusual situation, would never be taken as the "fair valuation" of the property to the going concern. But, again, if some unusual situation makes it apparent that the particular property has a market value over and above the general market value for similar lots, then this increase in value would have to be included in a fair valuation.

In this case some parcels of property happen to lie upon an improved street, or in a peculiar location, and values much greater than those at which the property was placed upon the books or shown by the bank's inventory can be realized. In other localities, the property if thrown upon the market at a time like the present, when sales could not readily be made, would find as a market value much less than what was a fair valuation from the standpoint of the bank before it closed its doors.

It would appear that the valuation of the Banking Department and those appraisers for the creditors who have fixed their estimates upon what they think the property ought to bring at ordinary sale, as distinguished from what Mr. Ginsberg would like, and expected, to have it bring, is a fairly accurate valuation for our purposes.

The testimony of Mr. Ginsberg and his experts must be viewed with some allowance for their expressed intention to fix the value which they think the property ought to bring before its owner should be willing to sell, and that would seem to be higher than the fair valuation of the bankruptcy statute. The values in the Banking Department inventory give a fair total for our purpose.

[2] The second item about which a difference in valuation exists is that of the mortgages held by the bank. These are substantially, in practically all instances, second or third mortgages given for loans to persons who have undertaken building operations. These properties

are subject to mortgages already thereon and to which the bank's mortgages are subordinated.

Here again the experts generally agree that the valuations of the property from the standpoint of ultimate realization are not excessive. The Banking Department has made substantially no deductions. The creditors' experts generally have figured a reduction of from 10 to 20 per cent., which is actually the amount of bonus or discount exacted by those who make a business of purchasing (that is, discounting) such mortgages as a general business proposition, when a sale is forced or when the mortgage is not paid off at its expiration.

It does not seem to be disputed that the properties are worth, or will reasonably be worth, if the building operations are carried through, the amounts of the liens upon each parcel. Again, a fair valuation of such securities would seem to be what can be realized therefrom from the standpoint of a solvent or going bank, and not the so-called market value which could be obtained by treating them as quick assets, like commercial bonds or certificates of stock. But some losses and unusual expenses are probable and must be deducted in fixing market values. The exact deductions fixed by the witness Meyersohn would seem fair in amount, viz., $25,987.87.

Another item as to which much discussion has been had and testimony taken is the property of the Canal Realty Company. It appears that Mr. Kobre had an investment representing between $60,000 and $70,000, upon which he was losing money in New York. The Canal Realty Company was organized and $100,000 worth of stock issued therein. Mr. Kobre conveyed this property and sufficient cash to make up the total sum of $100,000, and received the total issue of stock therefor. One share was transferred to Ginsberg, and one share apiece to two others as directors, and the certificates of stock have always been held in the Brownsville Bank. The deeds and papers representing the operations of the company in Brownsville have also been kept in the Brownsville Bank, while the cashbook and bank account were kept in Canal Street.

This seems to be the way in which Mr. Ginsberg and Mr. Kobre checked each other with respect to this institution, although Kobre was placing in Ginsberg's hands the conduct of the business and the investment of the moneys.

With the $100,000 realized in this way, Ginsberg proceeded to purchase or acquire by trade property in Brownsville. He has made sales and conducted building operations, in the course of which he has made contracts with other parties, and the net result is an apparent surplus of some $73,246.40 at the time the bank closed.

There has never been a declaration of dividend upon the stock. Neither Kobre nor Ginsberg has ever acted as if the property taken in the name of the Canal Realty Company belonged to its stockholders in the ordinary sense. A year or so ago, the Canal Realty Company being inactive, the books of the corporation, including the minute books, were taken over to New York by Kobre, although the certificates of stock were not removed by him from the Brownsville Bank, and he

proceeded to use the Canal Realty Company as a dummy corporation, for certain transactions which he did not wish to conduct in his individual name. While these were being carried on, records thereof were kept in the New York Bank; but ultimately the entire books of the Canal Realty Company were brought back to Brownsville and the bank account transferred from Canal Street to the Brownsville Bank. This was upon the 22d day of June, 1914, the amount of the bank deposit transferred being $17,000 net.

The books show that in 1913 Mr. Weinstein, a clerk in the Canal Street Bank, apparently knowing that no dividends has been declared, and that the $100,000 originally invested had been left upon the books, without increase or payment for the use thereof, charged up interest against Brownsville, in behalf of the Canal Realty Company. Mr. Kobre ordered this item of interest stricken off, and it is apparent that as he was the party holding the stock, and as, according to all the testimony, he was under agreement with Ginsberg to turn the amount of capital stock over to Ginsberg for investment and division of profits, he could not charge interest and claim profits as well.

Both Kobre and Ginsberg now testify that the actual investment of funds by the Canal Realty Company was being made by the Brownsville Bank, and that Kobre and Ginsberg were to share in the profits therefrom through their sharing in the benefits of the Brownsville Bank, although Mr. Kobre, when first questioned upon the subject, testified that Ginsberg was to have one-half and he was to have one-half of the net profits, and did not state that it was to be done through distribution of the net profits in the Brownsville Bank.

If we consider that the property was invested by the stockholders in a partnership venture, then one-half of the net profits belongs either to Moses Ginsberg or to the Brownsville Branch and is available for its debts. As Moses Ginsberg admits that this amount belongs to the bank and not to himself, it should be added to the bank's assets. The other one-half belongs to Mr. Kobre, as agent or real estate operator for the Canal Realty Company.

The Brownsville Bank must account to the Canal Street Bank for the total value of the capital stock; but the profits are subject to the set-off of Ginsberg's share and to any debt of Kobre's to the Brownsville Bank, like the Oppenheim loans which he took over, and Ginsberg's claim for commissions.

The argument might be presented that the entire $100,000 representing the capital stock of this corporation is the individual property of Kobre, and is available to pay his creditors in this district, if the firm property is not sufficient to pay the firm debt; but the capital stock of the Canal Realty Company seems to be so plainly the property of the Canal Street business, or impressed with a trust for the benefit of the New York Bank, that no claim has been made by any of the Brownsville creditors thereto. The law recognizes no legal trust in real property bought by agents with the principal's money, and taken in the name of the principal (the Canal Realty Company). The claims of Ginsberg and Kobre to the surplus are really only charges or debts

by reason of their contract for the investment and sharing of the proceeds over the guaranteed fund ($100,000), and can be retained only as set-offs against the property to be returned on an accounting.

We have therefore, as shown in the table:

Real estate of the Canal Realty Company		$167,000.00
Interest of the Canal Realty Company		637.40
A mortgage of the Canal Realty Company		19,000.00
Cash balance from the $17,000 balance		3,988.25
Cash paid by Brownsville for Canal Street, but belonging to the Canal Realty Company		4,620.75
Total		$195,246.40
Against this we must charge a mortgage of	$ 22,000.00	
And the capital stock	100,000.00	
Total		122,000.00
Balance		$ 73,246.40

(Ginsberg claims some $2,500 paid for taxes, etc., but proof of this has not been furnished.)

One half of the balance or $35,623.45 belongs to Brownsville, and the other half is available for a set-off against Kobre's individual debts to the Brownsville Bank.

Another item included by Mr. Ginsberg as his total of assets of the Brownsville Bank consists of commissions charged by him for services as broker in purchasing real estate, making mortgages, etc., for New York after Ginsberg was contemplating the entry into a formal partnership with Mr. Kobre in all three institutions. Ginsberg and Kobre both testify that they had an agreement under which Ginsberg was to go ahead and do the work, as manager of the Brownsville Branch, necessary to make these investments for New York, with the understanding that if the partnership was consummated it would be for the interest of the entire estate, and that he as partner should not receive compensation therefor. But they both testify that it was understood between them that, if the partnership was not consummated, the ordinary commissions for making these investments should be paid out of the investments, and Ginsberg now claims that the Brownsville Bank is entitled to receive from Mr. Kobre these sums.

The strange result would have followed that, if the Brownsville Bank had continued and produced a surplus, Kobre would have received one-half the profit for the work done by Ginsberg and for which Ginsberg was charging. The services rendered by Ginsberg were in addition to, not in depreciation of, his work for Brownsville, and, although Mr. Ginsberg and Mr. Kobre may have discussed this question, Ginsberg had no agreement other than that Kobre would pay him for his services. The evidence of a definite agreement for the Brownsville Bank is not persuasive.

The benefits expected from the partnership necessarily included the risks or the trouble incurred by the intended partners, and this item would seem to be nothing more than a general claim against Canal Street for the services which Ginsberg rendered, as distinguished from

the services which he rendered when he went to New York and gave advice or made investments in anticipation of the expected partnership.

If Moses Ginsberg as an individual has a claim chargeable against New York assets for these services, it would be added to his personal assets in the Brownsville Bank, and amounts to one-half of the amount admitted by himself and Kobre as the value of the services. But he claims this only as an asset for the Brownsville creditors, and it should therefore be added to the total thereof.

The Oppenheim matter is an illustration of the care with which the business of the Brownsville Branch was separated from that of the other institutions and shows the way in which Mr. Ginsberg actually exercised the functions of a partner as distinguished from an employé on behalf of Brownsville.

It seems that one Oppenheim had secured a loan from Brownsville, upon Mr. Kobre's request, and for which Mr. Kobre as an individual was held responsible. Ultimately this loan was marked off to the amount of $7,320.99, and this item, together with the balance retained in the form of notes, making a total of $10,420.99, was assumed by Max Kobre and charged against Canal Street.

It would seem that this sum was properly held as an individual debt against the account of Max Kobre, and hence was properly charged against Canal Street; but it must first be deducted from the property of Max Kobre in the Eastern district, such for instance as his share in the Canal Realty Company profits.

But one other general class of items is in dispute. Certain outstanding notes or bills receivable, amounting at the present time to about $69,000, have not been collected. According to the testimony, the greater part of these notes can be and will be collected, or there is such reasonable prospect of their collection that from the standpoint of a going concern they certainly could in a large measure be treated as assets. The amount fixed by the creditors' appraisers generally as a deduction therefore would seem to represent the probable loss and is the same as the amount included by the Banking Department, viz., $10,659.46 less the Oppenheim note of $3,100, or in round figures $7,500.

One of the attorneys for the creditors has taken the deficit shown by the statement of the Banking Department, and, without adding any of the items shown by the testimony not to have been included therein, has added to the deficit the total amount of these notes which have not as yet been paid, viz., $69,000 (this includes again the $10,654.46 already deducted), the discount which would have to be given if the mortgages were sold or discounted with mortgage brokers, viz., $59,777, and the total amount of taxes chargeable against all the property, without apportionment as indicated in the testimony. He thus makes a total deficit of $244,051.34; but, as has been seen the taxes are much less, such a large deduction for mortgages should not be made, and the deduction for commercial paper must stand at $7,500 and cannot be deducted twice, while the deficit shown by the Banking Department is substantially reduced by the property included as as-

sets and not so treated by the Bank Examiner in making up that statement.

In summarizing, therefore:

We must add to the assets already found, viz.	$1,494,770.10
The sum of one-half commissions claimed, viz.	8,680.40
And one-half the surplus of the Canal Realty Co., viz.	36,623.45
Total	$1,540.073.95
And against this charge the liabilities previously found, viz.	$1,527,151.97
And the depreciation on mortgages, viz.	25,987.87
And the depreciation on commercial paper, viz.	7,500.00
Total	$1,560,639.84

—leaving a deficit of $20,565.89 by which the amount of the liabilities exceed that of the assets.

Upon this showing, and assuming that neither Max Kobre nor Sarah Kobre have property within this district available for the payment of all firm debts of the Brownsville Bank, and that they are, as individuals, insolvent, even though they can be adjudicated in this district, only subject to their adjudication in the primary proceeding against them in the district of their residence, we have the situation of an insolvent partnership with two insolvent partners, and with a third partner who is solvent and whose estate would make up a total sufficient to render the partnership as a whole solvent at the time of the filing of the petition. It would also seem to follow that the total assets available for the payment of the creditors' debts, under the administration of the estate in bankruptcy, and including the individual assets of Moses Ginsberg, may not be sufficient to entirely meet all the claims thereon at the present time.

The condition of the bank at the time of the commission of the alleged acts of bankruptcy must be taken as the standard from which to view an alleged fraudulent transfer or other alleged act of bankruptcy "while insolvent" under section 3a. But the condition of the bank at the time of filing the petition is to be taken as the standard from which to test the defense of "solvency" in order to give jurisdiction in bankruptcy under section 3c.

While the acts alleged as acts of bankruptcy in this case preceded the 3d day of August, 1914, and the petition herein was not filed until August 7, 1914, all the parties hereto have taken the values of assets and liabilities as substantially the same at the different dates, and have used the figures as of the date of August 3, 1914, for all purposes. The first petition against Max and Sarah Kobre was filed August 7, 1914.

Since the petition was filed, there have been large expenses and no profits from new business operations. The expenses of liquidation will be large and protection of the real estate will require considerable expenditures. From these standpoints, the likelihood of realizing less than would have been available on August 3, 1914, is very plain.

On the other hand, an improvement in the real estate market, or some fortunate sale under changed conditions, may make it possible to pay the creditors in full. A change of one or two items would

make a solvent situation on the present figures. Ginsberg has shown a number of parcels which taken alone would seem to be capable of producing excess enough over the appraisals to wipe out the entire deficit.

On such a showing, no one could find Ginsberg's claims to be absolutely unfounded or plainly and willfully false. Leaving Canal Street out of consideration, Kobre and Ginsberg might well have expected that the Brownsville Bank would (if real estate values again rose and no mishap forced liquidation) furnish a large profit. But the Canal Street Bank made a difference in the situation, and without the Brownsville Bank's assets Kobre was in financial trouble. With this impending as Ginsberg knew, and in the then condition of the real estate market, Ginsberg and Kobre were bound by knowledge of actual values for their assets and cannot avoid legal insolvency for the partnership by large hopes. In fact, Ginsberg seems to make no claim that the assets would be enough to meet the forced sales, foreclosures, and expenses which would surely follow the immediate liquidation made necessary by Kobre's insolvency and the dissolution of the firm.

While therefore the court must determine the issue of solvency without reference to after results (Duncan v. Landis, 106 Fed. 839, 45 C. C. A. 666), yet, when an individually solvent partner has not assets sufficient to make up the deficit of the firm, so that the creditors are admittedly certain to receive less than 100 cents on the dollar if the estate is administered out of bankruptcy, the distinctions considered in Francis v. McNeal, infra, immediately become of greater importance, and in a close case like the present the application of the statute must be as exact as may be.

[3] Ginsberg's personal assets are enough in amount to wipe out the deficit shown above. Ginsberg admits that with Kobre insolvent and the partnership dissolved he cannot preserve the estate and pay 100 cents on the dollar unless the court protects the liquidation by compelling equality of dividends and order of payment. Where the partnership is found insolvent, as in this case, the acts proven would be acts of bankruptcy as against the partners, but would not be acts of bankruptcy as against one partner individually if his estate were sufficient to wipe out the partnership deficit. In re Bertenshaw, 157 Fed. 363, 85 C. C. A. 61, 17 L. R. A. (N. S.) 886, 13 Ann. Cas. 986; Vaccaro v. Bank, 103 Fed. 436, 43 C. C. A. 279; Francis v. McNeal, 228 U. S. 695, 33 Sup. Ct. 701, 57 L. Ed. 1029.

[4] In the present case, therefore, it must be held that the Kobres and Ginsberg were insolvent and committed acts of bankruptcy as partners, and that as such the partnership could be adjudicated bankrupt under section 5a, if the personal assets of Ginsberg do not remove the possibility of finding insolvency as to the firm and if the present case can come within the bankruptcy jurisdiction to adjudicate as to the partnership.

The present bankruptcy statute provides, in section 5a, that "a partnership * * * may be adjudged a bankrupt," and, in section 5h, that:

"In * * * event of one or more but not all of the members of a partnership being adjudged bankrupt, the partnership property shall not be administered in bankruptcy, unless by consent of the partner or partners not adjudged bankrupt; but such partner * * * shall settle the partnership business * * * and account, etc."

The cases In re Meyer, 92 Fed. 896, affirmed 98 Fed. 976, 39 C. C. A. 368, In re Stokes, 106 Fed. 312, Dickas v. Barnes, 140 Fed. 849, 72 C. C. A. 261, 5 L. R. A. (N. S.) 654, and In re Bertenshaw, supra, stated the proposition that under the present statute a partnership could be adjudged bankrupt as a separate entity, even though one partner was not adjudicated and although his assets were not included in the computation. In some of these cases it was held that, even if one partner were solvent and had assets sufficient to make the partnership solvent, it would not prevent adjudication of the partnership and the administration in bankruptcy of the partnership estate and even of the solvent partner's assets as well.

In Vaccaro v. Security Bank, 103 Fed. 436, 43 C. C. A. 279, it was held that a partnership could not be insolvent and therefore could not be adjudicated if one partner was solvent individually and had assets sufficient to overcome the deficit of the partnership. It was held that section 5a did not apply in such a case, and that section 5h referred only to the administration of an estate where one partner was insolvent, and another partner, and hence the firm, was solvent.

The idea seems to have been presented by Judge Thomas in Chemical Bank v. Meyer (D. C.) 92 Fed. at page 898, and was decided also by Judge Brown In re Blair, 99 Fed. 76, and in Solomon v. Carvel (D. C.) 163 Fed. 140, although the latter case assumed the doctrine of In re Bertenshaw, supra, to have been settled.

But the question is disposed of by the cases of Francis v. McNeal, 228 U. S. 695, 33 Sup. Ct. 701, 57 L. Ed. 1029, which upholds the doctrine of Vaccaro v. Bank, supra, and by the case of In re Samuels & Lesser, 215 Fed. 845, 132 C. C. A. 187 (C. C. A. 2d Circuit). In the latter case it is held that while a firm may be adjudicated a bankrupt, if it and all of its members are insolvent, nevertheless no firm can be compulsorily adjudicated a bankrupt in which any partner appears to be solvent to the extent of having a surplus of property over the debts for which he is personally liable and the debts for which he is liable as a member of the firm.

This proposition is based upon the decision of Francis v. McNeal, supra, but in that case the exact question presented in this case was referred to by the Supreme Court. The court there said:

"But the fact remains as true as ever that partnership debts are debts of the members of the firm, and that the individual liability of the members is not collateral like that of a surety, but primary and direct, whatever priorities there may be in the marshaling of assets. * * * Therefore ordinarily it would be impossible that a firm should be insolvent while the members of it remained able to pay its debts."

[5] In a case where one, but not all, of the members of a partnership are adjudged bankrupt, "the partnership property may be administered by the partners not adjudged bankrupt and does not come into bankruptcy at all except by consent. The partnership cannot be in

bankruptcy if the partners are not." The court further says that it "would be a further anomaly not to distribute all the partnership assets. Yet the individual estate after paying private debts is part of those assets so far as needed."

In that case, the objecting partner did not oppose the administration of the firm and individual property by a trustee in bankruptcy. The court affirmed the decree by which the trustee applied to the use of the creditors in bankruptcy the firm property and that of all of its individual members. The objecting partner was ordered to turn his real estate over to the trustee, who was given leave to sell the same; it being admitted that ultimately the property of all would be insufficient to pay the entire firm debts. The court said that the exception in the bankruptcy law, under section 5h, where one or more, but not all, of the members of a partnership were adjudged bankrupt, meant that the partnership did not come into bankruptcy at all except by the consent of the solvent partner.

It would seem therefore that, if the total assets of the firm and individuals will not suffice "to pay the partnership debts," the firm property and the individual properties may be administered in bankruptcy if the firm is insolvent and if the unadjudicated partner does not object, i. e., consents thereto. This would seem to make the case like a voluntary bankruptcy but without the adjudication of the solvent partner.

The effect of a "discharge" which is said to be the object of a bankruptcy proceeding was considered to be a difficulty in Chemical Bank v. Meyer, supra, and in Francis v. McNeal, supra. In the latter case it is said that it would be an incongruity to grant a discharge in such a case from the debt considered as joint, but to leave the same persons liable for it considered as several.

But in practice this difficulty does not arise. In the present case the Kobres, if they surrender their property, may apply for a discharge as individuals and as members of the firm. If Ginsberg is not adjudicated, he cannot be discharged, and the debts of the firm will be discharged only by payment in full if that be possible. The firm as such cannot apply for discharge, and the debts will not be discharged except as the individuals are discharged, for the debts will not cease to be enforceable until the individual properties are applied to their payment and until the individuals also qualify for discharge.

Hence, if the firm is insolvent and a solvent partner consents to the administration of the firm and individual assets, it would seem that section 5h would apply and that an adjudication against the insolvent partners and against the firm would be legally possible. The administration of all the assets in the bankruptcy court would follow, and the solvent partner would be entitled to guide or share in that administration under the jurisdiction of the court.

In the present case Ginsberg has now consented to turn over his individual property to the bankruptcy court and to join in the administration of the estate even if the firm be held solvent. The determination that the firm is insolvent avoids the difficulty of concluding whether this creates a voluntary bankruptcy on his part, even if he

shows solvency as an individual and as a partner. His acceptance of jurisdiction and the admission thereby that he cannot meet the debts outside of bankruptcy administration seem to make it possible to proceed with the adjudication of the firm and to administer all the assets thereunder. If he be so fortunate as to have some property left after the debts of the firm and his individual debts are paid, no one can object, for the debts will be discharged by payment in full.

The partnership assets of the Brownsville Bank are available, first, to the depositors and creditors of that bank as a partnership. If the assets of that bank shall meet the claims of those creditors, then the surplus, under the circumstances, will be divided and the share therein of the Kobres will be turned over to the trustee in bankruptcy of the Kobre estate in the proceeding in the Southern district, if an adjudication in that proceeding be ever obtained and a trustee elected. If no adjudication should be had in the proceeding in the Southern district, and if a composition should result, then the Kobres' debts will be wiped out, and any surplus from the Brownsville Bank belonging to Kobre and his wife would be turned back to them or their successors.

If we look at subdivision "f" of section 5, we shall see that the net proceeds of the partnership property are to be used first for the payment of the firm debts, and if any surplus remains therefrom it shall be used to pay the debts of the individuals. "Should any surplus remain of the property of any partner after paying his individual debts, such surplus shall be added to the partnership assets and be applied to the payment of the partnership debts." This plainly contemplates that a partner may be solvent and have a surplus of assets. If so, that surplus is to be added to the partnership assets, and if the partnership is insolvent, and the other partners do not have a surplus of assets, that is, are insolvent themselves, then there could, as in Francis v. McNeal, supra, be no solvent partner unless the surplus of that partner who had a surplus over his individual debts should be sufficient to pay all of the firm debts for which he is liable. If his surplus were insufficient, then the firm would be insolvent and all of the partners ultimately insolvent. Ginsberg could get no discharge, but would still be liable for the balance, and the firm would be dissolved with its debts paid in part and not discharged so far as Ginsberg is concerned.

The case of Samuels & Lesser, supra, therefore, in so far as it decides that a partnership cannot be insolvent provided one partner is solvent, does not cover the case presented herein under subdivision "h," where the partner not adjudged a bankrupt consents to the adjudication of the partnership or acquiesces in the finding of insolvency of the partnership and consents to the administration in bankruptcy.

In the case at bar, the individual assets of Max Kobre and Sarah Kobre, his wife, are not available to the partnership creditors in this district until they have been applied to the partnership debts in the Canal Street Bank, except as a set-off may occur.

The adjudication as to Kobre and his wife in this district means only that a surplus of the firm assets, if such should result, will be divided and their shares turned over to their trustee in the Southern district of New York or be dealt with on composition there if one be put through.

An adjudication as to Max Kobre and Sarah Kobre as individuals and of the partnership of Max Kobre, Sarah Kobre, and Moses Ginsberg will be had.

In the selection of trustees, the rights of Moses Ginsberg under the analogy to section 5h will require his election as one trustee, and will enable him to thus "settle the partnership business" and account therefor.

In re GAY & STURGIS.

(District Court, D. Massachusetts. April 3, 1915.)

No. 20856.

1. BANKRUPTCY ⊂=228—CERTIFICATE OF REFEREE—FINDINGS OF FACT.
A certificate of the referee in bankruptcy on petition for review, which shows that he decided that it was proper to establish a time limit, as requested by trustees, for the bringing of petitions for the reclamation of securities and the establishment of liens, and that the limit established was reasonable, shows findings of fact which must stand, where the evidence is not reported.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 387; Dec. Dig. ⊂=228.]

2. BANKRUPTCY ⊂=224—RECLAMATION OF SECURITIES AND ESTABLISHMENT OF LIENS—AUTHORITY OF REFEREE—ESTABLISHING TIME LIMIT.
The referee in bankruptcy has power to fix a time limit for customers and creditors of a bankrupt stockbroker to file petitions for the reclamation of securities and claims to establish liens on cash in possession of the trustee.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 383; Dec. Dig. ⊂=224.]

In Bankruptcy. In the matter of Gay & Sturgis, bankrupts. Decree limiting time on reclamation proceedings affirmed.

Thomas M. Vinson, of Boston, Mass., for trustees.

Franklin T. Hammond and Horblit & Wasserman, all of Boston, Mass., for creditors.

MORTON, District Judge. Gay & Sturgis were stockbrokers against whom an involuntary petition was filed on May 22, 1914. Adjudication followed, and the case was referred to Mr. Referee Gibbs. As is not uncommon in failures of this character, many claims were made to specific property in the hands of the trustees. On December 28, 1914, the trustees petitioned:

"That the time within which customers and creditors of said firm may bring petitions for the reclamation of securities and claims to establish liens on the cash now in the possession of said trustees might be limited and fixed."

An order of notice thereon was issued by the referee, returnable January 16, 1915. Numerous creditors appeared in objection to the petition. The referee, after hearing, granted the prayer of the petitioners, and made a decree fixing February 20, 1915, as "the last day for customers and creditors of said bankrupts to file petitions with the

court for the reclamation of securities and to establish liens on the cash now in the possession of said trustees." The time limited was subsequently extended to March 20, 1915. The objecting creditors brought petitions for review, and the matter is here on the certificate of the referee.

[1] The certificate, as I understand it, shows that the referee decided that it was proper to establish a time limit as requested by the trustees, and that the time limit established by him was a reasonable one for this case. These are findings of fact, and, as the evidence is not reported, must stand.

[2] The only question now open is whether, assuming the referee's action to have been advisable, and the time fixed reasonable, he had power to make the decree in question. I rule that he did. In re McIntyre & Co., 24 Am. Bankr. Rep. 4, 176 Fed. 552, 100 C. C. A. 140; Nauman Co. v. Bradshaw, 27 Am. Bankr. Rep. 565, at 567, 193 Fed. 350, 113 C. C. A. 274.

Decree affirmed, except that the time limited is extended to and including May 15, 1915.

In re VIRGIN.

(District Court, S. D. Georgia, W. D. June 15, 1915.)

1. CHATTEL MORTGAGES ⟸60—EXECUTION—ATTESTATION BY EMPLOYÉ OF MORTGAGEE.
   That a mortgage to a bank was attested by an employé of the bank as a notary public does not render it invalid under the law of Georgia.
   [Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 115; Dec. Dig. ⟸60.]

2. WORDS AND PHRASES—"ATTESTATION."
   "Attestation" is the act of witnessing the actual execution of a paper and subscribing it as a witness (citing Words and Phrases, Attest).

3. CHATTEL MORTGAGES ⟸60—EXECUTION—ATTESTATION.
   Under Civ. Code Ga. 1910, § 3257, which requires a mortgage to be attested before a notary public or justice of a court, it is not necessary that the notary should attach a formal certificate of acknowledgment.
   [Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 115; Dec. Dig. ⟸60.]

4. BANKRUPTCY ⟸184—LIENS—VALIDITY OF CHATTEL MORTGAGE.
   Under Civ. Code Ga. 1910, § 3260, which provides that "mortgages not recorded within the time required remain valid as against the mortgagor, but are postponed to all other liens created or * * * purchases made prior to the actual record of the mortgage," a chattel mortgage executed by a merchant in good faith more than four months prior to his bankruptcy, when both he and the mortgagee believed him solvent, and with the express agreement that he should buy no more goods on credit, is not invalid as preferential, because not recorded until within the four months, but will not be given priority over a debt created by the bankrupt before it was recorded.
   [Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 275–277; Dec. Dig. ⟸184.]

5. BANKRUPTCY ⟸178—LIENS—CHATTEL MORTGAGE.
   Bankr. Act July 1, 1898, c. 541, § 47a (2), 30 Stat. 557, as amended by Act June 25, 1910, c. 412, § 8, 36 Stat. 840 (Comp. St. 1913, § 9631), by

clothing the trustee with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings, does not affect the validity of a chattel mortgage executed more than four months prior to the bankruptcy, and recorded within the four months period, but prior to the bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 221, 264–274, 283, 284; Dec. Dig. ⟸178.]

In Bankruptcy. In the matter of J. H. Virgin, bankrupt. On review of decision of referee allowing a mortgage of the Commercial National Bank as a prior lien. Modified.

Feagin & Hancock and R. D. Feagin, all of Macon, Ga., for trustee.

Mallary & Wimberly and R. S. Wimberly, all of Macon, Ga., for certain creditors.

Hardeman, Jones, Park & Johnston and Orville A. Park, all of Macon, Ga., for American Nat. Bank, liquidating agent of Commercial Nat. Bank.

SPEER, District Judge. The question before the court involves the validity of a mortgage to secure $7,500. This was executed by Mr. Virgin, at the time a dealer in jewelry. It was given to the Commercial National Bank to secure the amount named, and covered the entire stock of merchandise of the mortgagor. At the time, which was more than four months antecedent to bankruptcy, Mr. Virgin was on the verge of insolvency. It is not made plain that this was known to him or to the Commercial National Bank, the mortgagee. The mortgage was, indeed, made to obtain the sum involved in order that it might be paid on the existing debts of Mr. Virgin's creditors. This was done. It is true that Mr. Virgin requested the bank not to record the mortgage. It is equally true that no such promise was made him. To the contrary, it was expressly stipulated, contemporaneously with the creation of the debt, that he should make no further purchases on credit, and should reduce his stock as far as possible. Subsequently he did, however, make certain additional purchases, which it is stated amounted to about $500. The Commercial National Bank, becoming involved, transferred its assets and other values to the American National Bank, which undertook the liquidation of the Commercial. Mr. Virgin now applied to the American National Bank for additional credit. This was declined him, and the Commercial was directed by the American to proceed to collect the debt. The mortgage was recorded on one day, and the next the proceeding in bankruptcy was filed. The trustee now assails the mortgage as defectively executed, as a preference to the Commercial National Bank, and as fraudulent against the general creditors. The referee, after full hearing, has passed on all of these questions, and has filed a report negativing them, which is noteworthy for clearness and completeness. Exceptions thereto have been filed by the trustee, and thus the issues are presented.

[1] The execution of the mortgage cannot, we think, be declared invalid for the reason assigned, namely, that it was attested by a clerk in the Commercial National Bank, who was also a notary public. Said

the Georgia Court of Appeals in Betts Evans Trading Co. v. Bass, 2 Ga. App. 718, 721, 59 S. E. 8, 9:

"We do not see that a clerk, who has no interest conditional upon the profits, might not, as notary public, attest deeds, mortgages, or conditional bills of sale in behalf of his employer, or that a cashier or other officer of a bank, who owns no stock therein, might not do the same thing." The court adds, "though this would be a doubtful propriety."

The view of the state court as to validity, and not propriety, must be regarded as controlling here.

[2, 3] Nor can we assent to the contention of the exceptors that the notary must attach a formal certificate of his acknowledgment to the mortgage.

"Attestation and acknowledgment are different acts. Attestation is the act of witnessing the actual execution of a paper and subscribing one's name as a witness to that fact. Acknowledgment is the act of a grantor in going before some competent officer and declaring the paper to be his deed." White v. Magarahan, 87 Ga. 217, 219, 13 S. E. 509, 510.

See, also, Baxley v. Baxley, 117 Ga. 60, 43 S. E. 436.

This rule of the Georgia court is expressive of the general law.

"The act of witnessing an instrument of writing at the request of the party making the same and subscribing it as a witness is attestation." Bouvier's Law Dictionary, title "Attestation."

See, also, 1 Words and Phrases, page 628.

[4] Nor is the contention maintainable that the mortgage itself is altogether void because it was preferential. It was given for an actual loan of $7,500. There was no intention to create a preference. The facts indicate that both Mr. Virgin and the Commercial Bank believed that he was solvent. The mortgage was executed more than four months prior to bankruptcy, and was actually recorded before bankruptcy, though within four months. So far from there being an agreement or tacit understanding that the mortgage was to be withheld from record to the injury of subsequent creditors, it was expressly stipulated that no subsequent credit should be obtained. Now the Code of Georgia provides:

"Mortgages not recorded within the time required remain valid as against the mortgagor, but are postponed to all other liens created or obtained, or purchases made prior to the actual record of the mortgage." Code 1910, § 3260.

There are many authorities in support of this statutory principle. In re Williams (D. C.) 120 Fed. 542; Doody Co. v. Adams, 123 Fed. 1007, 58 C. C. A. 682; Robinson v. Woodmansee, 80 Ga. 249, 4 S. E. 497; Dickenson Trustee v. Stults, 120 Ga. 632, 48 S. E. 173. The Fifth Circuit Court of Appeals has held that:

"Neglect to promptly record a mortgage is not of itself fraudulent as against other creditors of the mortgagor." Bean v. Orr, 182 Fed. 599, 105 C. C. A. 137.

See, also, Meyer Bros. Drug Co. v. Pipkin Drug Co., 136 Fed. 396, 69 C. C. A. 240.

This was a Texas case, where the provisions of the statute are identical with those of Georgia. Besides, the execution of the mort-

gage, which was made in entire good faith, antedated the preferential period.

[5] Nor does the amendment to the Bankruptcy Law of 1910, which clothed the trustee with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings (paragraph 47a, as amended) change the status. The trustee could not have any lien of any sort before he became trustee, and before that date the mortgage was recorded, and is therefore prior to any lien this amendment created. See In re Jacobson & Perrill (D. C.) 200 Fed. 812. There it was held:

"The lien of a bankrupt's trustee conferred by the Bankruptcy Act as amended in 1910 does not relate back to a period four months prior to the institution of bankruptcy proceedings, nor can it antedate the institution of such proceedings."

See, also, Keeble v. John Deere Plow Co., 190 Fed. 1019, 111 C. C. A. 668.

And again by the Circuit Court of Appeals for the Fifth Circuit, it was held:

"Where the mortgage was given for a valid consideration, and not to hinder, delay, or defraud the creditors, and not having been withheld from record with fraudulent intent, and having been recorded before the lien of the bankrupt's trustee attached, it was valid against him." Anderson v. Chenault, 208 Fed. 400, 125 C. C. A. 616.

An attempt to review this case, originally decided in this district, was denied by the Supreme Court of the United States, 235 U. S. 700, 35 Sup. Ct. 201, 59 L. Ed. —.

In view of these considerations, we must hold that in the main, the decision of the referee must stand. It is, however, true that a bankruptcy court is a court of equity. In such a court it is competent, as between the parties before it, to afford redress to those who have been injured, where one party with a full opportunity to avoid the result has put it in the power of another to do injury to a third. The facts here seem to justify the application of this principle. It is true that the Commercial Bank declined the request of Mr. Virgin to withhold the mortgage from record. It is true that an agreement was reached that he should obtain no additional credits, and that he should pay cash for everything bought. But the mortgage was not in fact recorded. In fact, additional purchases, seemingly not in large amount, were made on credit. Had record been made, this would have been impossible, or, if possible, the vendor would have had at least constructive notice. It seems, therefore, that the creditors whose debts were created after the execution of the unrecorded mortgage, and before the actual record, are entitled to an equity equivalent to that of the mortgagee. This seems plain from the Georgia statute (Code 1910, § 3260), supra:

"Mortgages not recorded within the time required remain valid as against the mortgagor, but are postponed to all other liens created or obtained, or purchases made prior to the actual record of the mortgage."

This was the rule established by the Circuit Court of Appeals for the Fifth Circuit, in Clayton v. Exchange Bank of Macon, 121 Fed.

630, 57 C. C. A. 656, opinion by the late Judge Shelby, cited in Re Jacobson & Perrill (D. C.) 200 Fed. 812, decision by District Judge Newman. Said that learned judge on page 817:

"A mortgage may be free from fraud in the beginning and may become fraudulent by the conduct and acts of the parties afterwards. Although Goldstein Bros. took this mortgage in good faith, for a present consideration at the time it was taken, their subsequent action, or rather their nonaction and their silence when they should have spoken, must, in my opinion, render this mortgage invalid as against credtitors who sold goods and put them in the bankrupt stock before the record of the mortgage and without the knowledge of the existence of the same."

There Judge Newman doubtless used the word "fraudulent," because he adds:

"I think it is perfectly clear from this record that the mortgage was intentionally withheld from record."

Here it is not necessary to impute fraud. It is sufficient to say that the nonaction of the mortgagee, the bank, in its failure to record the mortgage, will be presumed to have misled the creditors who actually sold to the mortgagor between the execution of the mortgage and the date of its record. Therefore such creditors are entitled to prorate in the distribution of the assets on equal terms with the mortgagee and the bank, which is its liquidating agent.

Therefore a decree will be ordered directing the affirmance of the referee's findings, save as to the creditors of this class. A re-reference will also be directed, and the refereee directed to ascertain the amount of such valid claims and permit the holders to prorate equally with the bank in the application of the values arising from the sale of the mortgaged assets.

In re CITY DRUG STORE.

(District Court, S. D. Georgia, W. D. June 11, 1913.)

BANKRUPTCY ⇐191—CLAIMS—PRIORITY—RENT.

Civ. Code Ga. 1910, § 3340, provides that landlords shall have a special lien for rent on crops made on land rented from them superior to all other liens, except liens for taxes, and also a general lien on the debtor's property liable to levy and sale, and that such general lien shall date from the time of the levy of the distress warrant to enforce it. Bankr. Act July 1, 1898, c. 541, § 42a(2), 30 Stat. 557, as amended by Act June 25, 1910, c. 412, § 8, 36 Stat. 840 (Comp. St. 1913, § 9631), provides that the trustee shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings. Section 67f invalidates all levies and other liens obtained through legal proceedings within four months of the filing of the petition. *Held*, that a landlord of other than farm lands has a lien entitling his claim for rent to priority in payment, though there has been no levy of a distress warrant, as the provision that the lien dates from the levy of such warrant would seem merely to provide the time from which the process of the court can be exercised for its enforcement, while the purpose of the amendment of 1910 was to protect general creditors from unrecorded

mortgages, unlawful transfers, spurious claims, and to prevent the dissipation of the bankruptcy assets through unworthy and unmeritorious demands.

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

In Bankruptcy. In the matter of City Drug Store, bankrupt. On claim of Mahoney & Co., as landlords, to priority. Claim of priority allowed.

Charles Akerman, of Macon, Ga., for claimant.

Hardeman, Jones Park & Johnston, Orville A. Park, and E. P. Johnston, all of Macon, Ga., for trustee in bankruptcy.

SPEER, District Judge. Here is a controversy between the owner of a business house in Dublin, Ga., and the trustee in bankruptcy of its tenant. That tenant is the City Drug Store. It became bankrupt, owing to the landlord the sum of $236.67 for rent. The landlord insists that his right, as such, under the laws of the state of Georgia, gives him priority, and that his rent should be paid in full out of the assets.

This claim of priority is denied by the trustee. It is insisted for the latter that the levy of a distress warrant was essential to the completion of the landlord's lien. Here, while the contract of tenancy and the actual tenancy antedated the bankruptcy proceeding by two months, there was no levy of such distress warrant.

Now the landlord's lien was conferred by the state statute (Code 1910, § 3340). This provides:

"Landlords shall have a special lien for rent on crops made on land rented from them, superior to all other liens except liens for taxes, to which they shall be inferior, and shall also have 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 a distress warrant to enforce the same."

The statute, it is seen, creates a special lien for the landlord of farm lands, and a general lien for the landlord of other realty.

The priority of right in the landlord, asserted under this statute, has been hotly contested. As to the general lien of the landlord, where there had been a levy of a distress warrant, in Henderson, Trustee, v. Mayer, 225 U. S. 631–639, 32 Sup. Ct. 699, 56 L. Ed. 1233, it was upheld. These questions, so vital to those owning land in this state, may therefore be regarded as settled, and since the vast preponderance of values vested in our people is in lands, such investments have been accorded a degree of stability by the highest authority which is now of grave importance and will be increasingly important hereafter.

The Supreme Court in the Mayer Case, supra, indeed, placed the landlord's right upon what seems the broadest and most enduring foundation. It declared that the landlord's lien is not created by the levy of the distress warrant, but arises out of the relation of landlord and tenant. There are, in various forms, in this paramount and unanimous decision, reiterated expressions of this fundamental principle. It is, however, insisted for the trustee here that the state statute above

quoted makes the general lien date from the time of the levy of the distress warrant to enforce the same. It is further insisted with great plausibility that the Mayer Case was decided before the amendment to the Bankruptcy Act of 1910, by which it was declared that the trustee in bankruptcy "shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings." Section 47a (2). It is further insisted that, since the trustee here was appointed before the landlord levied his distress warrant, the amendment giving him the lien specified antedates and therefore has priority of, the landlord's lien. In support of this contention, the learned counsel who appeared for the trustee, who is also the editor of the Annotated Code of Georgia, cites the statutory catalogue of lien priority in this state, as follows:

"The following liens are established in this state: (1) Liens in favor of the state, counties, and municipal corporations for taxes. (2) Liens in favor of creditors by judgment and decree. (3) Liens in favor of laborers. (4) Liens in favor of landlords. (5) Liens in favor of mortgagees. (6) Liens in favor of landlords furnishing necessaries [and seven other classes]."

He then insists that the trustee's right as a judgment creditor, when it antedates the distraint, has priority, although acquired subsequently to the contract between the landlord and tenant. Unhappily for this inference, the argument of the same learned counselor evoked in this court in the recent case of In re J. H. Virgin, Bankrupt, 224 Fed. 128, the decision that the trustee's lien, provided by the same amendment, was inferior to a mortgage previously executed, which was made in good faith, but which had been recorded only one day before bankruptcy. Such a mortgage lien, in Georgia, is such from the date of its execution. The contract between landlord and tenant also exists from the date of its making. The former, if unrecorded, affords no notice to the business world; the latter does. The title of the landlord is of record. The public is therefore charged with notice that the tenant, the bankrupt in this case, is occupying the land of another. There, too, is the inherent right of the landlord, which has been recognized from the time whereof the memory of man runneth not to the contrary. He is the only *lord* known to our system.

The provision of the statute that his lien dates from the levy of the distress warrant, in view of the Mayer Case, already cited, would seem merely to provide the time from which the process of the court can be exercised for its enforcement. Can it be maintained that a mortgage, which in Georgia does not convey title, but is merely a security for debt, is, in the bankruptcy court, of greater dignity than the right of the landlord who holds title to the soil? The mortgage must be foreclosed; the distress warrant must be levied. The bankruptcy court may permit or direct either; but the lien of both, if honestly created, springs into existence the moment the contracts respectively were made. To hold otherwise in the case would be utterly to deny the landlord's right. The tenancy had existed for only two months. Had the distress warrant been sued out within that time, and anterior to bankruptcy, the proceeding would have been void ab initio, by the express terms of the act. Section 67f provides as follows:

"All levies, judgments, attachments, or other liens, obtained through legal proceedings * * * within four months prior to the filing of a petition in bankruptcy shall be deemed null and void."

And thus the proceeding to enforce the lien of the landlord on whose land the business itself was conducted would have been destroyed.

It seems, moreover, clear to the court that the purpose of Congress in the amendment of 1910, in giving the lien of a judgment creditor to the trustee, was to protect the general creditors from unrecorded mortgages, unlawful transfers, spurious claims, and to prevent the dissipation of the bankruptcy assets through unworthy and unmeritorious demands. This statutory lien, for such purposes, has not altogether the effect of a judgment obtained by due process of law, made anterior to a contract between the landlord and tenant. Such a judgment would take the goods of the tenant liable to levy and sale. But the trustee himself accepts his position and takes his lien charged with the knowledge that the contract between landlord and tenant exists. In many, if not most, cases of bankruptcy, as trustee, he continues the business of the bankrupt on the property of the landlord. Without the use of the land, the whole enterprise would have been thwarted in limine. Moreover, was the contention of the trustee sound, it might be feasible for him to hold the landlord's farm, warehouse, or storehouse, or other realty, and accord him merely the meed of any general creditor without lien or other security.

While this is not the view of other judges, for whom there is here entertained the profoundest deference and respect, and, of course, is not in harmony with the views of the referee, expressed in his report with a clarity which seems to rival some of the precedents cited, it seems in strict consonance with the rights of the landowner as defined by the Supreme Court of the United States in the Mayer Case, and upon which so much of the stability of our system must depend.

For these reasons, the finding of the referee is not approved. The claim of the landlord is held entitled to priority, and direction may be taken that it be paid in full by the trustee.

UNITED STATES v. BROWN.

(District Court, W. D. Washington, N. D. April 21, 1915.)

No. 2988.

1. EVIDENCE ⟸10—JUDICIAL NOTICE—FACTS OF COMMON KNOWLEDGE.
The court will take judicial notice of the fact that opium is not grown or produced in the United States.
[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 9–14; Dec. Dig. ⟸10.]

2. COMMERCE ⟸3—FOREIGN COMMERCE—REGULATION—STATUTES—VALIDITY.
Congress may prohibit the importation of opium and regulate its relation to interstate commerce, as is done by Act Dec. 17, 1914, providing for the registration with collectors of internal revenue of dealers in opium, imposing a tax on dealers, and making it unlawful for any person

who has not registered and paid the tax to have in his possession any opium or derivative thereof, and providing that such possession shall be presumptive evidence of a violation of the act.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 3; Dec. Dig. ⊂=3.]

Kenneth Brown was indicted for crime. Demurrer to indictment overruled.

Clay Allen, U. S. Dist. Atty., and Winter S. Martin, Asst. Dist. Atty., both of Seattle, Wash., for the United States.

Fred W. Dorr, of Seattle, Wash., for defendant.

NETERER, District Judge. It is charged by the indictment that the defendant at the time therein stated—

"did willfully, knowingly, unlawfully, and feloniously have in his possession and under his control a certain compound, manufacture, derivative, and preparation of opium, to wit, about three drams of yen shee, a more particular description of the quantity and quality of said opium derivative and preparation herein referred to as yen shee being to the grand jurors unknown; he the said Kenneth Brown, alias Kenneth Cummings, not having theretofore registered with the collector of internal revenue of the United States in and for the collection district of Washington, all as required under the provisions of the Act of Congress of December 17, 1914, and not having theretofore paid the special tax provided for by said mentioned act, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America."

A demurrer is filed on the ground that the indictment does not state facts sufficient to constitute an offense under any valid or constitutional law of the United States.

It is contended that the support of the indictment, if any, must come from section 8 of the act referred to, and that this section is unconstitutional, in that it is an attempt on the part of Congress to encroach upon the police power of the several states; that the only right Congress has to control the sale of a commodity, within the provisions of the Constitution, is (a) to regulate commerce; (b) the right of taxation. And neither of these rights is invoked by section 8. Counsel quotes excerpts from the opinions of several of the justices in the License Cases, 5 How. 504, 12 L. Ed. 256, Mugler v. Kansas, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205, Leisey v. Hardin, 135 U. S. 100, 10 Sup. Ct. 681, 34 L. Ed. 128, and Austin v. Tenn., 179 U. S. 343, 21 Sup. Ct. 132, 45 L. Ed. 224.

In the License Cases a statute of Massachusetts regulating the sale of foreign liquors within the state was held unconstitutional. In Mugler v. Kansas, a prohibition statute, so called, was held unconstitutional. In Leisey v. Hardin, an "original package" case, the court held that unbroken and unopened packages brought from another state could not be prohibited, as violative of interstate commerce. In Austin v. Tenn., a statute prohibiting the sale of cigarettes within the state was sustained.

No fault can be found with these cases; nor do I think that they throw much, if any, light upon the issue here. The purpose of the drug act in issue is expressed in its title:

"An act to provide for the registration of, with collectors of internal revenue, and to impose a special tax upon, all persons who produce, import, manufacture, compound, deal in, dispense, sell, distribute, or give away opium or coca leaves, their salts, derivatives, or preparations, and for other purposes."

[1] I think we may assume, and that the court will take judicial notice of the fact, that no opium is grown or produced in this country, and that the purpose of the act is to prohibit the importation of opium. The laws with relation to such importations have become more stringent with each succeeding enactment.

[2] Section 1 of the act in question provides, among other things:

"That on and after the first day of March, 1915, every person who produces, imports, manufactures, compounds, deals in, dispenses, sells, distributes, or gives away any opium or coca leaves or any compound, manufacture, salt, derivative or preparation thereof, shall register with the collector of internal revenue of the district his name or style, place of business. * * *"

And it further provides:

"At the time of such registry, and on or before the 1st day of July annually thereafter, every person who produces, imports, manufactures, compounds, deals in, dispenses, sells, distributes, or gives away any of the aforesaid drugs shall pay to the said collector a special tax at the rate of $1.00 per annum."

Section 2 provides a lawful and legal method of acquisition by any person entitled to have possession of these drugs.

Section 8 provides:

"That it shall be unlawful for any person not registered under the provisions of this act, and who has not paid the special tax provided for by this act, to have in his possession or under his control, any of the aforesaid drugs, and such possession or control shall be presumptive evidence of the violation of this section and also of the violation of the provisions of section 1 of this act * * *"

—the purpose of Congress being to prohibit the importation, manufacture, or sale of the drugs described; and by this act the drug became an "outlaw" in the country, its presence Congress has the right to trace, and has the power to punish any person in whose possession this "outlawed" article may be found. The possession of such drug or control thereof is made presumptive evidence of the unlawful importation, manufacture, etc., as well as an obligation to pay the special tax provided by the act, and a failure to register and pay the tax as provided in section 1 would be a fraud upon the United States, in that it deprived the government of the revenues provided by the act.

In United States v. Stowell, 133 U. S. 1, 10 Sup. Ct. 244, 33 L. Ed. 555, the court says:

"By the now settled doctrine of this court (notwithstanding the opposing dictum of Mr. Justice McLean, in United States v. 84 Boxes of Sugar, 7 Pet. [32 U. S.] 453, 462, 463 [8 L. Ed. 745]) statutes to prevent frauds upon the revenue are considered as enacted for the public good and to suppress a public wrong, and therefore, although they impose penalties or forfeitures, not to be construed, like penal laws generally, strictly in favor of the defendant; but they are to be fairly and reasonably construed, so as to carry out the intention of the Legislature."

Congress, having the power to exclude the drug entirely from the United States, and the right to regulate its relation to interstate commerce, and to levy a tax, must be held to have the right to make it unlawful for any person who has not complied with the provisions of the act by registration or paying a tax, to have in his possession this "outlawed" article. The act must be construed as a whole, and force given to every part when this can be done.

Taking the act as a whole, I think the demurrer should be overruled, and it is so ordered.

Ex parte CHIN QUOCK WAH.

(District Court, W. D. Washington, N. D. May 10, 1915.)

No. 2971.

1. ALIENS ⟸20—CONSTITUTIONAL LAW ⟸318—DEPORTATION—APPEALS—RIGHT TO APPEAR BY COUNSEL.

Due process of law does not require that an alien ordered deported shall be granted the right to appear by counsel on an appeal to the Commissioner of Labor.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 73; Dec. Dig. ⟸20; Constitutional Law, Cent. Dig. § 949; Dec. Dig. ⟸318.]

2. ALIENS ⟸32—DEPORTATION PROCEEDINGS—EVIDENCE.

A certificate issued by a United States commissioner to a person of Chinese descent, granting the right to enter the United States as an American citizen, was not conclusive that he was a native-born citizen in a proceeding involving the right to enter the United States of an alleged minor son of the certificate holder, as the certificate was neither a judgment nor evidence of a judgment.

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

Application by Chin Quock Wah for a writ of habeas corpus. Writ discharged, and petitioner remanded to custody.

Beeler & Sullivan, of Seattle, Wash., for applicant.

Clay Allen, U. S. Dist. Atty., of Seattle, Wash., and George P. Fishburne, Asst. U. S. Atty., of Tacoma, Wash., for the United States.

NETERER, District Judge. It is alleged in the amended petition that the petitioner is restrained of his liberty by the United States Commissioner of Immigration, in that he is ordered deported, contrary to law, and states that on the 14th of September, 1914, he arrived at the port of Seattle, made application for admittance, and that he was given a hearing by the immigration officials and testimony was taken from time to time, and on the 25th of November, 1914, an order was issued by the Commissioner of Immigration, finding that he was not entitled to remain in the United States, and his deportation ordered; that on the same day an appeal was taken to the Secretary of Labor; that the appeal was determined by one J. B. Densmore, Solicitor of the Department, as Acting Assistant; that at said time the Secretary of Labor and his Assistant were at their respective offices, and the action of Densmore was not authorized by law, and that the petitioner,

by reason thereof, did not have a hearing upon his appeal, and that he has been denied due process of law; that he is the minor son of Chin Wing Hin, a native-born Chinaman of the United States; and prays that he be discharged and allowed to join his father, who is a merchant, in Boston, Mass. It is further alleged that the petitioner was denied the right to have counsel appear before the Secretary of Labor and present oral argument in support of his appeal.

Return is made in which it is admitted that the petitioner arrived in the United States and applied for admission, and that he was denied admission and ordered to be deported. It admits that appeal was made to the Secretary of Labor, denies that said appeal was not heard by the Assistant Secretary, denies that applicant is the minor son of a domiciled Chinaman, denies that he is the son of Chin Wing Hin, and denies that Chin Wing Hin is a native-born Chinaman of the United States, or entitled to remain in the United States.

[1] The contention of the petitioner that his appeal was improperly disposed of is not well founded. The record discloses that the appeal was heard and disposed of by the Assistant Secretary of Labor. The contention that he was deprived of a fair hearing and not accorded due process of law is, I think, equally unfounded. There is no provision of law to my knowledge which accords to an immigrant the right of counsel before the Commissioner of Labor. This matter was before this court in Re Application of Chin Hing, opinion filed May 10, 1915, in which the language of Judge Lacombe, used in U. S. v. Williams (C. C.) 190 Fed. 898, was quoted, as follows:

"There is nothing in the statute which calls for the presence of counsel at the examination of aliens preliminary to admission; nothing to indicate that it was the intent of Congress that these investigations in hundreds of thousands of cases touching the qualifications of an alien seeking to enter were to be conducted as trials in court, with counsel present to represent the alien, witnesses called to testify, and elaborate examination and cross-examination of them."

[2] It is strenuously contended that the fact of Chin Wing Hin's birth in the United States was definitely disposed of and became a legal status, established by a certificate issued by one McGettrick, United States Commissioner, granting the right to enter the United States as an American citizen. Referring to the McGettrick certificate, this court in Ex parte MacPock (D. C.) 207 Fed. 696, at page 698, said:

"The first question to be disposed of is: Is the certificate which was presented a judgment in contemplation of the Exclusion Act? I think a reading of the document is sufficient to conclusively show that it is not. On its face it shows that it is not a judgment. It does not purport to be a certified copy of any judgment or record of judgment. It is not a document which could be considered as evidence by any court or tribunal. It is merely a statement that a certain act had been done. It does not purport to, nor does it in fact, fill the requirements of any rule of evidence, state law, or act of Congress with relation to authentication of records of the United States. 'A written statement by a United States commissioner that a Chinese person of a certain name was brought before him and was adjudged to have the right to remain in the United States by reason of being a citizen is not evidence of a judgment.' Ah How v. United States, 193 U. S. 65 [24 Sup. Ct. 357, 48 L. Ed. 619]; United States v. Lew Poy Dew (D. C.) 119 Fed. 786."

I have examined the testimony with relation to the vocation of Chin Wing Hin, and likewise that pertaining to the relationship of the applicant to Chin Wing Hin, and upon the evidence presented I cannot say that the conclusion is erroneous and that the applicant was not accorded a fair hearing.

The writ is discharged, and the petitioner remanded to the custody of the Department of Immigration. If the petitioner appeals from this order within 10 days, he may be released on filing recognizance in the sum of $2,000, conditioned as provided by law, pending the appeal.

THE ULRICA.

(District Court, D. New Jersey. June 5, 1915.)

MARITIME LIENS ⊂=37—REPAIRS—COMMON-LAW POSSESSORY LIEN.

A repairer in possession of a vessel has a common-law possessory lien for repairs made while so in possession, which continues notwithstanding the seizure of the vessel in proceedings by other lien claimants, and, if its claim is also maritime, its lien is entitled to priority over older liens of the same class.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. §§ 58–70; Dec. Dig. ⊂=37.]

In Admiralty. Suit by the Weehawken Dry Dock Company against the steamboat Ulrica. On determination of priority of liens.

Alexander & Ash, of New York City, for Weehawken Dry Dock Co.

Foley & Martin, of New York City, for Tietjen & Lang Dry Dock Co.

Roe, Runyon & Autenrieth, of Jersey City, N. J., for Archibald McNeil Sons Co.

RELLSTAB, District Judge. The steamboat Ulrica was libeled, while in the possession of the Weehawken Dry Dock Company, by Burton Smith and others, wage claimants. It was seized and sold by the United States marshal. The proceeds of sale, after payment of the amounts due such wage claimants and the taxed costs, are insufficient to pay the claims of the other libelants. The claim of the Weehawken Company embraces repairs made during different periods when such steamboat was in its possession. For the amount due for the repairs made during the period when the boat was last in its possession it claims priority in payment, on the ground that it had a common-law possessory lien for such repairs.

The Weehawken Company had a common-law lien for the repairs last made, and this lien continued notwithstanding the seizure of the steamboat by the United States marshal. The B. F. Woolsey (D. C.) 7 Fed. 108; The Two Marys (D. C.) 10 Fed. 919. See, also, American Trust Co. v. W. & A. Fletcher Co., 173 Fed. 471, 97 C. C. A. 477. This is not disputed by the other libelants; but they contend, first, that as their liens, being of the same class or rank of privilege as that of the Weehawken Company, all accrued before these repairs were

made by the Weehawken Company, they are superior to such possessory lien; and, second, that the possessory lien was waived.

As to the first contention: If the repairs made by the Weehawken Company were not maritime in their nature, its common-law lien would have to yield to the liens of the other libelants. The Guiding Star (C. C.) 18 Fed. 263; The Unadilla (D. C.) 73 Fed. 350. See, also, The Tergeste, 9 Asp. M. C. 356 [1903] L. R. 26. But the character of these repairs is maritime, and, treating the Weehawken Company's lien as maritime, unaffected by the fact that it had also a common-law lien for such repairs, it is manifest that such lien is at least equal in rank to the liens of the other libelants. That being the status of such lien, it is inconceivable that it should become subordinate to the other liens on the ground that the latter accrued before those repairs were made. Such a subordination, while it would be consistent with the doctrine which controls the priority among common-law liens, would be subversive of the very genius of the maritime law which in the matter of privilege among claims of the same class, in the absence of special equities, prefers those that have most immediately preserved the res subjected to the lien. The J. E. Rumbell, 148 U. S. 1, 9, 13 Sup. Ct. 498, 37 L. Ed. 345; The John G. Stevens, 170 U. S. 113, 119, 120, 18 Sup. Ct. 544, 42 L. Ed. 969; The Guiding Star (C. C.) 18 Fed. 263, 268. See, also, The Glen Island (D. C.) 194 Fed. 744, 746. There are no equities in this case that would justify the exclusion of the Weehawken Company's lien from the benefit of this primary rule. On the contrary, its possessory lien, arising from its custody of the steamboat at the time of seizure, but emphasizes the need of enforcing in this case the rule which gives priority in the inverse order to that in which the liens of the same class accrued.

As to the second contention: It is sufficient to say that the evidence does not support it. While the evidence tends to show that the Weehawken Company did not realize all the advantage that the possession of the steamboat gave it, yet there is nothing to indicate that it intended to surrender any rights that it may have had by reason thereof.

The Weehawken Company is entitled to priority in payment as to the sum of $138.02, the value of the repairs made by it during the period brought to a close by the seizure of such steamboat.

In re JARMULOWSKY.

Ex parte WOLF & POUKER.

(District Court, S. D. New York. April 12, 1915.)

BANKRUPTCY ⊂⇒116—MORTGAGES ⊂⇒199—RENTS—RIGHTS AS AGAINST RECEIVER IN BANKRUPTCY.

A real estate mortgage provided that, if default should be made, the rents and profits arising from the land were assigned to the mortgagee, who might enter or apply for a receiver. *Held* that, under the law of New York, the mortgagee was entitled to rents which became due and were collected by a receiver in bankruptcy after default on the mortgage,

although the mortgagee had not applied for a foreclosure receiver or for an order of sequestration.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. ⊂⊃116; Mortgages, Cent. Dig. §§ 513–525; Dec. Dig. ⊂⊃199.]

In Bankruptcy. In the matter of Meyer Jarmulowsky, bankrupt. On petition by Wolf & Pouker for the payment of rents collected from mortgaged premises. Petition granted.

This is an application by a mortgagee against a bankruptcy receiver for an order directing the receiver to pay to him rents which had fallen due, and had been collected, after default upon the mortgage, but before the mortgagee had applied either for a foreclosure receiver, or for a sequestration order of the rents for his benefit. The mortgage contained these clauses:

"Fifth. That if default shall be made in the payment of the principal sum mentioned in the said bond, or of any installment thereof, or of the interest which shall accrue thereon, or of any part of either, at the respective times therein specified for the payment thereof, the said mortgagee shall have the right forthwith, after any such default, to enter upon and take possession of the said mortgaged premises, and to let the said premises, and receive the rents, issues, and profits thereof, and to apply the same, after payment of all necessary charges and expenses, on account of the amount hereby secured, and said rents and profits are in the event of any such default hereby assigned to the mortgagee.

"Sixth. And the mortgagee shall also be at liberty, immediately after any such default, upon proceedings being commenced for the foreclosure of this mortgage, to apply for the appointment of a receiver of the rents and profits of the said premises without notice, and the mortgagee shall be entitled to the appointment of such a receiver as a matter of right, without consideration of the value of the mortgaged premises as security for the amounts due the mortgagee, or the solvency of any person or persons liable for the payment of such amounts."

Ralph Wolf, of New York City, for mortgagee.
Norman M. Behr, of New York City, for receiver.

LEARNED HAND, District Judge (after stating the facts as above). This question depends entirely upon the law of the state of New York as to whether a mortgagee's title to rents of realty after default is good against the creditors of the mortgagor, where the mortgage contains an assignment of rents to become effective on default. As between the bankrupt and the mortgagee the agreement would, of course, be valid, and it would seem that the creditors should stand in no better position than the bankrupt, except by virtue of some statute or rule forbidding secret liens. No such rule exists so far as I know, nor any reason why the agreement should not be carried out.

It must be admitted that the law is in some doubt upon the question when it arises between successive mortgagees. The last case is Sullivan v. Rosson, 166 App. Div. 68, 151 N. Y. Supp. 613, in which the Appellate Division for the First Department decided by a vote of three to two that an agreement like that at bar prevailed over the right of a junior mortgagee, who had secured a receiver in a foreclosure suit. Harris v. Taylor, 35 App. Div. 462, 54 N. Y. Supp. 864, also by a di-

vided court, held the same thing when the agreement authorized the mortgagee to collect the rents from the outset. Thomson v. Erskine, 36 Misc. Rep. 202, 73 N. Y. Supp. 166, a decision of Justice McAdam for the Appellate Term, held the same thing as Sullivan v. Rosson, supra. Judge Hough, in Re Banner (D. C.) 149 Fed. 936, made a contrary ruling in a bankruptcy case; but he distinguished Harris v. Taylor, supra, because the condition in that case applied from the outset. This decision was before Sullivan v. Rosson, supra, which, though not authoritative, is as near an exposition of the state law as is available.

It does not seem to me that the same question is presented here as in cases between a mortgagee in possession and a mortgagee with an assignment in his mortgage; but, if it be, then I think I should follow the last decision of the state court. The amount at stake does not justify an action in the state court.

The petitioner may take his order.

In re PROGRESSIVE WALL PAPER CORPORATION.

In re FIRST NAT. BANK OF BALLSTON SPA, N. Y.

(District Court, N. D. New York. June 4, 1915.)

1. PLEDGES ⟸9—DEBTS WHICH MAY BE SECURED—PRE-EXISTING LIABILITY.
   The existence of a valid indebtedness is a sufficient consideration for a new promise or a pledge of property as security for the payment of such indebtedness.

   [Ed. Note.—For other cases, see Pledges, Cent. Dig. § 20; Dec. Dig. ⟸9.]

2. CORPORATIONS ⟸471—VALIDITY OF BONDS—BONDS ISSUED FOR "PROPERTY" —PLEDGE.
   Mortgage bonds, issued by a corporation and pledged to a bank as collateral security to a note of the corporation for an amount equal to their par value, given in renewal of a prior valid note, in consideration of such renewal, without the indorsement of one who was bound by the prior note, and under an agreement with the pledgee that it would not sell the bonds for less than their par value, were issued for "property," within the meaning of Stock Corporation Law N. Y. (Consol. Laws, c. 59) § 55, which provides that "no corporation shall issue either stock or bonds except for money, labor done or property actually received for the use and lawful purposes of the corporation," and are valid in the hands of the pledgee.

   [Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1833-1836, 1838, 1840; Dec. Dig. ⟸471.

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

3. BANKRUPTCY ⟸323—SECURED CREDITOR—RIGHT TO PROVE FOR BALANCE DUE.
   In such case, where the corporation became a bankrupt, the bonds not having been sold, if the pledgee realizes from the sale of the mortgaged

property, sold in foreclosure or by the trustee, less than the amount of the note, it may prove the balance against the estate.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 503, 505, 513; Dec. Dig. ⟸323.]

In Bankruptcy. In the matter of Progressive Wall Paper Corporation, bankrupt. On review of order of referee declaring invalid bonds of bankrupt held by First National Bank of Ballston Spa, N. Y., as pledgee. Reversed.

This is a review of an order made by William P. Badger, referee in bankruptcy, adjudging that seven mortgage bonds made by the above-named bankrupt, or its predecessor in name, the Progressive Wall Paper Corporation, for $1,000 each, and now in the possession of the First National Bank of Ballston Spa, N. Y., as collateral security for a note of the said corporation given to and now held by said bank, have never been lawfully issued, and that same are null and void; also that the claim of the said bank to hold said bonds as collateral security for the said note of the bankrupt or otherwise is illegal, and that the said bank is not a lawful owner and holder of the bonds or any of them. The order of the referee also forever enjoins and restrains the said First National Bank of Ballston Spa from selling, negotiating, or in any way disposing of the said bonds, or any of them, and directs that the said bank deliver such bonds to Fred H. Justin, as trustee in bankruptcy of the said bankrupt corporation, the Progressive Wall Paper Corporation.

Weeds, Conway & Cotter, of Plattsburg, N. Y. (Frank E. Smith, of New York City, of counsel), for trustee in bankruptcy.

Luther A. Wait, of Saratoga Springs, N. Y. (Edgar T. Brackett, of Saratoga Springs, N. Y., of counsel), for claimant.

RAY, District Judge. The above-named bankrupt, the Progressive Wall Paper Corporation, a corporation of the state of New York and doing business at Plattsburg, in said state of New York, on the 23d day of November, 1914, was duly adjudged a bankrupt, and December 10, 1914, Fred H. Justin was duly appointed trustee of the bankrupt estate and property and duly qualified as such. In or about July, 1905, the now bankrupt corporation borrowed the sum of $10,000 from the First National Bank of Ballston Spa, and gave to it its promissory note therefor, and which note bore certain indorsements. Partial payments were made on said note from time to time, and renewals for the unpaid parts were made, until January 22, 1912, when the said bank held the note of the bankrupt due on that day for the sum of $7,000, that being the unpaid balance of the loan of July, 1905. On that day, January 22, 1912, the said note of $7,000 was unsecured, except by the indorsements of John J. Cunningham, Grenville M. Ingalsbee, John H. Derby, and Asahel R. Wing, who were officers of the said now bankrupt corporation.

On said last-mentioned day a renewal note for $7,000, made by the bankrupt and indorsed by said Cunningham, Ingalsbee, and Derby, was made and delivered to the said bank in payment or renewal of the prior note for the same amount. Asahel R. Wing, one of the prior indorsers as stated, declined to indorse further, and in place of his indorsement and as further security the said now bankrupt corporation delivered to

the said bank as collateral security for the payment of the said note and debt the said seven second mortgage bonds made by the bankrupt. These bonds were secured by a mortgage on the real property and plant of the said now bankrupt corporation, and which mortgage had been given to the Adirondack Trust Company as trustee named therein. This mortgage was dated November 1, 1911. Up to the time these bonds were delivered to the said bank as aforesaid they had not been issued or used in any way by the now bankrupt corporation, but had remained in the possession of the officers of said corporation. The mortgage was recorded and the formalities of the execution of said bonds had been complied with. The mortgage had been made, delivered, and recorded pursuant to a resolution of the authorities of said corporation and is in due form. On the 2d day of November, 1911, the directors of the now bankrupt corporation had adopted the following resolution:

"Resolved, that the treasurer of this corporation be authorized to issue the bonds of the corporation which are secured by the mortgage upon its property and franchises, dated November 1, 1911, to pay, or to secure, as collateral, the payment of the notes of the corporation, now outstanding, indorsed by John J. Cunningham, John H. Derby, Asahel R. Wing, and Grenville M. Ingalsbee, and to secure as collateral the payment of other notes of the corporation, which may be given hereafter in the transaction of its business, and to pay or secure as collateral renewals of any of said notes, without reference to degree of removal of the said renewal or renewals from the note or notes now outstanding, and that said treasurer be authorized to receive said bonds from the trustee."

Prior to January 22, 1912, the indorser Wing had sold his interest in the now bankrupt corporation, and on that day, when said note for $7,000 became due, it was arranged by the corporation and the First National Bank of Ballston Spa and the indorsers Cunningham, Derby, and Ingalsbee that thereafter the note given for the debt and in renewal should be indorsed by Cunningham, Derby, and Ingalsbee, and not by Wing, and that there should be deposited seven of the said second mortgage bonds issued under said mortgage as collateral security for the payment of said note. The renewal note of January 22, 1912, indorsed by Cunningham, Derby, and Ingalsbee, and accompanied by the said bonds in question, were delivered to the said bank on said 22d day of January, 1912, pursuant to the said arrangement and agreement. That note has been renewed from time to time at the same sum, with the same indorsers, and the said bonds have remained in the possession of the bank ever since as collateral for the note and debt.

The note now held by the bank, representing said debt and for which the said bonds are held as collateral, reads as follows:

"$7000.00. Plattsburgh, N. Y., October 17, 1914.

"Three months after date we promise to pay to the order of John J. Cunningham, Grenville M. Ingalsbee, and John H. Derby the sum of seven thousand 00/100 dollars, at the First National Bank of Ballston Spa, N. Y., for value received, having deposited with said bank, as collateral security, seven bonds of the Progressive Pulp & Paper Company, for $1,000.00 each, being numbered 31, 32, 33, 34, 35, 36, and 37, with full power to sell same at public or private sale at the option of said bank, after ten days notice in writing, by mail, directed to us at Plattsburgh, N. Y., and to apply the proceeds thereof towards the payment of this note, and of any other note or

notes held by the said bank, of which we are either the maker or indorser, accounting to us for the surplus of said sale, if any, with interest.

"Progressive Wall Paper Corporation,
"by A. S. Derby, Treas.

"Countersigned: John J. Cunningham, Prest.
"Due Jan'y 17, 1915."

This note was indorsed as follows:

"Indorsed:
"John J. Cunningham.
"Grenville M. Ingalsbee.
"John H. Derby,
"By Archibald S. Derby, Atty."

The note of January 22, 1912, read the same, except as to date.

January 15, 1915, said Ingalsbee, an indorser on said note, filed with the referee the claim on said note held by the bank against the said Progressive Wall Paper Corporation, and such claim was filed as a secured claim, stating that the security held by the said First National Bank of Ballston Spa for the said debt was the said seven second mortgage bonds of said corporation of the face value of $1,000 each. To this claim was attached a copy of the last renewal note, which bore date October 17, 1914, and which was indorsed as above stated. On or about January 20, 1915, the said bank gave notice to said trustee in bankruptcy and to the said indorsers that said bonds would be sold at public auction to the highest bidder at its banking house on the 30th day of January, 1915, pursuant to the contract and agreement by which same were pledged.

Thereupon the trustee in bankruptcy, Fred H. Justin, filed his petition, setting forth the facts and alleging that said bonds were illegally and improperly issued, and not valid or legal, and not the property of the bank, and that the bank was not entitled to hold same, and pursuant to the prayer of the petition the bank was enjoined and restrained from selling or disposing of the bonds until the further order of the court, and the said bank was required to show cause why it should not be adjudged and determined that the pledge and lien claimed by the bank on said bonds was and is illegal and invalid, and why the said bonds should not be declared void, and an order made directing the bank to return same to the trustee, or why the said bank should not be restrained from enforcing the pledge or lien, if the same should be found valid, through a sale thereof. Other relief, such as the petitioner might be entitled to, was also prayed for.

The bank appeared, and evidence was taken, and the referee made an order now under review adjudging:

That the said mortgage bonds, seven in number, "have never been lawfully issued, and that the same are null and void. (2) That the claim of the said bank to hold said bonds as collateral security for the note of the bankrupt or otherwise is illegal, and the said bank is not a lawful owner and holder of said bonds. (3) That the said First National Bank of Ballston Spa, N. Y., be and it hereby is forever enjoined and restrained from selling, negotiating, or in any way disposing of said bonds or any of them. (4) That said bank deliver up the said seven second mortgage bonds to Fred H. Justin as trustee herein."

This is the order under review.

The said Progressive Wall Paper Corporation, at the time the petition was filed against it, was insolvent, its debts amounting to about $345,000, including bonded debts, and the property, exclusive of real estate, was worth about $79,000, and it would also appear that the real estate is not of sufficient value, exclusive of the mortgage in question and the bonds issued under it, to pay the balance of the indebtedness of the corporation.

The referee was requested to find, but refused to find:

"That the First National Bank of Ballston Spa, N. Y., received said bonds in good faith and for value, before maturity, and without notice of any infirmity. That said bonds, when issued, were valid, and they have continued to be and still are valid, obligations of the bankrupt."

The First National Bank of Ballston Spa, N. Y., has agreed that it will not sell the said bonds, or any of them, for less than par. The indebtedness of the bankrupt corporation, the Progressive Wall Paper Corporation, to the claimant, First National Bank of Ballston, Spa, at the time of the bankruptcy, in the full sum of $7,000 on the note in question, a copy of which is set out above, is conceded. It is also conceded that the said note represents a part of the original debt of $10,000 incurred by the corporation in July, 1905. It is not denied or questioned that when Wing, one of the indorsers on the note originally given, and the renewals thereof given prior to and including the one existing January 22, 1912, sold out his interest in the now bankrupt corporation, he refused longer to be an indorser, and that it was then agreed between the First National Bank of Ballston Spa and the now existing corporation and the indorsers Cunningham, Ingalsbee, and Derby that the indebtedness should be allowed to run; that is, that the bank would continue to give credit to the corporation on its promissory note indorsed by Cunningham, Ingalsbee, and Derby, but that the corporation should put up with the bank as collateral security to the note and indebtedness represented thereby the said bonds or obligations of the corporation. It is conceded that these bonds or obligations had not been issued—that is sold or delivered to any one—before that. The mortgage given to secure this issue of bonds, which amounted to some $100,000, of which the $7,000 was a part, was duly authorized and recorded, and is in all respects regular. No defect is pointed out. The bonds themselves are properly made out, and are legal and valid on their face. There is no irregularity in the making and execution of the bonds. The resolution of November 2, 1911, adopted by the board of directors of the Progressive Wall Paper Corporation, or its predecessor in name, as the case may have been, is challenged. The referee was requested to find that the resolution of that date was duly passed. The referee did not so find, but found as follows:

"I find that such resolution was passed, but find that it was illegal, in so far as it authorized the issue of said bonds as collateral security for antecedent debts of said corporation."

It is noted that the resolution provides that the treasurer of the corporation is authorized to issue the bonds of the corporation secured by the mortgage referred to—

"to pay or to secure as collateral the payment of the notes of the corporation now outstanding, indorsed by John J. Cunningham, John H. Derby, Asahel R. Wing, and Grenville M. Ingalsbee, and to secure as collateral the payment of other notes of the corporation which may be given hereafter in the transaction of its business, and to pay or secure as collateral renewals of any of said notes, without reference to degree of removal of the said renewal or renewals from the note or notes now outstanding, and that said treasurer be authorized to receive said bonds from the trustee."

Under this resolution and by virtue thereof the treasurer did receive the bonds from the trustee, the Adirondack Trust Company, and under the agreement set forth did deliver same to the claimant here, the First National Bank of Ballston Spa. There is no question that the $10,000 borrowed of this bank in 1905 was borrowed for and used for the business of the corporation. At the time of the renewal of the note and the pledging of these bonds to the bank, the corporation was doing business, and it was necessary for it to have an extension of credit. The credit before had at the bank was secured by the indorsements of Cunningham, Ingalsbee, Derby, and Wing. The indorsement of Wing could no longer be obtained. The transaction and facts found and stated show that the pledging of the bonds as security for the indebtedness was to secure from the bank a surrender of the old note and an extension of credit, in effect a new loan of $7,000 secured by the note of the corporation indorsed by Cunningham, Derby, and Ingalsbee, and further secured by a pledge of the bonds or obligations of the corporation. These bonds were in turn secured by a mortgage upon the real estate of the principal debtor, the Progressive Wall Paper Corporation. In effect, the delivery of the bonds to the bank gave to it a lien upon the real estate of the corporation. The situation then was that the bank held the promissory note of the Progressive Wall Paper Corporation, now bankrupt; that is, it held the promise to pay of such corporation. It also held another promise to pay $7,000, made by the same corporation. There is abundant authority for the proposition that a mere promise of a debtor to pay the debt owing and evidenced by a prior written promise to pay such debt may not be regarded or treated as collateral security. But it is otherwise when the second promise is in the form of a pledge of property of the debtor, either personal property or real estate. A. may give his note to B. It is a mere written promise to pay. A. may also execute and deliver to B. at the same time, or at another time, a mortgage on personal property or a mortgage on real estate owned by him as collateral to his original promise, and this is in a sense collateral security for the payment of the debt. The one promise is collateral to the other; but it is of a different nature and quality, inasmuch as it pledges either personal property or real estate owned by the debtor to the payment of the debt. I know of no rule of law or statute which forbids a debtor to secure his obligations at a date subsequent to the original promise and the receipt of the original consideration by mortgage upon his property, unless it be in cases of insolvency, where preferences are for-

bidden or there be fraud in the transaction. I am not now discussing the effect of section 55 of the Stock Corporation Law of the state of New York (Consol. Laws, c. 59), which provides:

"No corporation shall issue either stock or bonds except for money, labor done or property actually received for the use and lawful purposes of such corporation."

[1] The Corporation Law of the state of New York and many recent court decisions of that state and federal decisions make it plain, I think, that the existence of a valid indebtedness is a sufficient consideration for a new promise or a pledge of property as security for the payment of such indebtedness. The old debt and extension of time for the payment thereof is value within the meaning of the law.

[2] In this case the bank not only extended the time for the payment of the debt by accepting the new note payable at a future day, but lost the benefit of the name and obligation of one of the indorsers to pay the debt, and accepted in lieu thereof and in consideration of the extension of time of payment the bonds in question. As stated, these bonds were a promise to pay executed by the debtor; but they were secured by mortgage upon the real estate of the debtor. This was a new and an additional security. Negotiable Instruments Law (Consol. Laws, c. 38) § 51, provides:

"Value is any consideration sufficient to support a simple contract. An antecedent or pre-existing debt constitutes value, and is deemed such whether the instrument is payable on demand or at a future time."

See language of Justice Miller in King v. Bowling Green Trust Co., 145 App. Div. 398, 402, 129 N. Y. Supp. 977.

There was no fraud in this transaction. The bonds were turned over to the bank as security for the payment of the note more than four months prior to the bankruptcy, and, as stated, there was a sufficient consideration, a valuable consideration. The bank knew, of course, that these bonds were the obligations of the debtor, the Progressive Wall Paper Corporation. The bank not only knew that they were obligations of the corporation, but also knew that they carried with them a lien upon the real estate of such corporation. The bank knew that they had not been issued to other parties, and were not owned by other parties. In short, the bank knew, when it took these bonds, that it was receiving the obligation of the debtor or its promise to pay at a future time, and that such promise was secured by mortgage on the real estate of the corporation. The bank also knew of the existence on the statute books of section 55 of the Stock Corporation Law of the state of New York, which as already stated provides that no corporation shall issue bonds except for money, labor done, or property actually received for the use and lawful purposes of such corporation. Assuming that the bank has made a binding agreement, and this is asserted by the attorney for the bank in his brief, that it will not sell these bonds for less than their par value, the proceeds of a sale will pay the note, as the proceeds will be applicable thereto and reduce the note for $7,000 by the amount of the par value of the bonds, which is also $7,000. In other words, the note held by the bankrupt will be extinguished or paid by the application thereto of the proceeds of the bonds of the debtor

executed and delivered to the bank more than four months prior to the bankruptcy. This will not work a preference, provided the bonds are legal and were legally issued, and the bank had the right to receive them as security for the payment of the note.

These bonds must have been issued—that is, delivered—by the Progressive Wall Paper Corporation to the bank in exchange for either money, labor done, or for property actually received for the use and lawful purposes of such corporation within the meaning of the language of the statute. If the quotation means that the money must be paid over at the time that the bonds are issued, then these bonds were not issued for money. There is no pretense that they were issued for labor done. Were they issued for property actually received for the use and lawful purposes of such corporation? If this language means that some tangible, usable, or marketable property must be received for the bonds when issued, then these bonds were not issued for property actually received for the use and lawful purposes of such corporation. In connection with the new or renewal note, indorsed as stated, these bonds were issued in exchange for the old note of the corporation, which it actually owed, and to enable it to continue business. The old note was received for the purpose of being canceled and retired. The old note or obligation was received by the corporation, and was retired. The note surrendered, indorsed as it was by Wing with the others, was property in the hands of the bank, and was surrendered. If the provision quoted (section 55 of the Stock Corporation Law) is intended to forbid a solvent corporation, owing debts evidenced by its notes indorsed by its officers, to issue its bonds secured by a mortgage on its real property, and use such bonds in exchange for and for the purpose of retiring the old or pre-existing notes, then, of course, these bonds are void in the hands of the bank. It does not seem to me that this was the purpose of the provision quoted. The occurrences of January 22, 1912, constituted a new transaction between the corporation and the bank. A new note was given, but one of the old indorsers was absolutely released, and the old note surrendered. A new note was given, with three indorsers in place of four. The time of payment was extended, and there was a new contract between the corporation and the bank and these indorsers, by which the bonds of the corporation secured by mortgage were to be placed with the bank as security for the payment of the note, and this operated, not only for the benefit of the bank and the corporation, but for the benefit of the three indorsers. Can it be said that the bank did not surrender property to the corporation in exchange for the bonds and the new note indorsed by the three, within the meaning of section 55 quoted?

The Corporation Law of the state of New York authorizes corporations organized thereunder to borrow money necessary for the transaction of their business and to issue and dispose of their obligations. Laws of New York 1892, c. 688, § 2, contains such a provision, and section 42 provided:

"That no corporation shall issue bonds except for money, labor or property actually received for its use and lawful purposes, and that no bonds shall be issued for less than the fair market value thereof."

Under this statute it was held by the Circuit Court of Appeals in this (the Second) circuit that where a corporation, being in need of money, pledged certain of its bonds secured by mortgage to a bank as security for further credit, under an agreement that the corporation might sell any of the bonds at par and on delivery of the proceeds thereof to the bank it would release and redeliver such bonds to the corporation, and the bank immediately thereafter extended its line of credit to the corporation, such bonds were properly issued and constituted valid claims against the corporation's estate in bankruptcy. In re Waterloo Organ Co., 134 Fed. 345, 67 C. C. A. 327.

In that case, at the time of the transfer of the bonds to the bank, the company was directly indebted to the bank upon its own notes in the sum of upwards of $6,000 and contingently liable as indorser on the business paper of its customers, which had been discounted by the bank for the benefit of the company, in the further sum of $33,000. On the delivery of the bonds the bank increased its line of discount to the company, and the indebtedness of the company to the bank was largely increased, and so continued down to the time of the adjudication, when the amount of paper on which the company was directly liable had been increased to $11,000, which was a sum in excess of the par value of the bonds. The court, per Townsend, Circuit Judge, said:

"In view of the amount then due, and the immediate increase by the bank of the company's line of discount until the direct liability alone of the company exceeded the fair market value or par value of said bonds, we think it may fairly be inferred that the company was in need of further funds in order to carry on its corporate business, that the bank was unwilling to grant further credits, except upon receipt of further security, and that the agreement between the parties was that said bonds should be issued at their fair market value, which was their par value, and that they were actually issued for property in the nature of advances, loans, discounts, credits, etc., received for the use and lawful purposes of said corporation, and that said issue, therefore, was valid."

This case is not on all fours with the one now at bar. In that case there were further advances and loans made by the bank. Here there was no further advance or loan of money, only an extension of time of payment of the then existing debt, accompanied by the release of one of the indorsers and the substitution of these bonds secured by mortgage as security for the payment of such debt. But it seems to me that here was the obtaining of property from the bank in exchange for these bonds, to wit, the old note, which bore the indorsement of Wing, and which note in the hands of the bank was clearly property.

It is a fair inference from all the facts that the corporation would not have obtained the surrender of this old note but for the pledge of the bonds in question. The statutes of the state of Wisconsin (St. 1913, § 1753) provide that no corporation shall issue bonds, except for money, labor, or property estimated at its true value actually received equal to 75 per cent. of the par value thereof, and that all bonds issued contrary thereto shall be void. Certain creditors of a corporation accepted its bonds secured by a mortgage as collateral for their past-due claims at not less than 75 per cent. of their face value, and extended the time of payment of the claims. The creditors took them under an

agreement either to return them or to account therefor at 75 cents on the dollar. It was held by the Circuit Court of Appeals, Seventh Circuit, in First Savings Bank & Trust Co. et al. v. Waukesha Canning Co. et al., 211 Fed. 927, 128 C. C. A. 305, reversing Nichols v. Waukesha Canning Co. (D. C.) 195 Fed. 807, that such bonds were issued for property and were valid. In that case the corporation was being pressed by its creditors, and issued its bonds secured by mortgage, and delivered them as collateral security to its own debts existing prior to the making of the mortgage and bonds. The prevailing opinion, in which all concurred, says (211 Fed. 929):

"Concretely stated, did the issue and application of the bonds in suit as collateral security to existing indebtedness constitute the issue and application of bonds for money or labor or property?"

The court held, following Pfister v. Milwaukee Electric Ry. Co., 83 Wis. 86, 53 N. W. 27, and Memphis & Little Rock R. R. v. Dow, 120 U. S. 298, 7 Sup. Ct. 482, 30 L. Ed. 395, that when the bonds were put by the corporation issuing them beyond its control by hypothecating them as security for loans or for any other purpose or in any other manner, it issued them within the meaning of the statute. In Nelson v. Hubbard, 96 Ala. 238, 11 South. 428, 17 L. R. A. 375, the court, considering a similar statute, said:

"And we do not think that such pledge to secure debts already contracted, if made without fraud and solely for the bona fide purpose of satisfactorily securing the payment of corporate debts, can properly be regarded as effecting a fictitious increase of indebtedness, or as not issued for money, labor done, or money or property actually received."

The Constitution of the state of California provides that:

"No corporation shall issue stock or bonds, except for money paid, labor done, or property actually received, and all fictitious increase of stock or indebtedness shall be void." Article 12, § 11.

In Atlantic Trust Co. v. Woodbridge Canal & Irrigation Co. (C. C.) 79 Fed. 842, it was held by Morrow, District Judge, that this constitutional provision did not prevent a corporation from pledging its bonds as collateral security for the payment of a debt incurred by it less in amount than the par value of the bonds. He also held that such a pledge is an issue of the bonds. It is true, as was stated by the judge writing the opinion in the case last cited, that the stipulated facts did not disclose whether or not the bonds in question were pledged as collateral security for the pre-existing indebtedness. The whole reasoning, however, of Judge Morrow, especially pages 846 and 847 of 79 Fed., would indicate that he regarded bonds issued and pledged as collateral to pre-existing indebtedness of the corporation valid. The Supreme Court of the United States, in Railway Co. v. Dow, 120 U. S. 287, 7 Sup. Ct. 482, 30 L. Ed. 595, in considering section 8 of article 12 of the Constitution of the state of Arkansas, which is substantially the same as that of the Constitution of the state of California referred to, and substantially the same as the statute of the state of New York, declared the purpose and scope of such provisions and said:

"The prohibition against the issuing of stock or bonds, except for money or property actually received or labor done, and against the fictitious increase

of stock or indebtedness, was intended to protect stockholders against spoliation, and to guard the public against securities that were absolutely worthless. One of the mischiefs sought to be remedied is the flooding of the market with stock and bonds that do not represent anything whatever of substantial value."

In Kemmerer et al. v. St. Louis Blast Furnace et al., 212 Fed. 63, 128 C. C. A. 519, the Circuit Court of Appeals, Eighth Circuit, had under consideration the constitutional provision of the state of Missouri on this subject, section 8 of article 12, and section 2981 of the Revised Statutes of 1909 of that state, and which provide that:

"Bonds of a corporation shall be issued only for money paid, labor done, or property actually received, and all fictitious increase of indebtedness shall be void."

The court held that bonds of a corporation issued and pledged to secure a pre-existing debt due from it "are invalid where no consideration passed to it from the creditor."

I do not see how this case of Kemmerer et al. v. St. Louis Blast Furnace Co. et al., supra, decided by the Circuit Court of Appeals of the Eighth Circuit, can be reconciled with the decision of the Circuit Court of Appeals, Seventh Circuit, in First Savings & Trust Co. et al. v. Waukesha Canning Co. et al., supra. They seem to be decidedly in conflict. The case in the Seventh circuit was decided January 14, 1914, and the case in the Eighth circuit was decided February 24, 1914. In the case of Kemmerer v. St. Louis Blast Furnace Co. et al., Judge Carland cited and quoted from Nichols v. Waukesha Canning Co. (D. C.) 195 Fed. 807, reversed in Waukesha Canning Co. v. First Savings & Trust Co., 211 Fed. 927, 128 C. C. A. 305, by the Circuit Court of Appeals, Seventh Circuit, as stated, and evidently was unaware of the fact that the case had been reversed by the Circuit Court of Appeals. However, the court in the Kemmerer Case cited (212 Fed. 63, 128 C. C. A. 519) expressly states that bonds issued by a corporation to secure a pre-existing debt of such corporation "are invalid where no consideration passed to it from the creditor." In other words, it would seem that, where a corporation makes its bonds secured by mortgage on its property and issues them as security merely for a pre-existing debt, such bonds are invalid in the hands of the pledgee unless there is some new consideration, and we would infer that that court would have held such bonds valid in case there had been some new or additional consideration for the pledge of the bonds. In the case now before this court I think there was a new and an independent consideration for the issue and delivery of the bonds in question to the bank. The corporation was unable to secure or furnish to the bank the indorsement of Wing. The bank required security in place of his name, and it is fair to assume that it would not have continued the loan but for the substitution of the additional security to it, the pledge of these bonds. A new note was given, time of payment was extended, and the bank lost the benefit of the indorsement of Wing and surrendered the old note indorsed by Wing. The old note was for $7,000, as was the new note, and the bank has agreed with the indorsers at least that it will not sell such bonds so pledged for less than their par value, to

wit, $7,000. If the bank adheres to this agreement, as it must, the bonds of the corporation will have been disposed of in satisfaction of the pre-existing debt, time of payment extended by the acceptance of the new note, at their full par value. The corporation will lose nothing. Its creditors will have suffered no loss. In effect, it will be the same as though the corporation had given to the bank a mortgage on its real property to secure this pre-existing debt of $7,000.

Nearly all the cases recognize the right and power of a corporation in the face of the limitation on the power of a corporation to pledge its bonds or obligations secured by mortgage on its property as security for a debt presently contracted for money borrowed, work done, or property purchased. Memphis, etc., Railroad v. Dow, 120 U. S. 287, 298, 7 Sup. Ct. 482, 30 L. Ed. 595; Illinois Trust & Savings Bank v. Pacific Railway Co., 117 Cal. 332–344, 49 Pac. 197. In California, as stated, there is a constitutional provision that no railroad corporation shall issue stock or bonds except for money, labor, or other property actually received by the corporation. In the case last cited it was held that the right of a corporation to pledge its bonds as collateral security is included in the right to sell them; and a constitutional provision that no railroad corporation shall issue stock or bonds except for money, labor, or other property actually received by the corporation does not prevent such pledge, where money or other property is actually received by the corporation in consequence of such use of them. In its opinion at page 344 of 117 Cal., at page 201 of 49 Pac., the court said:

"By the Constitution of Illinois it is provided that no railroad corporation shall issue stock or bonds except for money, labor, or property actually received and applied to the purposes for which such corporation was created; the Constitution of this state (article 12, § 11) contains a similar provision—omitting the clause as to application of the money, labor, or property. Upon these provisions appellant contends that it had no power to pledge its own bonds as collateral security. When the bonds were so pledged, and money or other property was actually received in consequence of such use of them, it seems to us that in a just and natural sense the bonds were issued 'for' such money or property; they served the purpose designed by the company—procured value for it. The cases upon the subject uphold the right to pledge as included in the right to sell. Farmers' Loan, etc., Co. v. Toledo, etc., R. R. Co., 54 Fed. 759 [4 C. C. A. 561]; Leo v. Union Pac. Ry. Co. (C. C.) 17 Fed. 273; Nelson v. Hubbard, 96 Ala. 238 [11 South. 428, 17 L. R. A. 375], decided in view of a constitutional provision substantially the same as that of California in this particular; Duncomb v. New York, etc., R. R. Co., 84 N. Y. 190. Some of these cases recognize the right of the corporation to pledge its bonds to secure a precedent debt. Appellant relies somewhat on Brewster v. Hartley, 37 Cal. 15, 99 Am. Dec. 237, where it was held that certificates of stock issued by a corporation in pledge to secure its debt are illegally issued; an examination of the grounds upon which the decision went in that case shows, we think, that the question here presented is widely different; it seems unnecessary to enlarge upon the points of diversity. See, besides the cases cited above, 1 Morawetz on Corporations, §§ 349, 350; Pfister v. Milwaukee, etc., Ry. Co., 83 Wis. 86 [53 N. W. 27]."

In Peoria, etc., R. Co. v. Thompson, 103 Ill. 187, it was held that a constitutional or statutory provision which prohibits railroad companies from issuing stock or bonds except for money, labor, or property actually received and applied to the purposes for which the company was

created does not interfere with the usual methods of raising money by issuing stock and bonds for legitimate corporate purposes, as for the purpose of raising money to pay debts incurred in constructing and equipping its road; nor does it prohibit the company from delivering bonds as advanced payment on a contract obligation of as great value as the bonds. Commonwealth v. Lehigh Ave. R. Co., 129 Pa. 405, 18 Atl. 414, 498, 5 L. R. A. 367; Hudson River, etc., R. Co. v. Hanfield, 36 App. Div. 605, 55 N. Y. Supp. 877.

In Memphis, etc., Railroad v. Dow, supra, the court held:

"The provision in the Constitution of Arkansas of 1874 that 'no private corporation shall issue stock or bonds except for money or property actually received, or labor done, and all fictitious increase of stock or indebtedness shall be void,' does not prevent the carrying out of an agreement between mortgage bondholders of an embarrassed railroad company in that state by which it was agreed that trustees should buy in the mortgaged property on foreclosure, and convey it to a new company to be organized by the bondholders, which should issue new mortgage bonds to pay the expenses of the sale, and other new mortgage bonds to be taken by the bondholders in lieu of their old bonds, and full paid up stock subject to the mortgage debt, to be delivered to and held by the bondholders without any payment of money; and the bonds issued under such an agreement are not subject to the provisions of section 5488, Rev. Stat. Ark. (Mansfield's Digest, p. 1057), respecting the legal rate of interest for certain classes of railroad securities."

I have not called attention to all of the cases bearing on the real question involved here. In view of the authorities to which attention has been called, and of the provisions of the New York statute and the statutory and constitutional provisions very similar thereto of other states and the decisions thereunder, this court cannot give a construction to the New York statute which will prohibit a corporation owing debts outstanding and pressing for payment, and represented by its notes past due and indorsed by third persons, but whose indorsements the corporation is no longer able to obtain, to renew such notes, secure an extension of time, and secure the payment of such renewal notes at maturity by a pledge of its bonds secured by a mortgage on its real estate, provided the transaction is just and fair, and the obligations of the corporation so pledged are of no greater par value than the debt thus secured, and the corporation is solvent at the time, and the old obligations of the debtor are surrendered and the indorsers thereby released. It cannot be doubted that if the Progressive Wall Paper Corporation, finding itself unable to longer secure the indorsement of Wing and through it a renewal of its note at the bank, had executed a new note indorsed by Cunningham, Derby, and Ingalsbee for the same amount and due three or six months later, and had presented same at the bank for discount to obtain money to take up the old note, and had been refused on account of the insufficiency of the security of the indorsers, and the corporation had thereupon pledged $7,000 of its mortgage bonds as additional security for the payment of such note, and had thereupon secured the discount of such note at the bank, and had the proceeds of such note passed to its credit, and thereupon had given its check to the bank in payment of the old note, and had thus secured a surrender of the old note, that the transaction would have been legal and binding, and that the issue of such bonds by so pledging

them to the bank would have been legal, proper, and binding under the statute.

Can it make any difference that this formality was not gone through with, to the end that the old note might be taken up and a further credit for the same amount obtained at the same bank? The result, so far as the corporation and its creditors are concerned, is precisely the same. Through the transaction as it actually occurred there was no violation of the true spirit and intent of the statute as declared by the Supreme Court of the United States in the Dow Case. Is it the true interpretation of this provision of the statute that for every bond of a corporation issued there must be a new acquisition by the corporation of money or labor performed or property purchased of substantially equal value? Is it true that a corporation doing business is prohibited to take up its notes, given for full value received either in money, labor, or property, and retire same by an issue of its bonds duly and formally authorized? Is it true that under this provision of the statute a solvent corporation doing business is forbidden to make temporary loans of money which are used in its legitimate corporate business, or incur debts for labor performed for the corporation in the due course of its business, or purchase property for the legitimate uses of the corporation, obtaining temporary credit for such loan, labor, or property as the case may be, and then, finding itself unable to pay at maturity, secure such debts by a pledge of its bonds secured by a mortgage on its property, including that into which the money, labor, or property went, and for which such debts were incurred? Can it be doubted that if the corporation, under such circumstances, instead of pledging its bonds, should sell such bonds for par, and receive the money therefor, and apply same in payment of such debts, such bonds would be valid, even if the purchaser thereof knew the purpose of the issue and the disposition to be made of the money at and before the purchase of such bonds. It would be a mere disposition of the bonds and obligations of the corporation for the purpose of raising money with which to pay and retire its outstanding promissory notes; that is, to pay pre-existing indebtedness. If, then, it be held that a corporation may issue and deliver its bonds to its creditor under the circumstances here disclosed as security for the pre-existing debt incurred for the benefit of the corporation in the legitimate conduct of its business and that such issue is valid, but is subject to the limitation that the pledgee may not sell or dispose of such bonds for less than their par value or value as determined in cases of insolvency, for instance, by a sale or disposition of the property of the corporation pledged for their payment, the purpose and intent of the statute is fully met and complied with.

The character and terms of the contract of pledge of the bonds to secure the payment of the pre-existing indebtedness is not unlimited. The issue may be valid, and the contract of pledge too broad, and not enforceable under the statute. The note of the Progressive Wall Paper Corporation of October 17, 1914, renewal of the prior notes of like tenor, promises to pay $7,000 three months after date and recites:

"Having deposited with said bank as collateral security seven bonds [description thereof] with full power to sell same at public or private sale at

the option of said bank after ten days' notice in writing, by mail, directed to us at Plattsburg, N. Y., to apply the proceeds thereof towards the payment of this note and of any other note or notes held by the said bank of which we are either the maker or indorser, accounting to us for the surplus of said sale, if any, with interest."

This is the contract of pledge. In no way does it expressly limit the amount for which the bonds may be sold. Literally and according to the terms broadly construed the bonds may be sold and put upon the market at ten cents on the dollar of their par value. In such case the holder of the note would credit the $700 received on the sale of the bonds, and prove up its claims against the Progressive Wall Paper Corporation, now insolvent, for the balance, or $6,300. The holder of the bonds could receive its share under the mortgage given to secure the bonds and prove up for the deficiency, if any. The purchaser of the bonds would be a large gainer, maybe, and the corporation and its creditors large losers. The statute referred to prohibits such a transaction as this. The Circuit Court of Appeals in this (the Second) circuit, in In re Waterloo Organ Co., 134 Fed. 345, 67 C. C. A. 327, held:

"That where a corporation, being in need of money, pledged certain of its bonds to a bank as security for further credit, under an agreement that the corporation might sell any of the bonds *at par*, and, on delivery of the proceeds thereof to the bank, it would release and redeliver such bonds to the corporation, and the bank immediately thereafter extended its line of credit to the corporation, such bonds were properly issued, and constituted valid claims against the corporation's estate in bankruptcy."

The court in its opinion said:

"The record fails to show any written agreement fixing the value at which the bonds were issued. It is agreed that their par value was their fair market value. In case of doubt as to the character of a transaction, or as to the proper construction and interpretation of a contract, and the determination of the respective rights and obligations of the parties thereto, such doubts may be resolved, and the intention or understanding of the parties thereto may be determined, by a consideration of their relations, the objects they respectively had in view, their declarations at the time of the transaction, and their acts then and *thereafter done.*"

The court therefore held that in view of all the facts and circumstances it should be held that the agreement and intent of the parties was that the bonds should not be sold by the bank at less than par.

In First Savings & Trust Co. v. Waukesha Canning Co. et al., 211 Fed. 927, 128 C. C. A. 305, there was no express contract or agreement by the pledgees that they would accept the bonds as collateral and account therefor at 75 per cent. of their par value, or not dispose of same at a less sum. But the court held that such an agreement was implied from the fact that the pledgees knew that to validate the issue they must be taken, if at all, at not less than 75 per cent. of their par value. The court therefore held that this was the understanding of the parties, and that the issue of the bonds as collateral was legal and valid.

In the case at bar it is presumed that the bank knew the law, and that there was no intent or purpose to violate it. It appears in the evidence, and is found by the referee as a fact, although not incorporated in the order:

"(11) That the First National Bank of Ballston Spa and said indorsers have consented and agreed that said bonds, if sold or disposed of, shall not be sold or disposed of at less than par."

This evidences the purpose and intent of the parties and of the bank. The finding quoted as filed reads, "First National Bank of Hudson Falls, N. Y.;" but there is no First National Bank of Hudson Falls involved in the proceedings, although there is a similar proceeding wherein the "People's National Bank of Hudson Falls, N. Y.," is claimant. I am assured by letter that the words "Hudson Falls," in the eleventh finding quoted, should be "Ballston Spa," and that this clerical error will be corrected.

It is true that the statute of the state of New York referred to contains no express provision that the bonds of a corporation secured by mortgage on its property shall not be sold for less than their par value, or given in payment for labor at less than their par value, or given in payment for property purchased for corporate purposes at less than their par value; but who can doubt that it would be unlawful, and that the issue of bonds would be void, should the corporation issue its bonds for money borrowed at 50 per cent. of their par value, or exchange same for labor at 50 per cent. of their par value, or use them to pay for property purchased at 50 per cent. of their par value, thereby loading the corporation with an obligation to pay double that of the value received? Such bonds so issued, unless on the market and in circulation and in the hands of a bona fide holder for value, might be held and probably would be held void. In the hands of a bona fide holder for value when purchased on the market such bonds would be held valid; but in the hands of the pledgee of the corporation clearly such issue would be invalid. Such pledgee, while a holder for some value, would not be a holder for full value, and would not be a holder in good faith.

I think the provision of the New York statute quoted, fairly construed, means that the bonds may be issued for money borrowed at substantially their par value, or given in exchange for labor substantially equal in value to the par value of the bonds, or given in exchange for property to be used for the corporate purposes of the corporation of substantially equal value to the par value of the bonds. The right to sell and dispose of the bonds includes the right to pledge them, as we have seen; but when pledged by the corporation issuing them, with power in the pledgee to sell, the obligation must be imposed on the pledgee to dispose of them at substantially their par value. The policy of the law is that a corporation shall not be loaded with obligations to pay issued for inadequate considerations. In Duncomb et al. v. N. Y., H. & N. R. R. Co. et al., 84 N. Y. 190, it was held in 1881 that:

"The director of a railroad corporation cannot purchase its bonds below par except on peril of avoidance by the courts upon application of the corporation."

[3] In the case at bar officers of the corporation were indorsers upon the note, and were seeking a renewal of the loan and pledging bonds, not only for the benefit of the corporation, but for their own benefit and protection, and the bank was fully informed as to the situa-

tion. The corporation has agreed, as stated, that it will not sell the bonds at less than par, and this must be taken as an indication of its understanding of the obligations of the contract of pledge—a practical construction thereof. If on foreclosure of the mortgage given to secure the payment of these bonds, or on a sale of the mortgaged property by the trustee in bankruptcy, the bank fails to realize a sufficient sum to pay such bonds in full, and consequently the note in full, it may prove up for the balance, and neither the bank, nor the corporation, nor its creditors will suffer.[1] The bankruptcy court is a court in equity, and may do equity, guided by the well-established principles of equity jurisprudence. The trustee in bankruptcy has taken the property of the bankrupt corporation subject to the same rights and equities that existed in favor of the bank and other creditors prior to such bankruptcy. The bank had carried this loan for about two years when bankruptcy intervened, holding the bonds of the corporation as collateral security, and the validity of such pledge of the bonds had not been questioned by the corporation. As stated, it is not questioned that the original loan of money represented by the note in question was received from the bank for proper corporate uses and purposes. When it took these bonds the bank lost its right of action against Wing, as well as a present right of action against the corporation itself. It received in exchange these bonds in pledge, and I think that with its agreement that they shall not be sold or disposed of for less than their par value the statute is satisfied, and that the issue thereof should be held valid.

It follows that the order of the referee holding the bonds invalid, and void in the hands of the bank should be reversed, and that the injunction against a sale or disposition thereof should be modified, so as to provide that the bank is enjoined and restrained from disposing of same at less than their par value. The notice that the bonds will be sold by the bank contains no such limitation or qualification. If the bank will file a stipulation that it will not sell or undertake to sell or dispose of these bonds for less than their par value, and stating that such agreement was a part of the contract of pledge, there may be an order reversing the order of the referee now under review. This will clear the situation and leave the bank free to act in the premises. Should the bank then violate the agreement or contract of pledge as thus made definite and certain, it would be answerable to the referee in bankruptcy for any loss the estate represented by him might sustain.

There will be an order accordingly.

[1] See, however, MacQuoid v. Queens Estates, 143 App. Div. 134, 136, 137, 127 N. Y. Supp. 867, and Gamble v. Q. C. W. & Co. et al., 123 N. Y. 91, 25 N. E. 201, 9 L. R. A. 527.

UNITED STATES v. ATLANTIC COAST LINE CO.

(District Court, E. D. North Carolina. June 30, 1915.)

1. MASTER AND SERVANT ⟸13—HOURS OF SERVICE—STATUTORY PROVISIONS—"EMERGENCY"—"EXIGENCY."

Hours of Service Act March 4, 1907, c. 2939, § 2, 34 Stat. 1415 (Comp. St. 1913, § 8677), provides that it shall be unlawful for carriers to require or permit any employé subject thereto to remain on duty for more than 16 consecutive hours, provided that no operator, etc., who by telegraph or telephone dispatches, etc., orders affecting train movements, shall be permitted to remain on duty for more than 9 hours in any 24-hour period at places and stations continuously operated, except in case of emergency. Section 3 imposes a penalty for violations, but provides that the act shall not apply in any case of casualty, unvoidable accident, or the act of God. An operator working from 4 o'clock p. m. until midnight at a continuously operated office at K. was subpœnaed as a witness in an action tried on May 26th, and obtained permission from the chief dispatcher at R. to obey the subpœna, with the understanding that he would return to K. about 2:30 p. m. The case was not reached for trial until about 4 p. m., and about 1 p. m. the operator wired the dispatcher that he would be delayed, but the next train from R. to K. did not reach K. until 10 p. m. The operator reached K. about 7:30 p. m., but, when requested to return to duty, reported that he was sick. One of the other operators therefore worked from 8 a. m. until 8 p. m., and the other from 8 p. m. until 8 a. m. on the morning of the 27th. *Held*, that the excessive hours of the first of such operators was due to an emergency, and the carrier was not liable for the statutory penalty, as "emergency" is not synonymous with "accident," "casualty," or "act of God," but is synonymous with "exigency," and means something arising suddenly out of the current of events; any event or occasional combination of circumstances, calling for immediate action or remedy; a pressing necessity; a sudden and unexpected happening or an unforeseen occurrence or condition.

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

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

2. MASTER AND SERVANT ⟸13—HOURS OF SERVICE—STATUTORY PROVISIONS.

It not appearing that the chief dispatcher was not promptly notified that such operator was sick, and there being no suggestion that he did not have an extra operator at R. there was no emergency or casualty excusing the company's act in allowing the second operator to work three hours, on the morning of the 27th, more than the hours allowed by statute.

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

3. MASTER AND SERVANT ⟸13—HOURS OF SERVICE—STATUTE—LIBERAL OR STRICT CONSTRUCTION.

The Hours of Service Act is remedial in its purpose and scope and penal in its means of employment, and though courts frequently invoke the principle that doubtful language in a remedial statute should be construed liberally to suppress the evil and advance the remedy, while penal statutes should be construed strictly to narrow the scope of the penalty, the better rule is probably to give the entire statute a fair construction for the purpose of ascertaining the legislative mind, and giving effect to its purpose, and an unreasonable relaxation of the rule prescribed on the one hand, or a strained construction on the other, is unwarranted.

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

4. MASTER AND SERVANT ⊂⊃13—HOURS OF SERVICE ACT—EXCEPTIONS AND PROVISOS.

The provision of Hours of Service Act, § 2, as to cases of emergency with respect to the hours of service of telegraph operators, constitutes an exception and not a proviso.

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

5. MASTER AND SERVANT ⊂⊃13—HOURS OF SERVICE ACT—CONSTRUCTION—MEANING OF LANGUAGE.

It must be assumed that Congress in excepting cases of emergency from the provisions of the Hours of Service Act, § 2, as to the hours of service of telegraph operators, used the term "a case of emergency" in that sense, and with that meaning given it in general use.

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

6. STATUTES ⊂⊃181—CONSTRUCTION—HARSH OR OPPRESSIVE CONSTRUCTION.

While the courts will endeavor to ascertain and enforce the legislative will, they will not, by strained and forced construction of statutes, give them such effect as will render their enforcement harsh and oppressive.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 259, 263; Dec. Dig. ⊂⊃181.]

7. MASTER AND SERVANT ⊂⊃13—HOURS OF SERVICE—STATUTORY PROVISIONS.

Pell's Rev. N. C. 1908, § 1643, provides that every witness summoned as directed shall appear and continue to attend court until discharged and, in default thereof, shall pay in civil actions or special proceedings, to the party at whose instance the subpœna issued, $40, in addition to full damages sustained. *Held*, that where a railroad telegraph operator, subpœnaed as a witness, was detained in court longer than was expected resulting in other operators working more than nine hours, the railroad company's immunity from liability under the Hours of Service Act was not affected by the fact that such operator was so subpœnaed as a witness on behalf of the railroad company, as his attendance at court was at the command of the court and pertained to the administration of justice, and his duty to obey the subpœna did not arise from his contract relation with the company.

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

8. EVIDENCE ⊂⊃10—JUDICIAL NOTICE—LOCATION OF PLACES.

Judicial notice may be taken that Kenly is about ten miles south of Smithfield on the main line of the Atlantic Coast Line Railroad.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 9–14; Dec. Dig. ⊂⊃10.]

9. EVIDENCE ⊂⊃40—JUDICIAL NOTICE—JURISDICTION AND PROCEDURE OF COURTS.

Judicial notice may be taken that the recorder's court at Smithfield, N. C., has a local and restricted jurisdiction, and usually tries and disposes of cases without the intervention of a jury.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 54, 55; Dec. Dig. ⊂⊃ 40.]

Action by the United States against the Atlantic Coast Line Company, for recovery of penalties for alleged violation of Hours of Service Act. Judgment for plaintiff on the second count.

Francis D. Winston, U. S. Atty., of Windsor, N. C., and R. F. Walter, Sp. Asst. U. S. Atty., of Washington, D. C.

George B. Elliott, of Wilmington, N. C., and Harry Skinner, of Greenville, N. C., for defendant.

CONNOR, District Judge. [1, 2] Plaintiff declared, in two counts, alleging separate violations of Hours of Service Act (34 Stat. c. 2939). The cause was submitted upon an agreed statement of facts, of which those material to the decision of the case are: Defendant, an interstate common carrier, on and prior to May 25, 1914, maintained at Kenly, N. C., a telegraph office, operated, during the day and night, for the purpose of sending and receiving orders pertaining to or affecting train movements. It had, in its employment, on said day, and prior thereto, as operators in said office, "Operator F. W. Scott, working from 8 o'clock a. m. until 4 o'clock p. m; operator P. H. Ethridge, working from 4 o'clock p. m. until 12 o'clock midnight; operator B. T. Allsbrook, working from 12 o'clock midnight until 8 o'clock a. m.

On the 8th day of May, 1914, one J. W. Fitzgerald commenced an action against defendant Atlantic Coast Line Company, returnable before a justice of the peace, from whose judgment an appeal was taken triable before the recorder's court, at Smithfield, N. C., which court meets every Monday, and generally holds not to exceed half the day. Operator P. H. Ethridge, whose "trick" commenced at 4 o'clock p. m. and continued until midnight, was served with a subpœna on the evening of May 25, 1914, to appear as a witness for the defendant before said recorder's court, at Smithfield, N. C., at 9 o'clock a. m. on May 26, 1914. He obtained permission from defendant's chief dispatcher at Rocky Mount, N. C., to obey the subpœna, with the understanding, with said dispatcher, that he would return to Kenly, on defendant's train No. 80, which passed Smithfield at 2:10 p. m. and was scheduled to reach Kenly at 2:30 p. m. on May 26, 1914. Ethridge, on the morning of May 26th, arose at 4 o'clock and called five other witnesses for the defendant in the same case. Instead of going on the train which passed Kenly at 5:30 a. m., reaching Smithfield, N. C., at 6 o'clock a. m., he accepted the invitation of a friend to go by automobile, which resulted in his leaving Kenly at 7 o'clock a. m. and reaching Smithfield at 9 o'clock a. m. He remained in the court during the morning and until 1 o'clock p. m. The case of Fitzgerald v. A. C. L. R. R. Co. was not called for trial at the morning session. Ethridge walked three-quarters of a mile to the telegraph office, and wired to the chief dispatcher that the case would not be reached before evening and to look out for the "second trick." The case was tried about 4 o'clock p. m. and was dismissed. Ethridge returned by automobile to Kenly, reaching there at 7:30 p. m. and, by reason of being up since 4 o'clock a. m., was fatigued and reported that he was sick. This report was made to operator Scott, who went, at the instance of the chief dispatcher, to have Ethridge resume his "trick." At the time the chief dispatcher received the message from Ethridge from Smithfield, defendant's train No. 89 had left Rocky Mount, and the only other passenger train on which he could possibly have sent a substitute to take Ethridge's place was due to reach Kenly at 10:02 o'clock p. m. Defendant, on account of the condition created by the absence of Ethridge, required and permitted its operator F. W. Scott, to remain on duty from the hour of 8 o'clock a. m. until 8 o'clock p. m. on May 26, 1914, and its operator B. T. Allsbrook to remain on duty from the hour of 8 o'clock p. m., May 26th,

until 8 o'clock a. m., May 27th. Ethridge returned to duty at 4 o'clock p. m. May 27th.

Plaintiff demands judgment on each count for the penalty prescribed by section 3 of the act. Upon the facts agreed, the sole question presented is whether, in permitting the operators to remain on duty, continuously, for longer period than nine hours, it violated the prohibitory provisions of the statute. The answer to that question is dependent upon the construction to be given the words "except in case of emergency," because, in such case, the act permits the operator "to be and remain on duty for four additional hours in a twenty-four hour period on not exceeding three days in any week." This last period was not exceeded by either of the operators.

[3] In view of several of the contentions made by counsel, for the government, and several of the opinions in cases relied upon, it will be convenient to notice the peculiar language of the statute as it is related to other statutes which may be treated, for purposes of interpretation, as in pari materia. The statute is remedial in its purpose and scope and penal in its means of employment. While courts frequently invoke the principle, in the interpretation of remedial statutes, that doubtful language should be construed liberally to suppress the evil and advance the remedy, whereas penal statutes should be construed strictly to narrow the scope of the penalty, probably the better rule is to give to the entire statute a fair construction for the purpose of ascertaining the legislative mind and the giving effect to its purpose. United States v. Kan. City Sou. Ry. Co., 202 Fed. 828, 121 C. C. A. 136. The safety of employés and of the traveling public was the manifest and well-understood purpose of Congress in the enactment of the group of statutes, relating to the operation of railroad trains, passed during the past ten years. The reasons which moved the legislative mind and stimulated its action are well known and understood. The courts have uniformly so construed the terms of the statutes as to effectuate the purpose of their enactment. Replying to the suggestion that to enforce, rigidly, the requirements of the Safety Appliance Act (Act March 2, 1893, c. 196, 27 Stat. 531 [Comp. St. 1913, §§ 8605–8612]) imposed hardship upon the railroads, Mr. Justice Moody, in St. Louis & Iron Mountain R. R. v. Taylor, 210 U. S. 281, 28 Sup. Ct. 616, 52 L. Ed. 1061, said:

"We have nothing to do but to ascertain and declare the meaning of a few simple words in which the duty is described. * * * Explanation cannot clarify them, and ought not to be employed to confuse them or lessen their significance. * * * It is urged that this is a harsh construction. To this we reply that, if it be the true construction, its harshness is no concern of the courts. * * * Certainly the statute ought not to be given an absurd or utterly unreasonable interpretation, leading to hardship and injustice, if any other interpretation is reasonably possible."

This language was approved by the court in C., B. & Q. Ry. v. U. S., 220 U. S. 559, 31 Sup. Ct. 612, 55 L. Ed. 582 and may now be regarded as the settled rule of construction of this statute.

"All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the Legislature intended exceptions to its language, which would avoid results of this

character. The reason of the law in such cases should prevail over its letter." United States v. Kirby, 7 Wall. 482, 19 L. Ed. 278.

When the measure of duty is prescribed and the rule commanded to be observed, or the conduct prohibited, is clear and absolute, the court will enforce the duty by enforcing the remedy prescribed by the Legislature. Atlantic R. R. Co. v. United States, 168 Fed. 175, 94 C. C. A. 35, and numerous other cases.

It will be observed, however, that the provisions of the statute under consideration in these cases are free from obscurity and contain no dispensing clause. In the Hours of Service Act, for manifest reasons, Congress deemed it essential for the enforcement of one of the purposes in view (the safety of the traveling public) to make provision for conditions which experience taught that, notwithstanding the highest possible degree of foresight, would sometimes arise. In the Safety Appliance Act, the kind, character, size, and adjustment of appliances generally understood and not difficult to be provided by the railroad companies were prescribed. When, however, Congress came to deal with the question of continuous service of employés, the human element, with its well-understood limitations and contingencies, it was found much more difficult to prescribe an absolute rule and measure of duty. This fact is recognized in the provisions found in the statute upon which this action is prosecuted. It was well known to the lawmakers that in maintaining telegraph offices and stations for the transmission of orders, messages, and instructions, controlling the movement of trains, conditions and contingencies would arise when, to enforce an absolute, inflexible rule, as to period of service, would defeat the purpose of the law and endanger the safety of travelers, as was said by Judge Sanborn, in U. S. v. Mo. Pac. Ry. Co., 213 Fed. 169, 130 C. C. A. 5:

"Congress perceived, and reflection will convince any one, that the protection, safety, and welfare of travelers and employés upon railroads require that in such cases hard and fast rules shall yield to the demands of humanity and the necessities of the cases. The times when such casualties will occur and when such cases will arise cannot be foreseen."

We find, therefore, that, after prescribing the number of hours of continuous service permitted, provision is made for "cases of emergency," in which four additional hours are permitted, with the limitation, in this respect, of "not exceeding three days in a week." In these exceptions to the measure of duty imposed upon the railroad companies, it is not difficult to interpret the legislative mind and to understand the contingencies for which it was making provision. The lawmakers, while seeking to protect the employé from unreasonable demands, and the traveling public from the danger which a knowledge of the extent of the power of human endurance had taught was a safe measure of limitation, upon such power, also recognized the fact that the character of the service, the location of the stations and offices, at which, in many instances, the service must be rendered, and the fact that its efficiency was dependent upon the human element, with its manifold liabilities to unforeseen and unforeseeable conditions, made provision for an extended service of four hours in "case of

emergency," without any limiting or other restrictive terms, except that the extended service should not exceed three times in one week, thus giving what was deemed a reasonable opportunity to supply another operator for the one who might, for any reason, be either out of place or temporarily incapacitated for service. It is therefore the duty of the court to give to the language of the statute such an interpretation as will effectuate the intention of the Legislature and promote the purpose which it had in view. This is elementary. To seek to defeat this intention and purpose by listening to appeals for an unreasonable relaxation of the rule on the one hand, or a strained construction on the other, is an equally unauthorized and unwarranted mental attitude for the court to take. To ascertain the intention of Congress in using the term "in case of emergency," we should examine the entire statute.

[4] The form of the statute is somewhat peculiar. While the provision regarding the hours of service of telegraph and telephone operators is found in a proviso, it is really an enactment of what ordinarily would be found in an independent section, dealing with a class of employés, and a service, separate and distinct from those coming within the preceding clause of section 2 of the act. This is not material, except as it affects a rule invoked in the construction of statutes and applied in pleading. That the term "in cases of emergency" constitutes an exception and not a proviso is manifest from an examination of section 3 of the statute. Treating the dispensing or exemptive term as an exception, the rule of construction is well settled.

"There is a manifest distinction between a proviso and an exception. If an exception occurs in the description of the offense in the statute, the exception must be negatived or the party will not be brought within the description. But if the exception comes by way of proviso, and does not alter the offense, but merely states what persons are to take advantage of it, then the defense must be specially pleaded or may be given in evidence under the general issue, according to circumstances." Simpson v. Ready, 12 M. & W. 736.

"An exception exempts absolutely from the operation of an engagement or an enactment. A proviso defeats their operation conditionally. An exception takes out of an engagement or enactment something which would otherwise be part of the subject-matter of it. A proviso avoids them by way of defeasance or excuse." West. Assur. Co. v. Mohlman, 83 Fed. 811, 28 C. C. A. 157, 40 L. R. A. 561; United States v. Cook, 17 Wall. 168, 21 L. Ed. 538.

Such force as may be attached to the placing of the exceptive words does not relate so much to the rules of pleading, or the burden of proof, as to the suggestion that the provisos, found in section 3, indicate that the word "emergency" was used by Congress in a sense different from "casualty," "unavoidable accident," "act of God," or other like terms found therein.

It will be observed that, in prescribing the number of hours of service permitted to employés coming within the first clause of section 3 of the act, no exemption is prescribed. The penalty imposed for its violation can be avoided only by an appeal to the proviso found in section 3, whereas for an alleged violation of that clause of section 2, relating to telegraph operators, defendant is entitled to invoke the exemptive language found in the body of the enactment "a case of emergency." It will be observed that no terms, such as "extraordinary"

or "unforeseeable," limit the usual and ordinary meaning given to the general term, as in the proviso to section 3, "unavoidable accident" or "and which could not have been foreseen." The extent to which the provisos of section 3 may be invoked for violation of the provisions of section 2, relating to telegraph operators, is discussed by Judge Sanborn in U. S. v. Mo. Pac. Ry. Co., 213 Fed. 170, 130 C. C. A. 5.

[5, 6] The liability of defendant, therefore, must depend upon the meaning to be given the words "a case of emergency"; and, in doing this, it must be assumed that Congress used the term in that sense and with that meaning given it in general use, keeping in view the general scope of the statute.

"The apparent and natural meaning of the terms of a statute is always to be preferred to any curious, hidden signification deduced by the reflection and ingenuity of acute and powerful intellects; and, where the language of a statute is unambiguous and its meaning is plain, no room is left for construction." U. S. v. Mo. Pac. Ry. Co., 213 Fed. 169, 130 C. C. A. 5.

While the courts will endeavor to ascertain and enforce the legislative will, they will not, by strained and forced construction of statutes, give to them such effect as will render their enforcement harsh and oppressive. It is neither reasonable as a rule of construction, nor consistent with the genius of our system of government, to attribute to the legislative department an intention or purpose to entangle the citizen, either natural or corporate, into guilt, and impose punishment and penalties by strained construction of language. To do so would not only make our laws odious but undermine that feeling of confidence in the justice of the Legislature and the court, so essential to cheerful obedience and patriotic service.

"An act which is not clearly an offense by the expressed will of the legislative body before it was done may not be lawfully or justly made such by construction after it is committed, either by the interpolation of expressions or by the expunging of its words by the judiciary." U. S. v. Mo. Pac. Ry. Co., supra.

If, therefore, the defendant was confronted, on May 26, 1914, with an "emergency" and, rather than endanger the safety of travelers on its passenger trains and its employés in charge of both freight and passenger trains, permitted its operators at Kenly "to be and remain on duty for four additional hours," as the statute authorized it to do, no penalty was incurred. We find that the English word "emergency" is derived from the Latin "emergo," "to arise out of," as "something which arises suddenly out of the currents of events." Brewer, 416. Its synonym is "exigency." Crabb. It does not appear to be synonymous with "accident" or "casualty." It manifestly is not so with "act of God." It is a condition which may arise out of either. That the failure of defendant's operator Ethridge to return to Kenly at 2:30 o'clock p. m. arose out of, or was caused by, the unexpected failure of the recorder's court at Smithfield to dispose of the case, in which he was a witness, during the morning, is too clear for debate. "Emergency" is defined as:

"Any event, or occasional combination of circumstances, which calls for immediate action or remedy; pressing necessity; exigency." Webster.

"A sudden and unexpected happening; an unforeseen occurrence or condition." Century Dictionary; U. S. v. Sou. Pac. R. R. Co., supra.

It would seem that, accepting these definitions as correct, the failure of Ethridge to return to Kenly at 2:30 o'clock p. m., in time to take his "trick" at 4 o'clock p. m., presented "a case of emergency," within the statute. Of necessity, each case, as it is presented, must depend largely upon the facts therein.

In U. S. v. Sou. Pac. Ry., 209 Fed. 562, 126 C. C. A. 384, to the suggestion that the company should have had extra train dispatchers, under pay, ready to take the place of one who became ill, Carland, J., says:

"The law recognizes the fact that emergencies may arise. Congress, no doubt, used the word 'emergency' with reference to the business of dispatching trains when conducted in the exercise of the ordinary care required in such business. If Congress had intended that the railroads should provide against all emergencies, then there was no use in granting to the company the right to require longer hours in the case of emergency."

In that case one of the operators was taken ill. The train dispatcher was unable to procure an operator to take his place. This condition continued from August 27 to September 3, 1912, during which time the other operators were on duty for more than 9, but not exceeding 12, hours. It was held that the chief dispatcher was not required to take the place of the one who was sick.

In U. S. v. Mo. Pac. Ry. Co., 213 Fed. 169, 130 C. C. A. 5, the operator was on duty in excess of the 9 hours prescribed by the statute and the additional 4 hours permitted to meet an emergency. Defendant was therefore compelled to rely, for a defense, upon the provisos to section 3. It appeared that the necessity grew out of a wreck on its road.

"Every possible effort was made to clear away the wreck at once. When the wreck occurred, the defendant expected to clear it away by 11 o'clock p. m., December 11th, which would have been 3 hours within the 17 hours of service permitted in case of accident. The company could have procured a relief operator at the time the wreck occurred, but it did not know and could not foresee that one would be necessary. It expected and believed that the wreck would be cleared by 11 o'clock. Subsequent unavoidable difficulties delayed the clearance until 5 a. m., December 12th, and made the continuous service necessary until 6:35 a. m. of that day."

The court held that "this was a case of unavoidable accident," and the continuous service necessary.

In United States v. N. Y., O. & W. Ry. Co. (D. C.) 216 Fed. 702, it appeared that one of the operators was taken suddenly sick, thereby causing another operator to remain on duty—held to be a casualty. In the same case it appeared that the mother of one of the operators, who was living with him, died suddenly and unexpectedly, and that for this reason he did not report for duty, and another operator was required to work for more than nine hours. In an interesting discussion, Judge Ray decides that these conditions were casualties. In U. S. v. Denver & R. G. R. Co., 220 Fed. 293, 136 C. C. A. 275, one of the operators, on September 8, 1912, became insubordinate and was, for that cause, dismissed. It was impossible to obtain another operator to take his place until September 10, 1912, which rendered it necessary

for the other operators to remain on duty more than 9 hours in a period of 24 hours. The court held that the conduct of the operator created an emergency which the company was called upon to meet, by extending the hours of service.

In San Pedro, L. A. & S. Ry. Co. v. U. S., 220 Fed. 737, 136 C. C. A. 343, it appeared that the company, as in the instant case, employed three operators at Kelso, whose regular hours of service were the same as here. One of them was taken ill January 16th. An operator was started on the 17th, from the nearest available point, to relieve the other two, in time to have reached Kelso within three days, "but unfortunately the train on which he was proceeding was derailed, * * * blocking the main line," resulting in a delay which rendered it necessary for the other operators to be and remain on duty in excess of the prescribed hours during January 20th and 21st. The court held that these conditions relieved the road of the penalty.

In Delano v. U. S., 220 Fed. 635, 136 C. C. A. 243, the only question decided was that the company does not escape liability for requiring a train dispatcher to remain on duty for a longer period of time than prescribed by the statute, by showing that, during a part of the time, he was employed otherwise than as a train dispatcher. The sole point decided in U. S. v. Ch. & N. W. Ry. Co. (D. C.) 219 Fed. 342, is that delays in the departure of trains is not an emergency, within the statute. This is manifestly true.

[7-9] It is, however, insisted that the defendant is not entitled to the immunity granted by the statute because Ethridge went to Smithfield as its witness in the case set for trial and was in its service. While it is true that he was under subpœna as defendant's witness, his duty to obey the summons was not because of his contract relation with defendant, but because he was a citizen of the state. A failure to do so would have subjected him to a penalty (Pell's Rev. § 1643) and to be attached for contempt. His attendance, while at the suggestion of defendant, was at the command of the court, and pertained to the administration of justice, and therefore imposed upon the defendant no other or higher degree of duty for making provision for meeting the requirements of the statute by reason thereof than if summoned by any other party to a suit. Judicial notice may be taken of the fact that Kenly is about 10 miles south of Smithfield, on defendant's main line of road. Notice may also be taken that the recorder's court at Smithfield had a local and restricted jurisdiction, and usually tried and disposed of cases without the intervention of a jury. That, as admitted, the court met on Monday morning, and usually held its session only half the day, is entirely consistent with well-known conditions. Ethridge reached Smithfield at 9 o'clock, in ample time to be present when the court opened, and remained in attendance until 1 o'clock, when, seeing that the case would not be called in time to enable him to return to Kenly on the train arriving at Smithfield at 2:10 o'clock p. m. and reaching Smithfield at 2:30 o'clock p. m., he walked some distance to reach a telegraph office and notified the special dispatcher at Rocky Mount, some 40 miles north of Smithfield, of the unforeseen condition or emergency which had arisen. In this he would seem to have done

all that was possible to meet the unexpected condition. It is admitted that, at that time, No. 89, the only train passing Rocky Mount, going south, had left, and it was impossible, except by dispatching a special train, for defendant to have put another operator at Kenly by 4 o'clock p. m. No other train reached Kenly until 10:02 o'clock p. m. Ethridge returned at 7:30 o'clock p. m. from Smithfield, by automobile.

As to the first count, it would seem that the defendant, in permitting operator Scott to remain on duty from 8 o'clock a. m. until 8 o'clock p. m. on May 26th, being 3 hours in excess of the 9 hours prescribed, except "in case of emergency," is not liable to the penalty.

Ethridge returned to Kenly at 7:30 p. m.; "by reason of being up since 4 o'clock a. m. was fatigued and reported that he was sick." It is admitted that operator Scott "went at the instance of the chief dispatcher to have Ethridge resume his 'trick.'" It is admitted that no substitute could have reached Kenly until 10:02 of the night of the 26th. It does not appear at what hour the chief dispatcher at Rocky Mount was notified that Ethridge reported at Kenly "sick." Allsbrook went on duty at 8 o'clock a. m. on the 27th. Conceding that the sickness of Ethridge was an emergency, and that it arose at 7:30 p. m. of the 26th, the question is presented whether the chief dispatcher should not have caused a supply to be at Kenly on the train reaching there at 10:02 p. m., which leaves Rocky Mount at 8:32 p. m., or shown that one could not be had. It was the duty of Ethridge to report promptly his physical condition upon reaching Kenly. It is provided that:

"In all prosecutions under this act the common carrier shall be deemed to have knowledge of all acts of its officers and its agents."

The chief dispatcher was notified at 1 o'clock p. m. that Ethridge was detained at Smithfield beyond the schedule time of the train reaching Kenly at 2:30 p. m. It does not appear whether he was informed that he could or would return on an automobile. Assuming that he was notified that Ethridge had returned to Kenly at 7:30 o'clock, sick, he knew that Allsbrook, the operator going on at 8 o'clock p. m., would be compelled to remain on duty more than 9 hours, unless Scott, who had been on 12 hours, took his trick at 5 o'clock a. m. There is no suggestion that he did not have an operator at Rocky Mount, whom he could have sent to relieve the situation at Kenly. The sole question, therefore, is whether, when the emergency caused by Ethridge's sickness arose, the defendant was prevented by a casualty, or unavoidable accident, from meeting it, and thereby avoiding the necessity for the extended service from 5 a. m. to 8 a. m. of the 27th. In the cases cited, wherein there was a sick emergency, the chief dispatcher promptly undertook to supply the missing or sick operator, but was prevented by casualties or accidents. Here there was no effort made to do so. While I do not follow the argument of counsel that, for the purpose of fixing liability on the company, Ethridge is to be regarded as on duty from 4 o'clock a. m. until 7:30 p. m., and that therefore no defense, under the exemptive terms of the statute, is open to the defendant, I am unable to find that the extended period of service from 5 a. m. to 8 a. m. on the morning of the 27th was caused by an emergency or by a

casualty. The absence of an explanation of the failure to supply the place of Ethridge on the morning of the 27th brings this extended period of service within the statute. I am of the opinion that a penalty in the sum of $100 should, under the circumstances, be imposed.

On the second count judgment will be entered for plaintiff for $100 and cost.

In re COLES.

(District Court, N. D. Iowa, W. D. July 6, 1915.)

No. 1068.

BANKRUPTCY ⟸396—HOMESTEAD EXEMPTION—IOWA STATUTE.

Bankrupt, who was a widow with four children, six years before the bankruptcy bought a house and lot for $1,400, in which she after that time lived with some or all of her children. It was a two-story and basement house, 22 feet wide and fronting on a street. For a time she occupied the main room on the ground floor as a store, and afterward rented it from time to time as opportunity offered, using the rents in support of her family. The second story, a shed addition in the rear, and the basement were occupied by bankrupt and her family as a residence. She sometimes took roomers. There were stairways leading from the main ground floor room to the second story and to the basement. When that room was rented, they were closed, but not taken down, and outside stairways were used. Pipes for water and the plumbing in the second story ran down through the first story to the basement. At the time of bankruptcy the property was worth from $3,000 to $4,000. Bankrupt owned no other real estate, and claimed this property in her schedule as her homestead. Code Iowa 1897, § 2972 et seq., exempt to the head of a family a homestead not exceeding one-half acre, if within a city or town, with the building and other appurtenances thereon, habitually and in good faith used as a part of the same as a homestead. *Held*, that this building could not be divided, so as to secure to the bankrupt her right to the exclusive use of any part of it as a homestead, or in fact without destroying its value for any purpose, and that, under the statute as construed by the Supreme Court of the state, she was entitled to retain the entire building and lot as her homestead.

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

In Bankruptcy. In the matter of Sintha A. Coles, bankrupt. On petition of bankrupt for review of an order of the referee approving report of trustee setting apart to her a homestead exemption. Reversed.

G. T. Wellman, of Sheldon, Iowa, for petitioner.
T. E. Diamond, of Sheldon, Iowa, for trustee.

REED, District Judge. Sintha A. Coles was adjudicated a bankrupt by this court February 18, 1913, upon her own petition. At such time she owned in her own right a two-story brick-veneered building in the city of Sheldon, O'Brien county, this state, in which she had lived with her family for several years prior thereto, and claimed it as her homestead and exempt from judicial sale under the statutes of Iowa. She owned no other real estate. E. B. Myers was appointed

trustee in bankruptcy of her estate, and on May 26, 1913, set apart from said real estate the following as exempt to her as a homestead, viz.:

"The certain one front room and the certain three rearmost rooms, all on the second floor of the building (above mentioned), of the value of about $600, and a small quantity of personal property."

The bankrupt was then living upon the second floor of said building, occupying all the rooms thereof as her homestead, but she was not then notified of the report of the trustee.

On June 12th the referee entered an order as follows:

"The trustee herein having filed his report of exempt property in accordance with General Order XVII (89 Fed. viii, 32 C. C. A. xix), and no exceptions being taken thereto, now, on motion of T. E. Diamond, attorney for said trustee, it is ordered: That said trustee's report of exempt property be and the same hereby is in all things confirmed, and the bankrupt's claim to exemption is hereby determined accordingly. That the property specified in such report be delivered to said bankrupt forthwith."

No notice was given to the bankrupt of this order until shortly before July 26th, when she filed with the referee exceptions or objections to such report, so far as relates to the homestead and the approval thereof by the referee, upon the grounds, among others, shortly stated, that said report in effect denies to her a right of homestead in such property, because said rooms so set apart to her are so related to other rooms in the building on the same floor, not assigned to her, that they cannot be partitioned or separated, so that she can have the exclusive use thereof, and do not afford her the use of the toilet and other rooms necessary and essential to afford her a reasonable homestead. August 14th the referee entered an order overruling such exceptions "without hearing counsel thereon," as he recites in the order. September 22, 1913, the bankrupt filed a petition for review of such report of the trustee, and of the order of the referee approving the same.

The referee has filed his certificate, showing the proceedings before him in said matter substantially as above stated. The trustee objects to the consideration of the petition for review, because no exception was taken to the report of the trustee or to the order of the referee, and that the petition for review was not filed with the referee within 10 days after such order was made, as required by a local rule in bankruptcy in this district. It is sufficient to say of the objections to the consideration of the petition for review that they are without substantial merit and must be and are overruled.

The testimony shows, without any dispute: That in April, 1907, the bankrupt contracted for the purchase of the premises in controversy for the sum of $1,400, took possession thereof at once, and in June, 1909, received the deed therefor, having then paid or settled for the full purchase price. At the time of such purchase her family consisted of herself, three daughters, and one son (her husband having recently died), and they occupied these premises as their homestead. Later one of the daughters married and moved from home; the son at the time of the bankruptcy was absent from home, whether permanently or only temporarily does not appear; but Mrs. Coles con-

tinued to live in the building, and to occupy all of the rooms on the second floor, consisting of a sitting room, kitchen, dining room, closets, pantry, water-closet, the cellar or basement, and a shed or lean-to attached to the rear of the main room of the first floor. The building is approximately 22 feet wide (the width of the lot) and some 90 feet in length, and fronts upon a street to the south. At first the bankrupt occupied the entire building and basement, using the front part of the first floor or main room as a store for the sale of secondhand goods, and the rear part as a kitchen and dining room, and all of the second floor for sleeping rooms of the family, and some roomers, and the shed or lean-to and basement for fuel, storage, washtubs, and other domestic uses. Later she successively rented the main room upon the first floor for different purposes, first as a salesroom of secondhand goods, then as a machine shop, and later for some other purposes, as she had opportunity to do from time to time, and used the income therefrom (approximately $250 per year for a part of the time) to aid in the support of herself and family. The rooms upon the second floor, the shed, and basement have always been used in connection with the use of the property as a homestead. Originally there were stairways leading from the inside of the main room of the first story to the basement and to the second floor, which were temporarily closed when the main room of the first floor was rented, as they were not needed by the occupants (but the openings were left, so they can be used when needed), and access to the second floor was reached by two outside stairways, one to the rear of the building from inside the shed, and one on the outside leading from the street in front, one of which rests in part upon a public alley of the city, and at present the only means of access to the second floor, both of which stairways enter anterooms upon the second floor that lead to a hallway extending nearly the entire length of the second floor, and from which the living rooms on that floor are reached. The basement, after the temporary closing of the cellarway leading from the first floor, was reached from the outside cellarway. There are three chimneys resting upon brackets in rooms on the second floor, which extend through the roof, into which flues or pipes enter from stoves used for heating purposes. The room in the first story was heated originally by means of stoves; the pipes extending through the ceiling into the chimneys upon the second floor. At some later time the first floor was heated by steam from a steam plant in a neighboring building. The plumbing from the second floor extends through the floor into the walls of the room below, thence to the basement, where it connects with the sewer pipes. The water pipes extend from the mains, through the first story to the second. The cellar is reached from the second story via the stairways before mentioned. Besides the sitting room, kitchen, dining room, closets, and pantry, there are some nine other small rooms upon the second floor, used for sleeping rooms by the bankrupt and members of her family, and at times some of them by roomers and transients, who may want them temporarily.

It is from the building thus shortly described that the four rooms upon the second floor were set apart to the bankrupt as the home-

stead of herself and family. The oldest daughter, Allie M., was, at the time ot the bankruptcy, about 24 years old, lived at home with her mother, and was employed, and had been for some time, as saleslady or clerk in a store, and at times in a telephone office, earning some $35 a month, from which she contributed to the support of her mother and a younger sister some 9 or 10 years old. The value of the building and lot as a whole at the time of the bankruptcy is estimated at $3,000 to $4,000; but the first story, apart from the rest of the building, it is said by some of the witnesses, would have no market value, but with the right to rest permanently upon the basement wall, and have the roof kept in proper repair, it would be worth about $1,000. It is obvious from this description of the building, which is approximately correct, that the four rooms set apart by the trustee and approved by the referee as the homestead of the bankrupt are entirely inadequate to afford her a reasonable and proper homestead, and it was practically so conceded in argument on behalf of the trustee. The report of the trustee, setting apart such rooms, and the approval thereof by the referee, as the homestead of the bankrupt, must therefore be each set aside and vacated.

Besides asserting the inadequacy of the rooms set apart for the homestead, it is contended in behalf of the bankrupt that the design and construction of the building and the use made of it by her are such that the building cannot be partitioned or so divided as to afford her a reasonable and proper homestead in a part thereof, with reasonable access to other rooms that are actually necessary and essential to a homestead, which should not be impaired or invaded by the occupants of the first floor or other parts of the building, and that she is entitled to have the whole building and premises set apart to her as a homestead; and this is the important question involved in this controversy.

Under the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 544) a bankrupt is entitled to the exemptions provided by the state law in force at the time the petition in bankruptcy is filed. So far as applicable Code of Iowa 1897, § 2972 et seq., provides: That the homestead of every family, whether owned by the husband or wife, shall be exempt from judicial sale. A widow or widower, though without children, shall be deemed a family, within the meaning of this statute, while continuing to occupy the real estate used as a homestead. It may contain one or more contiguous lots or tracts of land, with the building and other appurtenances thereon habitually and in good faith used as a part of the same homestead. If within a city or town, it must not exceed one-half acre in extent; otherwise it shall not contain in the aggregate more than 40 acres, and shall not embrace more than one dwelling house or other buildings, except such as are properly appurtenant thereto; but a shop or other building situated thereon, actually used and occupied by the owner in the prosecution of his ordinary business, which does not exceed $300 in value, is appurtenant to the homestead. Upon the death of either husband or wife, the survivor may continue to occupy the whole homestead until it is otherwise disposed of according to law. If there be no survivor, it shall

descend to the issue of either husband or wife according to the rules of descent, unless otherwise directed by will, and it shall be held by such issue exempt from any antecedent debts of their parents or their own, except those of the owner thereof contracted prior to its acquisition. That this bankrupt is entitled to a homestead exemption in this property under the Iowa statute is not controverted; but the trustee, in behalf of the creditors, contends that she is only entitled to the rooms upon the second floor of the building actually used by her and her daughter, or daughters, as their place of abode, and Rhodes v. McCormick, 4 Iowa, 368, 68 Am. Dec. 663, is relied upon as sustaining this contention.

In that case the property involved was a city lot 30 feet wide by 140 feet deep, upon which a three-story building 30 feet wide, the full width of the lot, and 64 feet deep, was erected by the defendant McCormick in about 1850, of the value of $8,000, the lower story of which was occupied by him as a store or place of business, for which it was originally designed, for some four or five years after it was built. At the time of the hearing in the district court the first story and cellar were rented to another, who used them as a store, the yearly rental value of which was $800. The two upper stories were finished by McCormick in about 1852, into one of which he moved and continued to occupy as the dwelling house of himself and family until the time of the hearing. Each of such upper stories had five rooms suitable for a dwelling; but for two years or so after they were finished some or all of the rooms upon the second floor were used as offices by attorneys and others for business purposes. The third story was used for a year or so as a printing office. Upon substantially such facts the trial court held the entire property exempt to McCormick and set the same apart to him as his homestead. The Supreme Court reversed this decision, and set apart to McCormick only the second and third floors and the land as his homestead, and held that the first floor and cellar were not exempt, and directed the sale thereof upon execution apart from the land, and suggested in its opinion that the purchaser of the first floor and cellar and McCormick, as the owner of the two upper stories and the land, should each use his separate property so as to do as little injury as possible to the property of the other. There is a vigorous dissenting opinion by one of the justices.

McCormick v. Bishop, 28 Iowa, 233, arose later out of that decision, because, as it appears, McCormick and the purchaser of the first floor and cellar of the building did not or could not observe the admonition of the court "that each should use his separate property so as to do as little injury as possible to the property of the other." But nothing was decided in this later case, further than that Bishop, as the purchaser of the first floor and cellar at the execution sale, and McCormick, as the owner of the second and third stories and the land, were not tenants in common, but adjoining tenants. Though the case was affirmed, it was remanded to the district court, with leave to plaintiff to amend the petition. What disposition was subsequently made of the case does not appear in the published opinions of the court.

The Supreme Court of Iowa has persistently declined to enlarge the

rule upon which the Rhodes Case was decided. In Wright & Co. v. Ditzler, 54 Iowa, 620, 7 N. W. 98, the defendant was the owner of a two-story frame building 22x40 feet, with a cellar under part of it, which had been exclusively occupied by him since it was erected in 1867. He was a merchant and produce dealer, and used the first floor of the building as a storeroom for the keeping and sale of merchandise by himself, and kept a store in that room and on that floor. The upper story had been used since its erection by the defendant and his family for dwelling purposes, and they had no other dwelling house or abode. The cellar had been used for family purposes, and at the same time defendant kept certain articles belonging to his stock of merchandise, as well as for family use. There were two entrances to the cellar, an outside entrance, and one inside from the room used as a storeroom, with steps leading down under the stairway to the second floor. In going to and from the cellar the family used the inside entrance. There is some further description of the building. The district court awarded the entire building to the defendant as his homestead, and the Supreme Court said:

"In Rhodes v. McCormick, 4 Iowa, 368 [68 Am. Dec. 663] it was held by this court that the ground and the second and third stories of a building thereon were exempt from judicial sale as the homestead of the defendant, while the first story and the cellar were subject to execution. In that case, however, the referees found that the cellar and first floor were originally designed for a business house. The building was three stories, 30 feet wide, and 64 feet deep, and the lower story and cellar were rented for $800 a year. The building involved in this case is a two-story frame building, 22x40 feet, with a cellar under part of it. It is not shown that any part of it was originally intended for a place of business. It was not rented, but has always been exclusively occupied by the defendant and his family. The cellar is used by the defendant's family, and the only convenient way of access to it in some portions of the year is through the lower story. The facts of this case clearly distinguish it from Rhodes v. McCormick. We feel clearly of opinion, under the facts found by the referees, that the whole building is exempt as defendant's homestead"

—and the judgment of the district court was affirmed.

In Smith v. Quiggans, 65 Iowa, 637, 22 N. W. 907, the defendant owned a two-story building and the lot on which it stood, and occupied it with his family as a residence. They lived in the lower story for some time, and afterwards moved into the second story and used that as a dwelling place or residence. The first story was divided into two rooms, and after the family moved into the second story they continued to use the rear room of the first story as a kitchen, and the front room as a grocery store. Access was gained to the second story by an outside stairway. The defendant testified that it was his purpose in the future to use the whole building as a residence, and that the second floor did not contain sufficient rooms for his family. It was not claimed by plaintiff that either the second story or the ground on which the building was situated was subject to be sold in satisfaction of plaintiff's judgment; but he contended that the lower story was not exempt from judicial sale. The trial court held the entire property exempt, and the Supreme Court said:

"We think, however, that the whole property is exempt. Defendant occupied and used the first story of the building in the prosecution of his ordinary

business. If this had been a separate building of the same value and situated on the same premises, and he had used it for the same purpose, it clearly would be exempt, under section 1997 of the Code," which allows as a part of the homestead a building not exceeding $300 in value, which he uses as a shop or place in which to conduct his ordinary business. "Regard ought to be had to the spirit of the law rather than to its strict letter. The manifest purpose of the Legislature was to exempt to the owner, in addition to the building or place occupied by him as a home for his family, the building or place which he uses and occupies in the prosecution of his ordinary business, provided it is appurtenant to the homestead and its value does not exceed $300. * * * The case is clearly distinguishable from Rhodes v. McCormick, 4 Iowa, 368 [68 Am. Dec. 663], and Mayfield v. Maasden, 59 Iowa, 517 [13 N. W. 652]. * * * We think, also, that the property did not become subject to sale when defendant ceased to carry on the business in it. Before engaging in the business he used and occupied it as a home for his family, and during the time he carried on the business he also devoted it to some extent, in connection with the second story to the same use, and it was his purpose at all times to reoccupy and use it as part of his home whenever he should cease to use it in carrying on the business."

The judgment of the circuit court was affirmed.

In Mayfield v. Maasden, 59 Iowa, 517, 13 N. W. 652, that court held that a two-story brick building, which was erected upon a fraction of a city lot, 25x80 feet, with a basement, the front room of which was at one time occupied as a barber shop, in which the defendant lived and occupied the whole second story above the basement, fell within the principle announced in the Rhodes Case, and that the doctrine of that case must govern its determination. The court said:

"We are aware that the decision [in the Rhodes Case] has been criticized, and some doubt may exist in regard to its correctness; but it has stood so long that we should not be justified in overruling it, even if we were otherwise disposed to do so."

Johnson v. Moser, 66 Iowa, 536, 24 N. W. 32, was a case of a four-story brick building, in which the owner had carried on a grocery business during all the time he occupied it. The first story he always used as a storeroom and place of business, and the greater part of the cellar, in which he stored the goods kept for sale. The second and third stories he used as a place of residence; the fourth floor was unfinished, and used only as a place for drying clothes. The first and fourth stories of the building, with the cellar (except that portion used for the storage of provisions and vegetables for the use of the family), were held not exempt within the rule of the Rhodes Case; but the second and third stories and a portion of the cellar were held exempt as the homestead of the family.

In Cass County Bank v. Weber, 83 Iowa, 63, 48 N. W. 1067, 12 L. R. A. 477, 32 Am. St. Rep. 288, the property claimed as a homestead was originally a brick building, with the first floor designed for a business room and living rooms above. Later it was converted into a hotel. The first story was made into two rooms, the first being used as an office and barroom, and the other as a dining room. The second floor was reached by a stairway from the front room or office. Underneath was a cellar, access to which was by a stairway from the dining room. On the north side of this building was built a frame addition, with kitchen and bedroom. Other additions were also made to the

brick building, in which were a sitting room and bedroom on the ground floor and bedrooms above. Between the sitting room and the dining room was a washroom, through which access was had from the brick part to the bedroom, and through the washroom and bedroom to the sitting room; the sleeping rooms in this part being over the sitting room. The district court found that the parts of the building not occupied as a homestead were, of the brick part the upper rooms, and the front room below used as an office, and the cellar beneath; also the bedroom east of and between the sitting room and washroom in the frame part, and by its decision gave the plaintiff a judgment thereon. The Supreme Court said:

"We regret that the condition of the record leaves some uncertainty as to these particular facts. We have endeavored, however, to be precise in our findings. * * * After Weber purchased the premises he built on the lots at the rear end a frame business house. The stabling was used by the defendants for the purpose of carrying on their business of hotel keeping, and neither that nor the frame business house was used as a part of the homestead, and the district court thus found. Our findings * * * do not exactly accord with those of the district court. That the defendants had a homestead in the premises is not questioned. Hence we are not to inquire whether or not there is a homestead, but, conceding one, we inquire after its extent. 'When an execution defendant shall use a particular building as a home, the whole of such building, in cases of controversy and disagreement, will be presumed to constitute and be a part of the homestead, until it is shown by the party adversely interested that some specific portion is not of the homestead character, and, therefore not exempt.' [Citing Rhodes v. McCormick.] As to the office room, the bedroom, and the cellar we have no difficulty in reaching a conclusion that they are not brought within the rule. The most that can be said is that there is shown to be, to some extent, a joint occupancy of them for homestead and hotel purposes. Of the bedroom it is true that it was used as a sleeping room for the guests of the hotel; but at the same time it was used by the family as a passageway from the dining room to the sitting room, both of which were found to be parts of the homestead. Now, let us suppose the bedroom had not been used for a sleeping room by any person, but merely a room through which the family passed to the sitting room from other parts of the house. We do not think that state of facts would justify a finding that it was not used as a part of the homestead, nor do we think the mere fact of its use by guests of the hotel, while at the same time used for the other purpose, would divest it of its character as a part of the homestead. The front or office room was used as an office and barroom, but it was at the same time used by the family. It was a means of ingress and egress from the street. It was a front room, back of which was the dining room, and still back the washroom, bedroom, and sitting room. These rooms were all devoted to the same purpose. At least, it does not appear that they were not, and we assume facts not otherwise established in harmony with the homestead right. It is not as if it was shown that one story of the building was used as a store or shop, or leased and occupied by a stranger, which use would indicate of itself a disuse by the family. The entertainment of hotel guests and of boarders is often in a manner to be consistent with an occupation at the same time by the family of the apartments as a part of the home. Such entertainments would, it is true, often, if not generally, be a limitation upon the use by the family of certain apartments, but not to the extent of exclusion. * * * The business of the hotel and the support of the family as to work and supplies, as well as occupation, were so mingled naturally that it is a task of much difficulty to show separate occupations or use, and the burden of doing so is with the plaintiff. The upper story of the brick building is divided into five sleeping rooms, and these (the record shows) were used exclusively for the guests of the hotel, and not by the family for homestead purposes; that is, they are a part of the homestead building, but not particularly occupied by the family. The legal

problem in this respect, in the light of authority, is somewhat difficult. Following the rule of Rhodes v. McCormick, 4 Iowa, 368 [68 Am. Dec. 663], Mayfield v. Maasden, 59 Iowa, 517 [13 N. W. 652], and Johnson v. Moser, 66 Iowa, 536 [24 N. W. 32],—that apartments of the homestead building, not occupied as such, are liable to execution—and we should find for the plaintiff; under these authorities our duty would be clear, but for the fact that in this case the only means of access to these rooms is through the office room, which we hold to be a part of the homestead, and we possess no authority to invade the homestead right by continuing the present means of access, unless we extend what is now by many regarded as a rule of doubtful merit—that of partitioning a homestead building between a debtor and his creditors, which we are not inclined to do. It would, of course, be idle to hold that a room or rooms in a building not used by the family were liable to execution, when the purchaser would have but a barren right—the title without a right of occupancy or use—and that, so far as disclosed by the record, would be the situation in this case. In Johnson v. Moser, 66 Iowa, 356 [24 N. W. 32], the homestead was limited to the two middle stories of a four-story building, and a right of access was given to the fourth story by hatchways, through the floors of the homestead part, and a hoisting apparatus, connected with the fourth story. This means of access, it seems, was a part of the plan of constructing the building, and could be continued without any interference with the occupation of the homestead part of the building. * * * It was, therefore, no invasion of the homestead right. The difference between that case and a right of access to these rooms through the front room below is too obvious to deserve notice. Such a right would be a serious impairment of the homestead privilege. For reasons certainly not stronger in Wright v. Ditzler, 54 Iowa, 620 [7 N. W. 98], a room used as a storeroom for the sale of merchandise was distinguished and held exempt from execution. Its sale would have interfered with the use and occupation of the living rooms above and cellar below. * * * These considerations lead us to the conclusion that the entire building should be treated as exempt from execution under the homestead law, and that the decree of the district court should be thus modified."

Groneweg v. Beck, 93 Iowa, 717, 62 N. W. 31, is to the same effect, and in its facts much like the case before us, except that the annex or one-story building in the rear of the main building was a separate building having an independent entrance from the side street, which might be removed from the lot without in any manner restricting or interfering with the homestead occupancy of the main building, and for that reason was held not exempt; but the rest of the premises, including the cellar, was held exempt as the homestead of Beck.

These are late decisions of the Supreme Court of Iowa construing the homestead law of that state, which, of course, are controlling upon this court. Other cases might be cited, varying in their facts, but it is unnecessary to do so; for those cited convince us that Rhodes v. McCormick, though not overruled in terms, is not followed in later cases, except upon facts substantially identical with its facts. That case was early disapproved in Phelps v. Rooney, 9 Wis. 86, 76 Am. Dec. 244, and other cases, as indicated in Cass County Bank v. Weber, 83 Iowa, 63, 48 N. W. 1067, 12 L. R. A. 477, 32 Am. St. Rep. 288, above, and does not control the decision of this case upon its facts.

It is urged in behalf of the trustee that the bankrupt has abandoned the first floor of the building as a part of the homestead, and has rented it for some time for business purposes, from which she derives an income. It is true that the bankrupt has rented the first floor of the building at different times, as opportunity offered to do so, and received the income therefrom, amounting at times to $250 a year, and

lesser amounts at later times; but she has never abandoned the building, and has always used the same, either in whole or in part, as the homestead of herself and family.

In Repenn v. Davis, 72 Iowa, 548, 34 N. W. 326, the facts are that plaintiff's grantors occupied the premises in question as their homestead, the legal title thereto being in the wife. The husband went away in quest of employment, intending to be absent temporarily, but without any fixed time. The wife remained at home and occupied the house with her daughter for some months, and then went to live with friends, renting the house, except one room, in which she kept her household goods. After an absence of some two years she returned, but, finding it necessary to engage in some business for her support, she found it more convenient to occupy another building, leaving some of her household goods in a room of the home, and reserved about one-half of the lot. The whole of the house and lot was not rented, and possession of a part thereof was always retained by the wife. This condition of affairs continued without change until the return of the husband and for a year thereafter, nearly seven years, when the plaintiff bought the premises from them. Both husband and wife intended to occupy the homestead again as such when their affairs should permit. It was held by the Supreme Court, reversing the decree of the district court, that there was no abandonment of the homestead, as the retention of the possession of a part thereof by the wife was notice to the world of their homestead rights in the property, and that the plaintiff acquired the title to the property free from the debts of the grantors.

Nor does the receipt by the bankrupt of rent for a part of the building, which she used for the support of herself and family, deprive the part so rented of its homestead character. In Re Irvin, 120 Fed. 733, 57 C. C. A. 147, the Court of Appeals (this circuit), speaking by Judge Caldwell, affirming In re Stone (D. C.) 116 Fed. 35, said:

"The debtor is not required to occupy and use as a dwelling all 'the improvements' on the lot, for that would make it obligatory on him to occupy his barn and other outhouses for living purposes; and no more is he required to occupy every room in his dwelling for domestic purposes. He may devote a part of his dwelling to business purposes. Our ancestors very generally carried on their business pursuits in their dwelling houses. * * * 'It is a strange and irrational idea, sometimes advanced, that a man ought to lose his homestead as soon as he attempts to make any part of it helpful in family expenses.' * * * The premises in question having been impressed with the character of a homestead before the debtor was adjudged a bankrupt, his trustee in bankruptcy cannot rightfully claim the same as part of the bankrupt's estate."

To hold that the homestead of this bankrupt should be limited to a part, or even all, of the rooms upon the second floor of this building, and direct the sale of the remainder thereof, would be practically to deny her a homestead in the premises, to the exclusive use and occupancy of all of which she is entitled, without interruption or invasion by the occupants of the remainder of the premises. Cass County Bank v. Weber, 83 Iowa, 63, 48 N. W. 1067, 12 L. R. A. 477, 32 Am. St. Rep. 288, above. And see Smith v. Quiggans, 65 Iowa, 637, 639, 22 N. W. 907.

In Jackson v. Bruns, 129 Iowa, 616, 106 N. W. 1, 3 L. R. A. (N. S.) 510, it is held by the Supreme Court of Iowa that no duty rests, in the absence of contract, upon the separate owners of upper and lower stories of the same building to maintain his own in a condition to protect the owner of the story above or below him, and that neither can be required to do so. This being true, it is an insurmountable objection to the partitioning of the two stories of this building between the bankrupt and a purchaser at execution sale of the lower story, or of any other part of this structure, for its condition is such that both the first and second stories will require, if they do not now, repairs to keep them in proper condition for occupancy. We can conceive of a building that might be designed and permanently constructed so that separate stories thereof, and perhaps separate rooms in a story, might be partitioned between separate owners without much disadvantage to either; but neither this building nor either of its stories is so arranged or constructed, and to direct that it be done, if carried into effect, would practically destroy the entire structure of its value as a building for any purpose.

The conclusion, therefore, is that the report of the trustee, and the approval thereof by the referee, setting apart as the homestead of the bankrupt only four of the rooms on the second floor of the building, be and hereby are each vacated and set aside, at the cost of the trustee. It is further ordered that the entire property in question be and hereby is set apart to the bankrupt as her homestead, to the exclusive use of which she shall be entitled. The clerk will certify to the referee a copy of this opinion and of these orders.

It is ordered accordingly.

In re JOHNSON.

Petition of PACIFIC COAST INV. CO.

(District Court, W. D. Washington, S. D. June 28, 1915.)

No. 1250.

1. INTOXICATING LIQUORS ⊂=327—CHATTEL MORTGAGE—LEGALITY OF CONTRACT—STATUTORY PROVISIONS—"INTEREST."

Rem. & Bal. Code Wash. § 6282, provides that it shall be unlawful for any person or corporation manufacturing or selling intoxicating liquors in quantities of five gallons or more to have any interest in the liquor, stock, fixtures, or equipment of any retail liquor store, or to pay or become surety for the payment for any other person of a license fee. *Held*, not to make it unlawful for an investment company to take a chattel mortgage on the stock, fixtures, etc., of a saloon, since the word "interest" does not include a mortgagee's lien, but refers to a fractional or undivided interest, as the statute, impliedly authorizes a loan by a manufacturer to a retail dealer for any purpose, except the payment of the license fee, and the incidental right to take security for the loan cannot be denied, in the absence of unequivocal language.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 467–472; Dec. Dig. ⊂=327.

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

2. INTOXICATING LIQUORS ⊂=117—STATUTES—LIBERAL OR STRICT CONSTRUCTION.

As Rem. & Bal. Code Wash. § 6282, relative to the ownership of or interest in retail liquor stores by wholesale dealers or manufacturers of liquor, deprives persons of a right of contract previously enjoyed, it should be strictly construed, especially, where it is sought to invoke it to establish a forfeiture, not only as to the lien of a chattel mortgage on things comprising a saloon, but on other things covered by the mortgage and not connected with the saloon in any way.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 127; Dec. Dig. ⊂=117.]

3. CHATTEL MORTGAGES ⊂=129—NATURE OF MORTGAGEE'S INTEREST.

A chattel mortgagee, not in possession, has no title to the mortgaged chattels, though he has a right or lien which he may preserve against other creditors or grantees by recording.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 216; Dec. Dig. ⊂=129.]

4. STATUTES ⊂=211—CONSTRUCTION—REFERENCE TO TITLE.

Where the body of an act is not ambiguous, the title cannot be resorted to for a key to its interpretation, especially as under Const. Wash. art. 2, § 19, providing that no bill shall embrace more than one subject, and that shall be expressed in the title, the title serves its purpose when it aptly includes that which is expressed in the body of the law, and the scope of the body of the act cannot be broadened merely because a broader meaning could be given the words of the title.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 288; Dec. Dig. ⊂=211.]

5. INTOXICATING LIQUORS ⊂=327—ILLEGALITY—PARTIAL INVALIDITY.

Rem. & Bal. Code Wash. § 6282, makes it unlawful for any person or corporation manufacturing or selling intoxicating liquors in quantities of five gallons or more to pay the license fee required by law or ordinance for any retail liquor store. Section 6283 provides that whoever violates any of the provisions of the preceding section shall be guilty of a misdemeanor and shall be fined or imprisoned as therein provided, and that any money loaned in violation thereof shall be forfeited to the city, county, or state. An investment company loaned J. $3,800, of which $800 was for the purchase of the unexpired portion of a liquor license, and $3,000 for the purchase of the licensee's saloon, hotel, furniture, and business. A separate check was drawn for the $800, and separate notes were given therefor; all the notes being secured by a chattel mortgage on the furniture, fixtures, and stock of merchandise. *Held* that, even though there was a loan of the license fee, the contract was severable, and the notes given for the furniture, equipment, etc., and the mortgage securing them, were valid.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 467–472; Dec. Dig. ⊂=327.]

6. BANKRUPTCY ⊂=311—CLAIMS—DISALLOWANCE UNTIL SURRENDER OF PREFERENCE.

A claim by a chattel mortgagee to the proceeds of a sale of mortgaged property is not such a claim as will be disallowed until the surrender of an illegal preference under Bankr. Act July 1, 1898, c. 541, § 57g, 30 Stat. 560, as amended by Act Feb. 5, 1903, c. 487, § 12, 32 Stat. 799 (Comp. St. 1913, § 9641), providing that the claims of creditors, who have received voidable preferences, shall not be allowed, unless they shall surrender such preferences.

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

7. BANKRUPTCY ⊂=267—SALE OF MORTGAGED PROPERTY—LIABILITY FOR EXPENSES.

A chattel mortgagee ratifying a sale by the mortgagor's trustee in bankruptcy, by petitioning for the proceeds thereof, is liable for the expense attendant thereon, including rent of the premises, where the mortgaged property was kept after the appointment of the trustee, and while the receiver was in possession, but is not liable for any other charges or expenses, nor any attorney's fees incurred by the receiver or trustee.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 371, 380; Dec. Dig. ⊂=267.]

In Bankruptcy. In the matter of A. L. Johnson, bankrupt. On petition by the Pacific Coast Investment Company for the proceeds of mortgaged property. Referee's order, holding the mortgage invalid, disapproved.

Troy & Sturdevant, of Olympia, Wash., for petitioner. A. Emerson Cross and T. H. McKay, both of Aberdeen, Wash., for trustee.

CUSHMAN, District Judge. The bankrupt, prior to bankruptcy, was engaged in the hotel and retail liquor business. Petition for adjudication in bankruptcy was filed December 24, 1912. Eleven months prior thereto the bankrupt, in order to purchase the saloon, hotel furniture, and business, and secure the unexpired portion of the seller's liquor license, borrowed $3,800 from the Pacific Coast Investment Company, for which notes were given, payable monthly, for $100 each. These notes were secured by a mortgage on chattels, including the hotel and saloon furniture and fixtures and the merchandise stock.

The trustee petitioned for the sale of the personal property of the bankrupt, on which the Pacific Coast Investment Company held this mortgage. That company appeared and objected to the sale, setting up that the property offered for sale was covered by its mortgage, executed in good faith more than four months prior to the adjudication, and that it was a good and subsisting lien. The referee overruled the objection of the petitioner and sold the property for $2,100. Whereupon the petitioner filed its petition for the distribution of the funds realized to itself. To this petition, the trustee filed an answer admitting the mortgage and alleging that it was invalid for the reason that, while it was made in the name of the Pacific Coast Investment Company, it was, in reality, a transaction wherein the Olympia Brewing Company advanced the money and received the mortgage; that, in part, it was secured upon, and given for the purchase of, the license, liquors, and saloon of the bankrupt, in violation of the laws of Washington.

An amended answer was filed for the trustee, alleging, further, a subsequent transaction, whereby the bankrupt, within four months prior to bankruptcy, surrendered to petitioner the bankrupt's liquor license, alleged to be of the value of $666.65, and that it received such amount therefor, whereby petitioner gained an illegal preference. The referee, after taking testimony, held the mortgage invalid.

[1] If it be concluded that the relation between the petitioning company and the Olympia Brewing Company was sufficiently close to warrant a finding that what was done in this matter by the Pacific Coast

Investment Company was virtually the action of the Olympia Brewing Company, the question still remains as to the legality of the mortgage in question.

The Washington statute provides:

"Section 1. That from and after the 31st day of December, 1909, it shall be unlawful for any person, persons, firm or corporation engaged in the manufacture, rectifying or bottling of spirituous, fermented malt or other intoxicating liquors or engaged in buying, selling or disposing of the same in quantities of five gallons or more to own all or any part of or to have any interest in the liquor, stock, fixtures or equipment of any kind whatsoever of any retail liquor store or to pay, advance or loan or become surety for the payment for any other person of the license fee required by any state law or city charter or ordinance, or to hire, engage or employ, directly or indirectly, any person, persons, firm or corporation to manage, conduct, control or operate a place where intoxicating liquors are sold at retail, to wit, in less than five gallons at a time or to sign or become surety on any bond required by law of a retail liquor dealer." Section 6282, Rem. & Bal.; title 267, § 97, Pierce's Code 1912.

The referee concludes that a manufacturer of intoxicating liquors is forbidden by this statute to take a mortgage upon a retail liquor store, and in effect holds that such a mortgage would be an "interest" in such liquor store, within the meaning of this statute.

[2] This law deprives persons of a right of contract theretofore at all times enjoyed under the law and, in the present cause, is being invoked for the purpose of establishing a forfeiture, not only as to the lien of the mortgage upon those things comprising the saloon, but also those not connected with it in any way. It should therefore be strictly construed.

It will not be presumed that the Legislature intended to deprive one engaged in an authorized business of such rights, in the absence of unequivocal language. Before the contract, or any part of it, can be held illegal, it must be clearly within the prohibition of the letter and spirit of the statute, and, if there is a fair doubt as to whether it is embraced within such prohibition, the doubt will be resolved in favor of the petitioning mortgagee. 36 Cyc. 1178 to 1188.

The law denies a liquor manufacturer the right to "own all or any part or to have any interest in the liquor, stock, fixtures or equipment of any kind whatsoever of any retail liquor store." The words "have any interest," as used here, have the same meaning as "own any interest." If they are given a broader meaning, the words "own all or any part" are wholly superfluous, for a man who owns "all or a part" of a thing certainly has an interest in that thing. The words "any part," as used in this act, were liable to be misunderstood and taken as meaning, for example, a case where one man owned the fixtures and equipment of a saloon and another owned the liquor. Hence the words "or to have any interest in" were inserted to deny the manufacturer the right to have or own a fractional or undivided interest in a retail liquor store, its liquor stock, fixtures, or equipment.

The statute also forbids the manufacturer loaning or becoming surety "for the payment for any other person of the license fee required by any state law" for a retail liquor store. The statute, by denying the manufacturer the right to make a loan for this purpose, impliedly authorizes a loan by the manufacturer to a retail dealer for any other pur-

pose. This under the familiar maxim, "Expressio unius est exclusio alterius." This right to loan carries with it the right to take security upon any and all property, because such right is incidental to the right to loan, which right cannot be denied, in the absence of unequivocal language to that effect.

By this construction only can all the words of the statute be given effect. The Legislature is presumed not to have used unnecessary words in expressing its meaning. If the word "interest," as used, is broad enough to include a mortgagee's lien, it is broad enough to include the right of one who "owns all or any part," and the Legislature is thereby convicted of using useless and unnecessary words in the statute.

Ownership of any article affords a different control and warrants the anticipation of a different result than that to be expected from a mortgagee's lien. The influence and control of the mortgagee over the mortgaged property and its use would depend largely, if not entirely, upon the solvency of the mortgagor, which would not be the case with an owner.

Whether the purpose on the part of the Legislature in enacting this statute was to prevent a manufacturer of intoxicating liquors from controlling saloons, or to discourage their activity in starting saloons, as the words used in the statute are confined to a denial of right of ownership in the saloon, there is no reason to strain the words used to include something else, because deemed capable of producing a somewhat similar result to that presumed to arise from the admittedly condemned act. Johnson v. So. Pac., 117 Fed. 462, 54 C. C. A. 508; Id., 196 U. S. 1, 25 Sup. Ct. 158, 49 L. Ed. 363; Field v. U. S., 137 Fed. 6, 69 C. C. A. 568; Erbaugh v. U. S., 173 Fed. 433, 97 C. C. A. 663; St. Louis Merchants' Bridge Termin. Ry. v. U. S., 188 Fed. 191, 110 C. C. A. 63.

Even though this statute imposed a penalty and is invoked to justify a forfeiture, the court would have no right to disregard the obvious intent of the Legislature; but no obvious intent is manifest to include, by the word "interest," a mortgagee's lien.

[3] A chattel mortgagee, not in possession, has no title to the mortgaged chattels, although he has a right or lien, which he may preserve against other creditors or grantees by recording. Silsby v. Aldridge, 1 Wash. 117, 23 Pac. 836; Binnian v. Baker, 6 Wash. 50, 32 Pac. 1008; Sayward v. Nunan, 6 Wash. 87, 32 Pac. 1022; First Nat. Bk. v. Hagan, 16 Wash. 45, 47 Pac. 223.

In Ormsby v. Ottman, 85 Fed. 492, 29 C. C. A. 295, Judge Sanborn writing the opinion, where a statute authorizing service by publication in suits to quiet title was involved, the language of the statute being "adverse estate or interest," it was held that the word "interest" would include a mortgagee's lien, and that the mortgagee might be served by publication. The court apparently concedes that generally the word "interest" means an estate, but, in the statutes before it for consideration, held (partly in view of the statutes in pari materia and upon consideration of the very object of a suit to quiet title) that the word "interest" included the claim of a mortgagee. Ordinarily an interest would

mean an estate, but its being coupled in the disjunctive with the word "estate" would tend to show that it was used in another sense. One of the statutes before the court in that case, held to be in pari materia with the one in question, provided for service by publication "when any defendant has or claims a lien or interest."

The Washington statute in the present case is not one of procedure. It takes away a right of contract and is invoked to justify a forfeiture, and the interpretation is rather to be controlled by the rule adopted in the following cases, in which it has been held that the word "interest" does not include or describe a mortgagee's lien. Williams v. Santa Clara Min. Ass'n, 66 Cal. 193, 5 Pac. 85–91; Adams v. Colonial & U. S. Mortg. Co., 82 Miss. 263, 34 South. 482, 488, 17 L. R. A. (N. S.) 138, 100 Am. St. Rep. 633; Garrett v. Fernauld, 63 Fla. 434, 57 South. 671; Sterns-Rogers Mfg. Co. v. Aztec Gold Min. & Mill. Co., 14 N. M. 300, 93 Pac. 706; Alexander v. Cleland, 13 N. M. 524, 86 Pac. 425; Morrison v. Clarksburg Coal & Coke Co., 52 W. Va. 331, 43 S. E. 102, 106.

The title to the act in question is:

"An act to prohibit any manufacturer of or wholesale dealer in intoxicating liquor from owning, operating or having any financial interest in any saloon or other retail liquor store or in any retail liquor license in the state of Washington or to become surety on any liquor dealer's bond and providing penalties for violation thereof." Laws 1909, p. 182.

[4] As long as the body of the act is not ambiguous, there is no reason to resort to its title for a key to its interpretation. The Constitution of the state of Washington provides:

"No bill shall embrace more than one subject, and that shall be expressed in the title." Article 2, § 19.

Under such provision, the title to an act should be as broad or broader than the body of the act, and, if the title aptly includes that which is expressed in the body of the law, it has served its purpose, and the broadening of the scope of the body of the act in violation of its terms would not be warranted merely because a broader meaning could be given the words of the title. 36 Cyc. 1133.

[5] Of the $3,800 secured by the mortgage, $800 was loaned to the bankrupt to buy the unexpired portion of a liquor license. Considering this as the loan "of the license fee" prohibited by statute, does it require the rejection of petitioner's claim to the proceeds of the sale of the mortgaged property?

The second section of the act provides:

"Whoever violates any of the provisions of section 1 of this act shall be deemed guilty of a misdemeanor and for the first offense shall be fined in any sum not less than one hundred (100) dollars nor more than five hundred (500) dollars or to be imprisoned in the county jail for not less than thirty (30) days nor more than six (6) months and any money paid, advanced or loaned in violation of this act, for any license, by any such person, persons, firm or corporation mentioned in section one (1) of this act shall be forfeited to the city, county or state, as the case may be." Rem. & Bal. § 6283; Pierce's Code 1912, tit. 267, § 99.

The thing prohibited not being malum in se, and one strict penalty being imposed by the act expressly, the greater weight of authority

in the national courts, applying the rule of "expressio unius est exclusio alterius," is that no legislative intent is shown to invalidate such a contract as that here in question.

"There is another equally well-settled rule of law, so far as the national courts are concerned. When a statute imposes specific penalties for its violation, where the act is not malum in se, and the purpose of the statute can be accomplished without declaring contracts in violation thereof illegal, the inference is that it was not the intention of the lawmakers to render such contracts illegal and unenforceable. Harris v. Runnels, 12 How. 79, 13 L. Ed. 901; Farmers', etc., Nat. Bank v. Dearing, 91 U. S. 29, 23 L. Ed. 196; National Bank v. Matthews, 98 U. S. 621, 25 L. Ed. 188; Barnet v. National Bank, 98 U. S. 555, 25 L. Ed. 212; Louisiana v. Wood, 102 U. S. 294, 298, 26 L. Ed. 153; Fritts v. Palmer, 132 U. S. 282, 289, 293, 10 Sup. Ct. 93, 33 L. Ed. 317; Central Transportation Co. v. Pullman Co., 139 U. S. 24, 60, 11 Sup. Ct. 478, 35 L. Ed. 55; Logan County Bank v. Townsend, 139 U. S. 67, 11 Sup. Ct. 496, 35 L. Ed. 107; Merchants' Cotton Press Co. v. Insurance Co., 151 U. S. 368, 388, 14 Sup. Ct. 367, 38 L. Ed. 195; Pullman Co. v. Central Transportation Co., 171 U. S. 138, 18 Sup. Ct. 808, 43 L. Ed. 108; Connely v. Union Sewer Pipe Co., 184 U. S. 540, 545, 22 Sup. Ct. 431, 46 L. Ed. 679; Yates v. Jones National Bank, 206 U. S. 158, 179, 27 Sup. Ct. 638, 51 L. Ed. 1002; Hanover National Bank v. First National Bank, 109 Fed. 421, 426, 48 C. C. A. 482, 487; Dunlop v. Mercer, supra; Boatmen's Bank v. Fritzlen (C. C.) 175 Fed. 183." In re T. H. Bunch Co. (D. C.) 180 Fed. 519, at 527.

Before determining whether the foregoing rule is controlling in the present case, inquiry should first be had as to whether the contracts secured by the mortgage are several, and, if so, whether the tainted portions can be rejected, and yet leave sufficient of petitioner's claim unsatisfied to cover the amount realized from the sale.

A separate check was drawn to the bankrupt for $800 and another for $3,000. All of the testimony, both that for the petitioner and that of the witnesses produced by the trustee, is to the effect that the $800 was for the purchase of the license, and that the first eight notes of $100 maturing were for the payment of this part of the money loaned, and that each of these notes was paid long prior to bankruptcy. This is likewise corroborated by the manner in which the account was kept in petitioner's books.

Under this state of facts, the contract is clearly severable, and that portion of the notes given for the purchase of the hotel, store, liquors, and equipment and the mortgage securing the same are valid. Gelpcke v. City of Dubuque, 68 U. S. (1 Wall.) 221, 17 L. Ed. 519; Borland v. Prindle, Weeden & Co. (C. C.) 144 Fed. 713; U. S. Consol. S. R. Co. v. Griffin, etc., Co., 126 Fed. 364, 61 C. C. A. 334 (C. C. A. 9th Cir.); Glucose Sugar Refin. Co. v. City of Marshalltown (C. C.) 153 Fed. 620; Minn. Sandstone Co. v. Clark, 35 Wash. 466, 77 Pac. 803; McDonald v. Neilson, 2 Cow. (N. Y.) 139, 14 Am. Dec. 431, 436; 27 Cyc. 1130g; 15 Am. & Eng. Encyc. Law, 990 (2d Ed.). The foregoing rule is applicable to a mortgage where part of that secured by it is valid and part secured is invalid. U. S. v. Bradley, 35 U. S. 343, at 360, 9 L. Ed. 448; Corbett v. Woodward, Fed. Cas. No. 3,223; In re Stowe, Fed. Cas. No. 13,513; Mills v. Hudmon & Co., 175 Ala. 448, 57 South. 739; First Nat. Bank v. Ashmead, 33 Fla. 416, 14 South. 886. It has been held that an illegal contract, which, at its inception, was entire, may still be severed in its performance and part of it legalized thereby. Fore-

man v. Ahl, 55 Pa. 325; 15 Am. & Eng. Encyc. Law (2d Ed.) 991, note D.

Hazelton v. Sheckells, 202 U. S. 71, 78, 26 Sup. Ct. 567, 50 L. Ed. 939, 6 Ann. Cas. 217; Miller v. Ammon, 145 U. S. 421–427, 12 Sup. Ct. 884, 36 L. Ed. 759; Gibbs v. Baltimore Gas Co., 130 U. S. 396, 9 Sup. Ct. 553, 32 L. Ed. 979; Grover v. Zook, 44 Wash. 489, at 501, 87 Pac. 638, 7 L. R. A. (N. S.) 582, 120 Am. St. Rep. 1012, 12 Ann. Cas. 192; Horseman v. Horseman, 43 Or. 83, 72 Pac. 698; Potter v. Potter, 43 Or. 149, 72 Pac. 702—have been cited. These were all cases where the contract in question was not severable; where there was no measure by which to gauge the illegal part of the consideration as against that which was undertaken to be performed. The distinction between such a contract and one such as is here involved is plainly indicated in the last two cases, in one of which the opinion was written by Judge Wolverton and in the other by Judge Bean.

It has been held "where the consideration of a contract consists of several different elements, and no apportionment or separate valuation, or means of apportionment or valuation of the different elements of the consideration is made by the parties," that "the entire contract will be held illegal, if one of the elements of the consideration is immoral or against public policy." 15 Am. & Eng. Encyc. of Law (2d Ed.) 989, note 1. In the present case the means of appraisement and valuation of the consideration is made by the parties, for dollars were borrowed and dollars were promised in return. They are themselves a measure of value. Having reached this conclusion, it is not necessary to determine whether the Pacific Coast Investment Company and the Olympia Brewing Company should be held identical.

[6] The conclusion reached is not affected by the fact that subsequently, in another transaction, the bankrupt surrendered to the petitioner another liquor license certificate with his right thereto and for which petitioner had loaned him the license fee, and that the petitioner has disposed of the same for $666.65, which it refuses to surrender to the trustee.

The right asserted by the petitioner to the proceeds of the sale of the mortgaged property (a right to a res) is not such a claim as, under section 57g of the Bankruptcy Act, as amended, will be disallowed until the surrender of an illegal preference obtained. Even were it considered as an ordinary claim, not arising out of an entirely separate transaction, the greater weight of authority is against its disallowance. Collier on Bankruptcy (10th Ed.) 733, notes 160, 161.

[7] The petitioner, having ratified the sale made by the trustee by petitioning for the proceeds of the sale, is held liable for the expense attendant thereon, including the rent for the premises, where the mortgaged chattels were kept after the appointment of the trustee, and also while the receiver was in possession. But the petitioner is not required to pay any other charges or expenses, nor any attorneys' fees incurred by the receiver or trustee. In re J. H. Alison Lbr. Co. (D. C.) 137 Fed. 643.

The referee's order is disapproved.

WATTS, WATTS & CO., Limited, v. UNIONE AUSTRIACA DI NAVIGAZIONE.

(District Court, E. D. New York. May 20, 1915.)

1. PAYMENT ⇐16—REQUISITES—PAYMENT BY BILLS OR NOTES.
By the general commercial law, a promise to pay, whether in the form of notes or bills, is not the equivalent of payment, unless specially agreed to be taken as such.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 63–69; Dec. Dig. ⇐16.]

2. COURTS ⇐1—JURISDICTION—LIMITATIONS.
The jurisdiction of courts is part of the power inherent in the state by virtue of its sovereignty, and is susceptible of no limitation not imposed by the state itself; for any restriction deriving validity from an external source would imply a diminution of its sovereignty to the extent of the restriction, and the investment of that sovereignty to the same extent in some other power.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1–4, 6–9, 91–106; Dec. Dig. ⇐1.]

3. WAR ⇐16—JURISDICTION OF COURTS OF NEUTRAL NATION—DISCRETION AS TO EXERCISE.
While a state of war existing between two nations does not affect the jurisdiction of a court of admiralty of a neutral country, the exercise of that jurisdiction for the enforcement of obligations which arose and were to be performed outside of that country, and the parties to which are foreign to it, is not obligatory, but is discretionary, with a view to the circumstances, and the existence of such state of war may be taken into consideration.

[Ed. Note.—For other cases, see War, Cent. Dig. §§ 80–84; Dec. Dig. ⇐16.]

4. COURTS ⇐12—JURISDICTION—EXERCISE THROUGH "COMITY."
"Comity" is not a rule of law, but a rule of practice, convenience, and expediency; but where the parties to a suit are not only foreigners, but belong to different nations, and have therefore no common forum, good and sufficient reasons should appear to warrant a refusal to entertain the suit.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 32–36, 40, 41, 43, 45; Dec. Dig. ⇐12.

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

5. WAR ⇐15—COMMERCIAL INTERCOURSE WITH ENEMY.
By the law of nations, all ordinary commercial intercourse between citizens of belligerents, being incompatible with a state of war between their countries, is absolutely interdicted.

[Ed. Note.—For other cases, see War, Cent. Dig. §§ 64–79; Dec. Dig. ⇐15.]

6. WAR ⇐16—JURISDICTION OF CONTRACTS BETWEEN BELLIGERENTS.
Where the law of both belligerent countries forbids a payment by a subject to a subject of the enemy country during the continuance of a war, such payment will not be enforced by a court of a neutral country, which has acquired jurisdiction of property of the debtor.

[Ed. Note.—For other cases, see War, Cent. Dig. §§ 80–84; Dec. Dig. ⇐16.]

In Admiralty. Suit by Watts, Watts & Co., Limited, against the Unione Austriaca di Navigazione, etc. Libel dismissed without prejudice.

This is a libel brought by Watts, Watts & Co., Limited, an English corporation, against the Unione Austriaca di Navigazione, etc., an Austrian corporation, to recover the sum of $45,360, the contract price of bunker coal supplied by the libelant to the respondent's steamers at Algiers, a dependency of the French Republic, before the outbreak of war between England and Austria. Jurisdiction was obtained by a writ of foreign attachment of the respondent's steamer Martha Washington. The parties have stipulated the following facts:

On November 19, 1913, the parties entered into a contract according to which the libelant undertook to supply bunker coal required by respondent's steamers coaling en route. Payment was required "in cash at port of delivery, or by due acceptance and payment of captain's draft in sterling on owners at 60 days' sight payable in London." Pursuant to contract coal was supplied by the libelant to respondent's steamers at Algiers, for which, on the date of delivery, the captains of the several steamers drew drafts in sterling on the owners at 60 days' sight, payable in London. The following table itemizes the transactions:

Date.	Vessel.	No. of Tons.	Amount.	Draft Due.
1914				
May 29	Martha Washington	606	£ 734:15:6	Aug. 7/14
June 1	Kaiser Franz Josef I	781	946:19:3	" 11/14
3	Anna	112	135:16:0	" 11/14
5	Oceania	572	620:16:0	" 17/14
9	Gerty	192	232:16:0	" 18/14
15	Argentina	290	351:12:6	" 22/14
18	Kaiser Franz Josef I	992	1,202:16:0	" 27/14
23	Campania	140	169:15:0	Sept. 1/14
26	Belvedere	399	423: 3:3	" 4/14
28	Martha Washington		972: 8:6	" 4/14
July 3	Argentina	478	579:11:6	" 12/14
6	Oceania	463	561: 7:9	" 12/14
13	Kaiser Franz Josef I	803	973:12:9	" 22/14
23	Martha Washington	607	735:19:9	Oct. 1/14
			£8,641: 9:9	

The drafts were duly accepted as payable at Kais. Koen. Priv. Oesterreichische Laenderbank, in London, where the libelant thereafter caused them to be duly presented for payment. None of them was paid, and all were duly protested. On August 4th Great Britain declared war against Germany and issued an alien's restriction order on the following day. The first draft fell due August 7th; the reason given for failure to pay was, "Not sufficient cover." The second and third drafts became payable on August 11th. On August 12th a state of war with Austria-Hungary was declared by Great Britain as from midnight of that day; and by a proclamation issued on that day the provisions of a previous proclamation of August 5th prohibiting trade with the German Empire was extended to all commercial intercourse with Austria-Hungary. The notice of protest of these two drafts, dated August 13th, recites that the premises of the Laenderbank were found closed and the following notice posted: "Owing to the state of war, the business of the London branch of the Laenderbank is necessarily discontinued until its application to his Britannic Majesty's government for a license to continue business has been granted." Both drafts were also indorsed by the bank, "Insufficient funds." On or about August 13th Sir William Plender was appointed controller of the London branch of the Laenderbank. The reason given for failure to pay the next seven drafts, falling due between August 17th and September 4th, as stated in the notices of protest, was: "We are instructed by Sir Wil-

liam Plender, the controller appointed by the British government, not to make any payments at present." The answer given on presentation of the last four drafts was, "No advice."

Meanwhile on August 24th this libel was filed, and on the following day process in personam with clause of foreign attachment issued out of this court. The stipulation as to the facts embodies the following subsequent events. By a supplemental proclamation, dated September 9, 1914, Great Britain prohibited specifically, among other things, the payment of any sum of money to or for the benefit of an enemy, or giving security for the payment of any debt, or accepting, paying, or otherwise dealing with any negotiable instrument, held by or on behalf of an enemy, with this proviso: "Nothing in this proclamation shall be deemed to prohibit payments by or on account of enemies to persons resident, carrying on business, or being in our dominions, if such payments arise out of transactions entered into before the outbreak of war, or otherwise permitted." The Trading with the Enemy Act of 1914 (4 & 5 Geo. V, c. 87) was enacted September 18th, in aid of the prior proclamations, and fixed penalties for violations. On the part of Austria-Hungary, an imperial order of October 16, 1914, authorized the government to issue orders to prevent transactions, directly or indirectly, with hostile states, and three General Orders by the Joint Ministry, dated October 22d, pursuant to such authority, prohibited payments, directly or indirectly, to citizens of Great Britain and France and their colonies, and authorized the appointment of trustees to supervise business establishments within the country which are managed or controlled from such hostile states. Finally the respondent summarized the situation, from its own standpoint, in a letter written to the libelant from Trieste on September 19th, wherein its liability for the payment of the amount due was expressly confirmed. "The legal dispositions taken by the British and Austrian governments * * * prevent us, however, to fulfill our original undertaking. We beg, therefore, to ask you to wait for the payment until normal circumstances will enable us to square our account, eventually to ask you for a suggestion how you would propose to settle this matter, or f. i. whether you would accept a guarantee of one of our first-class bankers in Vienna."

Convers & Kirlin, of New York City (J. Parker Kirlin and John M. Woolsey, both of New York City, of counsel), for libelant.

Lorenzo Ullo, of New York City, for respondent.

VEEDER, District Judge (after stating the facts as above). It appears from the foregoing statement that drafts given by the Austrian respondent for coal supplied before the outbreak of war by the British libelant, payable at the Laenderbank, London, were not paid when due because the respondent had not forwarded the funds to pay them. The reason given by the respondent for its failure to supply the funds was that the state of war which had intervened made it impossible for the respondent to perform an obligation calling for payment to an alien enemy. The embargo imposed by Sir William Plender, the controller in charge of the Laenderbank, upon the payment of funds by the bank, may be put aside. The respondent had not supplied the bank with funds. Moreover, the libelant is not suing upon the drafts; when the libel was filed, only 6 of the 14 drafts had in fact become due. The libelant sues upon the original debt arising out of its performance of the contract.

[1] The respondent's claim that the taking of drafts constituted a novation is without force. The contract between the parties expressly provided for "due acceptance and payment." The drafts were received by the libelant, not in satisfaction of the debt, but as conditional

payment only. Such, indeed, would be the presumption of law in the absence of proof; for by the general commercial law a promise to pay, whether in the form of notes or bills, is not of itself the equivalent of payment. On principle, nothing can be payment in fact save that which is such in truth, unless specially agreed to be taken as its equivalent. The Emily Soudar, 17 Wall. 666, 21 L. Ed. 683.

I pass over various points argued by counsel to consider an issue which lies at the foundation of the case. The respondent contends that this court, as a court of a neutral nation, should not exercise its jurisdictional power between alien belligerents to require an act prohibited alike by the municipal law of both belligerents; i. e., the transfer, by process of judgment and execution, of funds from one alien belligerent to the other. The status of a debt due from one belligerent to another is said to be that of property in the debtor's enemy country, and a neutral court may not disregard the state of war, and by judicial action compulsorily change that status into a payable one. In other words, to take cognizance of this case would be a breach of neutrality.

To this argument the libelant replies that the contract made between the parties specified the place of performance, and it is necessary to consider only whether such performance by the respondent is legal according to the law of that place. And whether that place be Algiers or London, it is clear that, even after the outbreak of war, it was lawful for the libelant to receive, and for their alien enemy debtor to pay them, there the amount due; and if jurisdiction were obtainable there over the respondent the obligation could be enforced there by legal action. Whether such performance would involve a breach of Austrian law is immaterial to this inquiry, since Austria was not the place of payment, and its law does not govern its legality. So far as neutrality is concerned, how can it be a breach of neutrality for this court to decide controversies in accordance with the settled principles of maritime law, when regularly presented to it in accordance with recognized admiralty procedure? How can such enforcement here of legal rights between all belligerent subjects, irrespective of their enemy status abroad, be said to infringe that attitude of impartiality which lies at the foundation of neutrality?

[2] The issue thus presented is one of great importance, and I regret to find that it must be decided without the aid of authority. The researches of learned counsel indicate that it is now presented for judicial determination for the first time. The question is not one of jurisdiction, but of the propriety of the exercise of jurisdiction. This court's power is in no wise limited by the fact that other nations are at war. The jurisdiction of courts is part and parcel of the power inherent in the state by virtue of its sovereignty. The jurisdiction of the state within its own territory is necessarily exclusive and absolute. It is therefore susceptible of no limitation not imposed by itself; for any restriction upon it deriving validity from an external source would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in some other power. The Schooner Exchange, 7 Cranch, 136, 3 L. Ed. 287.

[3, 4] But when parties foreign to a state come before its courts

asking cognizance of obligations which arose and were to be performed outside that state, the exercise of jurisdiction is not obligatory; it is discretionary, with a view to the circumstances. The Belgenland, 114 U. S. 355, 5 Sup. Ct. 860, 29 L. Ed. 152; Benedict's Admiralty, § 195. If jurisdiction is exercised, it is exercised as an act of international comity; if refused, the refusal does not arise out of any incapacity to act. Comity, therefore, is not a rule of law, but a rule of practice, convenience, and expediency. While, however, it is not a matter of absolute obligation, it is something more than mere courtesy and good will. Where the parties are not only foreigners, but belong to different nations, and have therefore no common forum, good and sufficient reasons should appear to warrant a refusal to entertain the action.

When this libel was filed Great Britain and Austria-Hungary were at war. This fact affected materially the relations of the parties. The outbreak of war brings about ipso facto a radical change in the relations of noncombatant subjects as well as of the public armed forces of the belligerent states. Although numerous mitigations have blunted the severity of the old doctrine that a state of war placed the general population of the opposing nations in a condition of active hostility, the subjects of enemy states are still, to a very considerable extent, regarded as enemies. Noncombatants are, or usually have been, in modern times, exempt from most of the severities of warfare; but they are by no means free to act as if no war existed.

[5] The law of nations, as judicially declared, prohibits all intercourse between citizens of the belligerents which is inconsistent with the state of war between their countries. No transaction injurious to their own government may be entered into or continued by them. Ordinary commercial intercourse is therefore incompatible with a state of war, since every act and contract which tends to increase the enemy's resources is absolutely interdicted; and this includes every kind of trading or commercial dealing, whether by transmission of money or goods, or orders for the delivery of either, directly or indirectly, or by contracts in any form looking to or involving such transmission. Every such contract made during the war is illegal and void. Since, however, aid to the enemy is the touchstone of illegality, discrimination is permitted in the case of contracts made before the outbreak of war. Further performance which inures to the aid of, or involves any dealing with, the enemy, is illegal. If from its character the contract is incapable of suspension, it is dissolved; but where such interruption of performance does not go to the root of the transaction, the contract is merely suspended during the war. The alien enemy is not civiliter mortuus; he is merely in a state of suspended animation. When the war ends, the mutual obligations of performance and right of action revive.

Where, therefore, such a contract has been entered into with an alien enemy before the outbreak of war, and has been performed on his side, the war merely suspends his remedy; in other words, he cannot sue upon it during the existence of hostilities. If, on the other hand, performance of the contract is on the side of the other party, he can enforce the contract (particularly such as require for

performance the payment of money only) in the courts of his own country during the continuance of war, provided, of course, a cause of action has accrued. The reason why the rule debarring action on the part of an alien enemy plaintiff can have no application where the parties are reversed is plain. The rule is based upon the obvious ground that it is contrary to public policy for the courts of a belligerent country to render any assistance to an alien enemy to enforce rights which, but for the war, he would be entitled to enforce to his own advantage and to the detriment of his enemy. It is apparent, therefore, that to hold that a subject's right of action in his own country against an alien enemy is suspended, would be to defeat the very object of the suspensory rule, and to turn a disability into a relief.

This is the municipal law of England. Porter v. Freundenburg, 31 Times Law Repts. 163 (Jan. 19, 1915); Robinson v. Continental Insurance Company of Mannheim, [1915] 1 K. B. 155; Ingle v. Same, 84 L. J. K. B. 491; Leader, Plunkett & Leader v. Direction der Disconto Gesellschaft, 31 Times Law Repts. 63; Continental Tyre & Rubber Co., Ltd., v. Daimler Motor Co., Ltd., Id. 178; In re Mary, Duchess of Sutherland, Id. 248; Thurn and Taxis (Princess) v. Moffitt, 84 L. J. Ch. 220; Janson v. Driefontein Consolidated Mines, Ltd., [1902] A. C. 484; Alcinois v. Nigrew, 4 E. & B. 217; Le Bret v. Papillon, 4 East, 502; The Hoop, 1 Chr. Rob. 196; Ex parte Boussmaker, 13 Vesey, Jr. 71; Albrecht v. Sussman, 2 Ves. & B. 323. It is also the law of this country. McVeigh v. United States, 11 Wall. 259, 20 L. Ed. 80; Hanger v. Abbott, 6 Wall. 532, 18 L. Ed. 939; The Julia, 8 Cranch, 181, 3 L. Ed. 528; United States v. Lane, 8 Wall. 185, 19 L. Ed. 445; Briggs v. United States, 143 U. S. 346, 12 Sup. Ct. 391, 36 L. Ed. 180; Kershaw v. Kelsey, 100 Mass. 561, 97 Am. Dec. 124, 1 Am. Rep. 142; Griswold v. Waddington, 15 Johns. 57; Whelan v. Cook, 29 Md. 12. And in the absence of proof of the foreign law, it may be taken to be the law of Austria-Hungary and of France. It is in fact the law common to all nations, since it is merely a formulation of the instinct of self-defense. The apparently contradictory provision of the Hague Convention of 1907 Concerning the Laws and Customs of War on Land, art. 23 (h), whereby it is forbidden to declare extinguished, suspended, or unenforceable in a court of law the rights and rights of action of the nationals of the adverse party, has been construed by the English Court of Appeal to mean, in accordance with its context, merely that the military commander of a belligerent force in the occupation of the enemy's territory is forbidden to make any declaration preventing the inhabitants from using their courts to assert their civil rights. Porter v. Freundenburg, 31 Times Law Repts. 163. The proclamations and orders in evidence are therefore merely declaratory of the common law.

[6] Such being the law common to the belligerents and to the neutral forum, it seems clear to me that it should be recognized and applied in this situation. It is quite beside the point to rely as the libelant does, upon the fact that the libelant could enforce this payment in England if it could find the respondent or any of its property there. That recourse would be available to it under such circumstances as a

particular application of the general rule looking to the impairment of the resources of the alien enemy. But it is because the libelant finds it impossible to reach the respondent or its property in England that it has applied to this forum. From the standpoint of this neutral jurisdiction the controlling consideration is that the law of both belligerent countries forbids a payment by one belligerent subject to his enemy during the continuance of war. This court, in the exercise of jurisdiction founded on comity, may not ignore that state of war and disregard the consequences resulting from it.

The libel is dismissed without prejudice.

THE EROS.

(District Court, E. D. New York. June 8, 1915.)

ADMIRALTY ⇐=75—DISCOVERY ⇐=12—PRODUCTION OF WRITINGS—NECESSITY.

A libelant's motion for discovery of cablegrams and other messages will not be granted, either under the admiralty or the general equity rules, where the libelant has or can obtain originals or copies of all the messages, and all he could gain by discovery would be to establish the authority of the sender and the receipt of the answers, which facts could be established by depositions taken on commission.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 559, 586, 587; Dec. Dig. ⇐=75; Discovery, Cent. Dig. § 13; Dec. Dig. ⇐=12.]

In Admiralty. Libel by Eugene Higgins against the Eros. On application by libelant for discovery. Application denied.

Duer, Strong & Whitehead, of New York City (Selden Bacon, of New York City, of counsel), for libelant.

Convers & Kirlin, of New York City (L. De Grove Potter and George L. Prettyman, both of New York City, of counsel), for claimant.

CHATFIELD, District Judge. This application is made for what is asserted to be the discovery of certain original cablegrams sent from France, and of certain messages and a letter sent from the United States to the owner of the yacht Eros, whose agent in this country has intervened as claimant. The application is based upon an alleged power of the court of admiralty, proceeding either under its own or the general admiralty rules, or, in the absence of any particular rule, applying the equity rules of the United States (in particular rule 58), to compel the production of any paper, inspection of which may be necessary, and as to which the customary interrogatories, notice to produce, or subpœna duces tecum will not enable the moving party to secure proper information in order to prepare for trial.

It may be assumed that, under circumstances making such action proper, the court might grant the relief of a motion for discovery, in any case where the filing of a suit in equity, brought upon a bill for such discovery, would be unnecessary. But the present motion presents no such situation. The libelant has in his possession, or can ob-

tain from the cable company in the United States, the originals of such messages as were sent by him. He also has the replies received, and in the case of the letter a notice to produce, or a subpœna duces tecum, would enable the libelant to offer on the trial his copy of the letter sent, and, under the circumstances shown, any denial of receipt would be a matter of defense for the claimant.

If the libelant is seeking to prove that the claimant, or an authorized agent, was the party conducting the correspondence in France, and if he is anticipating some evidence indicating that the claimant is not responsible therefor, then the contents of the letters, or the production of the originals for inspection of their contents, would not supply the evidence needed. The only method by which testimony as to the persons engaged in any transaction, as to the signature upon original documents, or the receipt by any particular person of other documents, can be shown, is to take the testimony of those individuals who had to do with the matters in question. In fact, if the authenticity of signature were called in question, after the production of the original documents, the same necessity for taking testimony would result as is now presented in securing evidence that the documents, whose contents are known, were sent by the owner of the boat.

It would seem that the present motion for discovery of papers would result in nothing more than an effort, under authority of the court, to compel the claimant or his proctors to make unnecessary the issuance of a commission. The case of Brown v. Swann, 10 Pet. 497, 9 L. Ed. 508, holding that discovery is as to facts known to one party, and which should be disclosed by him, and which the complainant is unable to prove by other testimony, and also the case of Miller v. Moise (C. C.) 168 Fed. 940, holding that a bill of discovery will not lie where the information can be obtained by the taking of depositions or the use of a subpœna duces tecum, sufficiently indicate that the admiralty and equity rules should not be extended so far beyond even the powers of a bill of discovery as to institute new practices that are inadvisable as general rules. This particular case may present difficulties because of the conditions of war, although there seems to be no question that the libelant may proceed against the boat, inasmuch as he is a citizen of this country and does not come within the rule laid down in the case of Watts, Watts & Co., Ltd., v. Unione Austriaca di Navigazione, etc. (decided in this district May 20, 1915) 224 Fed. 188.

It would appear that the libelant may not need the testimony which he is seeking, if he gives a proper notice to produce and introduces upon the trial the series of correspondence; but if a situation should arise upon the trial, where by the acts of the claimant or his principal the taking of depositions should be necessary, it would be safer, in such extraordinary case, to hold up the trial and issue the deposition than to make a broad anticipatory rule because of the features of this particular suit.

The motion will be denied.

JOHNSON v. CHICAGO, M. & ST. P. RY. CO.

(District Court, W. D. Washington, N. D. May, 1915.)

No. 54.

1. COURTS ⟸365—UNITED STATES COURT—STATE LAWS AS RULE OF DECISION—ACTION FOR PERSONAL INJURY.
In actions in the United States courts for personal injuries the rule adopted by the federal courts must prevail, rather than the rule of the state court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 950, 952, 955, 969–971; Dec. Dig. ⟸365.]

2. EQUITY ⟸363—MOTION TO DISMISS—EFFECT AS ADMISSION.
A motion to dismiss a bill in equity admits all the allegations of the bill which are well pleaded.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 762–766, 768; Dec. Dig. ⟸363.]

3. RELEASE ⟸24—RIGHT TO CONTEST—RETURN OF CONSIDERATION.
Where an injured servant, who had been cared for in his employer's hospital by his employer's physician, and paid only the amounts expended by him for such care and the value of his time during that period, at his former wages, not as compensation for future damages, but under a mutual mistake that his injuries were practically cured, executed a release of all further claim, and thereafter became very much worse, and was seriously and permanently injured, he can have the release set aside without returning or offering to return the amount received therefor.

[Ed. Note.—For other cases, see Release, Cent. Dig. §§ 41–46; Dec. Dig. ⟸24.]

4. CANCELLATION OF INSTRUMENTS ⟸34—PROCEEDINGS—LACHES—RELEASE—RIGHT OF ACTION BARRED.
An injured servant, who signed a release more than a year prior to the expiration of the time limited by Rem. & Bal. Code Wash. § 159, for bringing an action for his injuries, and immediately thereafter became much worse, and so continued until after the expiration of the time limited, cannot then sue to have the release canceled, since it was his own laches, and not the mistake as to the extent of his injuries, which prevented the bringing of his action within the time limited.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 49–54; Dec. Dig. ⟸34.]

5. LIMITATION OF ACTIONS ⟸95, 104—FRAUD—MUTUAL MISTAKE.
The statute of limitations does not begin to run against the right of action so long as the plaintiff is prevented from bringing the action by the defendant's fraud or by mutual mistake.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 337, 473, 474, 511–513; Dec. Dig. ⟸95, 104.]

In Equity. Bill by Oscar L. Johnson against the Chicago, Milwaukee & St. Paul Railway Company to cancel a relief. On motion to dismiss the bill. Motion granted.

Dudley G. Wooten, E. K. Hawkins, and John N. Perkins, all of Seattle, Wash., for plaintiff.

George W. Korte, of Seattle, Wash., for defendant.

NETERER, District Judge. The bill, after stating jurisdictional facts, alleges in substance that plaintiff was injured through defend-

ant's negligence while in its employ, March 5, 1910; was treated by defendant's physicians, and after three weeks discharged as practically well; that further disorder developed because of the injury, and plaintiff was thereafter treated and operated upon by defendant's physicians; that after the operation he experienced new symptoms of disease, which are described in detail; that on or about April 29, 1912, at the instance and request of defendant, and influenced thereto solely by the representations and statements of defendant's physicians to the effect that he would gradually recover from his injuries and symptoms of disease following the same, as well as the surgical operation, plaintiff signed a written release in full of claims against the defendant for injuries received, in consideration of $2,585 paid by the defendant to the plaintiff; that such settlement was merely the cost and expense of hospital and medical and surgical treatment while being cared for by defendant, and the value of his time for said period, estimated at the wages he was earning; that subsequent to the execution of the release plaintiff rapidly grew worse and suffered a complication of ailments, fully described in the bill, which subject him to great agony of mind and body and intolerable shame and humiliation among his associates, besides rendering it impossible for him to seek or secure any kind of employment; that at the time he executed the release he had no knowledge, suspicion, or intimation that he was in danger of the conditions and symptoms described in the bill, and that defendant's physicians were either themselves ignorant of the facts, or purposely and fraudulently concealed them from plaintiff, in order to induce him to sign the release; that plaintiff brought an action for damages against defendant in the King county superior court, in which he estimated his total damages at $30,000, and deducted as a credit the sum of $2,585, the amount paid as aforesaid, which money was paid in various amounts and at different times during the period when he was under the care of defendant's physicians, and not as a lump sum by way of compensation for any future or permanent injury for which defendant might be liable; that it is utterly impossible for plaintiff to repay the $2,585, or any part thereof, at this time, or to make tender of repayment, and that, having deducted this sum from the total amount of damages claimed, his failure to repay or tender repayment should not prejudice his rights and relief as set forth in the bill; and prays that the release referred to be canceled, and plaintiff restored to all his rights in the premises. Defendant alleges in its brief, and it is not denied, that service in the lawsuit was made upon defendant December 22, 1914, and filed January 9, 1915. The law action referred to was removed to this court, where it is now pending.

Defendant has moved the court to dismiss the bill, upon the ground that the facts stated therein are insufficient to constitute a valid cause of action in equity, in that (a) the release signed by plaintiff relates to personal injuries and a satisfaction of the damage and claim for personal injuries occurring March 5, 1910, and that plaintiff's cause of action, if any, for injuries received on that date, accrued at that time, and that the law action commenced by plaintiff is barred by section 159 of Remington & Ballinger's Code of Washington, which provides

that an action for an injury by one person to the person of another must be commenced within three years from the date of the accrual of the cause of action; (b) that it appears on the face of the bill that plaintiff was paid $2,585 at the time of the execution of the release, and there is no allegation in the bill that plaintiff has returned, or made an offer to return, the money so received by him, and he still retains the fruits received under the claimed fraudulent transaction.

Defendant, in its brief, submits that it is the uniform rule of the Circuit Court of Appeals of this circuit, as well as of this court, that "a party executing a release to a railroad company for a claim for personal injuries cannot avoid it, as obtained by false and fraudulent representations, unless he first returns, or offers to return, the money received as the consideration for its execution," and cites Hill v. Northern Pacific Ry. Co., 113 Fed. 914, 51 C. C. A. 544, Price v. Connors, 146 Fed. 503, 77 C. C. A. 17, Cook v. Fidelity & Deposit Co., 167 Fed. 95, 92 C. C. A. 547, Mahr v. Railway Co., 170 Fed. 699, 96 C. C. A. 19, Standard Portland Cement Co. v. Evans, 205 Fed. 1, 125 C. C. A. 1, all decided by the Circuit Court of this circuit, and Maine Northwestern Development Co. v. Northern Commercial Co. (D. C.) 213 Fed. 103, and Columbia Digger Co. v. Rector (D. C.) 215 Fed. 619. The number and fullness of the cases spare much discussion.

Hill v. Northern Pacific Ry. Co., supra, was an action for damages for the death of plaintiff's husband through negligence of the defendant company. The defense set up a release signed by plaintiff, and plaintiff alleged fraud in obtaining the release. The reply contained no averment of tender of the money received upon the settlement, nor offered to return any of the money, but averred a willingness to deduct this amount from the total damages claimed. Judge Ross, for the court, said:

"We find it unnecessary in this case to decide whether the question of fraud leading up to and inducing the execution of such instruments may be inquired into and determined in an action at law in a federal court, for the reason that, conceding that it may be, good faith and fair dealing would require the plaintiff, as a condition precedent to the presentation and maintenance of such an issue, to return or offer to return the money received in consideration of the instruments. * * * Whatever exceptions there may be to the general rule certainly should not embrace a case like the present one, where a trial might establish that the plaintiffs have no valid claim, and at the same time leave the defendant's money in the plaintiff's pockets."

In Price v. Connors, supra, which was an action for damages for injuries sustained as the result of a gunshot wound, defendants introduced in evidence a written release, executed and acknowledged by plaintiff, who denied all knowledge of the execution. It was alleged in the reply that plaintiff was intoxicated at the time of the execution of the release, but the evidence on that question was conflicting. The trial court refused to instruct the jury that it was plaintiff's duty to restore, or offer to restore, everything of value which he received as a consideration for the release, and in the event of his failure to do so he would be bound by the release, even though the jury should believe he was so intoxicated at the time of signing it as to be incompetent of executing it. The Circuit Court (146 Fed. at page 504) said:

"We are of the opinion that the court below erred in giving the instructions complained of. The case was not one of that class wherein the court, having it within its power to fully protect the interest of the adverse party in case of rescission, might proceed to a hearing without requiring the repayment or tender of the money received in consideration of the release, illustrations of which class of cases may be found in Thackrah v. Haas, 119 U. S. 499 [7 Sup. Ct. 311, 30 L. Ed. 486], and Billings v. Smelting Co., 52 Fed. 250 [30 C. C. A. 69]. In the present case the jury might have found that the whole of the damage suffered by the plaintiff did not, in fact, amount to $500, the amount the defendants paid the plaintiff in settlement. And since the defendants put in issue all of the allegations of the complaint, it might, if the evidence justified it, have been found by the jury that the plaintiff was not entitled to recover at all."

Mahr v. Union Pacific Ry. Co., supra, involved the validity of a settlement and release of a claim for personal injuries. There was no evidence offered in support of the allegation of the amended reply that plaintiff had offered to return the money he had received in settlement of his claim, or that he had tendered the same in court. The trial court directed a verdict for the defendant, which decision was affirmed by the Circuit Court of Appeals.

Defendant has also cited several decisions of Circuit Courts of Appeals of other circuits following the rule established in this circuit. In Stephenson v. Supreme Council A. L. H. (C. C.) 130 Fed. 491, cited, it was found unnecessary to consider the question, but the court cited Hill v. Railway Co., supra. Heck v. Missouri Pac. Ry. Co. (C. C.) 147 Fed. 775, was an action for trespass on the case. Accord and satisfaction was pleaded in the nature of a written release by plaintiff, who sought to avoid it on the ground of fraud. The plea was held bad because the plaintiff had not returned or offered to return the consideration upon which the release was based. In North Chicago Street Ry. Co. v. Chicago Union Traction Co. (C. C.) 150 Fed. 612, it was held that a party desiring to rescind a contract must promptly return the consideration received.

Plaintiff contends that under the facts alleged in the complaint it is not necessary to refund the money received in consideration of the release, provided that amount is deducted from the amount claimed as damages, and cites Great Northern Ry. Co. v. Fowler, 136 Fed. 118, 69 C. C. A. 106, Pattison v. S. R. & S. Ry. Co., 55 Wash. 625, 104 Pac. 825, Sanford v. Royal Ins. Co., 11 Wash. 653, 40 Pac. 609, and Bjorklund v. Seattle Electric Co., 35 Wash. 439, 77 Pac. 727, 1 Ann. Cas. 443.

In Great Northern Ry. Co. v. Fowler, supra, which is a decision by the Circuit Court of Appeals of this circuit, it appeared that, at the time of the examination of the plaintiff by the defendant's surgeon, he called the latter's attention to a pain in his shoulder, but was informed by the surgeon that the pain was purely sympathetic, and was attributable to his fractured arm. Plaintiff thereafter signed a release in full of all claims, and it subsequently developed that his shoulder was broken and dislocated, and this action was brought to set aside the settlement. Judge Gilbert, for the court, said:

"We entertain no doubt that such a release, executed under a mutual mistake of fact so induced by the appellant, should be set aside. It is true that, where there is no misrepresentation or fraud on the part of the releasee,

a releasor cannot subsequently avoid his release on the ground that his injuries were more serious than he thought them to be, even though his opinion at the time of making the settlement may have been based upon that of a physician employed by the releasee to examine and report on the extent of his injuries. * * * But it is equally true that a mutual mistake of fact, or an innocent misrepresentation of the facts, of the releasor's injury, made by the releasee's physician, may be effective to avoid a release induced thereby."

In this case, however, the plaintiff did tender back the amount received, as Judge Gilbert, in his statement, says:

"And the appellee brought into court and tendered the repayment of $195, which he had so received, with interest thereon."

[1] The Washington court is not in harmony with the federal courts upon this issue. The rule adopted by the United States courts, however, must prevail. The Circuit Court of Appeals of this circuit, in Tweeten v. Railway Co., 210 Fed. 829, at page 830, 127 C. C. A. 378, in applying the fellow servant doctrine, stated that the rule adopted by the United States courts must control in personal injury cases, and said:

"Here is a situation which seems to demand remedial legislation; for, while the courts of the United States will follow the decisions of the courts of the state in which they are held when, in construing the state law, those decisions establish a rule of property, they must ignore them when they establish no more than a rule of liability for personal injuries."

The doctrine contended for by the plaintiff, it is asserted, is approved in Thackrah v. Haas, 119 U. S. 499, 7 Sup. Ct. 311, 30 L. Ed. 486, a case in which the transfer of shares in a corporation procured from the owner while he was so intoxicated as to be incapable of transacting business, by fraud and for a grossly inadequate consideration, was set aside, it appearing that without any fault of his he was unable to restore the consideration, and the court held provision could be made for repayment in the final decree, and at page 502, of 119 U. S., at page 312 of 7 Sup. Ct. (30 L. Ed. 486), said:

"The complaint further alleges, and the demurrer admits, that the greater part of this sum of $1,200 was retained by the bank and applied to the payment of a debt previously due to it from the plaintiff, and (it would seem before he recovered from his intoxication) the rest of that sum was applied by his wife to the payment of his small debts, and he had no means available to raise money to repay the $1,200, except the interests in the mining company which he had been induced by the defendants' fraud to make a transfer of. The plaintiff, without fault of his, being unable to repay the consideration of the fraudulent transfer, equity will not require him to do so as a condition precedent to granting him relief, but will make due provision in the final decree, for the repayment of that sum out of the property recovered."

[2, 3] In the case at bar the complainant merely says that it is impossible for him to tender or repay the money, and it is contended on the part of the defendant that such statement of a conclusion is insufficient. The motion of the defendant admits all well-pleaded allegations and statements of the bill as true. Viewing the statement of the complainant in that light, he has received, as cost and expense of hospital and medical and surgical treatment while he was cared for by the defendant, and the value of his time for said period, estimated at a value

of wages he was earning, $2,585. We have the admission that the defendant was caring for him, that it placed him in the hospital, that its physicians and surgeons treated and operated upon him, and the sum paid was for these services and expenditures which the defendant had voluntarily furnished without creating any obligation on the part of the plaintiff to pay. Taking this as true, the defendant could not be injured in any event, whatever the ultimate recovery might be, and I am inclined to the view, as against this motion, that equity does not require the defendant to pay or tender the amount received.

[4] A more serious question arises as to whether the action is not barred by limitation of time in the suit at law, and that, being barred, the court, in this proceeding, would not do an idle thing and consume its time in determining a matter which would be of no consequence, and under the agreement of the parties that this matter is to be determined it is well to dispose of it now. Section 159, Remington & Ballinger's Code of Washington, provides that an action for the injury of one person by another must be commenced within three years from the date of the accrual of the cause of action. There can be no question but that the cause of action of the plaintiff accrued on the 5th day of March, 1910, the date of his injury. There is no allegation in the bill that there was any injury received subsequent to this date; nor is there any statement that the injury thus received was aggravated by the defendant or any of its agents who treated the complainant, thereby creating a new liability. There is statement with relation to the opinion as to recovery.

"The plaintiff's ignorance of the wrong committed or of his rights with respect thereto cannot be considered in determining when the statute begins to run; his cause of action accrues, and the statute is set in motion, upon the commission of the wrongful act or the negligent omission or breach of duty by the defendant, without regard to when he became aware of it. An exception to this rule is made in cases of concealment of the cause of action or fraud on the part of the defendant, and in special cases where the ignorance of the plaintiff is due to no fault or negligence of his own, but to the peculiar circumstances of the case." 19 American & English Enc. of Law, pages 213-215.

[5] A number of authorities are cited by plaintiff to show that, where the plaintiff is prevented from bringing his action through fraud, concealment, or deceitful conduct of the defendant, or mutual mistake of the parties, the bar of the statute does not operate until the discovery of the fraud or mistake. This proposition is so fundamental that no authorities need be cited. There is no statement in the bill that would indicate any conduct on the part of the defendant which prevented the plaintiff from bringing his action prior to the time or within the period limited by law. Plaintiff must act diligently, and not delay the action beyond the time when he is cognizant of the injuries upon which he bases his right of recovery. In the case at bar, plaintiff signed a release a year prior to the expiration of the period of limitation. The bill shows on its face that immediately after signing the release plaintiff grew worse and began to suffer from the complication of diseases which he refers to in his bill. Plaintiff must be held to this knowledge, and likewise to the exercise of ordinary diligence in the prosecution of

his action, and in seeking relief from the conduct complained of; and if he fails to exercise this diligence, equity will not suspend the operation of the statute. The Circuit Court of Appeals of this circuit, in Newberry v. Wilkinson, 199 Fed. 673, at page 688, 118 C. C. A. 111, in disposing of the right of a minor who was fraudulently induced to sign away certain property rights, said:

"Reasonable attention to an affair peculiarly his own would have led plaintiff, at least soon after his arrival at age, to the possession of all the knowledge he acquired immediately prior to the bringing of the suit. But he delayed the institution of his suit until the statute of limitations had fully run against him and in favor of the surety. * * * We are of the opinion that, had the suit been seasonably instituted after the plaintiff became of age, the bar of the statute of nonclaim would not have stood in the way of his recovery, and, of course, had the suit been brought but a few days earlier, the statute of limitations * * * would not have run at all. We are impelled to the conviction, however, that the delay suffered by plaintiff after he was in possession of information challenging further inquiry on his part, and after he had arrived at legal age, * * * amounts to laches on his part, and a court of chancery will not now interpose to remove the bar of either of such statutes of limitation, nor will it afford him the relief prayed."

For the reasons stated, I think that the bill must be dismissed.

MEEKINS v. BRANNING MFG. CO. et al.

(District Court, E. D. North Carolina. June 30, 1915.)

1. CONVERSION ⟸1—NATURE OF DOCTRINE.

In equity, money directed to be employed in the purchase of land and land directed to be sold and converted into money are considered as that species of property into which they are directed to be converted, whether the direction is given by will, contract, or otherwise.

[Ed. Note.—For other cases, see Conversion, Cent. Dig. § 1; Dec. Dig. ⟸1.]

2. CONVERSION ⟸15—CONVERSION OF REALTY INTO PERSONALTY.

A testator, after making specific devises and bequests to his wife and each of his children, directed that all the residue of his estate after taking out the specific devises and legacies should be sold and debts owing to him collected, and that if there should be any surplus above the payment of debts, expenses, and legacies, such surplus should be equally divided between his wife and children. *Held*, that there was an equitable conversion of undevised real estate into personalty.

[Ed. Note.—For other cases, see Conversion, Cent. Dig. §§ 28–37, 52; Dec. Dig. ⟸15.]

3. EXECUTORS AND ADMINISTRATORS ⟸138—POWER OF SALE—CONSTRUCTION OF WILL—"ESTATE."

The executors were authorized to sell real property not specifically devised, since the word "estate" included land, and where by the terms of a will a fund consisting of the proceeds of real and personal property is created and its application or distribution directed, but no specific person is named to make the sale, the power is by necessary implication given to the executor.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 560–566, 568–575; Dec. Dig. ⟸138.

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

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4. CONVERSION ⊂=19—OPERATION AND EFFECT—DESCENT AND DISTRIBUTION.
Where a will imposes upon the executor the duty to convert land into money for the purpose of discharging trusts imposed upon him, the conversion takes place as of the death of the testator, and the subsequent devolution and disposition of the fund is governed by the rules applicable to personal property; and hence, where persons who are to share in the distribution die, their personal representatives are entitled to their share.
[Ed. Note.—For other cases, see Conversion, Cent. Dig. §§ 45–51, 55; Dec. Dig. ⊂=19.]

5. EXECUTORS AND ADMINISTRATORS ⊂=148—POWER OF SALE—TITLE OF HEIRS.
When no title is devised to an executor, but a mere power to sell is given, the legal title descends to the heir until the power is executed, when the purchaser's title relates to the death of the testator.
[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 595–601; Dec. Dig. ⊂=148.]

6. CONVERSION ⊂=15—FAILURE OF PURPOSE OF CONVERSION.
When the purpose for which an executor is directed to convert land into money fails or becomes unnecessary before the sale is made, the power to sell ceases and the title to the land remains in the heir or devisee; but when the purpose only partially fails, or fails only as to one or more of the objects for which the sale is to be made, the conversion must still be made in order to satisfy the purposes which remain effective.
[Ed. Note.—For other cases, see Conversion, Cent. Dig. §§ 28–37, 52: Dec. Dig. ⊂=15.]

7. CONVERSION ⊂=15—FAILURE OF PURPOSE OF CONVERSION.
Where a testator directed that the residue of his estate should be sold and that if there should be any surplus over and above the payment of debts, expenses, and legacies it should be equally divided between his wife and children, there was no failure of the purpose for which the conversion was directed, though the proceeds of a sale of land were not necessary for the payment of debts and legacies, as the payment of debts and legacies constituted only two of the purposes of the conversion.
[Ed. Note.—For other cases, see Conversion, Cent. Dig. §§ 28–37, 52; Dec. Dig. ⊂=15.]

8. CONVERSION ⊂=22—ELECTION TO TAKE IN UNCONVERTED FORM.
Notwithstanding a positive direction in the will to sell land, those to whom the proceeds are given are entitled to elect to take the land in its unconverted form, and thereby to convert the property back to its original condition; but the right to elect must be made by all of the beneficiaries and all must be sui juris, as an infant cannot so elect.
[Ed. Note.—For other cases, see Conversion, Cent. Dig. §§ 66–72; Dec. Dig. ⊂=22.]

9. CONVERSION ⊂=22—ELECTION TO TAKE IN UNCONVERTED FORM.
An election by those entitled to the proceeds of land which a testator directs to be sold to take the land in its unconverted form may be accomplished by acts indicating a purpose to take the land or by a demand upon the trustee, when vested in him, for a conveyance of the legal title, or by enjoining the trustee or executor from exercising the power of sale.
[Ed. Note.—For other cases, see Conversion, Cent. Dig. §§ 66–72; Dec. Dig. ⊂=22.]

10. CONVERSION ⊂=22—ELECTION TO TAKE IN UNCONVERTED FORM.
A testator directed that the residue of his estate should be sold and that if there should be any surplus after the payment of debts, expenses, and legacies it should be equally divided between his wife and his four children in equal portions. Undevised land was not sold for 14 years after his death. Two of the children as executors exercised the power of sale. The husband of a daughter, who was dead, accepted her share as guardian of his minor son, and, though the other child survived the sale for 15

years, it did not appear that she did not acquiesce in the sale and receive her share of the proceeds. *Held*, that there was no election by the parties to take the land in its unconverted form, the delay in exercising the power of sale evidently being due to the character of the land, which was principally valuable for its timber, and the condition of the timber market in that section of the state.

[Ed. Note.—For other cases, see Conversion, Cent. Dig. §§ 66–72; Dec. Dig. ⊂⊃22.]

In Equity. Suit by Joseph C. Meekins against the Branning Manufacturing Company and another. Bill dismissed.

Bill filed by plaintiff for an accounting of the value of timber cut from lands of which he alleges defendant, Branning Manufacturing Company, and himself, are tenants in common, heard upon the pleadings and an agreed statement of facts.

S. Brown Shepherd, of Raleigh, N. C., for plaintiff.

Pruden & Pruden, of Edenton, N. C., for defendant Branning Mfg. Co.

CONNOR, District Judge. Plaintiff alleges that defendant Branning Manufacturing Company and himself are, and have been since August 16, 1894, owners as tenants in common of the land described in his bill; plaintiff being the owner of one half, subject to the life estate of defendant Jeremiah C. Meekins, Jr., and defendant Branning Manufacturing Company, of the other half thereof; that the defendant has cut a large quantity of valuable timber from the land and, although demand has been made, refuses to account therefor. He also avers that defendant company holds a deed executed by Thomas and Joseph A. Spruill, executors of Benjamin Spruill, deceased, purporting to convey the entire tract, under which said company claims to be the sole owner of the land. He seeks to have the deed declared a cloud on his title, to the extent of one-half interest therein, and that defendant account for, and be decreed to pay to him, one-half the value of the timber cut from the land, and for partition thereof. Defendant Branning Manufacturing Company alleges that it is the sole owner of said land, admits that it has cut the timber therefrom, etc.

The parties submitted the cause upon the following agreed statement of facts:

(1) Benjamin Spruill died on April 30, 1880, leaving a last will and testament which was duly proven and recorded in Tyrrell county, N. C.

(2) That the said Benjamin Spruill left him surviving a widow, Nancy Spruill, and four children, to wit: Thomas Spruill, Joseph A. Spruill, Buena Vista McCleese (née Buena Vista Spruill), and Nancy Meekins (née Nancy Spruill).

(3) That Nancy Meekins, née Spruill, died January 12, 1887, leaving Jeremiah C. Meekins, Jr., her husband, and plaintiff Joseph C. Meekins, her only heir at law her surviving; the first being still living and defendant in this action.

That Joseph C. Meekins, plaintiff, was born on January 11, 1887 and was, at the beginning of this action, more than 25 years old, and

Buena Vista McCleese was 21 years old and under no disability for more than 10 years before her death in 1909, as hereinafter set forth and after the Branning Manufacturing Company had cut the timber aforesaid.

(5) That Buena Vista McCleese died in May, 1909, leaving a last will and testament by which she devised and bequeathed to the plaintiff, Joseph Charles Meekins, as follows:

"All my property, both real and personal, of which I may die seised and possessed or entitled to and by this I mean to give him everything I possess including money, notes, bonds and choses in action."

(6) That, on July 19, 1882, Thomas Spruill and Joseph Spruill, who had duly qualified as executors of the will of Benjamin Spruill, deceased, filed their account as executors in the office of the clerk of the superior court of Tyrrell county.

(7) That Thomas Spruill and Joseph A. Spruill, as executors aforesaid, on the 16th day of August, 1894, acting under the power contained in the will of Benjamin Spruill, deceased, undertook to convey the timber on the land, described in section 4 of the complaint, to the defendant the Branning Manufacturing Company, for the consideration of $4,800, paid them in cash, which said land was a part of the land included and described in the residuary clause of the will of Benjamin Spruill.

(8) That J. C. Meekins, Jr., first acted as guardian for Joseph C. Meekins, plaintiff, and later resigned, and J. C. Meekins, Sr., qualified and acted as such guardian and executed a receipt to J. C. Meekins, Jr., as guardian for the funds received by him, as will appear of record which is made a part hereof.

(9) That, while J. C. Meekins, Jr., was guardian, he received as guardian, from said executors of Benjamin Spruill, deceased, his ward's part of the amount received by them from the sale of the land aforesaid to the Branning Manufacturing Company, set out in section 7 above, to wit, $1,128, and on the 11th day of December, 1894, gave his receipt to the said executors.

(10) That the Branning Manufacturing Company, acting under and by authority of the deed to it aforesaid, began to cut the timber from the said land more than ten years before the bringing of this action and completed the cutting of the same more than three years before this action was brought and after the plaintiff, Joseph C. Meekins, reached the age of 21 years.

Benjamin Spruill, after devising to each of his children specific tracts of land, and bequeathing specific articles of personal property and giving his daughters money legacies, concludes his will with a residuary clause in the following words:

"My will and desire is that all the residue of my estate (if any), after taking out the devises and legacies above mentioned, shall be sold and the debts owing to me collected, and, if there should be any surplus over and above the payment of the debts, expenses and legacies, that such overplus, including the different amounts for which my life is insured shall be equally divided between my wife Nancy and four children, Thomas, Joseph, Buena Vista and Nancy, in equal portions, share and share alike, to them and each of them, their executors, administrators and assigns absolutely forever."

[1] It is a settled doctrine of equity that:

"Money directed to be employed in the purchase of land, and land directed to be sold and converted into money, are to be considered as that species of property into which they are directed to be converted; and this, in whatever manner the direction is given, whether by will, contract, etc." Fletcher v. Ashbruner, 1 L. C. Eq. (3 Am. Ed.) 659.

"In the case of wills, a conversion of real estate will be implied where there has been a blending of real and personal estate, so as to show that the testator intended to create a common fund out of both the real and personal estate, and to bequeath the fund as money." Fetter, Eq. 69; Craig v. Leslie, 3 Wheat. 56, 4 L. Ed. 460.

[2, 3] It would seem that the language of the residuary clause, read in the light of the entire will, comes clearly within this equitable doctrine. It will be noted that the testator makes to his wife and each of his four children devises and bequests of specific property constituting what he evidently regarded as an equitable division of his property, and, in the residuary clause, he directs that all the residue of his estate (if any), after taking out the devises and legacies mentioned, shall be sold and the debts owing him collected, and, if there should be any surplus over the payment of the debts, expenses and legacies, that such overplus, including the different amounts, for which his life is insured, shall be equally divided between his wife and four children, in equal portions, share and share alike, to them and each of them, their executors, administrators, and assigns absolutely forever. The authorities concur in holding that power is vested in the executors to make sale of such real property as was not specifically devised—the principle being that, where, by the terms of the will, a fund consisting of the proceeds of real and personal property is created, and its application, or distribution, directed, and no specific person is named to make the sale, the power is, by necessary implication, given to the executor. The word "estate" includes land. Foil v. Newsome, 138 N. C. 115, 50 S. E. 597, 3 Ann. Cas. 417.

"When a testator, in the disposition of his estate, imposes on his executor trusts to be executed, or duties to be performed, which require, for their execution or performances, an estate in his lands, or a power of sale, the executor will take, by implication, such an estate, or power as will enable him to execute the trusts or perform the duties devolved upon him." Vaughan v. Farmer, 90 N. C. 607; Powell v. Wood, 149 N. C. 235, 62 S. E. 1071.

[4] Assuming therefore that the terms of the residuary clause of the will worked a conversion "out and out," and that the power to make the sale vested in the executors, the question arises as to whether those who were entitled to the proceeds of the sale, under the will, took as devisees or legatees—whether such proceeds passed as realty or personalty. It is well settled that the conversion takes effect upon the death of the testator, and the property is then stamped with the character in which it passes to the beneficiary.

When the language used by the testator imposes the duty upon the executor to convert the land into money for the purpose of discharging the trusts imposed upon him, the rule is settled that a conversion takes place in wills as from the death of the testator. It logically follows therefore:

"That every person claiming property under an instrument directing its conversion must take it in the character which that instrument has impressed upon it, and its subsequent devolution and disposition will be governed by the rules applicable to that species of property." Shepherd, C. J., in Benbow v. Moore, 114 N. C. 263, 19 S. E. 156.

[5] It is also well settled that, when no title is devised to the executor, but a mere power to sell is given, the legal title descends to the heir until the power is executed, when the title of the purchaser relates to the death of the testator and those who, at that time, are entitled, will take the proceeds or, if dead, their personal representatives.

This principle, it would seem, was recognized by the testator, because we find that he gives the proceeds of the sale of the surplus of the estate to his wife and children, and their personal representatives. The facts stated in case of Benbow v. Moore, supra, and the well considered and sustained opinion of the late Chief Justice Shepherd, illustrates several of the principles involved here. There, land was, by will, probated during the year 1860, directed to be sold and a portion of the proceeds given to the defendant, then under coverture. For reasons appearing in the case, the sale was not made until 1868, the last payment on account of the purchase money paid to defendant and her husband 1874. At the date of the death of the testator, the husband was entitled jure mariti to the personal property of the wife. Prior to the sale of the land, and the payment of the purchase money, the Constitution of the state abolished the marital rights of the husband, in his wife's personal property. Upon the death of the husband, his widow, the defendant, sought to impress, upon the title to land purchased by the husband and paid for with the identical money received from the sale of the land under the provisions of the will, a resulting trust, because the purchase money was her property. The Supreme Court, enforcing the rule that the conversion took place at the death of the testator, and that the sale, when made, related back to that date, held that the money, although the law had been changed, belonged to him jure mariti; the Chief Justice, after a careful review of the authorities, saying:

"If, as we have seen, the principle of equitable conversion applies, there is no question but that the sale, when made, relates to the death of the testator."

In the light, both of reason and authority, therefore, it is clear that, upon the sale of the land, the widow and children of Benjamin A. Spruill took the proceeds as money, and that, upon the death of plaintiff's mother, Nancy Meekins, née Spruill, prior to the sale, her personal representative was entitled to the share to which she would have been entitled if living. Her husband, the defendant Jeremiah C. Meekins, Jr., was, under the statute of distributions in force in this state at that time, entitled to receive it as her administrator and hold it for his own use as sole distributee. Pell's Rev. c. 1, § 4; Wooten v. Wooten, 123 N. C. 219, 31 S. E. 491. It also follows that the share to which Buena Vista McCleese, née Spruill, was entitled, passed to her as personalty, and such interest as plaintiff was entitled to under her will must be sought through her personal representative. It does not appear that she did not receive her portion of the proceeds. She sur-

vived the date of the sale 15 years. It would seem, in the light of the fact that the share which the executors erroneously supposed belonged to the plaintiff was promptly paid to his guardian, it is not a violent presumption that she received the portion due her.

[6] Plaintiff's counsel, conceding the general equitable doctrine, contends that one of the limitations placed upon it, by the court of equity, is that when the purpose for which the executor is directed to convert the land into money fails, or it becomes unnecessary before the sale is made, the power to sell ceases and the title to the land remains in the heir, or in the devisee. This is undoubtedly true; many illustrative cases are cited by counsel. It will be observed that, in such cases, the discharge of the duty imposed upon the executor became either impossible or unnecessary because of conditions arising prior to the sale—as when land is directed to be sold, if necessary, to pay debts, and there be no debts existing at the death of the testator, or they be discharged by the proceeds of the personalty, as appears to have been the case here—but when the purpose of the sale only partially fails, or fails only as to one or more of the objects for which it is to be made, "the conversion must still be made in order to satisfy the purposes which remain effective." 3 Pom. Eq. 1171.

"If the purpose and object of the conversion fail altogether, or in part, then the whole estate in the one case and the part, in the other, is regarded as an estate, or interest undisposed of by the will; and as the devisor, in the event happening, has made no disposition of the estate, it takes the direction given it by the law, independently of the will, and goes to the heir at law. But, in the latter case, where there is only a partial failure, if the purpose of the will still require a sale and conversion, the heir takes the part thus undisposed of as money, and not as land, and on his death it will go to his personal representative. * * * It may be said to be established, beyond all controversy that, when the testator directs his land to be sold, for the purpose of division among his children and grandchildren, so long as this purpose of the sale and conversion exists, and is necessary to carry out the intent of the will, so long is the quality of personalty effectually stamped upon the estate in the hands of the executors; and courts are bound to consider it as subject to the laws of that species of property into which it was intended to be converted." Note to Ackroyd v. Smithson, 1 L. C. Eq. 836.

[7] The testator directs the disposition of the entire proceeds of the land and personalty which was to be sold by the executors, and they complied strictly with such direction; there was no failure of the purpose for which the conversion was directed; the payment of debts and legacies constituted only two of such purposes; the condition of his estate was probably understood by the testator; and he must have known that a portion and, as it turned out, the whole of the proceeds of the land, would be paid to his widow and children.

It is conceded that the lands sold by the executors was "valuable chiefly for timber purposes, are wild lands, and that the growth of timber thereon is irregular, large areas being thinly set with said timber trees, and other portions far removed from one another, being set with varied and valuable timber growth, and that the said described tracts of land are incapable and impossible of division or partition in kind."

In the light of well-known conditions existing in that section of the state, at the date of the will, it is not difficult to interpret the mind of the testator and ascertain his intention as expressed in his will,

in respect to these lands. There can be no serious doubt that he intended that they should be sold and their proceeds, together with the other portions of his estate, not specifically disposed of, be distributed as directed.

[8, 9] It is undoubtedly true, as contended by the plaintiff, that, notwithstanding the positive direction to sell, those to whom the proceeds were given were entitled, by any of the means recognized by the courts, to elect to take the land in its unconverted form and thereby, to that extent, defeat the intention of the testator. When this is done, it is said that the property is converted back to its original condition or the exercise of the right to elect works a reconversion.

"Where the whole beneficial interest in the money in the one case, or in the land in the other, belongs to the person for whose use it is given, a court of equity will not compel the trustee to execute the trust against the wishes of the cestui que trust, but will permit him to take the money or the land, if he elect to do so before the conversion has actually been made. * * * It is this election, and not the mere right to make it, which changes the character of the estate, so as to make it real or personal, at the will of the party entitled to the beneficial interest." Craig v. Leslie, 3 Wheat. 564, 4 L. Ed. 460.

So Judge Gibson says:

"This right of election must be exercised before the property is converted: and, until it be actually exercised, the property bears the same character, and remains subject to the same rules of transmission to representatives, as if the conversion were actually made." Allison v. Wilson's Ex'rs, 13 Serg. & R. (Pa.) 330.

This election may be accomplished by acts indicating a purpose to take the land, in its unconverted form, or by a demand upon the trustee, when vested in him, for a conveyance of the legal title, or by enjoining the trustee or executor from exercising the power of sale. The right to elect must be made by all of the beneficiaries, and all must be sui juris. It is well settled that an infant cannot do so. As said by Mr. Justice Hoke in Duckworth v. Jordan, 138 N. C. 525, 51 S. E. 111:

"This reconversion can be effected where all the parties, beneficially interested in the property, by some explicit and binding action direct that no actual conversion shall take place and elect to take the property in its original form. * * * All the interests must concur and all must be bound."

[10] It is manifest, for many reasons, that there was not, nor with the status of the parties could there be, any election by them to work a reconversion. Phifer v. Giles, 159 N. C. 142, 74 S. E. 921. On the contrary, two of the beneficial owners, the executors, exercised the power of sale; the husband of plaintiff's mother, then deceased, accepted, as his guardian, the share coming to him; the other daughter, Buena Vista, was then living, and survived the sale 15 years; there is no suggestion that she did not acquiesce in the sale and receive her share of the proceeds. The delay in exercising the power of sale is easily understood, in view of the character of the land, and the principal, if not sole, element of its value and the condition of the timber market in that section of the state. Whatever rights may have accrued to the beneficiary under the will to prevent the sale should have been asserted before the rights of an innocent purchaser for value attached.

Concluding that the sale was, in all respects, valid and passed the title to the defendant, it is unnecessary to discuss the other questions raised upon the record and argued by counsel. A decree will be entered dismissing the bill.

Dismissed.

THE SOUTHERN.

(District Court, D. Maryland. June 7, 1915.)

1. COLLISION ⇐38—VESSELS CROSSING—DUTY OF PRIVILEGED VESSEL.

So long as there is a chance that the burdened vessel will conform with rules in time to escape a collision, it is the duty of the privileged vessel to keep its course and speed whenever, by any possibility, a change from either might contribute to a collision; but no privilege exempts a vessel from using ordinary common sense to escape from danger.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 37, 38; Dec. Dig. ⇐38.]

2. COLLISION ⇐95—STEAM VESSELS CROSSING—CHANGE OF COURSE BY PRIVILEGED VESSEL.

A collision in Baltimore harbor between a scow in tow and a crossing power launch on the starboard side of the tow *held* due to the fault of the launch, which changed its course to starboard and was from 200 to 300 feet from its proper and direct course at the time of collision, and which also could have stopped, when collision became imminent, in time to avoid it. The tug *held* not in fault for violation of the starboard hand rule, because the launch, when seen, was on a course which would have taken it safely under the stern of the tow.

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

In Admiralty. Petition by the Chesapeake Steamship Company of Baltimore City, as owner of the steam tug Southern, for limitation of liability. On hearing on question of liability for collision. Decree for petitioner.

Arthur D. Foster and John Henry Skeen, both of Baltimore, Md., for petitioner.

Isaac Lobe Straus, Joshua Horner, Jr., and Robert Phillips, all of Baltimore, Md., for claimants.

ROSE, District Judge. On the morning of January 15, 1915, there was a collision in the harbor of Baltimore between scow No. 8, then in tow of the tug Southern, and the launch Leader. The last was capsized and damaged. One of the three persons on board of it was drowned. The other two were thrown into the water. They say they were seriously hurt. The tug belongs to the Chesapeake Steamship Company. The latter was sued in one of the state courts for the death of the man who lost his life and for the injuries suffered by the others; $90,000 in the aggregate is claimed in the various suits brought against it. While asserting that the tug was in no wise to blame, it has asked this court to limit its liability to $4,700, the sum at which in these proceedings the tug and tow have been appraised.

Was the tug in fault? is the question now to be passed upon. At the time of the collision the launch was bound from Pier 6 on the Canton side of the harbor to Curtis Bay; the tug and tow, from Pier 2 on that side to Pier 31–32 on the Locust Point side. These courses were very nearly at right angles to each other. The launch was to the starboard of the tug and its tow, and, to the extent to which the starboard hand rule applied, they were the burdened vessels; it, the privileged.

The master of the launch says that he blew a one-blast signal on a mouth whistle. In the position in which the boats then were, this meant that he elected to cross the bows of the tug and tow. He never heard any signals of any kind from the tug or its tow. They kept silently moving across his path until the risk of collision became imminent, and then, and only then, he changed his course to starboard in an attempt to escape. He says that the bow end of the scow struck the port side of the stem of the launch. The story of the captain of the tug is that the launch, when he first noticed it, was on a course which would have carried it safely under his stern. He blew a two-blast signal. He had no response, but at that time the launch changed its course to starboard. He at once blew the danger signal and ordered his engines full speed astern. The launch, however, continued to go more and more to starboard, and, although he brought his tug and tow almost, if not quite, to a standstill, the launch struck the scow on the port side near its forward end. Each in the pleadings charges that the other did not keep a proper lookout, did not respond to signals, and violated inland pilot rule 1. Moreover, the tug says that the navigator of the launch was incompetent, and was blameworthy in trying to cross the bows of the tug and tow. The launch alleges that the tug violated rules 2, 7, and 9.

In order to pass intelligently upon the merits of these mutual charges, it is necessary to consider the limits of time and space within which all the material acts of omission or commission happened, and especially to fix, at least approximately, the point at which the collision took place.

In so far as the tug is concerned, upon the evidence there is no room for controversy as to what she did, although there is a question as to when she did it. Her course was about west by north and was never altered. The boats, therefore, came together somewhere on the direct line between Pier 2 and Pier 32. Only one witness appears to have been asked how far, at the time of the collision, the tug was from the outer end of Pier 2. He was a disinterested and experienced master mariner, thoroughly familiar with the harbor. At the time of the collision he was at Pier 2. He says that the boats came together about 1,000 feet away from it. Such estimates of distances on the water, even when made by competent and experienced men, are extremely likely to be incorrect, as is strikingly illustrated by the testimony given in this case by the captain of the tug. Nevertheless, all the other circumstances, and in my view all the other testimony, except that now given by the master of the launch, tends to show that the estimate of 1,000 feet was not far out of the way. The United States coast guard steamer Guthrie was at the time lying about midstream. Some of the witnesses think it was somewhat nearer the Canton shore;

others, the Locust Point. The distance between the pier head lines on the Canton and Locust Point sides may be taken roughly at 2,500 feet. The witnesses say that at the time of the collision the Guthrie was 300 to 500 feet away from the point at which the boats came together, and to the northward of them. These locations tend strongly to confirm the estimate that at the time of the collision the tug was at least 800 or 900 feet from the end of Pier 2.

How did the launch get there? The extreme northern corner of Pier 6 is distant northerly only 600 feet from the prolongation of the southern side of Pier 2. Pier 6 extends to the pier head line. Pier 2 is not so long, and stops about 165 feet short of that line. The most direct route of the launch to its destination would have been just outside of the pier head line. So moving, it would have crossed the course of the tug somewhere from 175 to 250 feet from the end of Pier 2. If it had done so, it would have passed safely under the stern of the tug and tow. Its master says that he was steering for the lower end of Ft. McHenry, so as to get out beyond the channel. The point of land upon which the fort stands so narrows the harbor mouth that no straight course from Pier 6 to pass it can be laid which will cross the path of the tug further than 375 feet from the pier head line, or 540 feet from the outer end of Pier 2. If the collision took place from 800 to 1,000 feet from the pier, the launch must have gone from 260 to 460 feet to the starboard of any course it had occasion to be on.

The captain of the tug insists that the launch did go to starboard, and kept going more and more in that direction, and, had it not done so, there would have been no trouble of any kind. While listening to him testify, I was impressed with the conviction that, whether he was right in this respect or not, he believed that he was. The navigator of the launch testified that he kept his original course until the very second before the collision, when, in a last despairing effort to escape the impending catastrophe, he tried to go to starboard, but had not moved more than five feet in that direction when the crash came. A few days after the accident he testified concerning it before the steamboat inspectors. He then said he went as much as 150 feet to starboard. If the collision took place, as I believe it did, not less than 750 or 800 feet from Pier 2, this statement of his deflection to starboard was an under rather than an over estimate.

Why did he thus unnecessarily run into danger? He was a boiler cleaner by trade. That did not give him steady occupation. For some 7 or 8 years he had off and on in those intervals, when he could not get employment at it, worked for an owner of launches. Some 4½ months before the collision he had obtained a license to run a motor boat. No examination is necessarily required for such a license. How far he knew the rules of navigation and understood the meaning of the various signals prescribed by them is not clear. Very probably he could pass a theoretical examination in them. Whether his knowledge of them had become so far instinctive that he could surely rely upon it in times of danger, when it was necessary both to think and to act quickly, is very doubtful. His testimony in other respects than as to the distance which he went to starboard is hardly reconcilable with the established facts. He said he sounded one blast on a mouth whistle

when he was within a very few hundred feet of the tug. When he blew this whistle he had his head out of the open forward window of the launch. No one not in the launch heard this signal, although he says that the wind was blowing, though lightly, from the launch to the tug. If he blew his whistle while in the position he says he was, it would almost certainly have been heard by others, unless, indeed, he sounded it at the very moment one of the much more powerful blasts were blown from the tug or from the Guthrie. But, had such signals been given when he was leaning out of his window looking at the tug, it is hard to understand how he could have failed to hear what was readily heard by other people in a number of different directions, some of them further from the tug than he was. The testimony of Cohen, his surviving passsenger, suggests a possible explanation. This last-mentioned witness was so shaken by the death of his son, and by his own immersion and narrow escape from drowning, that he does not attempt to recall many, or indeed any, details of what took place. He remembers the sounding of a whistle on the launch. His head was down at the time, and he did not see where the navigator of the launch was then standing. His present recollection is that the whistle appeared to come from the neighborhood of the engine of the launch, which was some five feet abaft the wheel.

The most probable explanation of what took place on the launch is that its navigator was for some reason busying himself with its engine when he was needed at its wheel and on the lookout. His fault and that of the launch was clear enough. If he was relying on the starboard hand rule, it was his duty to keep his course and speed until further to do so involved inevitable disaster, unless, of course, he had otherwise agreed with the burdened vessel, as he says he had not. If he had held his course, there would have been no collision. Whether the launch struck the scow, or the scow the launch, is in dispute. At all events, their stems came together. The scow was not over 85 feet long. If the launch had held its course, instead of being 200 or 300 feet to the starboard of it, the collision could scarcely have taken place.

It would have been unnecessary to have gone into all these details, if the only purpose had been to ascertain whether the launch was in fault. It could stop within from 30 to 50 feet. The circumstances would be very unusual under which it could be held free from blame in colliding on crossing courses with a tug and tow, which from the stem of the tug to the stern of the tow extended about 100 feet, and which never changed their course.

[1] It is true that so long as there is a chance that the burdened vessel will, after all, conform to the rules in time to escape a collision, it is the duty of the privileged to keep its course and maintain its speed, whenever by any possibility a change of either might conceivably contribute to a collision. The Chicago, 125 Fed. 712, 60 C. C. A. 480; The Cygnus, 142 Fed. 85, 73 C. C. A. 309; The Deveaux Powell, 165 Fed. 634, 92 C. C. A. 54.

[2] In the case at bar the danger of collision had become imminent before the launch came within 50 feet of the scow. It was not then possible for the tug to do anything to keep the boats from coming together. It was still in the power of the launch to stop. Such stopping

would not have done any harm, no matter what the tug and its tow thereafter might do or attempt. No privilege exempts a vessel from using ordinary common sense to escape from danger. The New York, 175 U. S. 187, 20 Sup. Ct. 67, 44 L. Ed. 126; The City of Chester, 78 Fed. 186, 24 C. C. A. 51.

Most of the parties to this litigation are interested in the conduct of the launch only in so far as it throws light upon the question of the liability of the tug, which is to them the one practically important issue. The launch in its damaged condition is of little value. Its negligence could not be imputed to the deceased passenger on it. It is highly probable that the pecuniary value of his life to his widow would fully equal the sum at which the tug and scow had been appraised. To her and to her father-in-law, who is suing for his own injuries, as well as to the owners of the tow and tug, it makes very little difference whether the launch was or was not in fault. What interests them is: Was the tug also to blame?

The contention that the scow so obstructed the view of the navigator of the tug that he could not see the launch is not sustained by the evidence, nor was the tug guilty of violating rule 2 by crossing signals. If the whistle of the launch was ever sounded, it was not heard by any one not on the launch itself. If the tug is blameworthy, it is for her failure to observe the starboard hand rule; and this inquiry can itself be still further narrowed. Many of the questions asked the master of the tug on cross-examination were in effect criticisms of his failure to direct his course so as to pass under the stern of the launch. The tug and the launch were never more than 600 feet apart, and by the time there would have been any reason to attempt such a maneuver they were much closer. If the launch had held its course, it would have crossed that of the tug, as already pointed out, not more than 375 feet west of the pier head line. That crossing would have taken place in about a minute and a quarter after the launch started from Pier 6, for its speed was about 5 miles an hour and the distance 600 feet. To have turned the tug and tow in those narrow limits of time and space, so as to pass under the stern of the launch, would have exposed the launch to a peril from which even prudent navigation on its part might not have enabled it to escape. The captain of the tug rightly said that he had not room to go under the stern of the launch. It is true that, like many other practical men, he found it difficult to explain in words what to him was so plain that he could not conceive how any explanation could make it clearer.

In the last analysis, if the tug is to blame at all, it is for not sooner stopping and reversing. It must be admitted that the tug in this respect may all the more readily have offended against the starboard hand rule, because it is certain that its captain never gave thought to that rule, or for a single moment supposed that it had any relation to his navigation with reference to that of the launch. It seemed to him so simple a matter for the 21-foot launch to keep out of his way, and so much more difficult for his tug and tow to get out of its, that it obviously never entered his head that he was navigating a burdened vessel. Nevertheless, a power boat, however small, is a steam vessel

within the meaning of the starboard hand rule. The Nimrod (D. C.) 173 Fed. 520.

His failure to appreciate that the rule was applicable may, if he in fact broke it, go far to explain why so experienced a mariner violated it; but it will not make the tug liable unless what he in fact did was forbidden by it. He says that when he first saw the launch it was on a course which, if held by it, would have carried it safely under his stern. Under such circumstances he was entitled to proceed. He was not bound to anticipate an unreasonable change of course on its part. The Wm. E. Gladwish, 206 Fed. 901, 124 C. C. A. 561.

If the launch had continued to head as he says it was at first headed, any attempt by him to stop and reverse would have made collision probable, if not certain. But if, the circumstances being such as they were, he was under no obligation to do anything until the change of course upon the part of the launch manifested itself, his improper delay, if any there was, comes down to a matter of seconds. He did stop and reverse, or tried to, before the collision, but very little before. He sounded the danger signal and stopped and reversed. Now, the sounding of the danger signal was so nearly simultaneous with the collision that the deck officer of the Guthrie thought he saw the boats come together before he heard the blasts. The tug had previously given a two-blast signal intended for the launch. According to the present recollection of the master of the tug, this signal was sounded before he noticed any change of course on the part of the launch. The Guthrie thought the signal was intended for it, and replied with two blasts.

As already stated, the master of the launch says he heard none of these whistles. As he claims that he made no change of course until a second or less before the collision, those who rely upon his testimony naturally do not question that the two-blast signal from the tug preceded that change of course.

As I have reached the conclusion that the launch at the time of the collision was from 200 to 300 feet off its course, it may be interesting to inquire whether this departure began before or after the tug gave its first signal. To have gotten so far to the westward as the launch had would have taken an appreciable, although, of course, a small, amount of time—perhaps in the neighborhood of a half to three-quarters of a minute. The collision was almost simultaneous with the sounding of the signal. That signal followed immediately upon the two-blast signal from the Guthrie, which was promptly sounded in reply to the like signal from the tug. All this may have taken as much as half a minute, or even more; possibly it may have taken a few seconds less. No one can be certain about it. It is possible that the tug's captain did not signal the launch at all until he thought he saw a change in its course, and that he then gave the signal to call the attention of those in charge of the launch to the fact that he intended to cross its bow. I should hesitate to hold the tug liable on a guess that such was the case.

Moreover, even if the fact were certain, would the tug necessarily be in fault? There was no danger until the launch, privileged vessel as it was, without reason changed its course when within 300 feet or

thereabouts of the tug. This change had no apparent purpose. The captain of the tug may well have wondered whether it was not merely one of those erratic movements in which small and recklessly steered craft of the kind so frequently indulge. It might be that a second later the launch would return to its original heading. If it did, his stopping and backing might cause the very collision he wished to avoid. The change of the launch's course produced an embarrassing and perplexing situation, which might well make the master of the tug hesitate as to what it was best to do. As the launch had, or with reasonable care on the part of its navigator would have had, perfect control of its movements, and was still far enough off to enable it to escape the tug and its tow, if it knew precisely what the tug proposed to do, and as the movements of the tug could be more accurately estimated if it continued on its course than was possible while it was trying to stop and back, it was not unnatural for its master to think that the safest thing he could do was to keep going ahead, and by blowing two blasts tell the launch that he intended so to do. Of course, if he blew the two-blast signal before the launch changed her course, he has done nothing which it is necessary to defend; but even if the signal was not sounded until the change of course had begun, and he was in error in thinking and acting as he did, it was a mistake occasioned by the wrongful act of the launch in altering its course, and was an error for which the tug under the circumstances should not be held responsible. Of course, after the two-blast signal had once been given, the tug could not stop or back until it was certain that the launch did not respond to it; for, if the launch did comply with the tug's request and go to port, the tug's stopping and backing would almost certainly have caused a collision.

The fault of the launch is clear and manifest. It was the primary cause of the collision. The burden of proof rests upon those who contend that fault on the part of the tug also contributed to the disaster. That burden has not been sustained. It follows that the tug and scow must be held free from blame.

A decree in accordance with these conclusions may be presented for signature.

THE CRETIC.

(District Court, D. Massachusetts. August 5, 1914.)

No. 789.

1. SHIPPING ⇐163—CARRIAGE OF PASSENGERS—CONTRACT MADE BY TICKETS. That a purchaser of steamship tickets, who was a man of education and an experienced traveler, did not read the tickets, although they were bought 13 days before the sailing date, cannot enlarge his rights thereunder; but he is bound by the contract thereby made so far as its terms are not invalid as against public policy.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 530–532; Dec. Dig. ⇐163.]

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2. SHIPPING ⊂=167—PASSENGER'S EFFECTS—LIMITATION OF LIABILITY.
Where a steamship ticket includes two or more passengers, a provision therein limiting the liability of the shipowner in case of loss of baggage to $100 does not mean the entire liability, but the liability to each passenger; but the limitation applies not only to the shipowner, but to the vessel as well.
[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 553–555; Dec. Dig. ⊂=167.]

3. SHIPPING ⊂=167—PASSENGER'S EFFECTS—LIMITATION OF LIABILITY.
There is a distinction between a provision in a steamship ticket limiting liability for loss of baggage and a mere notice of such limitation printed on the ticket; in the latter case the notice must be brought home to the passenger to be effective, but when a part of the contract it is necessarily accepted with the ticket, and the passenger is bound thereby unless invalid, as contrary to public policy.
[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 553–555; Dec. Dig. ⊂=167.]

4. SHIPPING ⊂=167—CARRIERS — PASSENGER'S EFFECTS—CONTRACT LIMITING LIABILITY—VALIDITY.
A provision in a steamship ticket limiting the liability of the carrier to $100 for loss of baggage, unless a higher value is declared and additional payment made, is reasonable and valid.
[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 553–555; Dec. Dig. ⊂=167.]

In Admiralty. Suit by Hiram Bingham and Alfreda Bingham against the steamship Cretic; Oceanic Steam Navigation Company, Limited, claimant. Decree for libelants.

Brandeis, Dunbar & Nutter, of Boston, Mass., for libelant.

Blodgett, Jones, Burnham & Bingham, of Boston, Mass., for claimant.

Findings of Fact.

MORTON, District Judge. This is a libel in rem, brought by Hiram Bingham and his wife, Alfreda, against the Cretic, to recover for the loss of a trunk and contents. The facts are as follows:

The libelant Hiram Bingham purchased, on or about June 15, 1913, at New Haven, from the claimant's agent there, a ticket for three first-class passages and one one-half first-class passage, for transportation of himself, his wife, their son, and a child, with baggage, from Boston to Genoa, Italy, on the Cretic, sailing from Boston June 28, 1913. The trunk in question formed part of the personal baggage of Prof. and Mrs. Bingham. It was delivered on board the steamer Cretic at Boston on the day of her sailing, and was there seen on her deck by the libelant. It had been tagged by him for the baggage room on the steamer, and he at that time changed the marking on the tag from "baggage room" to "stateroom." After having done this, he saw the trunk carried aft by one of the stevedores. The trunk contained jewelry worth $1,725 which belonged to Mrs. Bingham, and clothing and personal effects belonging to Prof. and Mrs. Bingham worth $275, a total value of $2,000. It was never delivered to the libelants, and never seen by anybody connected with this case after being carried aft as above stated. Prof. Bingham advised the officers of the ship within

a few days that the trunk had not been delivered to his stateroom, and search was made over the vessel, but without success. He kept watch of the trunks that went ashore at the various ports at which the steamer touched before reaching Genoa, and did not see the trunk among the baggage put off at those places. He watched the baggage at Genoa, and did not see the trunk there. He promptly made claim upon the local agent of the line for the loss of it and its contents. In view of the precautions taken by the claimant to prevent baggage, after having been put on board at Boston, from being taken ashore before the steamer sailed, it seems improbable that the trunk was removed from the steamer at that place. It was undoubtedly lost by the negligence or willful misconduct of some officers or members of the Cretic's crew, after the voyage began.

A copy of the material parts of the ticket is annexed.[1] The defense principally relied upon is that, by reason of the provisions contained in the ticket, limiting the extent of liability, the steamer is not liable for the value of the jewelry lost. These provisions are found in the fourth, fifth, and eighth clauses of the ticket, preceding the signature of the company, and plainly form part of the contract under which the libelants were carried. Prof. Bingham did not read the ticket; but he was an experienced traveler, and he was aware that steamship tickets frequently do contain provisions limiting liability. He acted as agent for his wife in all matters concerning her transportation and the shipment of her baggage and effects. He paid to the claimant the sum specified in the ticket and accepted the ticket, which was issued to him. He is a man of much education and large experience as a traveler, a professor in Yale University.

Opinion.

[1] The fact that Prof. Bingham chose to accept the ticket without reading it, or familiarizing himself with its provisions, does not enlarge the libelants' rights in this suit. They are to be held to the terms of the contract which they accepted, so far as those terms are not invalid as against public policy.

[2, 3] Paragraph 5 of the ticket means that the liability of the company or the vessel to each of the passengers referred to in the ticket for the loss of baggage shall not exceed $100. It does not, as contended by the libelant, limit the entire liability for loss of baggage under the ticket to $100. Nor does the limitation apply only to the shipowners, and not to the vessel itself; it relieves both. The Queen of the Pacific, 180 U. S. 49, at 51, 21 Sup. Ct. 278, 45 L. Ed. 419. There is a well-recognized distinction on this point between mere notices by the carrier, printed upon the ticket or otherwise given to the passenger, that the carrier will not be liable beyond a certain amount, and provisions to that effect contained in the contract of carriage itself. The former are not valid unless distinctly brought home to, and accepted by, the passenger; the latter, entering into and forming part of the contract, are necessarily accepted with the ticket, unless repugnant to public policy. The Majestic, 166 U. S. 375, 384, 17 Sup. Ct. 597, 41 L. Ed.

[1] See note at end of case.

1039; Bachman v. Clyde S. S. Co., 152 Fed. 403, 81 C. C. A. 529; The Morro Castle (D. C.) 168 Fed. 555; Hohl v. Norddeutscher Lloyd, 175 Fed. 544, 99 C. C. A. 166.

[4] It seems to me that the limitation of liability to $100 per passenger was valid and was binding upon the libelants. Presumably this limitation entered into the price charged for the ticket. Hart v. Penn. R. R. Co., 112 U. S. 331, 340, 5 Sup. Ct. 151, 28 L. Ed. 717. If the passenger desired further protection, he could obtain it by declaring a greater value and paying thereon, or by shipping under a bill of lading as provided in the ticket, clause 5. These provisions offered the passenger a choice, which seems not unreasonable, either of letting his baggage go at the valuation of $100, or of declaring a higher value and of paying an additional sum for the additional liability undertaken by the carrier. The Kensington, 183 U. S. 263, 277, 22 Sup. Ct. 102, 46 L. Ed. 190. Even though Rev. Stats. § 4281 (Comp. St. 1913, § 8019), does not apply to baggage like this trunk, for which no bills of lading are taken (La Bourgogne, 144 Fed. 781, 786, 75 C. C. A. 647), it certainly shows legislative recognition of the wisdom of allowing ocean carriers to protect themselves against claims for undeclared jewelry in baggage or freight, a thing so plainly just and well settled as to need no elaboration. Calderon v. Atlas S. S. Co., 170 U. S. 272, 278, 18 Sup. Ct. 588, 42 L. Ed. 1033.

It is said for the libelants that the steamer is liable as bailee, irrespective of her liability as carrier, and that her liability as bailee is not limited by the provisions in the ticket. This is mere verbalism. The trunk was delivered to the steamer, and accepted by her as baggage belonging to persons traveling under the ticket before referred to; and the rights and liabilities of the parties are determined thereby. Cases like The Minnetonka, 146 Fed. 509, 512, 77 C. C. A. 217, and Holmes v. North German Lloyd S. S. Co., 184 N. Y. 280, 77 N. E. 21, 5 L. R. A. (N. S.) 650, in which the property lost was not delivered as baggage, are plainly distinguishable.

Each libelant is entitled to a decree for damages in the sum of $100, with costs.

NOTE.

New York, June 6, 1913.

This ticket is good for first-class passage of 3 adults, 1 child, ——— servants, ——— infants, by the British steamship Cretic, to sail from Boston for Genoa on June 28/13, unless prevented by some unforeseen circumstances, upon the following conditions, which are agreed upon between the carrier and each passenger, viz.: At 4 p. m.

* * * * * * * * * * * * *

4. Neither the shipowner, agent, master, or passage broker shall be liable as carrier in any form or manner for any article specified in section 4281 of the Revised Statutes of the United States, shipped or taken on the vessel by any passenger in any baggage, unless the passenger at the time of such lading shall give to the shipowner, master, agent, clerk, or broker of the vessel a written notice of the true character and value thereof, and, if required, produce the same for inspection, and have the same entered on a bill of lading therefor, or unless such articles be delivered into the personal custody of the purser of the vessel, and the true character and value thereof stated in writing; and in the event of such deposit, neither the vessel, nor her owner, master, agent, or passage broker, shall be liable in respect of the ar-

ticles deposited, beyond the sum of $100, which sum it is mutually agreed that the value of the articles does not exceed, unless value in excess of that sum be declared, and a further charge thereon be paid or tendered in advance on the excess value at the rate of 1 per cent. Neither the shipowner, master, agent, nor passage broker shall be liable for the loss of or damage to any such article when arising from any of the causes enumerated in clause 3, nor in any event beyond the value and according to the character thereof notified and entered as aforesaid, nor except as may be provided by the bill of lading, if a bill of lading is issued, or by the certificate of deposit, if the property be deposited.

5. In the event of the loss of, or damage to, or delay in the delivery of, the baggage of any passenger, carried under this contract, or a part thereof, for which the shipowner may be liable, it is, subject to the preceding clause hereof, mutually agreed that such liability shall not exceed the sum of $100, which sum it is agreed the value thereof does not exceed, and to which value the shipowner, subject to clause 6, undertakes to carry the same free of charge, unless the passenger, before embarkation under this contract, shall declare in writing to the shipowner, agent, or passage broker the true value of such baggage, if in excess of $100, and shall pay or offer to pay in advance, on the value thereof in excess of $100, at the rate of 1 per cent, or at his option shall ship the excess baggage as freight under a bill of lading.

6. If the baggage, without reference to its value, exceeds 20 cubic feet in measurement for each passenger, the passenger shall pay for each cubic foot in excess thereof the sum of 25 cents.

* * * * * * * * * * * * *

8. All responsibility of the shipowner, agent, or passage broker hereunder shall be limited to that period only while the passenger and his baggage are on board the transatlantic ocean steamship or its tenders. All other transportation hereunder is included for the passenger's convenience, and will be at the passenger's risk, subject to the ordinary conditions of carriage of each railway or transportation company employed for the purpose, or to any special conditions required by them.

9. No claim under this ticket shall be enforceable against the shipowner or his property, or the agent or passage broker, unless notice thereof in writing, with full particulars of the claim, be delivered to the shipowner or agent within three days after the passenger shall be landed from the transatlantic ocean steamer at the termination of her voyage, or in case of the voyage being abandoned or broken up within seven days thereafter.

* * * * * * * * * * * * *

For and on behalf of the Oceanic Steam Navigation Company, Limited.
$562.50. White Star Line,
Per Sweezey & Kelsey.

In re PACIFIC ELECTRIC & AUTOMOBILE CO.

(District Court, W. D. Washington, Northern Division. June 8, 1915.)

No. 5374.

1. COURTS ⇐366—FEDERAL COURTS—CONTROLLING STATE DECISIONS.
The construction placed by the Supreme Court of Washington on Rem. & Bal. Code, Wash., § 3670, as to validity of conditional sales of personal property, will be adopted by the federal court as to cases claimed to be within the section.

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

2. BANKRUPTCY ⇐184—TITLE OF TRUSTEE—CONDITIONAL SALE CONTRACTS.
Under Bankr. Act (Act July 1, 1898, c. 541, 30 Stat. 557) § 47, subd. a, cl. 2, as amended by Act June 25, 1910, c. 412, § 8, 36 Stat. 840 (Comp. St. 1913, § 9631), providing that the trustee in bankruptcy as to all property

in the custody or coming into the custody of the court shall be deemed vested with all rights, remedies, and powers of a creditor holding a lien, and as to all property not in the custody of the bankruptcy court, with the rights, remedies, and powers of a judgment creditor holding an execution returned unsatisfied, an adjudication in bankruptcy creates a lien in favor of the trustee on all property in the custody, or coming into the custody, of the court, and the status of general creditors is changed, and by operation of law a lien is created in favor of the trustee for them, and the rights of the trustee supersede any rights previously existing under a conditional sale to the bankrupt, a memorandum of which was not recorded as required by state statute to be valid as to purchasers, incumbrancers, and creditors.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 275–277; Dec. Dig. ⊂⊃184.]

In Bankruptcy. In the matter of the Pacific Electric & Automobile Company, a corporation, bankrupt. On petition to review order of referee, denying a reclamation petition of the Burrows Adding Machine Company. Affirmed.

Saunders & Nelson, of Seattle, Wash., for petitioner.
E. H. Chavelle, of Seattle, Wash., for trustee.

NETERER, District Judge. On December 9, 1914, the Pacific Electric & Automobile Company was adjudged bankrupt. On April 30th, prior to adjudication, the bankrupt had purchased from the Burrows Adding Machine Company, an adding machine, upon a conditional sale contract, which contract was not signed by the vendor, and not filed for record as provided by Remington & Ballinger's Code of Washington, § 3670, within 10 days after its execution. On April 30, 1915, petition and demand for reclamation of the machine was made by the Burrows Adding Machine Company, and the matter was heard before the referee. The referee denied the right to reclaim, and the decision of the referee is brought here for review.

The petitioner relies upon Malmo v. W. R. & F. Co., 79 Wash. 534, 140 Pac. 569, In re Flatland, 196 Fed. 310, 116 C. C. A. 130, Lundberg v. Kitsap County Bank, 79 Wash. 75, 139 Pac. 769, and Secor v. Close, 145 Pac. 56.

[1] This case must be concluded by the construction placed upon section 3670 of the Washington Code, which provides as follows:

"All conditional sales of personal property, or leases thereof, containing a conditional right to purchase, where the property is placed in the possession of the vendee, shall be absolute as to the purchasers, incumbrancers and subsequent creditors in good faith, unless within ten days after taking possession by the vendee, a memorandum of such sale, stating its terms and conditions and signed by the vendor and vendee, shall be filed in the auditor's office of the county, wherein, at the date of the vendee's taking possession of the property, the vendee resides."

Construction placed upon this section by the state court will be adopted by the federal court. York Mfg. Co. v. Cassell, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782; Holt v. Crucible Steel Co., 224 U. S. 262†; Nauman Co. v. Bradshaw, 193 Fed. 350, 113 C. C. A. 274; Tullis v.

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

† 32 Sup. Ct. 414, 56 L. Ed. 756.

Railway Co., 175 U. S. 348, 20 Sup. Ct. 136, 44 L. Ed. 192. The Circuit Court of Appeals of this circuit, In re Osborn, 196 Fed. 257, at page 259, 116 C. C. A. 59, with relation to a conditional sale contract, under this same statute, said:

"There is no evidence on the face of the instrument of an intent or purpose on the part of the vendor to accept the terms proposed by the vendee, and the order itself does not show that the vendor had accepted or agreed to the terms and conditions of the proposal. The so-called agreement was by its terms and conditions absolutely unilateral, and extraneous evidence was not admissible to show that the terms and conditions of the proposal were accepted by the vendor. Such acceptance was one of the terms and conditions required by the statute to appear upon the face of the instrument.

"The petition and adjudication in bankruptcy in this case were filed in December, 1910. As far as the Bankruptcy Act is concerned, the right of the trustee to the property in question is therefore governed by the amended act (Act June 25, 1910, c. 412, § 8, 36 Stat. 840, amending section 47a (2) of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 557). That amendment provides: 'And such trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be * * * vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon.' Giving effect to the provisions of the Bankruptcy Act and the statute of the state of Washington, the court must hold that the sale made by the petitioner, Purcell Safe Company, to the bankrupt, S. C. Osborn & Co., and S. C. Osborn, of the property described in the contract, was an absolute and unconditional sale."

This case was decided after the Washington court had held for nearly a score of years that a chattel mortgage, not executed or recorded as provided by statute, was void as to subsequent creditors (Willamette Casket Co. v. Cross Undertaking Co., 12 Wash. 190, 40 Pac. 729; Mendenhall v. Kratz, 14 Wash. 453, 44 Pac. 872; Hinchman v. Point Defiance Ry. Co., 14 Wash. 361, 44 Pac. 867; Blumauer v. Clock, 24 Wash. 596, 64 Pac. 844, 85 Am. St. Rep. 966; Springer v. Ayer, 50 Wash. 642, 97 Pac. 774; and American Multigraph Sales Co. v. Jones, 58 Wash. 619, 109 Pac. 108), and the federal courts of this district had followed such construction of the state court (Pacific State Bank v. Coats, 205 Fed. 619, 123 C. C. A. 634, Ann. Cas. 1913E, 846). The Willamette Casket Co. v. Cross Undertaking Co., supra, was overruled by the Washington court in Pacific Coast Biscuit Co. v. Perry, 77 Wash. 353, 137 Pac. 483, when it held that only subsequent lien creditors could attack the validity of a chattel mortgage not filed within 10 days, and in Malmo v. W. R. & F. Co., supra, the state court held an unrecorded conditional sale contract good as against a receiver representing subsequent general creditors, citing Pacific Coast Biscuit Co. v. Perry, supra, and Heal v. Evans Creek Coal & Coke Co., 71 Wash. 225, 128 Pac. 211, and this was adhered to in Watson v. First National Bank of Clarkston, 82 Wash. 65, 143 Pac. 451, and Secor v. Close, 145 Pac. 56. Malmo v. W. R. & F. Co., supra, was decided May 8, 1914, by department 2. On November 14, 1914, this same department, in Jennings, Trustee, v. Frank Schwartz, 82 Wash. 209, 144 Pac. 39, had the identical question in issue here before it, and held that the memorandum of sale as set out in this case could not be considered, under the law, as a conditional sale contract, and did not follow Malmo v. W. R. & F. Co., supra, or refer to it, and cited with approval from

Worley v. Metropolitan Motor Car Co., 72 Wash. 243, 130 Pac. 107, as foliows:

"Whatever the general rule may be as to priority between creditors, we think this case must be decided by reference to the statute and that alone. The provision that all conditional sales of personal property where the property is placed in the possession of the vendee shall be absolute is equivalent to the expression 'shall be void,' that is, of no legal force or effect as to purchasers, incumbrancers, and subsequent creditors in good faith, unless the requirements of the statute are followed"

—and further cited First National Bank of Everett v. Wilcox, 72 Wash. 473, 130 Pac. 756, 131 Pac. 203, in which, "it was held that a conditional sale contract was absolute as to subsequent creditors, where the memorandum of the contract was not filed in the county of the residence of the vendee as such residence was stated in its articles of incorporation, although filed in the county where the property was delivered, and where the vendee had its mills and manufacturing plant," and at page 217 of 82 Wash., at page 42 of 144 Pac., the court further said:

"Tested by the more strict rule, we are clear that this memorandum was not signed by the vendor within the meaning of the statute. The instrument would appear no different on its face had it been prepared wholly by the vendee without the knowledge or consent of the vendor. Whether it was signed by the vendor or not was thus subject to dispute even as between the parties, and the question could only be determined by an examination into their acts and conduct. The rights of third persons should not be left to depend upon such circumstances; as to them the instrument should be fair upon its face. As this instrument is not thus fair, we hold the sale absolute as to subsequent creditors in good faith."

In the Jennings Case, supra, on August 23, 1912, the respondent made a sale of personal property to the petitioner. The property was delivered on the following day and within 10 days thereafter the vendor of the property caused to be filed in the auditor's office of the county wherein the vendee resided a memorandum of the conditions of the sale. The instrument was signed by the vendee, but was not signed by the vendor. The vendee, after receiving the property, set it up in his manufacturing plant. He thereafter made default in the payments, and the vendor, upon default, entered the plant and took possession of the property. Thereafter the vendee was adjudged bankrupt, and in due course the trustee in bankruptcy brought an action to recover the property. The lower court denied the recovery, which decision was reversed by the Supreme Court, and judgment for the trustee directed.

[2] In view of the confusion of the state decisions and the contention of the respective parties, both relying on state court decisions, we examine the Bankruptcy Act as amended in 1910, and find that section 47, subd. (a), cl. 2, supplementing the duties of the trustee in bankruptcy, provides:

"And such trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of

a judgment creditor holding an execution duly returned unsatisfied," 36 Stat. L. 840

—and from this we learn that the adjudication in bankruptcy created a lien in favor of the trustee upon all property in the custody, or coming into the custody, of the bankruptcy court. The status of the general creditors by such act was changed, and by operation of law a lien was created and established in favor of the trustee for the general creditors, and superseded any rights theretofore existing in favor of a conditional sale, a memorandum of which was not recorded pursuant to section 3670, supra.

I think, under any view of the law, the decision of the referee must be affirmed.

HARRISON v. MOYER, Warden.

(District Court, N. D. Georgia. February 25, 1915.)

1. CONSPIRACY ⟸43—INDICTMENT—STATUTE.

An indictment found by the grand jury of the District of Columbia, which charges the defendant with conspiracy to obtain money by false pretenses without charging any overt act, does not charge an offense under Penal Code (Act March 4, 1909, c. 321) § 37, 35 Stat. 1096 (Comp. St. 1913, § 10201), making punishable by not more than two years' imprisonment a conspiracy to defraud the United States, where one or more of the conspirators do any act to effect the object of the conspiracy, but charges a common-law conspiracy, which is punishable under Code of Laws 1901 D. C. (Act March 3, 1901, c. 854, 31 Stat. 1337) § 910, providing for the punishment of criminal offenses, not covered by any section of the Code, by imprisonment not to exceed five years.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 79, 80, 84–99; Dec. Dig. ⟸43.]

2. CRIMINAL LAW ⟸10—OFFENSES—COMMON-LAW OFFENSE IN DISTRICT OF COLUMBIA.

Under Act Feb. 27, 1801, c. 15, 2 Stat. 103, accepting the cession of the District of Columbia and continuing in force the laws of Maryland in that District, the common law, both civil and criminal, was extended to that District, and there may be common-law offenses against the United States committed therein.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 8; Dec. Dig. ⟸10.]

3. HABEAS CORPUS ⟸30—GROUNDS FOR RELIEF—ERROR.

Where the trial court imposed sentence under a statute which he determined to be applicable, error in that determination could be corrected only by writ of error, not by habeas corpus proceedings.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 25; Dec. Dig. ⟸30.]

Application for a writ of habeas corpus by John B. F. Harrison against W. H. Moyer, Warden. Application denied.

Robert B. Troutman, of Atlanta, Ga., for petitioner.

John W. Henley, Asst. U. S. Atty., of Atlanta, Ga., for respondent.

NEWMAN, District Judge. John B. F. Harrison is confined in the United States penitentiary at Atlanta, Ga., in this district, and applies to this court for a writ of habeas corpus.

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[1] The copy of the indictment attached to the application for the writ shows the indictment to have been as follows:

"The grand jurors of the United States of America, in and for the District of Columbia aforesaid, upon their oath do present that one John B. F. Harrison and one William A. Marshall, each late of the District aforesaid, on the twentieth day of January, in the year of our Lord one thousand nine hundred and eleven, and at the District aforesaid, unlawfully, feloniously, and fraudulently did combine, conspire, confederate, and agree together, by divers unlawful and fraudulent devices and contrivances, and by divers false pretenses, unlawfully and feloniously to obtain from, and acquire to themselves of and from one Edward C. Sears divers large sums of money, to wit, the sum of nine hundred and fifty-five dollars in money, of the value of nine hundred and fifty-five dollars, of the moneys of the said Edward C. Sears, and to cheat and defraud him thereof, against the form of the statute in such case made and provided, and against the peace and government of the said United States."

It further appears that the petitioner was tried by a jury in the Supreme Court of the District of Columbia on this indictment, and was convicted on November 9, 1911, and on December 8, 1911, the petitioner, Harrison, was again brought before the court, and was sentenced to five years in the penitentiary to be designated by the Attorney General of the United States, to take effect from the date of his arrival in the penitentiary. Petitioner claims that the highest sentence that could have been imposed upon him was two years in the penitentiary. The question in the case arises in this way:

Under section 5440 of the Revised Statutes, now section 37 of the federal Penal Code, it is provided that:

"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."

The claim of the petitioner, as I understand it, is that this was the law applicable to his offense. It will be perceived that in this indictment no overt act was charged, so it cannot be that the petitioner was indicted under section 37 of the federal Penal Code, because it would have amounted to no indictment under that statute. Ryan v. United States, 216 Fed. 13, 42, 132 C. C. A. 257; Hyde v. United States, 225 U. S. 347, 365, 32 Sup. Ct. 793, 56 L. Ed. 1114, Ann. Cas. 1914A, 614.

Section 910 of the Code of the District of Columbia, enacted by Congress and approved March 3, 1901 (31 Stat. 1337), contains this provision:

"Punishment for Offenses not Covered by Provisions of Code.—Whoever shall be convicted of any criminal offense not covered by the provisions of any section of this Code, or of any general law of the United States not locally inapplicable in the District of Columbia, shall be punished by a fine not exceeding one thousand dollars or by imprisonment for not more than five years, or both."

It seems clear that this petitioner was indicted, tried, convicted, and sentenced for a common-law conspiracy. In Tyner v. United States, 23 App. D. C. 324, it is stated (sixth headnote):

"While it is the general rule that there are no common-law offenses against the United States, such rule does not apply to the District of Columbia (following De Forest v. United States, 11 App. D. C. 458); and the common law being in force in the District of Columbia when Rev. Stat. U. S. § 5440 (U. S. Comp. Stat. 1901, p. 3676), was enacted, which makes it an indictable offense to conspire to commit any offense against or to defraud the United States in any manner and for any purpose, any common-law offense not repealed, superseded, or plainly inconsistent with existing legislation or necessarily obsolete is an offense against the United States within the meaning of that section."

[2] While it is well settled that there are no common-law offenses against the United States, by the decisions of the Supreme Court (United States v. Eaton, 144 U. S. 677, 687, 12 Sup. Ct. 764, 36 L. Ed. 591) it is quite as well settled now, by the decisions of the Court of Appeals of the District of Columbia, that this does not apply to the District of Columbia (Tyner v. United States, supra). In the case of De Forest v. United States, cited in the Tyner Case, supra, the Court of Appeals of the District of Columbia deals with this question, and the following is an extract from the opinion (11 App. D. C. 458, 464):

"The appellant's last assignment of error is founded upon the refusal of the trial court to allow the motion in arrest of judgment, which motion is based upon the theory that the appellant's offense was a common-law offense, and not one made such by any statute of the United States, and that there are no common-law offenses against the United States. And in support of this position the case of United States v. Eaton, 144 U. S. 677 [12 Sup. Ct. 764, 36 L. Ed. 591] and others are cited. In the case of United States v. Eaton, and in the several other cases therein referred to, it is stated in very broad and sweeping language, that 'it is well-settled law that there are no common-law offenses against the United States,' and yet it is perfectly apparent that the statement is to be qualified with reference to the circumstances under which it was made. As against the United States, regarded as coextensive with the federal Union of states and operating within the territorial limits of the states, it is undoubtedly true that there are no common-law offenses; for the jurisdiction there given to the United States by the federal Constitution is distinctly and expressly restricted to the powers enumerated in the Constitution. But the statement was not intended to have application to the District of Columbia. The question as to the authority of the United States in this District is not what power has been conferred upon it, but rather what power has been inhibited to it. Subject to the limitations imposed by the Constitution itself and by the spirit of our free institutions, the United States have supreme and exclusive power over the District of Columbia, and they are not limited to the governmental powers in the Constitution specifically enumerated as defining their jurisdiction for the country at large. For the District of Columbia it is competent for the Congress of the United States to declare that the common law is to be regarded as in force, and even in the absence of express statutory enactment we should have to hold, in view of the circumstances, that the common law in its entirety, both in its civil and criminal branches, except in so far as it has been modified by statute or has been found repugnant to our conditions, is in force in the District of Columbia. But we are not left to implication in that regard. At the time of the cession of the territory of Columbia by the state of Maryland to the federal Union, its law, as well as that of the rest of the states, was the common law of England, both civil and criminal, so far as that common law was suited to our condition and was unaffected by statute. And with the common law the state of Maryland had adopted a considerable part of the statute law of England. When by the act of February 27, 1801 (2 Stat. 103), the Congress of the United States finally accepted the cession and assumed jurisdiction over the ceded district, it was specifically provided 'that the laws of the state of Maryland, as they now [then] exist, shall be and continue in force in that part of the said District which was ceded by that state to the United States and by

them accepted.' This express enactment, if any such enactment was needed at all, was amply sufficient to continue in force and to perpetuate to the present day in the District of Columbia the common law of England as it existed in Maryland at that time, with all the existing statute legislation of the state and all the statute legislation of England that had been adopted by Maryland. And upon that theory of the law we have been conducting our affairs for nearly 100 years. It is very true that much of the criminal branch of our common law has either become obsolete or has been obliterated by statutory enactment upon the same subject. Nevertheless it is true that where it has not been repealed by express statutory provision, or modified by inconsistent legislation, or where it has not become obsolete or unsuited to our republican form of government, the common law of England in all its branches, both civil and criminal, remains to-day the law of the District of Columbia, and it has been repeatedly so held. See United States v. Watkins, 3 Cranch, C. C. 441 [Fed. Cas. No. 16,649]; United States v. Marshall, 6 Mackey, 34; United States v. Hale, 4 Cranch, C. C. 83 [Fed. Cas. No. 15,279]. The case of United States v. Eaton, therefore, is not applicable to the District of Columbia, and was not intended to be applicable to it. And we are of opinion that it was not within the purview of that case to hold that there can be no common-law offenses against the United States in the District of Columbia."

In United States v. Watkins, 3 Cranch, C. C. 441, Fed. Cas. No. 16,649, it is said that:

"The Circuit Court of the District of Columbia for the county of Washington has jurisdiction of an offense committed in that county against the common law of Maryland, adopted as the law of the United States for that county, by the act of Congress of February 27, 1801 (2 Stat. 103), although that offense may consist in the fraudulently obtaining of the money of the United States, by an officer of the United States, by means of false pretenses. By the cession of this part of the District to the United States by Maryland, all the state prerogatives which Maryland enjoyed under the common law which she had adopted, so far as concerned the ceded territory, passed to the United States. All the power which Maryland had, by virtue of that common-law prerogative, to punish, by indictment, offenders against her sovereignty, and to protect that sovereignty, as to this District, became vested in the United States. The United States, therefore, have a criminal common-law jurisdiction in this part of the District, and this court has a criminal common-law jurisdiction."

[3] Of course it cannot be known here what was in the mind of the court trying this case; but, if there be any law applicable to criminal cases in the District of Columbia under which this indictment and this conviction and sentence can be sustained, it is sufficient and should be adopted and applied here in this application for a writ of habeas corpus. No overt act being charged, the indictment must have been framed under some law which made conspiracy an offense without the charge of an overt act. This would be true of the common law as it exists in the District of Columbia under the authorities which have been cited, and there being nothing in the Code of the District of Columbia which specifically denounces a conspiracy to defraud as a crime, punishment would be under section 910 of that Code, and that provides for a maximum penalty of five years.

The court having imposed the sentence evidently under this section, and having necessarily determined that it applied, even if there was error, it would be a matter that should have been corrected by writ of error, and not by habeas corpus proceedings.

It appearing from the petition itself that the petitioner is not entitled to the writ of habeas corpus, and no relief could be granted if the same were issued, the application for the writ is denied.

In re SMITH CONST. CO.

MICHAEL v. OREGON HOTEL CO. et al.

(District Court, N. D. Georgia. July 12, 1915.)

No. 478.

1. PROCESS ⟸119—SERVICE ON NONRESIDENTS—VALIDITY.
Nonresidents, who appeared by their agents in response to an order of the referee in bankruptcy in summary proceedings, may not while in attendance on the court at the hearing, be served with process in another suit; and service is not good, if taken advantage of promptly.
[Ed. Note.—For other cases, see Process, Cent. Dig. §§ 148, 149; Dec. Dig. ⟸119.]

2. BANKRUPTCY ⟸293—COURTS—JURISDICTION.
The United States District Court for a district of Georgia, adjudging bankrupt a resident contractor, under contract to construct a building for an owner residing in South Carolina, has no jurisdiction of an action at law or suit in equity by the trustee in bankruptcy against the owner and other nonresidents to determine the validity of orders, given by the contractor to nonresidents, on the owner, for the matter in controversy is only what the owner owes for the completion of the work, and the court is not in possession through its trustee of the res.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 411, 417; Dec. Dig. ⟸293.]

3. BANKRUPTCY ⟸293—COURTS—JURISDICTION.
The court has no jurisdiction as to residents merely holding claims against the bankrupt contractor and having nothing belonging to the bankrupt, where all the persons interested in the performance of the contract are not parties to the proceedings and cannot be made so, because outside the jurisdiction.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 411, 417; Dec. Dig. ⟸293.]

In Bankruptcy. In the matter of the Smith Construction Company, a bankrupt. Bill by Max Michael, trustee in bankruptcy, against the Oregon Hotel Company and others. Pleas to jurisdiction sustained, and case dismissed.

Lamar C. Rucker, of Athens, Ga., for trustee.

John J. & Roy M. Strickland, of Athens, Ga., Bomar & Osborne, of Spartanburg, S. C., and Grier, Park & Nicholson, of Greenwood, S. C., for defendants.

NEWMAN, District Judge. This is a bill in equity, brought by Max Michael, as trustee for the Smith Construction Company, against the defendants named therein, all of whom, except the Athens Engineering Company, of Athens, Ga., and the Commercial Bank, of Athens, Ga., are citizens and nonresidents of the district and of the state.

It appears that the Smith Construction Company, when it was adjudged an involuntary bankrupt in the United States District Court for the Northern District of Georgia, Eastern Division, had a contract to build a hotel for the Oregon Hotel Company, of Greenwood,

S. C., and the building was not completed when bankruptcy occurred. The Smith Construction Company and the Oregon Hotel Company had agreed for certain subcontractors on the building and the bank at Greenwood, S. C., to be paid by the Oregon Hotel Company; that is, the subcontractors were to be paid after completing their work and as estimates were furnished and agreed to by the Smith Construction Company for the work begun by them on the hotel, and the bank for certain moneys advanced by it for the completion of the hotel.

This bill is filed, apparently, upon the assumption, and with allegations pertinent thereto, that the Smith Construction Company, at the time the bankruptcy proceeding was filed, was in actual possession of the Oregon Hotel, at Greenwood, S. C., and that the possession and control of the property vested in the court of bankruptcy, and therefore the receiver and trustee in bankruptcy had a right to the possession and control of the property. It is alleged that there was reserved by the Oregon Hotel Company, as against the Smith Construction Company, 15 per cent. of the amount due on estimates for work and material at each period that the architect furnished such estimates during the progress of the building. It is further alleged that there was due $1,000, or other such sum, at the time of the bankruptcy, to complete the work, and that something like $20,000 was due the Smith Construction Company. It is then alleged that the bankrupt had subcontracts with the W. J. Snead Lumber Company, the Taffoli & Marus Marble & Tile Company, and the Athens Engineering Company, and gave to the said subcontractors during the course and progress of the work certain orders on the funds held by the Oregon Hotel Company, upon condition that the orders should be paid out of such fund when the holders of such orders had completed their subcontracts in accordance with the terms and specifications thereof. It is further alleged that the National Loan & Exchange Bank of Greenwood, S. C., held drafts and orders signed by the bankrupt on the fund held by the Oregon Hotel Company, which drafts and orders were given within four months of the filing of the petition in bankruptcy and at the time the bankrupt was insolvent, etc. It is then alleged that the orders given to the National Loan & Exchange Bank to W. J. Snead Lumber Company, to Taffoli & Marus Marble & Tile Company, to the Athens Engineering Company, and the transfer and assignment made to the Commercial Bank of Athens, were given within four months of the filing of the bankruptcy proceeding, and were therefore preferences. It is again alleged that the hotel property was in the physical and actual possession of the bankrupt when the bankruptcy occurred, and, further, that the Hotel Company was the holder of $20,000, on which said liens should be marshaled, and by decree paid.

The trustee then prays that, inasmuch as he has no adequate remedy, except in a court of equity, subpœnas issue against the Oregon Hotel Company, the National Loan & Exchange Bank, the W. J. Snead Lumber Company, Taffoli & Marus Marble & Tile Company, the Greenwood Hardware Company, J. D. Linton, Athens Engineering Company, and Commercial Bank of Athens, commanding them

to appear, and, waiving answer under oath, he prays, also, that the liens, if any, that these various parties named have on the Oregon Hotel Company be marshaled against the fund, and that hearing be had of the respective contentions between the petitioner and the said subcontractors, and an accounting be had between them, and that the drafts and orders given to said subcontractors be required by the holder thereof, to wit, the Oregon Hotel Company to be surrendered into court to be canceled, and that an accounting be had, with a statement of their accounts against the Oregon Hotel Company, and that the fund held by the Oregon Hotel Company shall be disbursed under the order of the court.

There is a plea to the jurisdiction in all of these cases, and answers by various defendants; but the first question to be considered in the case is the jurisdiction of the court.

[1] Confessedly all of these parties, except those named living in Athens, Ga., are not within the jurisdiction of the court. Some of the parties named were served in this way: The referee in bankruptcy at Athens issued an order in a summary proceeding requiring these parties to appear before him and show cause why the funds should not be paid in by the Oregon Hotel Company to the trustee in bankruptcy and distributed according to law. Some of the parties, by their agents, appeared in response to this order of the referee at Athens, and while in attendance on the court at the hearing in the summary proceeding were served with process in the present case. These parties, as stated, live in other states, South Carolina and North Carolina, and were served in the way just stated, while they were away from home and attending court on an order of the referee in this district. Such service is not good, if taken advantage of promptly, as it has been here, and it will be so held. Of course, their rights might be waived by failing to object to the service and otherwise making a general appearance; but, without this, this court, in my opinion, has no jurisdiction of these nonresident parties.

[2] There is no ground whatever for the proceeding, except upon the theory that the court, through its trustee, was in possession of certain res, and there is no res here. It is not a suit at all to recover the real estate. It is nothing but a simple suit to recover from the Oregon Hotel Company, and apparently to have this court to determine that the orders given by the Smith Construction Company to various parties on the Oregon Hotel Company were invalid, and therefore the money should be paid in to this court. The matter in controversy, if there be a matter actually in controversy, is what the Oregon Hotel Company owes for the completion of the building. It is clear that all of this is covered by the orders given to these various people on the Oregon Hotel Company and accepted by that company.

These parties, the W. J. Snead Lumber Company, the National Loan & Exchange Bank of Greenwood, S. C., Taffoli & Marus Marble & Tile Company, of Charlotte, N. C., and the Oregon Hotel Company, of Greenwood, S. C., have all filed pleas raising the question of the jurisdiction of the court, and objecting to the jurisdiction of the court. I think their pleas must be sustained. The jurisdiction here

as a court of equity is challenged in the pleas; but that it is unnecessary to consider, for, whether the suit be at law or in equity, it is not within the jurisdiction of the court.

[3] So far as the parties living in Georgia are concerned, I see no reason whatever for proceeding here against them, for they are persons holding claims against the bankrupt estate. They have nothing at all belonging to the bankrupt estate, and unless the Oregon Hotel Company and the other parties can be brought in, and the matter determined as between all of the parties, the court would have no jurisdiction as to the Georgia parties in this proceeding.

All pleas to the jurisdiction must be sustained, and the case must be dismissed.

CARLISLE v. SMITH et al.

(District Court, N. D. Georgia. March 22, 1915.)

No. 10.

1. EQUITY ⇐359—VOLUNTARY DISMISSAL—RIGHT TO DISMISS.
Where defendants had filed no cross-bill, and had asked for no affirmative relief, and could have obtained no relief, except a decree dismissing the bill, plaintiff had a right to dismiss his bill without prejudice while the suit was pending on exceptions to the report of a special master, especially as plaintiff offered to stipulate that any evidence taken might be used by any of the defendants in any other suit then pending or thereafter brought, since, while such a dismissal will not be allowed where defendants' rights will be prejudiced, the mere hardship and annoyance of defending another suit does not justify the denial of the motion.
[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 749–755; Dec. Dig. ⇐359.]

2. EQUITY ⇐359—VOLUNTARY DISMISSAL—NECESSITY OF SPECIFYING THAT DISMISSAL IS WITHOUT PREJUDICE.
Where plaintiff voluntarily dismisses a suit, without expressing in the order of dismissal that it is without prejudice, the dismissal will be regarded as on the merits.
[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 749–755; Dec. Dig. ⇐359.]

3. EQUITY ⇐359—VOLUNTARY DISMISSAL—CONDITIONS—PAYMENT OF COSTS.
A plaintiff, voluntarily dismissing a bill in equity, will be required to pay all costs that have accrued in the case.
[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 749–755; Dec. Dig. ⇐359.]

In Equity. Suit by W. A. Carlisle against C. Elmer Smith and others. On motion to dismiss by plaintiff. Motion granted.

See, also, 200 Fed. 268.

Anderson & Rountree, of Atlanta, Ga., for plaintiff.

H. H. Dean, of Gainesville, Ga., and Robert C. & Philip H. Alston, of Atlanta, Ga., for defendants.

NEWMAN, District Judge. This is a motion made by the plaintiff to dismiss a bill filed in this court. The case in which the bill was filed has gone through these stages:

[1] In the first place it was removed from the state court to this court by the nonresident defendants. At the time of the removal there was in the case a temporary restraining order. The case was first heard on an application for an injunction pendente lite. After hearing, this was denied. There was a demurrer to the bill, which was overruled. The case was then referred to a special master, who heard testimony and drafted a report, and served copy of same on counsel. Exceptions were thereupon filed before him, which were overruled by the master, and the report of the master was filed in the court. Exceptions to this report were filed, and the case was pending for hearing on these exceptions when the motion to dismiss was made by the plaintiff.

The defendants objected to the dismissal, and shortly after the filing of the motion to dismiss in the clerk's office they filed these objections and what they call a "cross-bill." It must be determined now, in view of the situation of the case and what has occurred in it, whether the plaintiff has a right to dismiss.

Perhaps as satisfactory a statement of when a plaintiff may or may not dismiss a case in equity as can be found is stated by Judge Taft in City of Detroit v. Detroit City Ry. Co. et al. (C. C.) 55 Fed. 569, as follows:

"The motion to dismiss presents a question of equity practice which is not as clearly settled as could be desired. It seems hardly fair that after a case has been got ready for hearing, and the defendant has gone to the expense of a full preparation, the complainant may deprive the defendant of the benefit of all that preparation by a dismissal, under which he reserves full power to harass him by bringing a new bill when he shall choose to do so, on the simple condition that he pay the costs, which are so notoriously inadequate to compensate defendant for his actual expenditures. In England, since 1845, the rule has been, by virtue of an order in chancery, that a dismissal of a bill after a cause is set for hearing is on the merits and must be a bar to the bringing of another bill. General Ordinance No. 117; Mayor, etc., of Liverpool v. Chorley Waterworks Co., 2 De Gex, M. & G. 852; In re Orrell Colliery & Fire Brick Co., 12 Ch. Div. 681, 682. The equity rules of the United States Supreme Court, adopting the practice of the High Court of Chancery of England, were published in 1842, and it follows, therefore, that the equity practice in this regard of the federal courts continues to be that prevailing in the English Chancery Courts before the new rule was promulgated, in 1845. Badger v. Badger, 1 Cliff. 237 [Fed. Cas. No. 717]; Stevens v. The Railroads [C. C.] 4 Fed. 97; Western Union Tel. Co. v. American Bell Tel. Co. [C. C.] 50 Fed. 662.

"It is very clear, from an examination of the authorities, English and American, that the right of a complainant to dismiss his bill without prejudice, on payment of costs, was, of course, excepted in certain cases. Chicago & A. R. Co. v. Union Rolling Mill Co., 109 U. S. 702, 3 Sup. Ct. 594 [27 L. Ed. 1081]. The exception was where a dismissal of the bill would prejudice the defendants in some other way than by the mere prospect of being harassed and vexed by future litigation of the same kind. The exceptions are as broadly and clearly stated as anywhere by Chancellor Harper, of South Carolina, in the case of Bank v. Rose, 1 Rich. Eq. 294, as follows:

" 'Harper, Ch. The general rule is, as contended for, that the plaintiff at any time before decree, perhaps before the hearing, may dismiss his bill as of course upon the payment of costs; but certainly it cannot be said that the rule is without exception. The exception, stated in general terms, is that it is within the discretion of the court to refuse him permission to do so if the dismissal would work a prejudice to the other parties; and I gather from the cases, compared with each other, that it is not regarded as such prejudice to a

defendant that the complainant, dismissing his own bill, may at his pleasure harass him by filing another bill for the same matter. But whenever, in the progress of a cause, a defendant entitles himself to a decree, either against the complainant or against a codefendant, and a dismissal would put him to the expense and trouble of bringing a new suit and making his proofs anew, such dismissal will not be permitted.'

"In that case there had been a cross-bill filed, and affirmative relief asked, and the case had been prepared for hearing, and it was held a case where the motion to dismiss could not be granted. In Booth v. Leycerter, 1 Keen, 247, where a bill and cross-bill were set down for hearing together, it was held that the complainant would be prejudiced by dismissal of the cross-bill without prejudice, and leave was not granted. In Electric Accumulator Co. v. Bruch Electric Co. [C. C.] 44 Fed. 602, Mr. Justice Brown held that where, under an answer, and by virtue of the statute controlling patent litigation, a defendant was given a right, in the nature of affirmative relief, to have the patent sued on declared void, and the case had been pending three years, the defendant was entitled to have the original bill heard in spite of a motion to dismiss. In Manufacturing Co. v. Waring [C. C.] 46 Fed. 87, Judge Lacombe held that a complainant was not entitled of right to dismiss his bill after the answer is filed, setting up that the license to use a patent upon which the suit is brought is fraudulent and void, and showing that defendant is entitled to a decree for its cancellation. In Western Union Tel. Co. v. American Bell Tel. Co. [C. C.] 50 Fed. 662, 664, the rule is stated by Judge Colt as follows: 'Under that practice [i. e., the English chancery practice before 1845] the general rule was that a complainant might dismiss his bill upon payment of costs at any time before interlocutory or final decree; and this has been the general practice both in the federal and state courts. There are, however, certain well-recognized exceptions to this rule, and the question which arises upon this motion is whether the defendant comes within any of these exceptions. * * * But this does not mean that it is within the discretion of the court to deny the complainant this privilege under any circumstances, where it might think such dismissal would work a hardship to the defendant, as, for example, where it might burden him with the trouble and annoyance of defending against a second suit; but it means that if, during the progress of the case, the defendant has acquired some right, or if he seeks or has become entitled to affirmative relief, so that it would work an actual prejudice against him to have the case dismissed then, the complainant will not be permitted to dismiss his bill.'

"The question remains whether the case at bar comes within the exceptions. If it does not, we have no discretion to deny the motion. If it does, we have a discretion to grant or refuse it."

The above case is cited, and the rule in reference to dismissal of cases by plaintiffs, in equity suits, is laid down in Pullman's Car Co. v. Transportation Co., 171 U. S. 138, 145, 18 Sup. Ct. 808, 811, 43 L. Ed. 108, and in the opinion by Mr. Justice Peckham the rule is stated in this way:

"The general proposition is true that a complainant in an equity suit may dismiss his bill at any time before the hearing, but to this general proposition there are some * * * exceptions. Leave to dismiss a bill is not granted where, beyond the incidental annoyance of a second litigation upon the subject-matter, such action would be manifestly prejudicial to the defendant. The subject is treated of in Detroit v. Detroit City Railway Co., in an opinion by the Circuit Judge, and reported in 55 Fed. 569, where many of the authorities are collected, and the rule is stated substantially as above. The rule is also referred to in Chicago & Alton Railroad v. Union Rolling Mill Co., 109 U. S. 702 [3 Sup. Ct. 594, 27 L. Ed. 1081]. From these cases we gather that there must be some plain, legal prejudice to defendant to authorize a denial of the motion to discontinue. Such prejudice must be other than the mere prospect of future litigation rendered possible by the discontinuance. If the defendants have acquired some rights which might be lost or

rendered less efficient by the discontinuance, then the court, in the exercise of a sound discretion, may deny the application. Stevens v. The Railroads [C. C.] 4 Fed. 97, 105. Unless there is an obvious violation of a fundamental rule of a court of equity or an abuse of the discretion of the court, the decision of a motion for leave to discontinue will not be reviewed here."

In Simpkins, "A Federal Equity Suit," this is said:

"The general rule is that the plaintiff has the right, at any time before an interlocutory or final decree in a case, to dismiss it on paying costs, and without prejudice to his right to file another, and where the dismissal will deprive the defendant of no substantial right accrued since the suit commenced and the defendant has not prayed for affirmative relief to which he would be entitled"—citing a number of authorities (page 349).

Again in this same work (page 350) it is stated:

"The refusal to dismiss when the rights of the defendant may be prejudiced does not mean that by the dismissal he may be burdened by another suit, but the record must show some right upon which he should be heard and which is properly in issue."

[2] It is clear from the authorities that, if the plaintiff has a right to dismiss, he has a right to do so without prejudice. If he simply dismisses, without expressing in his order of dismissal that it is without prejudice, the case will be held to have been determined on the merits. In the work above cited, by Simpkins, it is stated on page 351:

"The practice in dismissing is to use the words 'without prejudice'; for, if you do not, the presumption is that it was heard on its merits"—citing a number of authorities.

So the question here is: Has the plaintiff the right as of course to dismiss his bill, or do any of the exceptions to the rule as to the right to dismiss apply here, and make the case one of discretion for the court as to whether the plaintiff should be allowed to dismiss or not?

There was no cross-bill in this case, nor was there anything in the answer asking for affirmative relief, and I do not see anything else in the course of the proceedings which would bring the defendant within the rule with reference to exceptions. A fair test of the question involved here is what the defendants were entitled to at the time the motion to dismiss by the plaintiff was made. It seems reasonably clear that the most the defendants could have obtained would have been a decree in their favor, and consequently dismissing the bill. The case is pending on exceptions to the master's report, and if the court had determined that it was right to do so, and had overruled all of these exceptions and confirmed the report, this would have resulted simply in a decree in favor of the defendants and the dismissal of the bill, as stated. There was not in the record anything, up to the time this motion to dismiss was made, which made any claim on behalf of the defendants beyond the fact that they were not liable to the plaintiff and that the plaintiff was not entitled to recover at all. The position of the defendants in the case, when this motion was made, was denial all the time. There was no application for any affirmative relief on their part, nor was there any pleading on which any affirmative relief could have been granted to them. I have examined the cases cited by counsel and all that I have been able to find myself, and the

result is I am compelled to conclude that the plaintiff has the right to dismiss his bill and to dismiss it "without prejudice."

The plaintiff has voluntarily offered to enter into a stipulation here that any evidence taken in this matter may be used hereafter by the defendants, and as I understand it, by either of them, in any other suit now pending or that may be brought hereafter. It must be conceded that the dismissal of this suit is a hardship, and, of course, in the language of the cases, it will be "an annoyance" to the defendants; but it is only the hardship and annoyance of defending another suit, and this, all the authorities agree, is not sufficient to justify the court in denying the motion to dismiss the bill.

[3] The plaintiff must, of course, before being allowed to dismiss, pay all costs that have accrued in this case. The costs will be ascertained by the clerk, and upon payment of this the plaintiff will be allowed to enter his voluntary dismissal of his bill, without prejudice.

It should be added that, a short time after the motion to dismiss this case was filed in the clerk's office, counsel for defendants presented to the court what is called a "cross-bill," which they asked permission to file. This paper called a "cross-bill" does not set up anything which I consider meritorious, in view of the fact that the plaintiff had, before it was presented, filed his motion to dismiss. So I think the motion to file this "cross-bill" must be denied, and, if filed, it should be dismissed, as it would fall with the dismissal of plaintiff's bill.

In re CONSUMERS' ALBANY BREWING CO.

MURPHY v. WEILL et al.

(District Court, N. D. New York. June 21, 1915.)

BANKRUPTCY ⊂=301—POWER OF BANKRUPTCY COURT—ENJOINING VIOLATION OF CONTRACT WITH TRUSTEE.

A brewing company guaranteed a lease of certain premises in consideration of a contract by the lessee, made with the consent of the lessor, to sell no malt liquors except those made by the brewing company. When the lease had about one more year to run, the brewing company was adjudicated a bankrupt, and its trustee, who was authorized to continue the business, thereafter performed the contract. Proceedings were commenced by the owner to dispossess the assignee of the lessee, which were resisted by the trustee. A verbal agreement was then made between the trustee, the owner, and a proposed new tenant that, in consideration of the withdrawal by the trustee of his opposition, the new tenant should enter into a similar contract. This agreement was performed by the trustee, but was repudiated by the other parties. *Held*, that such action deprived the bankrupt estate of a valuable property right, and that the court of bankruptcy had power by injunction to compel the performance of the agreement during the remainder of the term of the original lease; the remedy at law being inadequate.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 464; Dec. Dig. ⊂=301.]

In Bankruptcy. In the matter of the Consumers' Albany Brewing Company, bankrupt. On application by Edward Murphy, 2d, trus-

tee, for an injunction against Eugene Weill and the German Hall Association. Injunction granted.

This is an application by Edward Murphy, 2d, trustee in bankruptcy of the Consumers' Albany Brewing Company, for an order restraining and enjoining the German Hall Association, owner and lessor of certain premises in the city of Albany, and Eugene Weill, lessee of such premises, as follows: (1) Restraining the lessee from purchasing from any source other than from such trustee of above-named bankrupt the supply of ale and lagers to be sold on the premises above referred to during the existence of a certain lease of said premises; and (2) restraining and enjoining said owner and lessor from permitting the rented premises to be occupied by any person, firm, or corporation, selling ales and lagers, who does not purchase such ales and lagers from the said bankrupt or trustee in bankruptcy; and for such other or further relief as such trustee in bankruptcy may be entitled to.

Leopold Minkin, of Albany, N. Y. (H. D. Bailey, of Troy, N. Y., of counsel), for petitioner.

Chas. M. Friend and John A. Stephens, both of Albany, N. Y., for tenant.

Crawford & Cogan, of Albany, N. Y., for owner and landlord.

RAY, District Judge (after stating the facts as above). On and prior to April 10, 1911, Albany German Hall Association was and now is the owner of certain premises in the city of Albany, N. Y., on and in which was a café, restaurant, banquet hall, bowling alleys, and cellars, with living rooms above, including some barroom fixtures, etc. April 10, 1911, the Albany German Hall Association in writing leased these premises to one Joseph Reniers, of New York City, for the term of five years from May 1, 1911, to April 30, 1916, at an annual rent of $5,000, payable in equal monthly installments in advance. This lease contained a provision that liquor tax certificates for the sale of liquors on such premises issued during such term should be assigned to the lessor as security that the sale of liquors on such premises should not be abandoned by the lessee. If rent was not paid, then, at the option of the lessor, the lease might be terminated. The lease also contained a provision that, if anything detrimental to the German Hall Association occurred on the premises with the consent or sanction of the lessee, then the lease was to become void. The agreements and conditions were to be binding on the successors and assigns of the first party and the heirs, executors, and administrators of the second party. For a good and a valuable consideration Reniers, with the knowledge and consent of said German Hall Association, agreed with the Consumers' Albany Brewing Company that he would sell in such place the ales, beers, and lagers made by said Consumers' Albany Brewing Company only; the manufacture and sale of such ales, etc., being the business in which it was engaged. May 1, 1911, the Consumers' Albany Brewing Company in writing guaranteed to the said Albany German Hall Association the payment of one-half the said rent Reniers was to pay, and notice was to be given to said guarantor by the said owner if rent was not paid. It is plain that it was understood and agreed by the owner, the lessee, and said guarantor of the rent that the lessee was to sell in and on said premises the beers, ales, and lagers made by Consumers' Albany Brewing Company and no oth-

ers. Reniers occupied the premises and complied with this agreement and understanding until March 10, 1914, when he was duly adjudicated a bankrupt.

About the middle of March, 1914, with the knowledge and consent of all parties, one Sanford Eaton took over the lease and agreement and became tenant of said premises, with substantially the same understanding and agreement with the lessor and owner and Consumers' Albany Brewing Company. March 24th said Eaton deposited with said Brewing Company $1,000 and entered into a written agreement with it in substance as follows:

The said Brewing Company caused the liquor tax to be transferred to one Wendell as agent of Eaton, who covenanted to properly conduct the hall, etc., and Eaton covenanted and agreed "to sell, use, and handle in said German Hall the malt products manufactured by said party of the first part (Consumers' Albany Brewing Company) and no other malt products," except permission was given to deal in imported beer sold by Hollander & Co., and, each week, a dark lager, not to exceed one-half barrel, manufactured by Beverwyck Brewing Company of Albany, N. Y.

Hollander & Co. had guaranteed the payment of the half of the rent not guaranteed by Consumers' Albany Brewing Company.

September 15, 1914, said Consumers' Albany Brewing Company was duly adjudged a bankrupt. This court had appointed Edward Murphy, 2d, receiver of the alleged bankrupt corporation, with power and direction to continue the business, and later said Edward Murphy, 2d, was duly elected and appointed trustee and authorized and directed to continue the business.

Later, Eaton, it was claimed, violated his agreement, and German Hall Association, the lessor, sought to dispossess him. The Consumers' Albany Brewing Company was, of course, deeply interested, and claimed that Eaton was not in fault, and proposed to stand behind Eaton and resist such proceedings. This led to an interview and an agreement between the German Hall Association and the Consumers' Albany Brewing Company, including Eaton, by which such dispossession proceedings were not to be contested, and in consideration thereof German Hall Association was not to let into possession of such premises, or lease or let same to any person who would not agree and bind himself to sell therein the ales, beers, and lagers manufactured by the Consumers' Albany Brewing Company only (with exception named), and to this Weill, proposed lessee, consented. Thereupon the trustee in bankruptcy forbore to resist the expulsion of Eaton, and the dispossession proceedings went to judgment without opposition, and an agreement was made between German Hall Association and Weill, leasing to Weill such premises, but the rights and interests of the Consumers' Albany Brewing Company and the trustee in bankruptcy were ignored, and both lessor and proposed lessee refused to stand by or recognize the verbal agreement that the new lessee should sell the beers, ales, and lagers made by the Consumers' Albany Brewing Company only, and in effect propose to ignore and repudiate same. The agreement referred to, made by German Hall Association, Weill, and the trustee in bankruptcy, was not reduced to writing.

The real question is: Has this court power to enjoin the owner of

these premises, German Hall Association, from allowing same to be occupied by a tenant who will not enter into a contract as a condition of its lease, or with whom in making a lease the said association will and does not make a condition that such tenant must sell in such premises the ales, beers, and lagers made by the Consumers' Albany Brewing Company? The business of the Consumers' Albany Brewing Company is now being run and continued by the trustee in bankruptcy under the authority and direction of this court, and was being so conducted when the agreement was made between the owner, the trustee of the Consumers' Company, and the proposed tenant that such ales, beers, and lagers should be sold on the premises by the new tenants in case opposition to the ejection of Eaton was abandoned by the said trustee.

The right to have such ales, beers, and lagers sold on the premises to the exclusion of others was a valuable asset and right, and formed a part of the value of the property rights which had come into the possession and under the control of this court. Any action which interfered with and limited the market and sales of beer, etc., being made and sold by the trustee by authority of the court, injured the estate of the bankrupt, lessened its value—both its present earning power and value and its selling value as a going business and concern. The value of a manufacturing business depends, to an extent, on whether it is a going concern, the extent and volume of its business, the number of its customers, and whether or not such customers are permanent. Existing contracts for the sale and delivery of beer, ales, and lagers at future times, as required and as the business of the purchaser may require, and which business and its success will also determine the amount required and to be taken by such purchaser for his trade, are a valuable asset, and if the bankrupt estate, by its trustee, is in condition to perform such contracts on its part, they may be performed, and the other party compelled to perform, or enjoined from violating, such contracts, or compelled to make compensation in damages. Where there is a full, complete, and adequate remedy at law for the breach or threatened violation of a valid contract, a court will not ordinarily grant equitable relief by way of injunction, either mandatory or prohibitive.

An action for the specific performance of a contract is many times and usually permissible when same relates to real estate, and frequently when it relates to personal property. This pending proceeding is in the nature of an action to compel specific performance by the German Hall Association and Weill of this verbal agreement based on a valuable and good consideration. The Consumers' Albany Brewing Company fully performed—did all it agreed to do. The German Hall Association and Weill contend that no binding agreement was made; that there was an agreement to make a contract, but that none was made. But everything was agreed upon. The Consumers' Albany Brewing Company was to withdraw opposition to the removal of Eaton, which it did. German Hall Association agreed that the new tenant should sell the product of Consumers' Company only, except imported beer, and the price the tenant was to pay was made known

and agreed upon—pronounced satisfactory. Weill, the proposed new tenant, was called in, and the terms made known and he consented thereto. He was to go the next day and settle on details, if any, and, by fair inference, the necessary papers were then to be executed. Instead of doing so, the verbal agreement was deliberately ignored, and, although Consumers' Company kept its agreement, the German Hall Association not only availed itself of the agreement to eject Eaton, but entered into a lease with Weill without the knowledge or consent of the Consumers' Company, absolutely ignoring the Consumers' Company and the trustee in bankruptcy and their rights.

It is true that the making of the agreement and contract between Weill and Consumers' Company was not consummated by the execution of a written paper, but if there was anything upon which the minds of the parties had not met the evidence fails to disclose what it was. Until a long time thereafter, and after excuses for delay had been made, the Consumers' Albany Brewing Company and its trustee in bankruptcy were not notified of the purpose of Weill and German Hall Association not to execute the agreement. The lease actually entered into between the German Hall Association and Weill was for the unexpired term of the Reniers lease, transferred to Eaton, ending May 1, 1916, with the privilege of renewal for five years. This court could not undertake for a long term of years to supervise the execution and enforcement of a long term contract and agreement, or bind the trustee and estate represented by him to continue the production of ales, beers, and lagers and the furnishing of same to the tenant of these German Hall premises, or even bind the purchaser of the assets and business of the Consumers' Albany Brewing Company so to do, for a long term of years. Who would purchase, the terms of sale and purchase, and the kind and quality of ales, beers, and lagers the purchase would produce, and the price at which same should be furnished, are matters a trustee in bankruptcy should not undertake to determine, if to extend over a term of years.

But here it was competent for the trustee to contract to enforce the existing term until its termination, May 1, 1916. The estate he represented was able, under the orders and direction of the court to fulfill all the obligations of the contract, the performance of which it had guaranteed, and into the performance of which, the evidence shows, it had put money. In Hair Company v. Huckins, 56 Fed. 366, 5 C. C. A. 522, it was held that an injunction would not lie to restrain the breach of a contract whereby defendant agreed that for the term of five years he would use plaintiff's hotel registers in his business, and no others, as plaintiff had adequate remedy at law. In Steinau v. Cincinnati Gas, Light & Coke Co., 48 Ohio St. 324, 27 N. E. 545, S. contracted with the light company, in consideration of a reduced price for gas, that he would not use electric material or power for general illuminating purposes, the quantity of gas used not to fall below a specified amount. S. violated his agreement, and the company sought to enforce performance in equity. It was held there was an adequate remedy at law. In Newport City v. Newport Light Co., 84 Ky. 166, the city made a contract with a gas company to furnish the city gas-

light for a term of years, with an *exclusive* right in the company to use the streets for such purpose. Held, the city might be enjoined from conferring the same right on a competing company.

In 1 Beach on Injunctions, 439, § 437, it is said, citing cases:

"A court of equity will interfere by injunction, at the suit of a lessee who claims an exclusive contract right to carry on a particular business on the leased premises, to prevent another lessee, having notice of that right, from violating it; the jurisdiction in such a case being analogous to the remedy by specific performance, and founded also on the necessity of preventing a constantly recurring grievance, for which there can be no adequate compensation in damages. Where an hotel proprietor has granted one telegraph company the exclusive privilege of establishing and operating an office upon his premises, equity will interfere by injunction to prevent a breach of the contract in the form of an extension of the same facilities to another and a rival company; the remedy at law of the party having the first and unquestioned right being inadequate."

In 1 Joyce on Injunctions, 646, § 429, it is said, citing cases:

"An injunction to prevent the breach of a contract is a negative specific enforcement of it, and the test of the jurisdiction of equity to grant such an injunction is the inadequacy of the legal remedy."

See Dills v. Doebler, 62 Conn. 366, 26 Atl. 398, 20 L. R. A. 432, 36 Am. St. Rep. 345; Pom. Eq. Jur. § 1341; Morris Canal & Banking Co. v. S. & M., 5 N. J. Eq. 203.

In General Electric Co. v. Westinghouse Electric & Mfg. Co. (C. C.) 144 Fed. 458, this court considered this subject, citing many authorities, at considerable length. In Waldorf Astoria Segar Co. v. Salamon, Impleaded, 109 App. Div. 65, 95 N. Y. Supp. 1053, affirmed 184 N. Y. 584, 77 N. E. 1197, it was held that:

"A court of equity will, by injunction, enforce a negative covenant that real estate is not to be used by the lessor, or leased for certain purposes."

In the same case it was held that a lessee who takes a lease of the premises with knowledge of such a covenant will be enjoined from violating same.

It is immaterial that Consumers' Albany Brewing Company was not lessee and occupant of these premises. It was a guarantor of the Reniers lease, assigned to Eaton, put money into it, and was vitally interested in its performance. The new agreement was of great concern and interest to the trustee in bankruptcy appointed by this court, and as this trustee in good faith surrendered a valuable right on the faith of such new agreement which concerns an estate in the hands of and under the protection of this court, and which will suffer pecuniarily if the injunction is not granted, and as the damages are not capable of easy ascertainment, if at all, and the lease will end May 1, 1916, unless a purchaser of the premises elects to continue it for a further term of five years under the option, and the trustee in bankruptcy has elected to stand on this agreement, which has been sanctioned by the referee having charge of this matter, the injunction prayed for is granted, and there will be an order accordingly.

In re LEVITAN.

(District Court, D. New Jersey. July 7, 1915.)

1. BANKRUPTCY ⟸426—DISCHARGE—DEBTS RELEASED—BURDEN OF PROOF.
A liability evidenced by a judgment being provable in bankruptcy under the express provisions of Bankr. Act July 1, 1898, c. 541, § 63a (1), 30 Stat. 562 (Comp. St. 1913, § 9647), the burden of proof is on the judgment creditor to show that it is within section 17a (2), excepting from debts released by a discharge in bankruptcy such as are liabilities for willful and malicious injuries to the person or property of another.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 787, 791–807; Dec. Dig. ⟸426.]

2. BANKRUPTCY ⟸433—RESTRAINING ENFORCEMENT OF JUDGMENT—VACATION.
Bankr. Act, § 17a (2), excepts from provable debts released by a discharge in bankruptcy liabilities for willful and malicious injuries to another's person or property. The bankrupt and a judgment creditor were mutual dealers, and in the course of such dealings the bankrupt lawfully obtained and used a promissory note, for converting which a judgment was subsequently recovered against him; it not clearly appearing upon what ground his conduct turned the lawful receipt and use of the note into a tort. *Held*, that proof of these facts did not sufficiently show that the judgment would not be released by a discharge in bankruptcy to justify the vacation of an order restraining the enforcement of the judgment for one year from the adjudication, or until the question of a discharge was determined.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 808–823; Dec. Dig. ⟸433.]

3. BANKRUPTCY ⟸433—RESTRAINING ENFORCEMENT OF JUDGMENT—VACATION.
Whether a discharge in bankruptcy will release a judgment cannot be finally determined on a motion to vacate an order restraining the enforcement of such judgment for one year from the adjudication, or until the matter of a discharge is determined, but, if a discharge is granted, can be tried out in proceedings based on such judgment.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 808–823; Dec. Dig. ⟸433.]

In Bankruptcy. In the matter of Wolf M. Levitan, bankrupt. On motion to vacate an order staying the enforcement of a judgment. Motion denied.

Charles A. Kalish, of New York City, for the motion.

Henry Kuntz, of New York City (Abraham P. Wilkes, of New York City, of counsel), for bankrupt.

RELLSTAB, District Judge. On the 29th day of December, 1914, Wolf M. Levitan was adjudicated a voluntary bankrupt. On the day following, in response to his petition setting forth the recovery against him by the Castle Braid Company of a judgment founded on a promissory note alleged to have been converted by bankrupt, and the necessary allegations showing that such liability was a provable debt in bankruptcy and would be released by a discharge granted in such proceedings, and that the said company threatened to take proceedings against him to enforce such judgment, this court made an order, under section 11 of the Bankruptcy Act, enjoining said company from taking any proceedings to enforce such judgment "for one year from * * * the 28th day of December, 1914, or, if an application for a

discharge is made in the meantime, then until the question of said discharge is determined."

The company now moves to vacate this order, on the ground that such judgment is founded on a willful and malicious conversion of property and falls within the exception of section 17a(2) of the Bankruptcy Act. This section provides, inter alia, that:

"A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as * * * (2) are liabilities for * * * willful and malicious injuries to the person or property of another."

The company, in its petition seeking a vacation of such order, in substance alleges:

That it delivered two promissory notes to the bankrupt for $375 each; that subsequently, at the request of the bankrupt, it delivered to him two other promissory notes, one for $500, and the other for $250, to take the place of such first-mentioned notes; "that the bankrupt returned one of said notes of $375, and fraudulently represented that he was the holder of the other one of said notes, and would deliver same to your petitioner; that the said statement was false and fraudulent, in that the bankrupt was not the holder of the said note, but the said bankrupt wrongfully, willfully, and maliciously converted and misappropriated one of the $375 notes; that on or about the 26th day of September, 1914, an action was commenced in the Municipal Court of the City of New York, Borough of Manhattan, Ninth District, wherein your petitioner was plaintiff and the bankrupt herein was defendant, to recover the sum of $375 for damages sustained by the wrongful, willful, and malicious misappropriation and conversion of the said note of $375 and the fraudulent statement made with reference thereto;" that it secured a judgment on the note not returned, and "that pursuant to the said judgment your petitioner is entitled to an execution against the person of the said bankrupt, and is entitled to have the said bankrupt arrested and imprisoned"; and that the execution of said judgment was stayed by said order of December 30, 1914.

The petition further alleged, on information and belief, that:

Said judgment was "created by the fraud, embezzlement, misappropriation, and defalcation of the bankrupt herein, while acting in a fiduciary capacity, and the said judgment is not a judgment that is [dis]chargeable under the United States Bankruptcy Act."

A copy of the complaint filed in the suit above referred to is annexed to said petition. This complaint states two causes of action. The first alleges a conversion of said note, in the following language:

"On information and belief, that said defendant has wrongfully converted and appropriated the said promissory note for $375 to his own use and by causing the same to be discounted."

The second alleges the obtaining of said note by false representations, charging, on information and belief, that the bankrupt knew that such representations were untrue at the time he made them.

The bankrupt, in his affidavit filed in opposition to such motion, alleges, in substance, that at the time of the delivery of said notes the Castle Braid Company was indebted to him in a large sum of money for goods purchased, and that in good faith he discounted the note in question and applied its proceeds to such indebtedness, without intent to defraud said company; that such company is indebted to his estate in bankruptcy in a sum exceeding the amount of such judgment; that at the trial of said suit the company elected to go to trial

upon the first cause of action, and that the said judgment was predicated on said cause of action; that, though the said company conceded at the trial of such action that it was indebted to the bankrupt to some extent, such indebtedness was not permitted to be counterclaimed, as that suit was one for conversion.

The ground alleged in such petition, viz., that the alleged fraud was perpetrated by the bankrupt while acting in a fiduciary capacity, was abandoned on the argument of the motion, and properly so, as there is nothing in the record that shows that the bankrupt bore a fiduciary relation to such company; and the motion is based alone on the ground that the judgment is founded on a liability for a willful and malicious injury to the company's property.

[1, 2] The liability underlying this judgment, as shown by the foregoing recital of facts, and which record controls this motion, is a provable debt in bankruptcy. Sections 17 and 63a (1), Bankr. Act; Crawford v. Burke, 195 U. S. 176, 25 Sup. Ct. 9, 49 L. Ed. 147; Tindle v. Birkett, 205 U. S. 183, 27 Sup. Ct. 493, 51 L. Ed. 762; Friend v. Talcott, 228 U. S. 27, 33 Sup. Ct. 505, 57 L. Ed. 718; F. L. Grant Shoe Co. v. Laird, 212 U. S. 445, 29 Sup. Ct. 332, 53 L. Ed. 591. It being a provable debt in bankruptcy, the burden of proof is upon the judgment creditor to show that such liability is within the exception of section 17a (2). In re Grout (Vt.) 92 Atl. 646, 33 Am. Bankr. Rep. 789. This burden has not been sustained. The record negatives any such wrongdoing as is necessary to constitute maliciousness within the meaning of such section. True, a spirit of malevolence (necessary to constitute actual malice) in committing the wrong is not essential to establish the malice contemplated in section 17 (Tinker v. Colwell, 193 U. S. 473, 24 Sup. Ct. 505, 48 L. Ed. 754; Peters v. United States, 177 Fed. 885, 101 C. C. A. 99, 24 Am. Bankr. Rep. 206; Kavanaugh v. McIntyre, 210 N. Y. 175, 104 N. E. 135, 31 Am. Bankr. Rep. 712); yet something more than an intention to do the thing which is subsequently pronounced wrong and inexcusable is necessary to constitute such malice. The wrong that is excluded from the effect of the discharge must be both willful and malicious. The doing of the act voluntarily and intentionally satisfies the former requirement, but does not meet the latter. The use of these two different terms necessarily requires something more than is comprehended in the term first used. Perhaps intentionally doing the thing without just cause or excuse, the criterion adopted in the cases last cited, is a sufficient, precise definition of what will be both willful and malicious; but what is just cause or excuse depends upon the particular circumstances in which the challenged act is done. Such a question is not always determined by the ultimate fact found in a given controversy. In the present case the judicial determination that the defendant was guilty of conversion did not establish that he acted maliciously, for the reason that malice or bad faith is not a necessary element of conversion. If he acted in good faith, the act, though intentional and amounting to conversion would not have been malicious, even though it should be ultimately determined to have been legally indefensible. To hold otherwise would be to make all intentional acts falling under

the head of torts, resulting in injury to person or property, malicious and nondischargeable in bankruptcy, regardless of the motives which animated them.

In the instant case, as the record is made up on this motion, the bankrupt and the Castle Braid Company were mutual dealers. In the course of such dealings he lawfully obtained and used the promissory note in question. The record does not clearly show upon what ground the bankrupt's subsequent conduct turned the lawful receipt and use of this note into a tort. It tends to show that a tort was committed in obtaining the second series of notes, and is silent as to what became of them. But, be that as it may, by the elimination of the charge of fraud contained in the company's second stated cause of action, and its election to stand upon its first alleged cause of action, the contest resulting in said judgment was over the title to one of the first series of notes, the ownership of which admittedly was originally in the bankrupt. A conversion resulting from such a transaction, though a tort, lacks the essential element to constitute the malice under consideration—bad faith. Burnham v. Pidcock, 58 App. Div. 273, 68 N. Y. Supp. 1007, 5 Am. Bankr. Rep. 590; Ulner v. Doran, 152 N. Y. Supp. 655, 34 Am. Bankr. Rep. 410; Hiteshue v. Jones, 28 Am. Bankr. Rep. 854. Neither Kavanaugh v. McIntyre, supra, nor In re Arnao (D. C.) 210 Fed. 395, 32 Am. Bankr. Rep. 88, is in conflict with this view. In both the conduct of the bankrupt was dishonest, as well as unlawful. In the former the court noted that:

It "is very significant that the defendants against whom the judgment was rendered went on the witness stand, but made no attempt to justify or excuse the acts of the firm. These facts show that the conversion of the stock and scrip was not merely technical, nor committed in the assertion of a mistaken claim to the property."

And in the latter the court held:

"That the facts here indisputably show that the wrongful acts of the bankrupt were practically larcenous."

[3] Whether a discharge, if granted to the bankrupt, will release this judgment, cannot be finally determined in these proceedings. In re Mussey (D. C.) 99 Fed. 71, 3 Am. Bankr. Rep. 592; In re Marshall Paper Co., 102 Fed. 872–874, 43 C. C. A. 38, 4 Am. Bankr. Rep. 468; In re McCarty (D. C.) 111 Fed. 151, 7 Am. Bankr. Rep. 40; In re Claff (D. C.) 111 Fed. 506, 7 Am. Bankr. Rep. 128. At this time it is sufficient to say that on the record before this court the judgment creditor has not shown that a discharge, if granted, will not release such liability.

If the bankrupt fails to apply for his discharge within the statutory period, or if the same, when applied for, shall be denied, the restraining order under review expires by its own limitation. If a discharge shall be granted, its permanent efficacy as preventing the enforcement of such judgment can be tried out in proceedings based on such judgment, in which the record underlying that question may or may not be the same as that which controls the present motion. Hallagan v. Dowell (Iowa) 139 N. W. 883, 31 Am. Bankr. Rep. 848.

The motion to vacate is denied.

In re CULGIN-PACE CONTRACTING CO.

(District Court, D. Massachusetts. February 18, 1915.)

No. 14113.

1. BANKRUPTCY ⟸72—CORPORATIONS SUBJECT TO BANKRUPTCY ACT.
A corporation engaged principally in manufacturing is subject to adjudication under the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 544, as amended by Act Feb. 5, 1903, c. 487, 32 Stat. 797, and Act June 15, 1906, c. 3333, 34 Stat. 267), as it stood on September 21, 1908, at the filing of a bankruptcy petition.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 17; Dec. Dig. ⟸72.]

2. BANKRUPTCY ⟸100—INVOLUNTARY PROCEEDINGS—JUDGMENT—RES JUDICATA.
A judgment of a District Court dismissing a bankruptcy petition alleging that the alleged bankrupt, a corporation, was engaged principally in mercantile pursuits, including, among others, those of designing, constructing, enlarging, or otherwise engaged in any work on bridges, streets, foundations, tunnels, waterworks, reservoirs, sewage, dams, and all kinds of excavation, and iron, wood, masonry, earth, and concrete construction, and making contracts therefor, rendered on sustaining a demurrer to the petition on the ground that the petition does not show that the alleged bankrupt can be adjudicated a bankrupt, bars a subsequent petition in another district by creditors intervening in the proceedings, as against the objection that the petition does not explicitly allege that the alleged bankrupt was engaged in manufacturing pursuits.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 60, 131, 141–144; Dec. Dig. ⟸100.]

3. BANKRUPTCY ⟸77—INVOLUNTARY PETITIONS—INTERVENING CREDITORS.
A single intervening creditor may carry on an involuntary petition in bankruptcy good on its face.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 55, 101–103, 105, 106; Dec. Dig. ⟸77.]

4. BANKRUPTCY ⟸100—INVOLUNTARY PETITION—JUDGMENT OF DISMISSAL—CONCLUSIVENESS.
A creditor, failing to intervene in involuntary bankruptcy proceedings dismissed for failure to show that the alleged bankrupt can be adjudicated a bankrupt under the Bankruptcy Act, may not maintain an involuntary petition in another district.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 63, 131, 141–144; Dec. Dig. ⟸100.]

In Bankruptcy. In the matter of the Culgin-Pace Contracting Company, alleged bankrupt. Bankruptcy petition dismissed.

Green & Bennett, of Holyoke, Mass., for Ætna Life Ins. Co.
Parker & Milton, of Boston, Mass., for bankrupt.

MORTON, District Judge. [1] Upon the facts stated in the referee's report, the Culgin-Pace Contracting Company was "engaged principally in manufacturing." Friday v. Hall & Kaul Co., 216 U. S. 449, 30 Sup. Ct. 261, 54 L. Ed. 562, 26 L. R. A. (N. S.) 475. It is therefore subject to adjudication under the Bankruptcy Act as it stood at the filing of this petition on September 21, 1908.

[2] The only other question is whether the decision of the United States District Court for the Southern District of New York, dismissing a bankruptcy petition (sworn to on September 9, 1908) brought against this respondent in that district, bars these proceedings under the principle of res judicata.

All the present petitioners became parties to the New York proceedings by an intervening petition in favor of adjudication therein dated October 27, 1908; i. e., more than a month after this petition had been filed. The only party now before the court that did not join in the suit in New York is the Ætna Life Insurance Company. Whether the Ætna Company was a creditor of the respondent at the date when the New York petition was brought did not clearly appear in evidence before the referee. From facts subsequently agreed upon by the parties, it appears that of the Ætna Company's present claim of $1,743, all but $105 was in existence when the New York petition was filed. There does not appear to have been any material change in the respondent's situation, nor in the business or pursuit in which it was principally engaged, between the filing of the bankruptcy petition in New York and in this district. It is not contended that this petition is, in this respect, based on facts which occurred after the New York petition had been filed, nor on materially different facts from those on which that petition was based.

The petition in this case alleges that the respondent was "engaged principally in manufacturing and mercantile pursuits." The petition in the New York case alleged that said company was "engaged principally in mercantile pursuits, including, among others, those of designing, constructing, enlarging, * * * or otherwise engaged in any work on bridges, * * * streets, * * * foundations, * * * tunnels, * * * waterworks, * * * reservoirs, * * * sewage, * * * dams, and all kinds of excavation, and iron, wood, masonry, earth, and concrete construction, in all parts of the world, and making contracts therefor." The answer in that case, by way of demurrer, alleged that upon the allegations of the petition the respondent was not a corporation subject to adjudication under the Bankruptcy Act, and was not "principally engaged in manufacturing * * * or mercantile pursuits."

The decree of the court was:

"Ordered that the demurrer interposed herein be and hereby is in all respects sustained, and the petition * * * be and hereby is dismissd, upon the ground that said Culgin-Pace Contracting Company is not a corporation entitled to the benefits of the Bankruptcy Act of 1898."

It is true, as the petitioners contend, that the New York petition did not explicitly allege that the respondent was engaged in "manufacturing pursuits," and that the petition here does so allege. But it is also true that the New York petition described with considerable detail the business of the respondent as the facts herein found show it to have been, and that the decision there did not turn upon any narrowness or defect in the petition, nor upon any lack of jurisdiction, but was made upon the broad ground that the respondent was not, on the allegations in the petition, "a corporation entitled to

the benefits of the Bankruptcy Act of 1898." In view of those allegations, the omission of the words "manufacturing pursuits" does not constitute an essential difference between the two petitions. The point decided in the New York case was not merely whether the respondent was "engaged in mercantile pursuits," but whether, being engaged in the business described in the petition, it could be adjudicated a bankrupt under the act as it then stood. The demurrer explicitly raised that question.

It is the very issue here presented; and as to the present petitioners who were parties in that case, it has been adjudicated against them. No appeal having been taken, that judgment is final and concludes their rights. Parties litigant are estopped by the judgment as to all matters which were properly involved in the case. Stark v. Starr, 94 U. S. 477, 485, 24 L. Ed. 276; Hein v. Westinghouse Air Brake Co. (C. C.) 172 Fed. 524; Union Pacific Co. v. Mason City, etc., Co., 165 Fed. 844, 850, 91 C. C. A. 530. The question whether the respondent corporation was "engaged principally" in such a pursuit that it could be adjudicated bankrupt was a single question.

"The law, to prevent vexatious or oppressive litigation, forbids the splitting up of one single or entire cause of action into parts, and the bringing of separate actions for each." Andrews, J., Perry v. Dickerson, 85 N. Y. 345, 39 Am. Rep. 663.

See Goodman v. Pocock, 15 Ad. & El. N. S. 576; Hoseason v. Keegen, 178 Mass. 247, 59 N. E. 627.

"Here we find in the prior judgment a solemn and express adjudication in favor of the validity of the patent. If in that particular the court went beyond its province, its action was not void, and the remedy for the respondents was to apply to have its decree amended." Putnam, J., Empire State Nail Co. v. Am. Solid Leather Button Co., 74 Fed. 864, 21 C. C. A. 152 (C. C. A. First Circuit.)

"This finding, having gone into the judgment, is conclusive as to the facts found in all subsequent controversies between the parties on the contract." Field, J., Lumber Co. v. Buchtel, 101 U. S. 638, 639, 25 L. Ed. 1072.

[3, 4] There remains the further question whether the fact that the Ætna Life Insurance Company, which here intervened in favor of adjudication on February 5, 1909, was not a party to the New York proceedings, saves this petition from being barred by the New York decision. A single intervening creditor has the right to carry on a petition good on its face. Re Sheffer, Fed. Cas. No. 12,742; Collier on Bankruptcy (10th Ed.) p. 780. The Ætna Company had the right to intervene in the New York proceedings, of which it is assumed to have taken notice. Re Billing (D. C.) 145 Fed. 395; Collier, p. 782. Its failure to exercise such right does not, I think, leave it in any more favorable position, as to these proceedings, than those creditors who did intervene in New York.

"It cannot reasonably be presumed that Congress intended to authorize different creditors to come in successively and retry issues which have been decided, and in that way make the pendency of involuntary cases perpetual." Hanford, J., Neustadter v. Chicago Dry Goods Co. (D. C.) 3 Am. Bankr. Rep. 96, 96 Fed. 830.

The petitioning creditors in the New York case represent, as to the issues there raised, all the creditors of the respondent; and the adjudication there binds the entire class of creditors of which the petitioners were representatives. McIntosh v. Pittsburgh (C. C.) 112 Fed. 705, at 707. The result, which is regrettable, is that the petition must be dismissed.

Petition dismissed.

In re WILKES-BARRE LIGHT CO.

(District Court, M. D. Pennsylvania. June 22, 1915.)

No. 2082.

1. BANKRUPTCY ⟸72—CORPORATIONS SUBJECT TO BANKRUPTCY ACT—"MANUFACTURING"—"MERCANTILE PURSUIT."

A corporation generating electricity and transmitting it over its wires to its consumers for a consideration is not engaged in "manufacturing" or a "mercantile pursuit," within Bankr. Act July 1, 1898, c. 541, § 4, 30 Stat. 547, as amended by Act Feb. 5, 1903, c. 487, § 3, 32 Stat. 797 (Comp. St. 1913, § 9588), and it cannot be adjudged a bankrupt.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 17; Dec. Dig. ⟸72.

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

2. BANKRUPTCY ⟸72—CORPORATIONS SUBJECT TO BANKRUPTCY ACT—PUBLIC SERVICE CORPORATIONS.

A corporation organized under a state statute to manufacture electricity, and supply light, heat, and power by electricity, with the right to a certain extent of exercising eminent domain, and with authority from the state to use the highways of a municipality, subject to reasonable regulations of the municipality, and defined by state statute as a public service corporation, and manufacturing and supplying electricity for light, heat, and power is not within Bankr. Act July 1, 1898, § 4, as amended by Act Feb. 5, 1903, § 3, providing that any corporation engaged principally in manufacturing or mercantile pursuits may be adjudged a bankrupt.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 17; Dec. Dig. ⟸72.]

In Bankruptcy. In the matter of the Wilkes-Barre Light Company, an alleged bankrupt. Demurrer to petition in bankruptcy sustained, adjudication denied, and petition dismissed.

A. Hourigan, Wm. N. Reynolds, Jr., and D. A. Fell, all of Wilkes-Barre, Pa., for petitioners.

Jos. E. Fleitz, of Wilkes-Barre, Pa., C. M. Bowman, of Philadelphia, Pa., and E. G. Butler, Chas. A. Shea, and Geo. J. Llewellyn, all of Wilkes-Barre, Pa., for bankrupt.

WITMER, District Judge. A creditor's petition was filed, on January 24, 1912, against the Wilkes-Barre Light Company. The petition alleges that the company is engaged in business in the city of Wilkes-Barre and is by occupation a merchant, and that while insolvent it committed an act of bankruptcy in applying to the courts of Luzerne county for the appointment of a receiver. On motion a receiver was

appointed by this court. Since then three receivers were substituted for the one originally appointed, who have managed the business of the company to date. On February 14, 1912, the company demurred to the petition, assigning five reasons, one of them being the lack of jurisdiction; and on the same day three answers were filed, two by intervening creditors, and one by stockholders and bondholders. On February 17th of the same year the petitioning creditors, the light company, and the intervening creditors agreed on a suspension of proceedings until any of the parties should give 10 days' notice to resume; the object of the agreement being, as stated, for "the purpose of harmonizing all conflicting interests, and promoting the business of the company, and securing to it a full enjoyment of its franchise." Since then the parties to the agreement, having failed in their purpose, moved the court to a determination of the issues presented by the creditor's petition, and the demurrer and the answers thereto, and on consideration the court overruled the demurrer, reserving the matter of jurisdiction, also raised in the answers filed. Testimony was taken, and the matter as presented, determining whether the petition can be maintained, rests in the answer whether a corporation of the character of the light company is embraced in the provisions of the Bankruptcy Act.

The company was incorporated April 19, 1910, in compliance with the requirements of an act of the General Assembly of Pennsylvania entitled "An act to provide for the incorporation and regulation of certain corporations," approved the 29th day of April, 1874 (P. L. 73), and the several supplements thereto, for the purpose of "manufacturing electricity, supplying of light, heat and power by means of electricity to the public in the city of Wilkes-Barre, Luzerne county, Pennsylvania, and to such persons, partnerships, and corporations residing therein or adjacent thereto as may desire the same." It appears in evidence that the company accepted the charter and perfected its organization. The necessary buildings, machinery, and apparatus for supplying light, heat, and power were erected, and means furnished to distribute the same to its patrons, such as department stores, theaters, dwellings, running elevators, etc., from which it realized a gross income of about $30,000 per annum. In brief, the company is in the business of generating electricity and supplying the same to all who may be in need of it at a determined rate of compensation.

[1] Is this company principally engaged in mercantile pursuits, or a merchant, as alleged in the petition, under the term implied in the act? The bankruptcy law (Act July 1, 1898, c. 541, § 4, 30 Stat. 547 [U. S. Comp. St. 1901, p. 3423], as amended by Act Feb. 5, 1903, c. 487, § 3, 32 Stat. 797 [U. S. Comp. St. Supp. 1907, p. 1025]), provides that "any corporation engaged principally in manufacturing, trading, printing, publishing, mining, or mercantile pursuits, owing debts, * * * may be adjudged a bankrupt upon default or an impartial trial," and shall be subject to the provisions and entitled to the benefits of the act. The petitioners insist that the alleged bankrupt is a manufacturer and engaged in mercantile pursuits, and therefore subject to the provisions of the law. The respondents deny this conten-

tion, and argue that, even if this be true, the corporation ought not be regarded otherwise than as a public service corporation, and is therefore beyond the provisions of the act.

The subject of electricity is always interesting, and the study of it opens a field almost without limitation. Much has been said and written, and it yet remains shrouded in mystery, and courts remain divided as to whether electricity is a product to be manufactured. Without attempting a lengthy scientific speculation or rehearsal of conflicting views of opinions of those whose duty it has been to give this matter consideration for one reason or another, I record myself with those of opinion that generating electricity is not manufacturing, nor is the transmitting of electricity over lines of wire to consumers for a consideration a mercantile pursuit, within the meaning of the Bankruptcy Act. To this end the very able opinion of Judge Ray and the authorities there collected in Re H. R. Elec. Power Co., 23 Am. Bankr. Rep. 191, 173 Fed. 934, are indeed very persuasive.

[2] However, if the company should be regarded as manufacturing or engaged in mercantile pursuits, as contemplated by the act, it has authority to do much more. Under authority of its charter and the provisions of Act May 8, 1889, § 2, cl. 1 (P. L. 136), providing that "every such corporation shall have * * * authority to supply light, heat and power, or any of them, by electricity, to the public in the borough, town, city or district where it may be located, and to such persons, partnerships and corporations, residing therein or adjacent thereto, as may desire the same, at such prices as may be agreed upon, and the power also, to make, erect and maintain the necessary buildings, machinery and apparatus for supplying such light, heat and power, or any of them, and to distribute the same, with the right to enter upon any public street, lane, alley or highway for such purpose, to alter, inspect and repair its system of distribution," the company has the right, to a certain extent, of exercising eminent domain, and is therefore correlatively charged with a duty to the public which is no part of the duties of an ordinary corporation "engaged in manufacturing, trading, printing, publishing, mining or mercantile pursuits." It is a utility corporation by necessity of the law creating it as such. The impress of its character is fixed by statute, and though municipal consent may be withheld for a time, as in the case before us, the nature or character of the corporation is not changed, nor is it dependent on the action of the municipality conferring or vacating the right of public franchise. The power and authority to use the highways of a municipality by an electric light company is conferred by the state and not by the municipality. The municipality has but the power to prescribe the manner and mode of using the highways. Hence it has been held that, where such power is exercised unreasonably or arbitrarily, courts will interfere. McQuillin on Municipal Corporations, §§ 728–738.

When the petition was filed the city of Wilkes-Barre had not yet recognized this company with the right of public franchise. Since then this has been conferred by ordinance of the city government. However, this has in no manner changed the nature of its use. It re-

mains but what it was before, and is now only what it was then. The Legislature has also stamped the character and nature of this class of corporations upon their charters, and by Act July 26, 1913, § 1 (P. L. 1374, 1375), defines a public service company without reservation as those including electric corporations.

Being of the opinion that Congress had not intended to include corporations such as this now before the court in the enumeration of section 4 of the Bankruptcy Act, either as it originally stood or as it has since been amended, it follows that adjudication is denied, and the petition is dismissed.

In re M. L. B. STURKEY CO., Inc.

In re CHASE CITY MFG. CO.

(District Court, W. D. South Carolina. July 6, 1915.)

1. BANKRUPTCY ⟸140—PROPERTY VESTING IN TRUSTEE—CONDITIONAL SALES —CONSIGNMENT.

An unrecorded contract, stating that the first parties had consigned a car of wagons to the second parties "to be paid for as follows: * * * All goods sold during the month be paid for the first day of the succeeding month," the second parties to store and insure the wagons, and in case of their destruction or injury by fire to pay for them at cost—and which made no provision reserving title, or for the return of the unsold wagons, is a contract of sale, not consignment, the word "consigned" being used in the sense of "delivered," and the trustee in bankruptcy of the second party is entitled to the wagons.

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

2. BANKRUPTCY ⟸184—PROPERTY VESTED IN TRUSTEE—VOID LIEN.

Even if that contract were construed to be a consignment, not a sale, it made the consignee a bailee, and was void against the trustee in bankruptcy, under Civ. Code S. C. 1912, § 3740, providing that agreements by which the vendor or bailor reserves any interest in the property shall be void as to subsequent creditors, unless they are in writing and recorded.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 275–277; Dec. Dig. ⟸184.]

In Bankruptcy. Proceedings against the M. L. B. Sturkey Company, Incorporated. On exceptions to the report of the referee disallowing the claim of the Chase City Manufacturing Company to certain property in the hands of the trustee. Referee's report approved and affirmed.

J. Moore Mars, of Abbeville, S. C., for trustee.
Featherstone & McGhee, of Greenwood, S. C., for claimant.

JOHNSON, District Judge. This case came on to be heard before me, at the request and by consent of counsel, on exceptions to the report of the referee. On May 1, 1914, M. L. B. Sturkey Company, a mercantile corporation, entered into a contract with the Chase City Manufacturing Company for the purchase of a car load of wag-

ons, to be shipped October 1 to November 1, 1914. It is provided in the said contract, among other things, as follows:

"It is expressly understood and agreed that all goods on hand and proceeds of all sales of goods received under this contract, also of all goods hereafter shipped to the maker of this contract, whether the proceeds are in notes, cash, or book accounts, are to be held as collateral security in trust and for the benefit of and subject to the order of the Chase City Manufacturing Company, until full cash settlement has been made of all obligations due to the said Chase City Manufacturing Company; that the title and ownership of all goods shipped under this contract shall remain vested in the Chase City Manufacturing Company until the price thereof shall have been paid in cash, or until all notes given under this contract are paid; but nothing in this clause shall be considered a release from making payments as provided elsewhere in this contract. If said goods, or any part thereof, be lost, damaged, or destroyed, before payment in full therefor by us, there shall be no rescission of the contract nor abatement in the price, but same shall be our loss, and not that of the Chase City Manufacturing Company.

"It is further understood and agreed that notes taken by the Chase City Manufacturing Company in settlement are not accepted as payment, but only as evidence of indebtedness. We further agree that a receipt from transportation company for goods delivered in good order shall be a release to the Chase City Manufacturing Company, and agree to look to the transportation company for all losses occasioned by rubbing, chafing, or any damage which may occur to goods while in transit, or the nondelivery of any goods receipted for.

"It is further agreed that in case of death or financial embarrassment of the firm, or any member or individual making this contract, all accounts or notes for goods bought under this contract shall become immediately due and payable. Right of homestead and exemption expressly waived. Accepted subject to the approval of the Chase City Manufacturing Company."

The wagons were shipped about October 1st. When the invoice reached Sturkey Company, Sturkey Company wrote as follows:

"McCormick, S. C., Oct. 1, 1914.

"The Chase City Mfg. Co., Chase City, Va.—Gentlemen: Your invoice of wagons received, and we wired you immediately: 'Have wagons returned to you. We cannot use under present conditions. See letter.' We did not expect the shipment to be made before November, as the duplicate stated same to be made October to November, and under the present disastrous situation you surely should have conferred with us before shipping. It is out of the question for us to handle the car now, as the situation in this section is desperate both as to collections and cash sales. Trusting our telegram reached you before the car left your city, and that you have had same returned to you.

"Yours truly, M. L. B. Sturkey Company."

On October 5th the Sturkey Company wired as follows:

"Chase City Mfg. Co., Chase City, Va.:

"Your ignoring of instructions as well as disregard of distressed conditions in cotton section justify our refusal of wagons except on consignment contract. Wire your acceptance of such terms and will proceed to unload car. For less than ten cents for cotton there will be no wagon business for some time.

"M. L. B. Sturkey Company."

And the Chase City Manufacturing Company answered on October 6th as follows:

"M. L. B. Sturkey Company, McCormick, S. C.:

"Unload wagons, consignment contract will follow in mail.

"Chase City Wagon Mfg. Co."

Following the foregoing letter and telegrams the second contract was entered into, to wit:

"This contract, made this 6th day of October, in the year 1914, by and between the Chase City Manufacturing Company, of Chase City, Mecklenburg county, Virginia, parties of the first part, and M. L. B. Sturkey Company, of McCormick, S. C., parties of the second part: Parties of the first part have this day consigned a car of wagons to parties of the second part to be paid for as follows: Prices named in order for goods to stand, and all goods sold during the month to be paid for the 1st day of the succeeding month at $24.25 and $25.25 for the one-horse wagons and $40.00 and $41.00 for the two-horse wagons. Parties of the second part to store and keep insured the wagons, and should a fire occur, and burn or injure them, then parties of the second part agree to settle at once for them. Parties of the first part are privileged to check up the wagons at any time they may see fit to do so.

"Witness our hands and seals this the 6th day of October, 1914.

"Chase City Mfg. Co., [Seal.]
"By Lucious Gregory, President,
"M. L. B. Sturkey Co., [Seal.]
"By M. L. B. Sturkey, President."

Neither contract was recorded. In January, 1915, the M. L. B. Sturkey Company was adjudged bankrupt, and thereafter a trustee was elected, who took charge of the property of the bankrupt, including the wagons here in controversy. The Chase City Manufacturing Company filed its petition, alleging that it had title to and was the owner of the wagons and entitled to their possession. The referee heard the case and filed his report, in which he held that the wagons passed to the trustee in bankruptcy for the benefit of the creditors of the bankrupt. There were subsequent creditors in this case, but the referee does not refer to that fact in his report. The Court of Appeals, in Millikin v. Bank, 30 Am. Bankr. Rep. 477, 206 Fed. 14, 124 C. C. A. 148, in construing and giving effect to the amendment of 1910 as to the rights of the trustee, holds that the trustee occupies the position of a lien creditor for the benefit of all creditors of the bankrupt. This cuts out, root and branch, all secret liens, as the law intended.

It is conceded by counsel for the petitioner that under the original contract, unrecorded, the title to the wagons would pass to the trustee; but it is earnestly and ably insisted that the substituted contract of October 6, 1914, merely created the M. L. B. Sturkey Company agent of the Chase City Manufacturing Company, and that the title to the wagons never passed and was never intended to pass to the M. L. B. Sturkey Company. Being strongly impressed with the equities of the petitioner, I have examined this case very carefully. It seems to me that the material difference between the substituted contract of October 6, 1914, and the original contract, is in the terms of payment. The original contract fixed definite periods of 60, 90, and 120 days, while the substituted contract provided that the wagons sold during any one month should be paid for on the 1st day of the following month. It is true that the contract of October 6th states that the "parties of the first part have this day consigned a car of wagons to the parties of the second part"; but in the same sentence it is stated that the wagons are "to be paid for as follows." The word "consigned," as used in this contract, seems to be used in the sense of "delivered." There is no reservation of title in the Chase City Manufacturing Com-

pany, nor any agreement for the return of the unsold portion of the goods, nor any other word, phrase, or sentence that would ordinarily be used in drawing a contract of consignment. It seems to me to be a sale.

[2] But, even if it could be held that it was a contract of consignment, nevertheless the relation of bailor and bailee existed between the petitioner and the bankrupt. Section 3740 of the Code of Laws of South Carolina (1912), vol. 1, provides as follows:

"Every agreement between the vendor and vendee, bailor or bailee of personal property, whereby the vendor or bailor shall reserve to himself any interest in the same, shall be null and void as to subsequent creditors (whether lien creditors or simple contract creditors) or purchasers for valuable consideration without notice, unless the same be reduced to writing and recorded in the manner now provided by law for the recording of mortgages; but nothing herein contained shall apply to livery stable keepers, inn keepers, or any other persons letting or hiring property for temporary use or for agricultural purposes, or depositing such property for the purpose of repairs or work or labor done thereon, or as a pledge or collateral to a loan."

With the exceptions named in the statute, contracts of bailment must be reduced to writing and recorded like mortgages. This case does not fall within any of the exceptions named in the statute. "The inclusion of the one is the exclusion of the other." The failure to record the contract was fatal to the petitioner. Augusta Grocery Co. v. Moline Plow Co., 31 Am. Bankr. Rep. 677, 213 Fed. 786, 130 C. C. A. 444; Townsend, Leaphart, etc., v. Ashepoo Co., 31 Am. Bankr. Rep. 682, 212 Fed. 97, 128 C. C. A. 613.

The report of the referee is approved and affirmed.

RUSSELL et al. v. SHIPPEN BROS. LUMBER CO.

(District Court, N. D. Georgia. March 22, 1915.)

No. 55.

1. CORPORATIONS ⇐557—STOCKHOLDERS' ACTIONS—SUFFICIENCY OF BILL.

In a stockholders' suit for a receivership of the corporation and other relief, an allegation on information and belief that the chief executive officer of the corporation asserted an indebtedness against the company in a large amount, which indebtedness was not admitted by plaintiffs, that the validity of such indebtedness should be carefully investigated, and that there were equitable rights in favor of the corporation against such officer, which should be asserted in favor of the company by one whose interest did not conflict with his duties, was insufficient under equity rule 27 (198 Fed. xxv, 115 C. C. A. xxv), providing that every bill brought by stockholders and founded on rights which may properly be asserted by the corporation must be verified by oath and contain an allegation that plaintiff was a shareholder at the time of the transaction of which he complains, or that his share has since devolved on him by operation of law, that the suit is not a collusive one to confer jurisdiction on a court of the United States, and must also set forth with particularity plaintiff's efforts to secure such action as he desires on the part of the managing directors or trustees and the causes of his failure to obtain such action or the reasons for not making such effort.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2227, 2228, 2230–2236; Dec. Dig. ⇐557.]

2. CORPORATIONS ⟸557—STOCKHOLDERS' ACTIONS—SUFFICIENCY OF BILL.
In a stockholders' suit for a receivership and to enjoin persons claiming to be the president and vice president of the corporation from exercising the powers of those or any other offices, the bill alleged that it would be useless to make demand upon the president to file suit against himself, that plaintiff had made demand upon the corporation and its officers and directors that it sue such officers for the purpose of restraining them and their agents from acting as officers and directors and diverting the assets of the company and restraining them from asserting claims against the corporation, that for reasons unknown to the plaintiffs this demand had been refused, and that the suit was not filed for the purpose of collusively giving jurisdiction to the court of a cause of which it had not jurisdiction. *Held*, that this allegation was sufficient under equity rule 27, relative to the allegations of stockholders' bills.
[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2227, 2228, 2230–2236; Dec. Dig. ⟸557.]

3. EQUITY ⟸363—MOTIONS TO DISMISS—SUFFICIENCY OF BILL.
Where the original and supplemental bill in a suit in equity were presented to the judge designated to hold District Court, and such judge allowed them to be filed, this was persuasive, though not controlling, on a motion to dismiss, that they made a case justifying the interposition of a court of equity.
[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 762–766, 768; Dec. Dig. ⟸363.]

In Equity. Suit by Charles S. Russell and others against the Shippen Bros. Lumber Company. On motion to dismiss. Motion overruled.

Robert C. & Philip H. Alston, of Atlanta, Ga., for plaintiff.
Charles T. & Linton C. Hopkins, of Atlanta, Ga., for defendant.

NEWMAN, District Judge. This case is now before the court on a motion to dismiss. The original bill was filed September 15, 1914. At that time it was presented to Hon. Don A. Pardee, United States Circuit Judge, who was then, and is now, designated to hold the District Court in this district. Judge Pardee made the following order thereon:

"The bill in the above-mentioned cause having been presented to the court, it is ordered that the same be filed and subpœna issue as therein prayed, and that the same be served upon the defendant, Shippen Bros. Lumber Company, and that the said Shippen Bros. Lumber Company show cause, before the judge presiding in the United States District Court for the Northern District of Georgia, on the 21st day of September, 1914, at 10 o'clock a. m., in the courtroom in the city of Atlanta, Ga., why the prayers of the petition should not be granted and receiver appointed. Let copy of this order be served upon the said Shippen Bros. Lumber Company as early as practicable. The court takes jurisdiction of this cause and of the assets of the said defendant company."

Three days thereafter, September 18, 1914, what is styled a supplemental bill was filed by the plaintiff. This supplemental bill set up a meeting of the stockholders of the defendant company held at Elijay on September 16th. A history of this meeting is set out in the supplemental bill, and it was claimed that the meeting resulted in the election of a board of directors composed of H. A. Bull and others, and

it alleges the board of directors headed by Will H. Shippen was not elected, although claiming to have been.

The plaintiff prayed that this supplemental bill be allowed to be filed; that William H. Shippen and F. E. Shippen be restrained and enjoined from exercising the powers of any office, especially the offices of president and vice president (to which offices it is theretofore stated in the supplemental bill they claimed to have been elected by the board of directors), and also restrained and enjoined from trespassing upon the property of the company, and required to deliver the books and papers of the company; further, that a receiver or receivers be appointed to take charge of the property and assets of the company; that the prayers of the original bill are adopted and made the prayers of the supplemental bill; that it be adjudicated that William H. Shippen, Frank E. Shippen, J. P. Cobb, St. J. P. Graham, and Leonard Harrison are not directors or officers of the company, and that they were not elected at such pretended meeting which has been referred to, and for general relief and subpœna.

[1] In the original bill there was a paragraph in the following language:

"Your orators are further informed, and on information and belief allege, that the chief executive officer of the said lumber company is among said claimants, and avers an indebtedness against said company in a large amount, which indebtedness is not admitted by your orators; and your orators aver that the validity of said indebtedness so claimed should be carefully investigated before the same is paid by said lumber company, and that there are equitable rights in favor of said lumber company against said chief executive which should be asserted in favor of said company by one whose interest does not conflict with his duties."

This is clearly defective in pleading what it was evidently intended for in compliance with new equity rule No. 27 (198 Fed. xxv, 115 C. C. A. xxv), which is as follows:

"Every bill brought by one or more stockholders in a corporation against the corporation and other parties, founded on rights which may properly be asserted by the corporation, must be verified by oath, and must contain an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his share had devolved on him since by operation of law, and that the suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance. It must also set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and, if necessary, of the shareholders, and the causes of his failure to obtain such action, or the reasons for not making such effort."

This last language, "or the reasons for not making such effort," was added to old equity rule 94, and is now a part of the same rule, known in the new rules as No. 27, as stated.

[2] In the supplemental bill, after stating that William H. Shippen sets up claim against the Shippen Bros. Lumber Company for over $50,000, proceeds in this language:

"Your orators further aver that it would be useless to make demand upon said William H. Shippen to file suit against himself, and that your orators have made demand upon the Shippen Bros. Lumber Company, one of the defendants herein, and upon its officers and directors, that defendant institute

suit against the said William H. Shippen and Frank E. Shippen for the purpose of enjoining and restraining them and their agents from acting as officers and directors of the said lumber company, and for the purpose of restraining them from diverting the assets of the said company, and restraining them from asserting any rights and liabilities which they or either of them claim against said Shippen Bros. Lumber Company on any account whatsoever, and especially upon a certain alleged note of said Shippen Bros. Lumber Company claimed to be held and owned by the said William H. Shippen, and that for reasons unknown to your orators this demand has been refused. This suit is not filed for the purpose of collusively giving jurisdiction to this honorable court of a cause of which it has not jurisdiction."

This allegation seems to be sufficient, under rule 27. This supplemental bill was also presented to Judge Pardee on September 18, 1914, and on that he makes this indorsement:

"Leave to file this supplemental bill is granted, it being understood that the status quo of this property be maintained, and it is ordered that the status quo of the property be maintained until the further order of the court."

This indorsement was signed by Judge Pardee. On September 30, 1914, there was an amendment to the original and supplemental bill, and on December 19, 1914, a new supplemental bill. This new amendment and this new supplemental bill greatly enlarge the scope of the litigation; but it is unnecessary to refer to them in the particular matter now before the court for decision, because, if a case was made which justified the court in entertaining the proceeding by the original bill and the first supplemental bill, that will be sufficient for the present purpose.

[3] Judge Pardee, as stated, allowed the filing of both the original and the first supplemental bill. While I do not say that this is controlling here, and that I may not go into the matter on this motion to dismiss and consider their sufficiency, it is at least persuasive that a case was made by this original and first supplemental bill which justified the interposition of a court of equity.

Considered as a stockholders' proceeding against the Shippen Bros. Lumber Company originally, as I have stated, I think what was alleged in the original bill in compliance with equity rule 27, though defective, was cured by this supplemental bill and by the allegations therein made. In the opinion filed on the 14th of November, 1914, among other things it was stated:

"As to the question arising in this case as to the jurisdiction of this court as a court of equity, * * * I do not see, in view of the allegations of the bill and the questions necessarily arising, how there could be a determination of the matter otherwise than in a court of equity."

The motion to dismiss will be overruled and denied.

In re WEBB CO.

(District Court, E. D. Pennsylvania. July 1, 1915.)

No. 4868.

BANKRUPTCY ⊂=172—RIGHTS OF TRUSTEE—TRANSFERS.

A manufacturer of fire apparatus, contracting with a city to make and deliver fire apparatus subject to inspection and acceptance by the city, assigned the money due from the city under the contract to an assignee in consideration for a loan made or note discounted. The assignee had no notice or reason to suspect the insolvency of the manufacturer. A few days before the bankruptcy of the manufacturer, and while he was insolvent and so known to be by the assignee, the manufacturer transferred to the assignee the apparatus specified in the contract. The assignee took possession as security for the loan. *Held*, that the transfer of the property was void, and the trustee in bankruptcy was entitled to possession thereof, for the assignment did not include a transfer of the apparatus, and the assignee obtained no rights thereunder until the city inspected and accepted it.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 220; Dec. Dig. ⊂=172.]

In Bankruptcy. In the matter of the Webb Company, bankrupt. Sur petition for review of order of referee adjudging that the trustee in bankruptcy was entitled to certain property. Findings of referee approved, order affirmed, and petition for review dismissed.

Marshall Van Winkle, of Jersey City, N. J., and Arthur G. Dewalt, of Allentown, Pa., for petitioners.

Butz & Rupp, of Allentown, Pa., for trustee.

George W. Aubrey, of Allentown, Pa., for bankrupt.

DICKINSON, District Judge. Statements of the two conventions into which the parties have entered must be preliminarily formulated. One is that the rights of the parties are to be determined without respect to any methods of legal procedure. The other is that these rights are to be found as of the date of bankruptcy, unaffected by what the parties have by agreement since done. A statement of these conventions is necessary in order to eliminate from the cause certain questions which would otherwise arise. Such a statement is further helpful to bring out in clearer relief the real question which is involved in the decision of the cause. A few general facts will suffice to disclose what this real question is.

The bankrupt was a fabricator of fire apparatus. It entered into an agreement to make and deliver to the city of Alhambra, Cal., a fire pump and hose cart, to be delivered at Alhambra, subject to inspection and acceptance. Being in need of funds, the bankrupt had secured from the Merchants' National Bank of Jersey City, N. J., the discount of its paper, payment of which had been demanded by the bank. The bankrupt desired to make another loan, out of which it could pay the loan already made to it. The bank was unwilling to supply the money without security, and an assignment of contracts upon which there was money due or to become due to the bankrupt was

suggested. The Alhambra contract was of the kind which the parties to this negotiation had in mind.

It is well to pause right here to analyze and appraise the situation. The bankrupt had two things. One was a contract upon which it would be entitled to a sum of money if and when it on its part had complied with the terms and conditions of the contract. This meant that there was no money coming to it unless and until it had delivered the fire apparatus in compliance with its agreement. It had also the fire apparatus, which, for clarity of view, we are assuming it to have completed and have ready for delivery.

It is reasonably clear that in such a position, if the bankrupt had both assigned the contract and had transferred the possession of the apparatus to the bank (there being then no question of insolvency or other legal obstacle in the way of the transfer), the bank could have delivered the apparatus to the purchaser and upon acceptance could have collected the price. If the bank had taken a transfer of the possession of the apparatus alone, without an assignment of the contract, then (under like conditions of the absence of other legal objections to the transfer) the bank would have become the owner of the apparatus and in a proper case could have disposed of it as such and retained the proceeds. If the bank had taken only an assignment of the contract and of the claim of the bankrupt against the city of Alhambra, then it would have taken nothing, or at least nothing which would have been of any avail to it, unless the bankrupt had carried out its agreement of sale.

To pursue the analogue a little further, if the bankrupt had then sold the machine to another purchaser, or it had been levied upon under an execution and sold by process of law, it is obvious that the bank would have received nothing. The referee, under the evidence in this case and the stipulation of the parties, has found that the latter is the position in which the bankrupt is placed. There are several matters of fact in controversy before the bank even reaches the position thus assumed for it. Finding, however, all these preliminary questions in its favor, to wit, that it gave value for what it received, and that there was an assignment in effect made, of which equity can take cognizance, it was nevertheless originally only an assignment of the contract, and did not include a transfer of the physical apparatus which we are assuming to have been completed. An effort was subsequently made to supply this omission by adding to the assignment of the contract a transfer and delivery of the apparatus. This latter transfer, however, was within a few days of the appointment of a receiver and of the petition in bankruptcy, and was made at a time when the Webb Company was manifestly insolvent, and was without other consideration than a pre-existing debt. This transfer of the physical thing was therefore an act which was null and void, and we are remitted to a statement of the position of the bank to be that of simply an assignee of the contract.

This brings us back to a recapitulation of the few simple facts already mentioned and a restatement of the real question before us. Given their utmost effect in favor of the bank, the facts are these:

For value received, in the form of a loan made or note discount, the bank received from the Webb Company, without notice or reason to suspect its insolvency, an assignment of all moneys due to the Webb Company by the city of Alhambra under the contract to which allusion has already been made. The Webb Company had then (by anticipation as an assumed fact) a fire pump and hose cart which it had made. The Webb Company then became insolvent, and in view of and prompted by the bank's knowledge of this insolvency, the bank obtained from the Webb Company a transfer of the pump and hose cart and took possession of them as security for the loan before that time made. The Webb Company shortly afterwards, and well within the period during which transfers are prohibited by the Bankruptcy Act, went into bankruptcy. The trustee took possession of the apparatus, etc., and the question arose between the trustee and the bank to whom the apparatus belonged.

The referee has decided the question in favor of the trustee, and in so doing it must be clear to any one that he was right. Had there been, as part of the original transaction, both an assignment of the contract and a transfer of the thing, accompanied with possession, the title of the bank would have been immune from attack. Delivery of possession in this sense is not necessarily an actual physical possession. It is sufficient if there has been such a delivery of which the subject-matter was reasonably capable. It is clear under the facts in this case that there was neither a transfer of title nor possession. The assignment of the contract itself might involve under certain circumstances and carry along with it a transfer of title and the right to possession of the thing which is the subject-matter of the contract; but the only legal equivalent of such transfer in fact would be such conditions out of which the right of the purchaser to compel a delivery of the thing bargained for arose.

The touchstone by which the existence or nonexistence of this right can be determined is to moot the question:

"Could the city of Alhambra have enforced against the trustee in bankruptcy the delivery of the apparatus, by compelling the trustee to have completed it in compliance with the contract into which the bankrupt had entered?"

To ask this question is under the facts of this case to answer it. The views of the referee have support in the case of Guarantee Co. v. Bank, 185 Fed. 373, 107 C. C. A. 429, 26 Am. Bankr. Rep. 85 (reversing In re Pittsburgh Industrial Iron Works [D. C.] 179 Fed. 151, 25 Am. Bankr. Rep. 221); In re Stiger (D. C.) 202 Fed. 791, 29 Am. Bankr. Rep. 253; Andrews & Co. v. Osborne, 209 Fed. 148, 126 C. C. A. 96, 31 Am. Bankr. Rep. 634; Citizens' Trust Co. v. Howell, 19 Pa. Super. Ct. 255. Some of these rulings are not, however, directly in point under the special facts of the instant case.

The findings of the referee are approved, the order as made by the referee affirmed, and the petition for a review dismissed.

Ex parte CHING HING.

(District Court, W. D. Washington, N. D. May 10, 1915.)

No. 2857.

1. HABEAS CORPUS ⊂⊃5—APPEAL—DETERMINATION.

Where a Chinese held for deportation applied for a writ of habeas corpus because his appeal had not been determined by the Secretary of Labor or a duly authorized Acting Secretary, and after a commission had been ordered to take the testimony of witnesses as to the authority of the one who heard the appeal, the appeal was considered by the Secretary himself, and the order for deportation affirmed, that hearing gives the petitioner all that he could secure by writ of habeas corpus, and the commission will be recalled, and the petition for writ denied.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 5; Dec. Dig. ⊂⊃5.]

2. ALIENS ⊂⊃32—EXPULSION—APPEAL—RIGHT OF COUNSEL.

On an appeal to the Secretary of Labor from an order deporting a Chinese, the applicant has no right to appear by counsel or to introduce further evidence in his own behalf.

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

Application by Ching Hing for a writ of habeas corpus for his discharge from the custody of the Department of Immigration. Writ discharged.

Beeler & Sullivan, of Seattle, Wash., for applicant.

Clay Allen, U. S. Dist. Atty., of Seattle, Wash., and George P. Fishburne, Asst. U. S. Dist. Atty., of Tacoma, Wash.

NETERER, District Judge. The petitioner alleges in substance that he arrived at the port of Seattle on the 15th of August, 1914, and applied for admission; that he was given a hearing and examination before the immigration officers, and on the 27th of August, 1914, an order was issued by the Commissioner of Immigration at Seattle, denying admission and ordering his deportation; that an appeal was prosecuted to the Secretary of Labor, and that on September 26, 1914, the order of deportation was confirmed; that his appeal was determined by J. B. Densmore, the Solicitor of the Department of Labor, and not by the Secretary of Labor, or the Assistant Secretary of Labor, each of whom, at the time of the determination of said appeal, was at his respective office in the city of Washington, and that the determination of his appeal by another not authorized is not a fair hearing and does not accord to him due process of law. By further supplemental or amended petition filed on the 25th of January, 1915, petitioner states that he was denied the right of counsel to present his appeal before the Secretary of Labor, and was deprived of a fair hearing. A return was made to the writ issued upon the petition, in which it is admitted that the petitioner was ordered to be deported after a fair hearing, and a denial that the appeal was not determined by the proper officers, or that any rights have been withheld from the petitioner. Upon the return day it was stipulated between George P. Fish-

burne, Assistant United States District Attorney, and the attorneys for the petitioner, that the depositions of Lewis F. Post, Assistant Secretary of the Department of Labor, and Cory M. Staden, both of Washington, D. C., should be taken before Thomas G. Lewis, a notary public, of Washington, D. C. Thereupon the said Thomas G. Lewis was appointed commissioner to take the depositions of the witnesses named. The witnesses declined to testify, because the answer might be prejudicial to the public interest, and a rule was issued by Justice Gould, of the Supreme Court of the District of Columbia, returnable November 14, 1914, directed to Lewis F. Post, Assistant Secretary of Labor, requiring him to show cause why he should not answer certain questions propounded to him pursuant to the said commission.

On the 13th day of November, 1914, the Secretary of Commerce and Labor examined the appeal of the petitioner herein and confirmed the decision heretofore rendered by "Acting Secretary" J. E. Densmore, and the decision and order of deportation of the Commissioner of Immigration. On the 25th of April a further return was made to the amended petition, in which all of the admissions are made as in the original return, and the further statement that the petitioner had appealed from the decision of the Commissioner to the Secretary of the Department of Labor, and that the said Secretary, after due consideration, had confirmed the decision of the Commissioner of Immigration in the manner provided by law. On the 5th of April, 1915, was filed a petition by the Assistant United States District Attorney, requesting that the order entered pursuant to stipulation on the 20th of October, 1914, for the taking of the testimony of Lewis F. Post, Assistant Secretary of Labor, be recalled, for the reason that on the 13th of November, 1914, the Secretary of Labor had personally reviewed the record and affirmed the decision of the Commissioner of Immigration. Objection is made to this petition, and also to the amended or supplemental return, and it is urged that the court should not permit to be filed or to consider upon this hearing the decision of the Secretary of Labor rendered since the inauguration of this proceeding, but that the matter should be heard and determined upon the record as it existed at the time of the filing of the petition.

[1] I do not think that the position of counsel for the petitioner is tenable. It is highly technical, and would not lead to any conclusion of the rights of the petitioner in this controversy. The petitioner in this case could not hope to be released from custody and permitted to unlawfully enter the United States while his appeal was pending before the Secretary of Labor. If the contention is correct that the "Acting Secretary" was not clothed with authority by reason of the presence of his superiors qualified to act, then the appeal had not been heard and the threatened deportation of the petitioner was simply premature, and the most that the petitioner could hope for would be a delay of the deportation until the proper officer of the department could determine his appeal. The record discloses that the Secretary of Labor did personally determine this appeal, and adversely to the petitioner. The Secretary of Labor having acted, the reason for the disclosure sought by the deposition and interrogatories of the Assistant Secretary of Labor is disposed of. There is nothing at issue, and I think

the commission to take the said deposition should be recalled. Courts are not organized to do idle things, but to determine issues presented, decreeing to the respective parties the rights as law or equity may direct. The entire record now being before the court, the court should consider the record now, and determine the respective rights of the parties. The Secretary of Labor having personally reviewed the decision of the Commissioner of Immigration, it is unnecessary to examine into the right of the "Acting Secretary" in the premises.

[2] The only other matter that remains for determination is the contention that applicant was denied the right of having his counsel appear before the Secretary of Labor for the purpose of presenting such further evidence and oral argument as he desired in support of his appeal, and whether such denial was depriving the petitioner of a fair hearing or of due process of law. No provision of law according to an alien the right of counsel before the Secretary of Labor has been called to my attention; nor do I know of any such provision. Circuit Judge Lacombe, of the Second Circuit, in U. S. v. Williams, 190 Fed. 898, says:

"There is nothing in the statute which calls for the presence of counsel at the examination of aliens preliminary to admission; nothing to indicate that it was the intent of Congress that these investigations in hundreds of thousands of cases touching the qualifications of an alien seeking to enter were to be conducted as trials in court, with counsel present to represent the alien, witnesses called to testify, and elaborate examination and cross-examination of them."

There is nothing in the rules of the Department in the determination of appeals before the Secretary of Labor which would justify a conclusion that counsel could appear before the Secretary and argue in support of his petition or offer further testimony as a matter of right. The great volume of business pending in the Department of Labor would make such a practice impossible. Appeals are determined upon the briefs presented, and no opportunity is afforded for argument, unless by special courtesy. From the record in this case, there is nothing to indicate that the petitioner did not have a fair hearing, and that every issue presented was determined by the proper official authorized by law. The commission to take depositions is recalled.

The writ is discharged, and the petitioner remanded to the custody of the Department of Immigration.

In re DALY.

(District Court, N. D. New York. July 15, 1915.)

1. BANKRUPTCY ⟸410—DISCHARGE—APPLICATION FOR DISCHARGE—TIME FOR FILING.

Bankr. Act July 1, 1898, c. 541, § 14a, 30 Stat. 550 (Comp. St. 1913, § 9598), provides that any person may, after the expiration of one month and within the next 12 months subsequent to being adjudged a bankrupt, file an application for a discharge, and that if it shall appear to the judge that the bankrupt was unavoidably prevented from filing it within such

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

time, it may be filed within, but not after the expiration of, the next 6 months. More than 13 months after an adjudication on December 9, 1913, the bankrupt presented for filing an application for a discharge; but it was not permitted to be filed, because not accompanied by any showing that the bankrupt was unavoidably prevented from filing it within the statutory period. On July 13, 1915, there was received by the judge, by mail, in an envelope postmarked the preceding day, an application for an extension of time for the filing of the petition for a discharge; such application being verified June 30, 1915. *Held* that, unless it could be shown that the failure to make such application before July 9th was due to the absence or fault of the clerk or judge, or to some fault on the part of the postmaster, or of some clerk in the office of the bankrupt's attorney, the court had no authority to grant the extension and allow the filing of the petition for a discharge.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 694; Dec. Dig. ⊂⊃410.]

2. BANKRUPTCY ⊂⊃410—DISCHARGE—APPLICATION FOR DISCHARGE—TIME FOR FILING.

Bankr. Act, § 14a, is susceptible of the construction that an application for a discharge may be filed within 12 months after the expiration of the first month succeeding the adjudication.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 694; Dec. Dig. ⊂⊃410.]

3. BANKRUPTCY ⊂⊃410—DISCHARGE—APPLICATION FOR DISCHARGE—TIME FOR FILING.

Where a delay in applying for an extension of time within which to file a petition for a discharge in bankruptcy is occasioned by the fault of some clerk or employé in the office of the attorney making the application, or by the fault of the postmaster or postmaster's employés, where the application is forwarded to the judge by mail, justice demands that a nunc pro tunc order be made allowing the filing of the petition.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 694; Dec. Dig. ⊂⊃410.]

In Bankruptcy. In the matter of William L. Daly, bankrupt. On petition for leave to file an application for a discharge. Denied conditionally.

The above-named bankrupt presents a supplemental petition, verified June 30, 1915, and asks for an order permitting the filing of his petition for a discharge, verified January 30, 1915, and then presented to the court for filing. This supplemental petition, while verified June 30, 1915, was presented to the court July 13, 1915. The question is: Has the court power to grant the application and permit the petition for a discharge to be filed?

Thomas F. Powers, of Troy, N. Y., for petitioner.

RAY, District Judge. [1] The petition for a discharge shows and expressly states that the petitioner William L. Daly was adjudged a bankrupt under the acts of Congress on the 9th day of December, 1913, by this court. The petition was verified on the 30th day of January, 1915, or 1 year and 20 days after the adjudication in bankruptcy.

Attention was called to the fact that under the law, section 14a of the Bankruptcy Act, such an application must be filed "after the expiration of one month and within the next twelve months subsequent

to being adjudged a bankrupt," or that it must "be made to appear to the judge that the bankrupt was unavoidably prevented from filing it within such time" in which case such application might be filed "*within,* but *not after,* the expiration of the next six months."

As more than one year had expired from the adjudication in bankruptcy at the time the petition for a discharge was presented, it was impossible for the clerk to file same, or for the court to permit it to be filed, without a showing that the bankrupt had been unavoidably prevented from filing it within the 13 months succeeding the adjudication in bankruptcy. The petitioner has now waited from January 30, 1915, to June 30, 1915, 5 months, before making his petition excusing his delay in not filing his petition for a discharge within the year.

As the adjudication was made December 9, 1913, one year from that date expired on the 9th day of December, 1914, and 13 months expired on the 9th day of January, 1915; and if we count from the expiration of 13 months after the adjudication, the time in which to obtain an extension of time for filing expired on the 9th day of July, 1915. If we are to count a year, and then 6 months after that time, or 18 months from the date of adjudication, the time within which the court might have granted an order allowing the application for a discharge to be filed expired on the 9th day of June, 1915. In either event this application comes too late, and the court is without power or jurisdiction to make the order.

The language of section 14a is explicit, and says:

"Any person may, after the expiration of one month and within the next twelve months subsequent to being adjudged a bankrupt, file an application for a discharge in the court of bankruptcy in which the proceedings are pending; if it shall be made to appear to the judge that the bankrupt was unavoidably prevented from filing it within such time, it may be filed within but not after the expiration of the next six months."

This statute expressly forbids the court or judge to make an order after the expiration of 18 months from the date of the adjudication extending the time within which the application for a discharge may be filed. The judge has no discretion in the matter; neither has the clerk of the court.

[2] The language, however, is susceptible of a construction that the application for a discharge may be filed within 12 months after the expiration of the first month succeeding the adjudication. If that is the proper construction, then the 12 months referred to in the statute expired on the 9th day of January, 1915, and counting the 6 months from that date would bring us to the 9th day of July, 1915. This petition asking for an extension of time was verified June 30th, 13 days before it reached the judge on the 13th of July. It was sent by mail to the judge at Utica, and forwarded to him at Norwich, his residence July 13, 1915. The envelope containing it was postmarked at Troy July 12, 1915, 12 days after the petition was verified.

If the delay in receiving this petition was due to the absence of the court or judge from either his office, or the place where he was holding court, or the place to which same was addressed, the judge would readily excuse the delay and hold the presentation in time. So, if

the delay were shown to be due to any act of omission, or commission on the part of any officer of the court the judge would excuse the delay.

Unless it can be shown that there was some fault on the part of the postmaster at Troy, or some clerk in the office of Mr. Powers, the attorney for the bankrupt, at Troy, N. Y., which delayed the forwarding of the petition, I am unable to see how jurisdiction exists to make an order permitting the filing of the petition. Leave is granted to Mr. Powers to show the reason, if any there be, why this application was not mailed at Troy prior to July 9, 1915. This may be done within 10 days. If no such excuse is presented, the application must be denied.

[3] It is doubtful if this power exists; but I think that fair treatment and the interests of justice demand that opportunity be given the bankrupt to excuse this delay, if it can be done. In Re Wolff (D. C.) 4 Am. Bankr. Rep. 74, 100 Fed. 430, it was held that a nunc pro tunc order may be granted, allowing the filing of an application for a discharge, where the delay in filing or presenting the application was caused by some act of the court or its officers. I think, if the delay is occasioned by the fault of a postmaster, or the postmaster's employés, where the application is forwarded by mail, or is occasioned by the fault of some clerk or employé in the office of the attorney making the application, justice demands that a nunc pro tunc order be made. It is not the purpose or policy of the law in such a matter as this to take advantage of errors, or mistakes, or misconstructions.

So ordered.

In re BROWN WAGON CO. (J. E. FAY & EGAN CO., Intervener).

(District Court, S. D. Georgia, W. D. July 28, 1915.)

1. BANKRUPTCY ⊜140—UNSECURED CREDITORS—CONDITIONAL SALES—VALIDITY—RECORD.

Under Code Ga. 1910, § 3319, providing that conditional sales must be recorded within 30 days from their date, and in other respects shall be governed by the laws as to the registration of mortgages, and section 3260, providing that mortgages not recorded within the time required remain valid as against the mortgagor, but are postponed to all other liens created or obtained prior to actual record, the record of a conditional sale within 30 days is not necessary as against unsecured creditors of the buyer.

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

2. BANKRUPTCY ⊜140—PREFERENCES—CONTRACT OF CONDITIONAL SALE—RECORD.

Under Bankr. Act, July 1, 1898, c. 541, 30 Stat. 557, § 47, as amended by Act June 25, 1910, c. 412, § 8, 36 Stat. 840 (Comp. St. 1913, § 9631), giving the trustee the rights of a judgment creditor, the lien of a bankrupt's trustee has no priority over a claim under a contract of conditional sale, executed in good faith prior to the 4-months period, but recorded within that time; but the claim under the conditional sale contract is to be

allowed as a secured claim against the fund arising from the sale of the particular machinery specified in such contract.

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

In Bankruptcy. In the matter of the Brown Wagon Company, bankrupt. On petition for review of referee's decision disallowing claim of the J. E. Fay & Egan Company as a secured claim. Report of referee overruled, with directions.

J. N. Talley and A. H. Heyward, both of Macon, Ga., for trustee in bankruptcy.

Minter Wimberly, of Macon, Ga., for objecting creditors.

John R. L. Smith, of Macon, Ga., and W. A. Thompson, of Atlanta, Ga., for intervener.

SPEER, District Judge. This case has been twice heard. The referee who first passed upon the issue involved has died, and the referee appointed to succeed him was of counsel. This has occasioned some delay. The question involved arises on a petition for review of the decision of the former referee. This disallowed the claim of J. E. Fay & Egan Company as a secured claim against the bankrupt, Brown Wagon Company.

The claimant sold certain machinery to the bankrupt, retaining title until payment. This was by contract of June 12, 1911, and payment was due in September of the same year. At maturity the note given was renewed until April 5, 1912. The contract for retention of title was not recorded until January 20, 1912; this being about 7 months after its execution. The Fay & Egan Company contends that it is entitled to a lien on the machinery thus sold, to which the retention of title contract related. To the contrary, the trustee, representing the general creditors, contends that the retention title contract is void because it was not recorded within 30 days as required by the law of Georgia; also that the recording of the contract within 4 months anterior to bankruptcy constituted a preference voidable at the instance of the trustee. He also contends that, at the time the contract was recorded, the claimant, Fay & Egan Company, had reasonable cause to believe that the Brown Wagon Company was insolvent, and in this way obtained a preference by recording the contract.

This last contention was made by the trustee on a second reference, after the matter had been heard in this court. In a supplemental opinion filed by the referee on this particular point, it was held that no reasonable cause for belief on the part of the Fay & Egan Company that Brown Wagon Company was insolvent existed. The referee, however, sustained the contentions of the trustee on the ground that the contract was not recorded as required by the state law, and, further, that the amendment of 1910, giving the trustee the rights of a judgment creditor, gave him, therefore, a priority over the lien recorded within 4 months of bankruptcy. It followed that as a secured claim the retention of title contract in favor of the intervener was disallowed.

[1] The Code of Georgia (section 3319) provides:

"Conditional bills of sale must be recorded within thirty days from their date, and in other respects * * * be governed by * * * laws relating to the registration of mortgages."

In this connection Code, § 3260, should be considered:

"Mortgages not recorded within the time required remain valid as against the mortgagor, but are postponed to all other liens created or obtained, or purchases made prior to * * * actual record of the mortgage."

There seems nothing in this provision to indicate that the retention of title contract is rendered void by failure to record within 30 days, as held by the referee. The purpose of registration is, of course, to put future purchasers or vendors on notice; but failure to record does not impair the validity of the contract as between the parties to it. It has been held in Georgia in a number of cases that the recording of conditional sales and mortgages is not necessary as against unsecured creditors. This rule has been adopted also by the bankruptcy courts.

[2] It is true, as cited by the referee, that the amendment to the Bankruptcy Act of 1910 gave to the trustee the rights of a judgment creditor, and such amendment makes it necessary for all mortgages and liens to be recorded before bankruptcy to be good as against such right of the trustee. Here, however, the contract, it is plain, was executed prior to the 4-months period. True, it was recorded within that period. It has been repeatedly held that a lien recorded even one day before bankruptcy is good as against this statutory lien of the trustee. This is obvious, because such record, if bona fide, was made before the trustee was appointed and before his lien could exist. It is also plain that this contract was executed in good faith more than 4 months before bankruptcy. There is an utter absence of evidence that there was any agreement to withhold the contract from record, and, as we have seen, the referee held that the Fay & Egan Company had no reasonable cause to believe that the Brown Wagon Company was insolvent at the time the contract was recorded. In the case of Jacobson & Perrill (D. C.) 200 Fed. 812, it was held:

"The lien of a bankrupt's trustee, conferred by the Bankruptcy Act as amended in 1910, does not relate back to a period 4 months prior to the institution of bankruptcy proceedings, nor can it antedate the institution of such proceedings."

Also a case more clearly in point was that of Keeble v. John Deere Plow Co. (decided by the Circuit Court of Appeals for the Fifth Circuit) 190 Fed. 1019, 111 C. C. A. 668. There it was held that a conditional sale, although recorded within 4-months period, was valid against the trustee, as it was recorded before the lien of the trustee did or could attach. The same rule was made applicable to a mortgage, under the same circumstances, in Re J. H. Virgin, Bankrupt, recently decided by this court, 224 Fed. 128.

In view of these considerations, the court feels obliged to overrule the report of the referee and direct that the claim of J. E. Fay & Egan Company, under their retention title contract, be allowed as a secured claim against the fund arising from the sale of the particular machinery specified in that contract.

In re HAYNES SON & CO.

(District Court, N. D. Georgia. March 5, 1915.)

BANKRUPTCY ⊂=145—NOVATION ⊂=1—ACCEPTANCE OF DRAFT IN PAYMENT—"ACCORD AND SATISFACTION."

Claimant, within four months before bankruptcy, sued the bankrupt and garnisheed an insurance company. The insurance company's agent gave claimant a draft on its home office, and the claimant's president instructed its attorney to dismiss the garnishment proceedings, but through inadvertence this was not done. The insurance company did not pay the draft, and the president directed the attorney to proceed on the draft by garnishment against the local agent. The attorney, however, instead of suing on the draft, based the garnishment proceedings on the judgment against the bankrupt. Civ. Code Ga. 1910, § 4326, provides that an "accord and satisfaction" arises where the parties by a subsequent agreement have satisfied the former one, and the latter agreement has been executed, and that the execution of a new agreement may itself amount to a satisfaction, where it is so expressly agreed by the parties. *Held*, that the facts showed that the draft was taken in payment, and that there was a novation, by which the bankrupt was released from liability, and the insurance company became claimant's debtor; and hence claimant was entitled to the amount due from the company to the extent of the draft as against the trustee in bankruptcy, though claimant obtained no rights under the garnishment, in view of Bankr. Act July 1, 1898, c. 541, § 67f, 30 Stat. 564 (Comp. St. 1913, § 9651), invalidating levies, judgments, attachments, or other liens obtained against an insolvent person within four months before the filing of the petition.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 205, 230–232, 234; Dec. Dig. ⊂=145; Novation, Cent. Dig. § 1; Dec. Dig. ⊂=1.

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

In Bankruptcy. In the matter of Haynes Son & Co., bankrupt. Ancillary proceedings in aid of a receiver in Alabama. Ordered as stated in the opinion.

Smith, Hammond & Smith, of Atlanta, Ga., for receiver.
Arthur Heyman, of Atlanta, Ga., for defendant.
F. L. Eyles, of Atlanta, Ga., for M. C. Kiser Co.

NEWMAN, District Judge. The question presented here is whether or not the claim of the M. C. Kiser Company against Haynes Son & Co. was in fact paid or settled as against Haynes Son & Co. by the acceptance by the M. C. Kiser Company of a draft drawn by the agent here of the National Fire Insurance Company of Hartford on the company's home office in Hartford.

The M. C. Kiser Company having garnisheed the National Fire Insurance Company of Hartford in the suit against Haynes Son & Co., the insurance company answered that it owed Haynes Son & Co. $1,000; this answer being made by Hugh T. Powell, its agent in Atlanta, upon whom service of garnishment had been made. The draft, which is now before me, drawn by Powell on his company, was for $304.45, and a receipt is entered on it by Gordon P. Kiser, the president of the M. C. Kiser Company, for that amount. The draft was not paid by

the home office, because, as I understand the statement on it, there was no release from the insured, and the draft was improperly drawn.

It is clear that the garnishment proceedings, having been instituted within four months of the bankruptcy, would fail by reason of the bankruptcy, and the M. C. Kiser Company obtained no rights thereby. Bankr. Act, § 67f. The real question is as to the effect of a draft given by Mr. Powell, agent of the insurance company, in payment of the debt of Haynes Son & Co., on which a judgment against the insurance company had been obtained in the garnishment proceedings.

Some testimony has been taken, and is to the effect that the M. C. Kiser Company received the draft, not simply as a draft which would extinguish the debt when the draft was paid, but as being itself a payment of the debt; a novation being claimed. The testimony is that the Kiser Company has no longer any claim against Haynes Son & Co., but that the insurance company has become and is now its debtor.

Thus far the testimony and the appearance of the papers in evidence are favorable to the Kiser Company, and would seem to show that there was a novation of the contract, and that the insurance company became liable to the Kiser Company. The president of the Kiser Company testified that upon the return of the draft he turned the matter over to counsel for his company, with directions to proceed by garnishment against the local agent in Atlanta of the National Fire Insurance Company of Hartford (the Cliff C. Hatcher Insurance Agency), basing the garnishment on the draft which had been obtained by the Kiser Company on the National Fire Insurance Company. This would indicate that the Kiser Company claimed, as is testified by its representatives, that it no longer claimed a debt against Haynes Son & Co., but that its debt was against the insurance company.

The president of the Kiser Company had instructed its attorney to dismiss the garnishment proceedings in the state court when the draft on the insurance company was received. Through inadvertence on the part of the attorney this has not been done, having been overlooked or forgotten in the stress of business. I hardly think the fact that this proceeding was based on the judgment, particularly as, according to the evidence, it was contrary to instructions received by the attorney, would be sufficient to defeat the rights of the M. C. Kiser Company, which it had clearly acquired when it accepted the draft, as the testimony here of both the president of the M. C. Kiser Company and Mr. Powell, the agent of the insurance company, shows it did, in full payment of its claim against Haynes Son & Co. According to the testimony of both the president of the Kiser Company and its attorney, the latter was definitely instructed, the date the draft was given, to dismiss all the garnishment proceedings; consequently, when the draft was returned unpaid and Mr. Kiser instructed his attorney to have summons of garnishment served on the Cliff C. Hatcher Insurance Agency, he must have intended that it should be based on the draft, because he supposed, and he so testified here, that the garnishment proceedings were all dismissed.

Section 4326 of the Code of Georgia provides that:

"Accord and satisfaction is where the parties, by a subsequent agreement, have satisfied the former one, and the latter agreement has been executed.

The execution of a new agreement may itself amount to a satisfaction, where it is so expressly agreed by the parties."

As I have stated, the claim here on the part of the Kiser Company is that they accepted this draft in satisfaction of their debt, and the testimony of the president of the Kiser Company and also of Mr. Powell is to the effect that this was true; that is, that it was understood that the draft extinguished all indebtedness against Haynes Son & Co. This being true, the only question, as remarked above, is whether taking out the new garnishment based on the judgment is sufficient to deprive the Kiser Company of the right it had obtained by novation of the contract and the acceptance of the draft in payment of its debt. It is not sufficient, in my opinion, to do so. Particularly is this true in view of the testimony of Mr. Eyles, counsel for the Kiser Company. He testifies that, when the draft was received from the agent of the insurance company, Mr. Kiser told him the understanding was that all garnishment proceedings should be dismissed, and that he would have done so at once, but he was very busy and overlooked it or forgot about it. When the draft came back unpaid, and he was instructed by Mr. Kiser to institute garnishment proceedings against the Cliff C. Hatcher Insurance Agency, finding that he had left the judgment open against the insurance company, he based the garnishment proceedings on that judgment, instead of a suit on the draft.

The Kiser Company should receive from the insurance company the amount of this draft, it being its duty, necessarily, to pay the costs on the new proceeding, and the remainder of the $1,000 should be paid to the trustee in bankruptcy.

MARYLAND CASUALTY CO. v. PRICE, SMITH, SPILMAN & CLAY.

(District Court, S. D. West Virginia. June 16, 1915.)

1. COURTS ⊜329—UNITED STATES COURTS—JURISDICTIONAL AMOUNT.

In a liability insurer's action against its attorneys, the declaration alleged the bringing of an action against one of its policy holders, notice thereof to the attorneys, with instructions to appear for insurer, a promise to look after the case, that the insurer attempted to compromise the litigation and could have done so at any time up to the rendition of judgment for $2,000, that by reason of the attorneys' neglect a default judgment was entered against the policy holder and an inquiry of damages executed, resulting in a judgment for $15,000, which the insurer was compelled to pay, and that under its policy its limit of liability, had it defended the action, would have been $5,000. There was no allegation that the terms of the policy were communicated to the attorneys, or that any facts constituting a defense were ever communicated to them. *Held*, that the declaration was insufficient to state a cause of action within the jurisdiction of a federal court, since, while a declaration alleging a total failure to make any defense may be sufficient to sustain a judgment for nominal damages, to state a cause of action for an amount cognizable in the courts of the United States, the declaration must aver either a good defense, or that a less sum would have been recovered, but for the attorneys' negligence.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 897; Dec. Dig. ⊜329.]

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2. ATTORNEY AND CLIENT ⊜109—LIABILITY FOR NEGLIGENCE.

Where a client, at the time of employing counsel to defend an action, had the option of settling the case for a comparatively small sum of money, but such fact was not communicated to the counsel, nor were any of the other facts of the case so communicated to them, the client could not make its attorneys responsible for its own default in failing to settle the case on the favorable terms known to it alone.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 221, 222; Dec. Dig. ⊜109.]

At Law. Action by the Maryland Casualty Company against Price, Smith, Spilman & Clay. On demurrer to the amended declaration. Demurrer sustained.

This is an action brought by the Maryland Casualty Company against the defendants, who were the regularly retained counsel of plaintiff company at Charleston, W. Va. The plaintiff company is engaged, inter alia, in issuing policies of liability insurance, and had issued such a policy to the Wylie Permanent Camping Company, a corporation of the state of West Virginia, doing a transportation and camping business in Yellowstone National Park, in the state of Wyoming. It appears that in the year 1908, and during the life of the said policy, an accident occurred to Mrs. Gail V. Lynch, a citizen and resident of the state of Ohio, which resulted in the bringing of a suit by Mrs. Lynch in this court against said Wylie Permanent Camping Company for the sum of $15,000 damages for the injury to her.

Under its policies of insurance the plaintiff company was empowered and was obligated to defend suits against its policy holders, and upon notification of the pendency of this action brought by Mrs. Lynch they notified the defendants, who were their regularly retained counsel at Charleston, of the fact, and instructed said firm to enter an appearance on behalf of the defendant therein. The original declaration then proceeds to aver that thereupon it became the duty of the defendants to enter such appearance and to take such further steps as were necessary to prevent a judgment from being rendered against said Wylie Permanent Camping Company; that said defendants on January 26, 1909, advised plaintiff that an appearance at rules was not necessary, and had not been made, but that defendants would look after the case and keep plaintiff advised as to its progress; that it became and was the duty of defendants to protect plaintiff against a judgment by default, and to advise plaintiff of the time when said case was set for trial, so that plaintiff could be ready with witnesses at the trial, etc.; and that it relied upon defendants to discharge their professional duties in these respects.

Plaintiff further avers that it made an effort to settle and compromise this litigation, and that it could have done so at any time up to the rendition of judgment therein for the sum of $2,000. It avers that by reason of the neglect of the defendant a default judgment was entered against Wylie Permanent Camping Company on the 2d day of July, 1909, and an inquiry of damages executed, resulting in a verdict and judgment against said company for the sum of $15,000 and for costs of said suit, both of which judgments plaintiff was, under its contract of insurance, compelled to pay to said Wylie Permanent Camping Company because of its failure to defend said action.

Plaintiff by an amended declaration avers that under its contract with Wylie Permanent Camping Company its limit of liability, had it defended said action, would have been $5,000, and it could not have been liable for more, had defense been made by defendants as instructed; but it does not aver that the terms of its said contract were communicated to defendants, or that any information of facts constituting a defense were ever communicated to the defendants.

Conley & Johnson, of Charleston, W. Va., for plaintiff.
Malcolm Jackson, of Charleston, W. Va., for defendants.

KELLER, District Judge (after stating the facts as above). [1] Of course, the question here is whether the declaration, taking all the facts stated as true, makes a prima facie case for recovery. It is ordinarily true that in a suit against attorneys for negligence it is necessary to allege and to prove that the negligence complained of is the proximate cause of the loss complained of; in other words, to aver and prove, either that the loss would not have occurred, or that its amount would have been lessened, but for the negligence complained of.

It is true, however, that in Wharton on Negligence, 752, it is stated that when negligence has been shown, in consequence of which judgment has gone against the client, it is not incumbent on the client to show that, but for the negligence, he could have succeeded in the action. The only case referred to in Wharton supporting this view is the case of Godefroy v. Jay, 7 Bingham, 413, in which no attention was paid to the case by the attorney, and judgment was obtained by default, which the client was compelled to pay, and the court held that it was for the attorney to show that his client was not damnified by such negligence. This would seem to be precedent and some authority for the proposition that a declaration which avers such total failure to make any defense would be sufficient, without any allegation or averment of a just defense, and I believe it sufficient to sustain a judgment for nominal damages.

However, upon the principle that in any case of trespass on the case for negligence, cognizable in the courts of the United States, the amount in controversy is an essential element to give jurisdiction, I incline to the opinion that the declaration must aver either a good defense to the entire action, or else aver that but for the negligence of defendants a less sum would have been recovered in the action. See the opinion of Judge Swing in Spangler v. Sellers (C. C.) 5 Fed. 893, 894.

[2] I am quite confident that when, as in the case at bar, there is an averment in the declaration of the fact that at the time of employing counsel the client had the option of settling the case for a comparatively small sum of money, and such fact was not communicated to counsel, nor were the facts of the case at all communicated to such counsel, the plaintiff ought not to be permitted to make counsel responsible for its own default in failing to settle the case on the favorable terms known to it alone; and therefore, where such facts are averred in the declaration, they should be accompanied by an averment of good defense against the entire cause of action, or, at the least, that the amount for which the settlement could have been made was greater than the true legal liability upon fair and full trial. See Grayson v. Wilkinson, 13 Miss. (5 Smedes & M.) 268 and Benton v. Craig, 2 Mo. 198.

Demurrer sustained.

UNITED STATES v. NORTHWESTERN FISHERIES CO.

(District Court, W. D. Washington, N. D. May 19, 1915.)

No. 2961.

FOOD ⊂=12—INSPECTION—SUBSEQUENT UNFITNESS.

One delivering and offering for transportation in interstate commerce a food product of a canning and packing establishment marked inspected by label as provided by Act March 4, 1907, c. 2907, 34 Stat. 1258, providing for the inspection of food products for use in interstate commerce, but unfit for human consumption, is not within the proviso declaring that any person selling or offering for sale or transporting for interstate commerce any food products which are diseased or otherwise unfit for human consumption, knowing that the food products are intended for human consumption, shall be guilty of a misdemeanor, for the act does not place responsibility for the condition of food subsequent to its inspection.

[Ed. Note.—For other cases, see Food, Dec. Dig. ⊂=12.]

The Northwestern Fisheries Company was charged with willfully, knowingly, and unlawfully delivering and offering for transportation in interstate commerce unwholesome food products. On motion for a directed verdict of not guilty. Granted.

Clay Allen, U. S. Dist. Atty., and Albert Moodie, Asst. U. S. Dist. Atty., both of Seattle, Wash.

Carroll A. Gordon, of Tacoma, Wash., for defendant.

NETERER, District Judge (orally). The information in this case charges the defendant with willfully, knowingly, and unlawfully delivering and offering for transportation in interstate commerce, to wit, from Seattle, Wash., to Orca Cannery, Cordova, Alaska, one case of meat food products, to wit, one case of lard, which was unsound, unhealthful, unwholesome, and otherwise unfit for human food, which said lard was intended, and said Northwestern Fisheries Company, a corporation, well knew that such lard and meat food was intended, for human consumption. The evidence shows that this lard offered for shipment was the product of a canning or packing establishment, and was marked "inspected" by label as provided by the act. It also shows that the food was unfit for human consumption. The defendant, at the close of the government's case, moved for dismissal, and now, on the conclusion of all of the evidence, has moved for a directed verdict of acquittal.

A consideration of this act shows that the purpose of the act, reference being had to section 1, is to provide a system of inspection for the purpose of preventing the use in interstate commerce of meat food products unfit for human consumption. The act deals with two classes of people, and likewise with two classes of food. One kind of food is that which is prepared for market in a slaughtering, packing, or canning establishment, and the other which is not. Provision is made by the act for a post mortem and ante mortem inspection, and for tagging or labeling "Inspected and passed," or "Inspected and condemned," and all condemned carcasses "shall be destroyed for food products in

the presence of the inspector." All meat food products prepared for interstate commerce in any canning or packing establishment shall be inspected, and marked "Inspected and passed," or "Inspected and condemned," and condemned food destroyed in the presence of the inspector. All food meat products marked "Inspected and passed," intended for interstate commerce, shall be packed in cans, pots, tins, canvas, and other receptacles, and shall be labeled, etc., and inspection—

"shall not be deemed complete until the meat food products have been sealed in said tins under the supervision of the inspector, and no such food products shall be sold or offered for sale by any person, firm or corporation, in interstate or foreign commerce under a false descriptive name."

After provision is made for inspection, the act provides, in section 8, that no person, firm, or corporation shall, etc., or offer for transportation, and no carrier of interstate or foreign commerce shall transport or receive for transportation from any state or territory, etc., to any state of the United States or to any foreign country, any meat food products which have not been inspected and marked "Inspected and passed" in accordance with the terms of this act; and section 17 provides that:

"No person, firm, or corporation engaged in interstate commerce * * * shall transport or offer for transportation, sell or offer to sell, any such * * * meat food products in any state or territory * * * other than the state or territory * * * in which the slaughtering, packing, canning * * * or other similar establishment owned * * * or operated by said person, firm or corporation is located, * * * until said firm * * * shall have complied with all of the provisions of the act."

And penalties are provided for the violation of the provisions of the act, or for counterfeiting any labels, etc. A complete system of inspection is provided for all slaughtering, packing, and canning establishments, and penalties provided for the sale or transportation, without inspection, and then provision is made for the other class of meats, which is not within this general provision, and then comes the exception, and that is that it—

"shall not apply to animals slaughtered by any farmer on the farm and sold and transported as interstate or foreign commerce, nor to retail butchers and retail dealers in meat or food products": "Provided that if any person shall sell or offer for sale, or transport for interstate or foreign commerce any meat or food products which are diseased, unsound * * * or otherwise unfit for human consumption, knowing that such meat food products are intended for human consumption, shall be guilty of a misdemeanor."

The contention of the government that this proviso applies to the entire act I do not think is tenable. There is no provision in any part of the act which attempts to place responsibility for the condition of the food subsequent to inspection. Every requirement is with relation to inspection, and the only meat which is treated in the act which is excluded from the inspection is the meat provided for in the exception, and the proviso which follows this proviso in the same section refers to this same class of people and the same character of meats.

Approaching this subject from every viewpoint of which I can conceive, it seems to me that the intention of Congress was to have

the proviso relate to retailers and farmers whose products are not subject to inspection. Otherwise no reliance could be placed upon a certificate of inspection. The government would make a dealer, in offering inspected meats for interstate commerce, a guarantor of the condition of the meat, and assume a burden which the government relieves against, and would utterly disregard and discredit the certificate of the regularly employed agents of the government, whose duty it is to see that the meat was inspected and properly labeled.

I do not think that the regulations to which my attention is directed can apply, for the reason that the regulations did not take effect until November, and this act is charged as having been done prior, and even though these regulations were in effect prior to the commission of the act charged, the charge here is not the offering of any goods in violation of any of the regulations; but it is the direct charge of offering food products which are unfit for human consumption, and the defendant is to meet this allegation, and not the other.

The motion is granted.

UNITED STATES v. FRIEDMAN.

(District Court, W. D. Tennessee, W. D. June 1, 1915.)

No. 319.

POISONS ⇐9—REGULATION—STATUTORY PROVISIONS.

Harrison Anti-Narcotic Law (Act Dec. 17, 1914, c. 1), § 2, 38 Stat. 786, making it unlawful for any person to sell or give away any of the enumerated drugs, except on a written order of the person to whom the article is sold or given, and requiring every person who shall accept any order, and sell or give away any of the drugs, to preserve the order for two years, and declaring that every person who shall give an order for any of the drugs shall make a duplicate thereof, and on acceptance of order shall preserve the duplicate for two years, providing that nothing shall apply to the dispensing of any of the drugs to a patient by a physician, provided the physician keeps a record of all drugs dispensed or distributed, showing the amount thereof, the date, and the name and address of the patient, unless the physician administers the same to the patient, does not limit the amount of drugs a physician may prescribe, and an indictment charging defendant with prescribing drugs in quantities more than was necessary for the immediate needs of his patient, and not in good faith, is subject to demurrer.

[Ed. Note.—For other cases, see Poisons, Cent. Dig. § 6; Dec. Dig. ⇐9.]

Benjamin Friedman was indicted for violation of the Harrison Anti-Narcotic Law. Indictment quashed, on sustaining demurrers.

Hubert F. Fisher, U. S. Dist. Atty., and W. D. Kyser, Asst. U. S. Dist. Atty., both of Memphis, Tenn.

Ralph Davis, of Memphis, Tenn., for the defendant.

McCALL, District Judge. The indictment in this case charges the defendant with having dispensed, distributed, and prescribed gum opium and powdered opium, the derivatives, compounds, and preparations thereof, to wit, morphine sulphate, heroin, and cocaine, a deriva-

tive of coca leaves, without the dispensing, distribution, and prescription as aforesaid being in the course of his professional practice; that is to say, that he dispensed, distributed, and prescribed the aforesaid drugs *in quantities more than was necessary* to meet the immediate needs of a patient, and did not distribute, dispense, and prescribe the drugs *in good faith and as a medicine.*

The defendant demurs to the indictment upon seven grounds. The first five are overruled. The sixth and seventh will be considered together, and are to the effect that the acts of the defendant averred in the indictment are not prohibited by law, nor are they in violation of any law of the United States.

The indictment is drawn under section 2 of the act of Congress approved December 17, 1914, known as the Harrison Anti-Narcotic Law. Section 2 provides: (1) That it shall be unlawful for any person to sell, barter, exchange or give away any of the drugs mentioned in the act, except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given. (2) Every person who shall accept any such order, and in pursuance thereof shall sell, barter, exchange, or give away any of the aforesaid drugs, shall preserve such order for a period of two years. (3) Every person who shall give an order as therein provided to any person for any of the aforesaid drugs shall, at or before the time of giving such order, make or cause to be made a duplicate thereof, on a form to be issued in blank for that purpose by the Commissioner of Internal Revenue, and in case of acceptance of such order shall preserve such duplicate for a period of two years. It is further provided that:

> Nothing contained in section 2 shall apply to the dispensing or distribution of any of the aforesaid drugs to a patient by a physician, dentist or veterinary surgeon, registered under the provisions of the act, in the course of his professional practice only: Provided, that such physician, dentist or veterinary surgeon shall keep a record of all such drugs dispensed or distributed, showing the amount dispensed or distributed, the date and the name and address of the patient, to whom such drugs are dispensed or distributed, except such as may be dispensed or distributed to a patient, upon whom such physician, dentist, or veterinary surgeon shall personally attend, and such record shall be kept for a period of two years from the date of dispensing or distributing such drug.

An attentive examination of the indictment discloses that the offense with which the defendant is charged is dispensing, distributing, and prescribing the prohibited drugs in *quantities more than was necessary to meet the needs of a patient,* and that they were not distributed, dispensed, and prescribed *in good faith* and as a medicine.

As I understand section 2 of the act, the only thing required of a person, who shall give an order as provided in said section for the drugs mentioned in the act, is that he shall make or cause to be made, at the time of giving the order, a duplicate thereof, on a form issued by the Commissioner of Internal Revenue, and in case of the acceptance of said order he shall preserve such duplicate for two years. The defendant is not indicted for failure to do either of these last-mentioned things.

Subsection "a" of section 2 provides that nothing contained in the section shall apply to physicians, dentists, or veterinary surgeons, reg-

istered under the act, who dispense or distribute any of the drugs in the course of their professional practice, provided that they shall keep a record of all of such drugs dispensed or distributed, showing the amount dispensed or distributed, the date, and the name and address of the patient to whom such drugs are dispensed or distributed, unless the physician shall administer them personally to the patient. But the defendant is not indicted for violation of subsection "a," but, as has been said, he is indicted for giving a prescription for said drugs *in quantities more than was necessary, and not in good faith and as a medicine.*

I fail to find in the act of Congress under examination any language making the doing of the things with which the defendant is charged a violation of law. In other words, there is no limit fixed to the amount of said drugs that a physician may prescribe, nor is there any duty imposed upon him, other than to keep a record of all such drugs dispensed by him, and the name and address of the patient, except those to whom he may personally administer, and that he must preserve the records for a period of two years. For failing to do either of these things he is not indicted.

The result is I think the sixth and seventh grounds of the demurrer are good, and an order will be entered quashing the indictment.

UNITED STATES v. WOODS (and five like cases).

(District Court, D. Montana. July 3, 1915.)

Nos. 2645–2647, 2661, 2663, 2664.

1. INTERNAL REVENUE ⊂=40—OFFENSES AGAINST REVENUE LAWS—ELEMENTS.
Act Dec. 17, 1914, c. 1, § 1, 38 Stat. 785, provides that every person who produces, deals in, etc., opium or coca leaves, or any compound or preparation thereof, shall register with the collector of internal revenue and pay a special tax, and that it shall be unlawful to produce, deal in, etc., any of such drugs without having registered and paid such tax. Section 8 provides that it shall be unlawful for any person who has not registered and paid such tax to have in his possession any of such drugs, and that possession thereof shall be presumptive evidence of a violation of both sections 1 and 8. *Held* that, as taxes can be imposed and statutory offenses created only by direct, clear, and apt language, the act does not impose the duty of registration and the payment of taxes upon mere consumers of the drugs, and only makes unlawful possession of the drugs by persons required to register and pay the tax, who have not done so.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 97–101, 103–106, 142, 143; Dec. Dig. ⊂=40.]

2. INTERNAL REVENUE ⊂=47—OFFENSES AGAINST REVENUE LAWS—INDICTMENT.
Indictments charging that defendants knowingly, unlawfully, and feloniously had in their possession and under their control smoking opium, not having theretofore registered with the collector of internal revenue, as required by Act Dec. 17, 1914, and not having theretofore paid the special tax provided for thereby, but not alleging that defendants were in any of the classes thereby required to register and pay such tax, were

fatally defective in substance, and too uncertain to be sustained, since, when an offense can be committed by only certain classes of persons, the indictment must allege that accused is in one of those classes.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 144–150; Dec. Dig. ⊂⊃47.]

Thelma Woods, W. Thompson, George Smith, William Ross, Fred Wayne, and E. White were indicted for offenses. On demurrers to the indictments. Demurrers sustained, and defendants discharged.

B. K. Wheeler, U. S. Atty., of Butte, Mont., Homer G. Murphy, Asst. U. S. Atty., of Helena, Mont., and Frank Woody, Asst. U. S. Atty., of Missoula, Mont.

Lester H. Loble, J. H. Brass, Park Smith, Geo. W. Padbury, Jr., G. G. Wilson, and Earle F. Angell, all of Helena, Mont., for defendants.

BOURQUIN, District Judge. Mutatis mutandis, the indictments charge that defendants "did willfully, knowingly, unlawfully, and feloniously have in her possession and under her control * * * smoking opium * * * not having theretofore registered with the collector of internal revenue * * * as required under the provisions of the act of Congress of December 17, 1914, and not having theretofore paid the special tax provided for by said mentioned act." General demurrers are interposed.

Of the act referred to in the indictment (Acts 63d Cong. 3d Sess. c. 1), section 1 provides that "every person who produces, imports, manufactures, compounds, deals in, dispenses, sells, distributes, or gives away opium or coca leaves or any compound, manufacture, salt, derivative, or preparation thereof, shall register with the collector of internal revenue of the district his name or style, place of business, and place or places where such business is to be carried on," and on or before the 1st day of July annually thereafter shall pay a special tax; and also that it shall be unlawful "to produce, import, manufacture, compound, deal in, dispense, sell, distribute, or give away" any such drugs without having registered and paid the tax. Section 8 provides that it shall be unlawful for any person not registered under the act and who has not paid the tax to have in his possession any of the drugs, and also that possession of any of the drugs shall be presumptive evidence of violation of both sections 1 and 8. Section 9, read in connection with section 335 of the federal Penal Code (Act March 4, 1909, c. 321, 35 Stat. 1152 [Comp. St. 1913, § 10509]), makes any violation of the act a felony. The act, whether of police or revenue, is of good purpose. What it will accomplish is another matter.

Any person convicted of its most trivial violation—the most law-abiding druggist or physician or like person in legitimate possession of the drugs, who inadvertently allows the annual tax to become delinquent for a day—though fined but $1, is made a felon and infamous! And this for a mere legal infraction, and not a true crime, is a consequence shockingly disproportionate to the offense, is antagonistic to sound criminal economics, and is abhorent to justice. It goes without

saying that because thereof under such laws prosecutions halt and convictions fail in many cases, in effect is usurpation of the pardoning power, unequal administration of criminal law, and favored and disfavored classes of offenders; the inevitable result being resentment and prejudice against courts and government, law and order, and impairment of and danger to the general well-being of society. All these evils could and ought to be avoided by repeal of section 335 and its arbitrary stamp of felony and infamy upon so many petty violations of laws of the United States.

In the instant cases, aside from constitutional objections urged, but unnecessary to further note, defendants maintain (1) that mere consumers of the drug and in possession of same only for their own consumption are not by the act required to register and pay the tax, and (2) that the indictments do not show that defendants are of any of the classes by the act required to register and pay the tax. The prosecution contends contra the first proposition, and that in view of section 8 aforesaid there is no support in principle for the second.

[1] Having in mind that taxes can be imposed and statutory offenses created only by direct, clear, and apt language, it seems clear that there is nothing in the act imposing the duty of registration and payment of taxes upon mere consumers of the drugs. They are not within section 1, and section 8 does not purport to extend the registration and taxation features of the act to them, or to any one, but only to make unlawful mere possession of the drugs by any person of the classes by section 1 required to register and pay, and who have not, and to create a statutory rule of evidence.

[2] And this latter has misled the prosecution to believe that the essentials of the offense need not be set out in the indictments, but only this rule of evidence—the possession of the drugs, from which in some cases the offense may be inferred; that is, in the cases of those by section 1 required to register and pay the tax. Whenever an offense can be committed by only certain classes of persons, the indictment must expressly allege that accused is of those classes or it is fatally defective in substance; for lacking such allegation, all alleged may be true, and accused be innocent. Furthermore, lacking such allegation, the uncertainty of these indictments is such that defendants might be repeatedly tried on the like and be unable to plead former judgments in bar. Indeed, the prosecution states that, though they are duplicates in form and substance, some of these indictments are against mere consumers of the drug, and some against sellers or givers of it. Such "catch-all" forms have always been held bad.

The demurrers are sustained, the indictments dismissed, and defendants discharged.

WAITE v. GOTTSTEIN et al.

(District Court, W. D. Washington, N. D. May, 1915.)

No. 53.

BANKRUPTCY ⊂=293—POSSESSION OF PROPERTY—PROPERTY OF TRUSTEE—JURISDICTION.

Bankr. Act July 1, 1898, c. 541, § 23b, 30 Stat. 552 (Comp. St. 1913, § 9607), provides that suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt might have brought or prosecuted them, unless by consent of the defendant, except suits for the recovery of property under sections 60b, 67e, and 70e. Section 60b provides that if a bankrupt shall have procured or suffered a judgment against him or made a transfer of his property within four months before the filing of the petition in bankruptcy, which judgment or transfer shall operate as a preference, it shall be voidable by the trustee and he may recover the property or its value, and any court of bankruptcy shall have jurisdiction concurrent with the state court of an action for that purpose. Section 67e requires the trustee to recover by legal proceedings property conveyed within four months prior to the petition with intent to defraud creditors. Section 70e requires the trustee to avoid any transfer by the bankrupt which any of his creditors might have avoided, and to recover the property from any person who may have received it except a bona fide holder for value, and gives the bankruptcy courts and state courts concurrent jurisdiction of actions for that purpose. *Held*, that an action by the trustee in bankruptcy to recovery property valued at $183 taken from the bankrupt by force does not come within any of the last three sections, and is not within the jurisdiction of the United States District Court.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 411, 417; Dec. Dig. ⊂=293.]

In Equity. Suit by Robert W. Waite, trustee in bankruptcy, against J. L. Gottstein and others. On objection to the jurisdiction of the court. Objection sustained.

Edward H. Chavelle, of Seattle, Wash., for trustee.
Leopold M. Stern, of Seattle, Wash., for defendants.

NETERER, District Judge. The trustee in bankruptcy has commenced an action against the defendants to recover certain personal property alleged to have been forcibly seized by the defendant from the bankrupt, consisting of brandies, wine, etc., of the value of $183.-82; and it is further alleged that the estate has a value of $1,000, and claims against the estate of approximately $4,477.62 have been filed, and demand is alleged for the return of the property, and refusal, with prayer that the return thereof be directed. Defendants have entered a special appearance and challenged the jurisdiction of the court.

Section 23b of the Bankruptcy Act provides as follows:

"Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant, except suits for the recovery of property under section sixty, subdivision b, and section sixty-seven, subdivision e, and section seventy, subdivision e."

Section 60b of the act provides:

"If a bankrupt shall have procured or suffered a judgment to be entered against him in favor of any person or have made a transfer of any of his property, and if, at the time of the transfer, or of the entry of the judgment, or of the recording or registering of the transfer if by law recording or registering thereof is required, and being within four months before the filing of the petition in bankruptcy or after the filing thereof and before * * * adjudication, the bankrupt be insolvent and the judgment or transfer then operate as a preference, and the person receiving it or to be benefited thereby, or his agent acting therein, shall * * * have reasonable cause to believe that the enforcement of such judgment or transfer would effect a preference, it shall be voidable by the trustee and he may recover the property or its value from such person. And for the purpose of such recovery any court of bankruptcy, as hereinbefore defined, and any state court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction."

Section 67 (4) makes it the duty of the trustee to recover and reclaim by legal proceeding or otherwise property conveyed, transferred, assigned, or incumbered by the bankrupt within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay, or defraud his creditors, or any of them, which property, except as exempt by the law of the bankrupt's domicile, shall remain a part of the assets of the estate of the bankrupt and shall pass to the trustee.

Section 70e provides:

"The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, * * * unless he was a bona fide holder for value prior to the date of the adjudication. Such property may be recovered or its value collected from whoever may have received it, except a bona fide holder for value. For the purpose of such recovery any court of bankruptcy as hereinbefore defined, and any state court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction."

I think it is apparent from an examination of the provisions of this act that the bankrupt could not proceed in this court for recovery of this property. Justice Day, in passing upon the same question in Harris v. First National Bank, 216 U. S. 382, 30 Sup. Ct. 296, 54 L. Ed. 528, upon an issue where the bankrupt prior to bankruptcy had delivered certain notes as collateral security to an overdraft, and on payment thereof the bank refused to return the notes, and in an action by the trustee to compel the return, and challenge to the court's jurisdiction, at page 385 of 216 U. S., at page 298 of 30 Sup. Ct., 54 L. Ed. 528, said:

"But we do not find it necessary to pass upon that question. Assuming for this purpose that actions may be brought by trustees in the courts of bankruptcy in cases coming within the terms of section 70, subd. 'e,' without the consent of defendant, we do not think the present action is one of that character. That subdivision provides for avoiding transfers of the bankrupt's property which his creditors might have avoided, and for recovery of such property, or its value, from persons who are not bona fide holders for value. In this action no such transfer is alleged; no attack is made upon a transfer by the bankrupt which would have been void as to creditors. The petition seeks to recover property held by the bank, if the allegations are true, which belonged to the bankrupt, and consequently passed to the trustee as the representative of the bankrupt's estate. The recovery sought is of property held for the

bankrupt estate which the defendant wrongfully refused to surrender. The District Court was right in denying jurisdiction of the suit."

The jurisdiction can only be sustained by bringing the allegations of the bill within the provisions of section 60b, section 67e, or section 70e of the act, and there are no allegations in this bill which bring it within any of these sections. The provisions of the Bankruptcy Act cannot be so enlarged and extended by the court as to give jurisdiction over a suit by a trustee to recover property of the bankrupt forcibly seized by a creditor against the will and without the collusion of the bankrupt and wrongfully held by such creditor without such person's consent.

The objection is sustained.

In re BOLSTAD.

(District Court, W. D. Washington, N. D. June 22, 1915.)

No. 5400.

BANKRUPTCY ⊂⇒184—LIENS—CHATTEL MORTGAGES—DELAY IN FILING.

Rem. & Bal. Code Wash. § 3661, requires chattel mortgages to be filed within 10 days in the auditor's office of the county, and section 3662 provides that such filing shall be notice to all the world of the existence and conditions of such mortgage. Bankr. Act July 1, 1898, c. 541, § 47 (2), 30 Stat. 557, as amended by Act June 25, 1910, c. 412, § 8, 36 Stat. 840 (Comp. St. 1913, § 9631), provides that the trustee shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings, and as to property not in the custody of the bankruptcy court, all the rights of a judgment creditor holding an execution duly returned unsatisfied. *Held* that, though a chattel mortgage was not filed within 10 days, where it was filed before bankruptcy proceedings were commenced the mortgagee's rights were superior to those of the trustee; it not appearing that there were any creditors of the bankrupt prior to the recording of the mortgage.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 275–277; Dec. Dig. ⊂⇒184.]

In Bankruptcy. In the matter of Henry B. Bolstad, bankrupt. On petition to review. Decision of referee affirmed.

Leopold M. Stern, of Seattle, Wash., for trustee.

C. J. Smith, of Seattle, Wash., for mortgagee.

NETERER, District Judge. On September 5, 1913, bankrupt executed a chattel mortgage. This was filed for record in the auditor's office November 24, 1913. On January 22, 1915, a petition and schedules in voluntary bankruptcy were filed, and adjudication followed. A trustee was duly elected, who took possession of all of the property of the bankrupt, including the mortgaged property. The mortgagee applied to have the mortgaged property, or the proceeds from its sale, set aside, or paid to him, setting up the fact of execution and recording of the mortgage and nonpayment. Issue was taken by the trustee and the matter came on for hearing, as to the validity of the mortgage, be-

fore the referee; it being contended by the trustee that the mortgage, not having been filed for record within 10 days after its execution, became void. The referee held the mortgage a subsisting lien. A petition to review this holding is presented. The trustee relies upon In re American Machine Works, 174 Fed. 805, 98 C. C. A. 513, in which the Court of Appeals of this Circuit, following the line of decisions of the state court in construing the conditional sale statute, found that the failure to record a conditional sale contract within the time fixed by the act makes the delivery of the personal property an absolute sale, and contends, by analogy, the construction placed upon the conditional sale statute would apply to the chattel mortgage statute.

Section 3661, Rem. & Bal. Code of Washington, provides that every chattel mortgage shall be filed within 10 days, in the auditor's office of the county in which the mortgaged property is situated, and provides for indexing, and fees for filing, and for release. Section 3662 provides that such filing shall be notice to all the world of the existence and conditions thereof. It is asserted, the mortgage becoming void as to subsequent creditors on failure to file within 10 days, that under the provisions of section 47, clause 2, subd. (2), of the Bankruptcy Act as amended in 1910, which provides:

"And such trustees, as to all property in the custody * * * of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied." 36 Stat. at Large, 840

—the trustee had a lien under the Bankruptcy Act, and within the provisions of the Washington statute. While there has been some confusion in the holding of the state court upon the conditional sale statute and chattel mortgage recording act, I think the question has been definitely disposed of by the Supreme Court of Washington. There is nothing in the record to show that there were any creditors of the bankrupt prior to the recording of the mortgage. The Washington court, in Watson v. First National Bank, 82 Wash. 65, at page 67, 143 Pac. 451, at page 452, says:

"Where the mortgage is executed and delivered, and prior to the time of its being recorded, persons other than the mortgagee become general creditors of the mortgagor, but do not become lien creditors until after the mortgage is filed for record, the rights of the mortgagee are superior to those of such general creditors. The mortgage speaks as of the date it is placed of record."

Had proceedings in bankruptcy been inaugurated before the filing of the mortgage, there could be no question as to the trustee's superior claim. In Willamette Casket Co. v. Cross Undertaking Co., 12 Wash. 190, 40 Pac. 729, the court held that an unrecorded mortgage was absolutely void, and may not become valid when properly filed; but that case was overruled in Pacific Coast Biscuit Co. v. Perry, 77 Wash. 353, 137 Pac. 483, and reference thereto made in Watson v. First National Bank, supra, in which case the court also cited with approval Cameron Hull & Co. v. Marvin, 26 Kan. 612, in which the court said:

"And if the mortgagee, whose mortgage is not recorded, and who does not have possession of the property, records his mortgage with the consent of the mortgagor, or takes possession of the property with the consent of the mortgagor, his mortgage then has the force and effect of a mortgage executed on the day on which it is filed for record, or on which the property is delivered. It is the same then as though a new mortgage had been executed by the parties and recorded. The old mortgage is then given life and force and effect by the joint action of both the parties, and hence must be held to be valid from that time on, as against all persons."

I do not think that In re American Machine Works, supra, has application here. I think the referee was right, and his decision is affirmed.

UNITED STATES v. WRIGHT.

(District Court, N. D. New York. July 15, 1915.)

1. CRIMINAL LAW ⊜1069—APPEALS—ALLOWANCE OF APPEAL.
Defendant, when arraigned for a felony, pleaded guilty under the advice of counsel, and the court, after hearing both defendant and his counsel, imposed sentence. Six months thereafter, and after two terms of court had intervened, he petitioned to have an appeal allowed, further proceedings stayed, and the record and proceedings printed for the purpose of an appeal. An assignment of errors was attached to the petition, in which it was stated that defendant was unlawfully deprived of a jury trial. *Held*, that the petition would not be entertained, nor would any order for the purpose of bringing about a review be made.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2691–2699; Dec. Dig. ⊜1069.]

2. CRIMINAL LAW ⊜304—EVIDENCE—JUDICIAL NOTICE—COURT PROCEEDINGS.
On an application for the allowance of an appeal, a stay of proceedings, and to have the record printed for the purpose of an appeal, the court may take judicial notice that defendant was tendered a jury trial at the time of his arraignment, and that under advice of counsel of his own selection he voluntarily pleaded guilty.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 700–717, 2951½; Dec. Dig. ⊜304.]

Ralph E. Wright was convicted of an offense. On petition for the allowance of an appeal, a stay of proceedings, etc. Petition denied.

This is an application by Ralph E. Wright, now serving a term in the United States penitentiary at Atlanta, Ga., for a flagrant violation of the Mann Act (Act June 25, 1910, c. 395, 36 Stat. 824 [Comp. St. 1913, §§ 8812–8819]). He was sentenced on a plea of guilty interposed in open court, having counsel of his own selection present, and after a full hearing on his plea for leniency, and after a full hearing in open court at the time of pronouncing sentence, made by his attorney and by himself. The petitioner asks to have an appeal allowed, further proceedings suspended and stayed, and that the record and proceedings, with all things concerning the same, be furnished and printed for the purpose of the appeal, and that an attorney be appointed to prosecute to the conclusion the appeal to the Supreme Court of the United States as provided by Act March 3, 1891, c. 517, 26 Stat. 826, and Act July 20, 1892, c. 209, 27 Stat. 252, and amendments by Act June 25, 1910, c. 435, 36 Stat. 866 (Comp. St. 1913, §§ 1626–1630), and Act March 3, 1911, c. 231, 36 Stat. 1087.

To this petition is annexed an assignment of errors, in which it is stated that the District Court erred in imposing sentence and judgment without a

trial by jury and a verdict by jury, and that the court was without jurisdiction to sentence the defendant without trial by jury, and that the defendant is therefore deprived of his liberty without due process of law. The assignment of errors also states that the defendant did not waive a jury trial and was without power to do so, as the offense charged was a felony.

Ralph E. Wright, in pro. per.
John H. Gleason, of Albany, N. Y., U. S. Atty.

RAY, District Judge (after stating the facts as above). [1] The defendant, Ralph E. Wright, was indicted at the December, 1914, term of this court, and the indictment was moved for trial in January, 1915, at a continuation of that term. The defendant was duly arraigned, and the trial duly moved. He was represented by able counsel. Acting under the advice of this counsel, he entered a plea of guilty. The court made careful inquiry into all the facts and circumstances of the case, and heard the plea of his counsel and his own statement in open court, before pronouncing sentence. The defendant was not deprived of a jury trial, but tendered one, but elected, under the advice of counsel, to enter a plea of guilty. After such plea was entered, both counsel for the defendant and the defendant himself were allowed to make a full statement as to why the sentence of the court should not then and there be imposed. No cause or reason for not imposing sentence on the plea of guilty was assigned or claimed. Thereupon sentence was imposed. About six months has elapsed since the imposition of such sentence. Two statutory terms of this court have intervened and been held since the final adjournment of the December term, at which such plea was entered and such sentence pronounced, viz., the February term at Albany, and the April term at Syracuse. No irregularity is alleged or claimed, except that the petition and assignment of errors falsely state that the defendant was denied a jury trial, and that sentence was imposed without jurisdiction, for the reason no jury trial was had. The petition is absolutely silent as to the fact that the defendant, under the advice of counsel when the case was moved, voluntarily entered a plea of guilty to the charge contained in the indictment.

[2] Under such circumstances this court is of the opinion it may take judicial notice of what occurred, and of the fact that the defendant was not denied a jury trial, but was tendered one at the time of his arraignment, when he was asked how he pleaded to the indictment, and that under the advice of counsel of his own selection he entered a plea voluntarily of guilty. No exception was taken or entered, and, as stated, no question was raised as to the power and jurisdiction of the court to impose sentence. There was no motion in arrest of judgment. Under such circumstances this court is of the opinion that it ought not, under the statutes referred to, to further entertain this application, or cause the record to be printed, or make any order in the premises to bring about a review by either the Supreme Court of the United States or the Court of Appeals of the proceedings, conviction, and sentence. The records of the court in this matter are before the court and will be deemed a part of this application.

The petition is denied, and there will be an order accordingly.

In re BOHRMAN.

(District Court, S. D. Georgia. July 12, 1915.)

(Syllabus by the Court.)

BANKRUPTCY ⊂=482—ATTORNEY'S FEES—ALLOWANCE.

An attorney for a voluntary bankrupt is not entitled to a fee for services in having a homestead exemption set apart for said bankrupt and attending a hearing before the referee upon objections filed by creditors to such exemption.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 874–876, 897; Dec. Dig. ⊂=482.]

In Bankruptcy. In the matter of L. A. Bohrman, bankrupt. Application of H. L. Jackson, attorney, for payment for services out of the estate of the bankrupt. Compensation reduced.

H. L. Jackson, pro se.

LAMBDIN, District Judge. L. A. Bohrman filed his petition in voluntary bankruptcy, and H. L. Jackson, as his attorney, prepared his petition and schedules and represented him in the bankruptcy proceedings. In the schedules the bankrupt claimed an exemption of $1,600 in specifics out of a stock of goods belonging to him, as allowed by the Constitution of the state of Georgia, and the trustee set aside a certain amount of goods, of the value of $1,600, as such exemption. Certain creditors objected to this exemption to the bankrupt. Subsequently the balance of the estate was reduced to cash, and the attorney for the bankrupt then filed his petition for compensation, and his application for fees was referred to a special master. The special master made his report, in which an allowance of $100 and expenses was recommended.

In the evidence had before the special master, and in the report made by him, it is apparent that the special master, in making this allowance, took into consideration the services rendered by the attorney for the bankrupt in the contest arising over the homestead exemption. The question here presented, therefore, is whether such services should be paid for out of the estate of the bankrupt now being administered by the court.

1. Section 64b (3) of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 563 [Comp. St. 1913, § 9648]) enumerates as a debt having priority and which should be paid in full out of the bankrupt estate:

"The cost of administration, including the fees and mileage payable to witnesses as now or hereafter provided by the laws of the United States, and one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases, to the bankrupt in involuntary cases while performing the duties herein prescribed, and to the bankrupt in voluntary cases, as the court may allow."

The fee allowed to the attorney for the bankrupt in voluntary cases, therefore, comes under the head of "the cost of the administration."

In the question now presented to the court, the homestead exemption was not administered by the bankruptcy court. It formed no part of his estate, and the trustee acquired no title to same. Lockwood v. Exchange Bank, 190 U. S. 294, 23 Sup. Ct. 751, 47 L. Ed. 1061, 10 Am. Bankr. Rep. 107; Collier on Bankruptcy (Tenth Edition) page 186 and cases cited. It follows, therefore, that, as this exemption was not administered by the bankruptcy court, the attorney for the bankrupt could not be allowed any fee based upon such exemption.

2. It appears from the section of the Bankruptcy Act quoted above that in involuntary cases the bankrupt is allowed a fee for his attorney only "while performing the duties" which the bankruptcy law prescribes should be performed by the bankrupt. The subsequent provision in the same section as to the allowance that should be made in voluntary cases should be construed in pari materia, and such allowance should be based on the same principles. Therefore it is only while the attorney is assisting the bankrupt in the performance of those duties prescribed by the Bankruptcy Act that he is entitled to a fee to be paid out of the bankrupt estate. Section 7 of the Bankruptcy Act (Comp. St. 1913, § 9591) prescribes these duties, and it nowhere appears in this section that it is made the duty of the bankrupt or his attorney to appear in a contest over the homestead exemption. This exemption is entirely for the benefit of the bankrupt, and not for the benefit of the estate being administered by the bankruptcy court. On the contrary, the allowance of this exemption reduces the estate. The attorney, therefore, in representing the bankrupt in a contest over this exemption, was not performing any services "in aid of the estate or its administration," nor did such services conduce to the benefit of the estate or its administration. Such being the case, and such services having been rendered for the benefit of the bankrupt alone, and not for the benefit of the estate or its administration, and not in assisting the bankrupt in the performance of the duties prescribed by the Bankruptcy Act, the matter is entirely a personal one between the bankrupt and his attorney, and the bankrupt, and not the estate, should pay for such services, and the attorney would have a claim upon this exemption for same. In re Castleberg (D. C.) 143 Fed. 1021, 16 Am. Bankr. Rep. 430; In re O'Hara (D. C.) 166 Fed. 384, 21 Am. Bankr. Rep. 508; In re Covington (D. C.) 132 Fed. 884, 13 Am. Bankr. Rep. 150; In re Duran Mercantile Co. (D. C.) 199 Fed. 961, 29 Am. Bankr. Rep. 450.

Therefore, the attorney for the bankrupt will not be allowed compensation for his services in the matter of said homestead exemption, and the amount of his compensation in the case will be reduced accordingly.

HAINES v. BUCKEYE WHEEL CO. et al.

(Circuit Court of Appeals, Sixth Circuit. July 20, 1915.)

No. 2746.

1. RECEIVERS ⇐92—AUTHORITY OF RECEIVER—RIGHT TO PURCHASE GOODS ON CREDIT.

A receiver petitioned for authority to borrow money to carry on the business of the corporation, representing that there was on hand an unfinished stock of buggies of great value, and that to realize on the stock to best advantage it would be necessary to complete and sell them. The court authorized the receiver to carry on the business, and, for the purpose of so doing, to borrow sums amounting to $5,000. In his report, where the receiver prayed for the allowance of compensation, he failed to disclose that he had purchased goods on credit which were not yet paid for. *Held* that, in view of the acts of the receiver, the order of the court allowing him to borrow money to carry on the business did not authorize him to make purchases on credit, for in the last analysis the purchasing of goods on credit is practically the same as the incurring of debts for monetary advances, and the receiver's right to borrow money was restricted to specified amounts.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 169; Dec. Dig. ⇐92.]

2. RECEIVERS ⇐166—LIABILITY OF—CREDITORS.

The receiver conducted the business at a great loss until practically all of the assets were exhausted. Thereafter those who had sold merchandise to the receiver filed an intervening petition claiming that he was personally bound to pay such claims, and the bank which had loaned the receiver money moved to require the return of the receiver's compensation. The return was ordered and the receiver was directed to pay the merchandise creditors. It appeared that when the compensation which was allowed under a misapprehension was returned there would be sufficient funds to pay the bank and the expenses of receivership. *Held*, that the right of the merchandise creditors could not be defeated on the ground that, if the receiver acted without authority, no damages resulted to the trust estate, and hence no charge could be made against him, the receiver and the sellers being in pari delicto, for such sellers were his own creditors, and the trust estate would not be decreased or diminished by his payment.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 319; Dec. Dig. ⇐166.]

3. PARTIES ⇐40—INTERVENTION—ACTION BY RECEIVER.

Where a receiver purchased goods on credit without authority, the sellers could file an intervening petition in the receivership proceedings to require the receiver to pay into court the amount of their claims, notwithstanding they could maintain independent actions against the receiver and on his bond.

[Ed. Note.—For other cases, see Parties, Cent. Dig. §§ 60–63, 65–67; Dec. Dig. ⇐40.]

4. RECEIVERS ⇐92—LIABILITY.

Where a receiver who was authorized to borrow money to carry on the business of a corporation did so, and the business resulted in a great loss, the receiver, though liable personally for the claims of persons from whom he made unauthorized purchases on credit, is not liable for the amounts borrowed.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 169; Dec. Dig. ⇐92.]

5. RECEIVERS ⟸92—LIABILITY—CLAIMS.

Where a receiver, who was carrying on the business, made purchases of goods on credit without authority, he is not, though personally liable for the amount of such purchases, liable for the compensation of attorneys of the sellers; the payment of his unauthorized debts being all that equity can demand from him.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 169; Dec. Dig. ⟸92.]

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

Intervening petition by the Buckeye Wheel Company and others against H. H. Haines, receiver of the New Decatur Buggy Company, in which the First National Bank of Middletown, Ohio, made a motion. From a judgment for petitioners, the receiver appeals. Modified and affirmed.

See, also, 203 Fed. 225, 121 C. C. A. 431.

On June 25, 1907, appellant was appointed receiver of the New Decatur Buggy Company, a corporation, by a decree made and entered by the lower court in the case of Harry W. Quackenbush v. Harry H. Elwood et al. Four days later and on June 29, 1907, the receiver petitioned the court for authority to continue the business of the corporation and to borrow the sum of $3,000 for that purpose. His petition was granted and an order made and entered accordingly. Inasmuch as the decision of this controversy hinges upon the construction to be given to this order of the court, the receiver's petition and the order are here set forth in full:

Petition.

"Your petitioner, H. H. Haines, having been duly appointed receiver herein, represents to the court:

"First. That in his opinion it is proper and necessary that he should make an inventory and appraisement of all the property and assets coming into his hands as said receiver, and he therefore respectfully suggests to the court that the court appoint three judicious disinterested persons as appraisers of all said porperty and assets.

"Second. Your petitioner further represents that in his opinion it is wise and expedient and for the best interest of the creditors and other parties interested that the business of the New Decatur Buggy Company should be continued by him as receiver for the following reason, to wit: There is on hand in the factory of said company at Middletown, Ohio, a large quantity of stock and materials for the manufacture of buggies and other vehicles, and that there are in various stages of manufacture buggies and other vehicles in said plant; that said stock and materials and partly manufactured products are of an approximate value of $40,000 to $50,000.

"Your petitioner further says that the spring season for the manufacture and sale of buggies and other vehicles is now at hand; that said spring season has been delayed by the rains and inclement weather of the past spring and summer; and that said period for the sale of said products will be most profitable commencing about July 1, 1907, and continuing until about November 1, 1907.

"Your petitioner further says that, unless said stock and materials shall be so manufactured into the products of said concern, said stock and materials will have to be sold at a great sacrifice and work great loss to both creditors and parties interested.

"Your petitioner further says that said company now has many orders for manufacture and shipment of goods, and that it can procure many more; that in the opinion of your petitioner orders can be obtained of such a number and size as to keep said factory continually and profitably in operation.

"Your petitioner further says that said factory having been closed so recently, the necessary working force thereof can be readily assembled for the purpose of running said plant.

"Wherefore, your petitioner prays for an order authorizing him to reopen said factory and employ the necessary working force and continue said business until the further order of said court.

"Third. Your petitioner says that it will be necessary in order to manufacture said goods and reopen said factory and employ said hands to use certain money, and that there is nothing on hand in the treasury of said company, and he therefore prays for an order of this court authorizing him to borrow money, not to exceed $3,000, at a rate of interest not exceeding 6 per cent., and that he be authorized to issue receiver's certificates or other evidence of indebtedness therefor."

Order.

"This day this cause came on to be heard on the application of H. H. Haines, receiver herein, praying for an order appointing appraisers to make an inventory and appraisement of the property and effects coming into his hands as said receiver, and was submitted to the court, and the court being fully advised in the premises finds that it is proper and necessary to grant said order, and does hereby order that said inventory and appraisement be made by said receiver, and that R. B. Edson, W. T. Harrison, and L. T. Palmer, be and they hereby are appointed appraisers for said purpose.

"Second. Thereupon this cause came on for further hearing on the application of said receiver for an order of court to reopen the factory of the New Decatur Buggy Company, referred to in the application, and to employ the necessary working force, and to continue said business, and was submitted to the court.

"On consideration whereof the court finds that it is necessary and for the best interests of the creditors and all parties interested that said order be granted, and the court does hereby order said receiver to reopen said factory, employ the necessary working force and continue said business until the further order of this court.

"Third. Thereupon this cause came on for further hearing upon the application of said receiver for authority to borrow money, and was submitted to the court.

"On consideration whereof the court finds that it is proper and necessary for the profitable operation of said plant that said order be granted.

"It is therefore ordered by the court that said receiver be and he is hereby authorized and empowered to borrow money for the purpose of continuing said business in a sum not to exceed $3,000 at a rate of interest not to exceed 6 per cent., and he is hereby authorized and empowered to issue receiver's certificates or other proper evidence of indebtedness therefor."

Pursuant to the authority so granted, the receiver immediately borrowed from the First National Bank of Middletown, Ohio (hereinafter called the "bank"), the sum of $3,000, and gave his promissory notes therefor. On July 25, 1907, the receiver again petitioned the court for authority to borrow an additional $2,000 "in order to carry on said business and meet the pay roll and other necessary expenses incurred by him as receiver." On the same day the court made an order authorizing him to borrow "money not exceeding $2,000, in addition to the money heretofore authorized to be borrowed by him." Immediately thereafter he borrowed $1,000 from the bank upon his promissory note. These sums of money aggregating $4,000, so borrowed by the receiver, with interest, constitute the claim of the bank.

The business of the New Decatur Buggy Company, which was continued by the receiver, consisted largely of assembling the parts of buggies which it purchased from dealers and manufacturers and then selling the completed product. Without applying for or obtaining other authority than that contained in the order of June 25, 1907, the receiver commenced at once to purchase on credit additional merchandise and parts of buggies from the Buckeye Wheel Company and many other concerns. He continued to operate the factory for about eight months, and, during that time, his purchases on credit aggregated about $34,000 and his payments thereon about $20,700, leaving a balance of up-

wards of $13,000 then owing by him. When the factory finally shut down in February, 1908, he owed the Buckeye Wheel Company alone more than $4,000 and his other merchandise creditors more than $9,000. Since then he has paid on these accounts about $7,200, leaving a balance of about $5,800 still owing to such creditors. The business was conducted at an enormous loss, and, through shrinkage in values as well as losses in operation, the receivership has terminated disastrously for all concerned. The net results are that the creditors of the New Decatur Buggy Company have received nothing, the entire estate (appraised at upwards of $93,000) has been lost, and the receiver now has in his hands about $4,000 with which to pay debts, amounting to nearly $10,000 owing by him to the bank and other creditors.

On September 28, 1908, the bank filed its intervening petition against the receiver to recover the moneys borrowed by him and evidenced by his notes. The receiver answered the petition, admitting the indebtedness, but presenting a counterclaim in an amount larger than the indebtedness. In its reply the bank denied liability upon the counterclaim. On May 5, 1911, a decree was made by the District Court disallowing the counterclaim of the receiver and ordering and directing him to pay to the bank the sum of $4,000 with interest out of the funds and assets in his hands. This decree was affirmed by this court. Haines v. First National Bank of Middletown, Ohio, 203 Fed. 225, 121 C. C. A. 431.

On April 14, 1910, the receiver filed his first report from which it appears that he had then sold and converted into money all of the property which had come into his possession, and that "his total receipts from the operation of said plant and the running of said business, the collection of accounts, sales of property, and from all other sources up to March 21, 1910, amounted to $89,725.44; his disbursements for the same period amounted to $81,041.63, leaving a balance of cash on hand for distribution of $8,683.81." Attached to his report as exhibits are tabulated statements of his receipts and disbursements. Among the receipts appears the $4,000 borrowed from the bank, and among the disbursements appear the payments to his merchandise creditors aggregating $28,015.70. The report contains no hint of the fact that he was still owing upwards of $5,800 to his merchandise creditors. While the record is imperfect and incomplete as to the court's action upon this report, it may fairly be inferred that the report was received, the account approved, and the receiver allowed $2,000 as compensation for his own services and $2,000 for the services of his attorneys. More than three years later and on May 12, 1913, the receiver filed his second report from which it appeared, for the first time, that he was still owing the Buckeye Wheel Company and 13 other merchandise creditors the sum of $5,835.63. The second report also shows that the receiver's debt to the bank was still unpaid and that, after paying $2,000 to himself and $2,000 to his attorneys and other small incidental expenses, he had in his hands the comparatively small sum of $3,854.08.

On June 2, 1913, the bank filed a motion stating that the receiver had failed to pay its claim and asking for an order requiring him to carry out the provisions of the decree of May 5, 1911, as affirmed by this court, and to pay to it the amount therein directed to be paid with interest. On June 7, 1913, the Buckeye Wheel Company filed its intervening petition in behalf of itself and other creditors of the receiver in like situation, alleging therein that the receiver had borrowed $4,000 from the bank pursuant to the authority conferred by the orders of June 29 and July 25, 1907, that the receiver had purchased from petitioner goods and merchandise of the value of $7,296.54 upon which he had paid $5,340.50, leaving a balance unpaid of $1,956.04, that the receiver had purchased of petitioner and other merchandise creditors goods and merchandise to the amount of $34,365.51 upon which he had paid $28,529.88, leaving a total indebtedness to merchandise creditors then due and payable of $5,835.63, and that, after applying the moneys in his hands upon the payment of the bank's claim, nothing would be left with which to meet his obligations to his merchandise creditors; charging that the receiver's purchases of goods and merchandise on credit were all made without authority and in violation of the orders of the court, and "that the purchase of said goods and merchandise and the contracting of said indebtedness by said receiver, as to any excess over said $5,000, were wasteful, extravagant, and such conduct as to consti-

tute negligence and faulty management on his part," and praying for an order allowing its claim and directing the receiver personally to make payment if he had not sufficient funds in his hands as receiver to meet his obligations. In his answer to the intervening petition, the receiver admitted the indebtedness, denied lack of authority to purchase goods and merchandise on credit, and denied personal liability.

The motion of the bank and the petition of the Buckeye Wheel Company were heard together. At the hearing, all charges of wastefulness, negligence, and mismanagement were waived and withdrawn. The District Court found that the receiver acted without authority and in contravention of the court's orders in contracting indebtedness for goods and merchandise, and that his accounts should be surcharged for the purpose of meeting and paying such unauthorized indebtedness. After reciting the findings, the decree proceeds as follows:

"It is now ordered, adjudged, and decreed that said receiver's accounts be surcharged, and that he repay into this court within thirty days from the entry hereof the amount heretofore allowed him as compensation for services, to wit, $2,000; that, in addition to said sum of $2,000, said receiver shall pay into this court within 30 days from the entry hereof a sum which shall be sufficient, taken together with the foregoing and the amount in his hands and with the amount now on deposit in the First National Bank of Middletown, Ohio, to pay the costs herein, the debt of said bank as aforesaid, and the debts of said goods and merchandise creditors (as above set forth).

"Of the funds in said receiver's hands he is ordered to make distribution as follows, viz.: He will first pay and deduct the costs, if any, which are due at this date and which may be properly and necessarily incurred in carrying out this decree and order of distribution. He will permit the First National Bank of Middletown, Ohio, to retain said sum of $216.90 held by it to the credit of said receiver, and apply same towards the payment and satisfaction of the debt of said bank. The balance in his hands, he will forthwith pay to the said bank or to its attorneys, Benjamin F. Harwitz and Joseph W. O'Hara.

"Of the funds to be paid into court by the receiver, as aforesaid, he is ordered to make distributions as follows, viz.: He will first pay the amounts hereafter fixed by this court as allowances to the solicitors for the Buckeye Wheel Company, he will then pay the balance to said bank and merchandise creditors according to the amounts then due upon their respective debts as above mentioned."

Gilbert Bettman, of Cincinnati, Ohio, for appellant.

Pogue, Hoffheimer & Pogue, H. B. Mackoy, and J. W. O'Hara, all of Cincinnati, Ohio, for appellees.

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

SESSIONS, District Judge (after stating the facts as above). [1] Was the receiver authorized to purchase goods and merchandise on credit and thereby to incur indebtedness in excess of $5,000 expressly authorized by the orders of the court? This is the controlling question in the case, and the answer thereto will make the solution of the other problems either easy or unnecessary. All parties concede that the authority of the receiver must be found in the orders of the court or it did not exist. The receiver contends that the court's order directing him to "continue the business" impliedly conferred upon him the power to incur debts for goods and material reasonably necessary in the conduct of such business and that the express authority to borrow not to exceed the sum of $5,000 was an addition to and not a limitation upon his power to bind the estate in his hands for merchandise debts. Appellees insist, and the court found, that:

"The receiver was authorized to carry on the business, and, for the purpose of doing so, was expressly authorized to borrow a sum of money; (and) this was not only a limitation of the amount of money he might borrow for the purpose but was a negation of any authority to involve the receiver, as such, in any expense in running the business greater than the amount authorized to be borrowed for that purpose."

A naked order of court requiring affirmative action of any kind by a receiver carries with it, by implication, the power to do whatever is reasonably necessary in its performance. But, in a plainly doubtful case, involving transactions of magnitude and not matters of minor detail, authority to act cannot be predicated upon mere inference or uncertain implication, because, in such case, it is not only the right but the duty of the receiver to inform the court fully as to the facts and to ask for instructions. As was said in Re Angell, 131 Mich. 345, 350, 351, 91 N. W. 611, 612:

"A receiver is an officer of court, and amenable to it for a proper discharge of the trust confided to him. When he is in doubt as to what he ought to do, he should take the advice of the court."

By so doing he can at all times protect himself, and if he neglects or refuses to avail himself of the ample and effective shield which the law thus provides and places in his hands, he acts upon his own responsibility and at his own risk and peril.

In the instant case, the receiver, in his petition for authority to continue the business and to borrow money for that purpose, did not inform the court that it would be necessary to buy additional material. On the contrary, the language used fairly imports that the material on hand, stated to be of the value of between forty and fifty thousand dollars, was all that would be needed at least until moneys could be realized from the sales of finished buggies. His statement was that it would be for the best interests of the estate to reopen the factory and manufacture the stock and material on hand into finished product, and his prayer was for authority to continue the business and for that purpose to borrow not to exceed $3,000 in the first instance and later an additional $2,000. The order of the court was:

"That said receiver be and he is hereby authorized and empowered to borrow money for the purpose of continuing said business in a sum not to exceed $3,000."

If the purchase of additional material was necessary, it was an essential part of the continuance of the business for which the receiver had been authorized to borrow money. Buying goods on credit is the equivalent of borrowing money to pay for such goods. There is no legal difference or distinction between an indebtedness for merchandise purchased and one for money borrowed. In either case, if the receiver acts within his authority, the receivership property is in effect pledged for the payment of the debt. The record shows that the receiver's outstanding indebtedness for goods purchased has at all times been more than $5,000, and at the end of the active operation of the factory was more than $13,000. During the seven or eight months while he was creating this large indebtedness, he made no mention thereof to the court. His first report was filed in April, 1910, after he had con-

verted all of the property into money and more than two years after he had ceased to operate the plant. In that report he stated that he had paid out $28,015.70 for merchandise, but he was strangely silent upon the subject of his having purchased such merchandise on credit. He was then seeking compensation for his services as receiver and represented that he had "a balance of cash on hand for distribution of $8,683.81," an amount more than sufficient to meet his debt to the bank and to pay for the services of himself and his attorneys. He carefully concealed the fact that he was still owing to his merchandise creditors nearly $6,000, an amount considerably larger than the balance of money on hand after payment of the principal, to say nothing of interest, of his authorized debt to the bank. That the court would not have awarded him compensation for his services if the true condition of the estate had been revealed is evidenced by the subsequent decree requiring and commanding him to repay the amount which had been allowed upon a showing which was nothing less than a misrepresentation of the facts. It may be true that the failure of the receiver to inform the court of earlier conditions, his concealment of later conditions, and the final filing of a misleading report are not in themselves a sufficient negation of authority to buy goods and material on credit. Nevertheless, his whole course of conduct has an important and legitimate bearing upon the question of his authority to incur debts of that kind and upon the ultimate question of whether his account should be surcharged so as to provide for the payment of such debts.

We conclude that the original order of the court, construed and interpreted in connection with the petition upon which it was based and viewed in the light of the subsequent conduct of the receiver, did not authorize him to make purchases on credit and to bind the estate in his hands for the payment of the debts so created. The language of the order is quite certain and definite. He was authorized to borrow a fixed sum of money for the specific purpose of continuing the business. In other words, with a working capital consisting at most of the money borrowed from the bank and the funds of the estate derived from the sale of its products or otherwise, he was required to do a cash business.

There are few, if any, reported decisions of the courts upon the precise question here presented. Analogous cases brought to our attention support and sustain, directly or indirectly, the findings and decree of the District Court. State Central Savings Bank v. Fanning Ball-Bearing Chain Co., 118 Iowa, 698, 92 N. W. 712; Kirker v. Owings; 98 Fed. 499, 39 C. C. A. 132, and cases there cited; Gutterson & Gould v. Lebanon Iron & Steel Co. (C. C.) 151 Fed. 72; Hitner v. Diamond State Steel Co. (D. C.) 207 Fed. 616. No case to the contrary has been cited, and, so far as we are aware, none has been found.

The case of Cake v. Mohun, 164 U. S. 311, 17 Sup. Ct. 100, 41 L. Ed. 447, cited and relied upon by appellant, is not an authority in his favor. There the receiver was expressly authorized by the order of the court "to carry on and manage the business of keeping said hotel in substantially the same manner as it has heretofore been carried on." No other restriction or limitation was placed upon his power to in-

cur debts in the conduct of the business which he was directed to continue. As said by the court:

"Under such circumstances, the power of the receiver to incur obligations for supplies and materials incidental to the business follows as a necessary incident to the receivership."

In the instant case, the authority of the receiver to incur debts in continuing the business was positively and specifically limited and restricted. The difference between the two cases is marked and vital. In the one the authority conferred was general and practically unlimited, in the other special and definitely restricted.

[2] Counsel for appellant further urge with much earnestness and insistence that, if the receiver acted without authority, no damages are shown to have resulted to the trust estate from his unauthorized purchases of goods and material and hence no charge against him can be made; that, in such case, interveners have no right to participate in the funds in the receiver's hands, and therefore no right to compel him personally to increase the receivership funds; and that persons dealing with the receiver were bound to know the extent of his authority and had no more right to sell than he had to buy and in these transactions the receiver and his merchandise creditors were in pari delicto, and therefore the latter are not entitled to the relief which they seek. In these contentions, counsel misapprehend the nature and lose sight of the primary object and purpose of this proceeding. This controversy is not between the receiver and the general creditors of the New Decatur Buggy Company, nor between the creditors of the receiver and the creditors of the defunct corporation, but strictly and solely between the receiver individually and his own creditors. The general creditors of the insolvent estate are neither active parties to this proceeding nor interested in the moneys sought to be recovered. The entire property of the estate and the goods and material sold to the receiver have been lost. The fund now on hand is insufficient to pay the claim of the bank, and, if the receiver be compelled to restore the $2,000 mistakenly allowed him as compensation, the fund will still be barely sufficient to pay that claim. The bank is the owner and holder of the notes of the receiver which he was expressly authorized to make and, as such, claims the entire fund now in the possession of the receiver. The other appellees are seeking to compel the receiver personally to pay the balance of the purchase price of goods which were sold to him in good faith and have gone into the estate, but which he had no authority to buy. The right of the bank to priority of payment is conceded by the merchandise creditors and as to all others has been adjudicated in the former suit. It follows that whatever moneys he personally is compelled to pay into court must be used to satisfy the claims of his merchandise creditors. The trust estate will be neither increased nor diminished thereby. This is as it should be, because, even if it were true, as urged by the receiver, that the trust estate has not been injured financially by his purchases of goods on credit, his own creditors have been injured and the exact measure of the damages resulting directly to them from his unauthorized action is the amount of their unpaid

claims. They and not the general creditors of the estate have suffered the injuries which they seek to have redressed.

[3] It is possible that appellees could have brought independent suits against the receiver and the surety upon his bond (In re Erie Lumber Co. [D. C.] 150 Fed. 817), but they were not confined to that remedy. They also had the undoubted right to intervene in the case wherein the receiver was appointed and to pursue their remedy in the court whose officer, by his unauthorized acts, has caused the losses which they have sustained. The receiver has not been discharged. He is still accountable to the court of his appointment, not only for his authorized acts, but for whatever he has done in the name of the court and under color of his office although outside the scope of his authority. As was said by the Supreme Court of Minnesota in the case of State ex rel. Pope v. Germania Bank of St. Paul, 103 Minn. 129, 143, 114 N. W. 651, 652:

"It is elementary that the court appointing a receiver or assignee in insolvency proceedings has and retains exclusive jurisdiction over the proceedings and the receiver or assignee for all purposes, settling and adjusting, in the same proceeding, all conflicting interests, all controversies, and all matters arising out of or connected with the trust, all questions respecting the accounts of the receiver, allowances for his compensation, the compensation of his attorneys, agents, and necessary clerks."

See, also, the cases hereinbefore cited.

Upon principle, as well as authority, this must be so. It is unthinkable that a court of equity can be powerless either to protect the integrity of its own faith and credit or to grant relief to those, who, without active fault on their part, have been wronged by its accredited officer, by surcharging his account with the loss so occasioned.

[4] The receiver ought not to be required personally to pay any part of the bank's claim. He was authorized to borrow the money. All charges of waste, negligence, and mismanagement have been waived and withdrawn. It does not appear that his unauthorized purchases of goods and merchandise resulted in the depletion or diminution of the trust estate and trust funds available for the payment of his authorized debts. Neither in its intervening petition nor in its present motion does the bank ask for a personal decree against the receiver. The decree in its favor, affirmed by this court, declared that the bank "has a valid and subsisting lien upon the funds and assets now in the hands of said H. H. Haines, receiver of the New Decatur Buggy Company, in the sum of $4,000 with interest," and ordered and directed him "to forthwith pay to said bank the said sum and interest out of said funds and assets now in his hands as such receiver." It follows that the bank is entitled to recover no more than the balance of the trust funds which will be in the hands of the receiver after the restoration of the $2,000 formerly allowed to him as compensation and after the payment of the expenses of the receivership including the costs and expenses of the litigation prior to the present proceedings.

[5] Nor should the receiver personally be compelled to pay for the services of the attorneys of the Buckeye Wheel Company in addition to the payment in full of the claims of his merchandise creditors. He has no claim to be satisfied, in whole or in part, from the money which

he must pay into court. He will receive no benefit therefrom. The payment of his unauthorized debts is all that equity can demand of him. Those who will share the benefits of the fund so created must also share the expense of its creation.

The case will be remanded to the District Court, with directions to modify and to recast its decree so as to require the receiver: (1) To repay and restore to the trust fund the sum of $2,000 heretofore allowed to him as compensation. (2) To pay from the fund then in his hands the expenses of the receivership, including the costs and expenses of the former suit with the bank, as the same shall be fixed and adjusted by the court, but not including the expenses of the present proceeding. (3) To pay to the bank the balance of the fund in his hands, or so much thereof as may be necessary to satisfy its claim with interest. (4) Personally to pay into court a sum of money equal to the aggregate amount of the claims of his merchandise creditors with interest thereon at the legal rate. (5) To pay from the fund so created the expenses (other than taxable costs) of the Buckeye Wheel Company in this proceeding, including fair and reasonable compensation to its attorneys, as the same shall be fixed and determined by the court. And (6) To distribute the balance of the fund ratably among his merchandise creditors in satisfaction of their claims.

So modified, the decree of the District Court is affirmed, with costs of both courts to be taxed against appellant personally.

GILLESPIE v. COLLIER.†

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

No. 4309.

1. INFANTS ⇐78—ACTIONS BY—APPOINTMENT OF NEXT FRIEND—STATUTE.
   Under Rev. Laws Okl. 1910, § 4686, providing that an action by an infant must be brought by his guardian or next friend, and authorizing the court to dismiss an action brought by the next friend, if it is not for the benefit of the infant, or to substitute a guardian of the infant, or any other person, as next friend, an order appointing a next friend is not a prerequisite to the right to sue, but the court's power is subsequent and supervisory.
   [Ed. Note.—For other cases, see Infants, Cent. Dig. §§ 195–207, 209; Dec. Dig. ⇐78.]

2. INFANTS ⇐80—ACTIONS BY—APPOINTMENT OF NEXT FRIEND—CURE OF OMISSION.
   Where the judgment for an infant plaintiff recited that the action of the next friend in suing was ratified and approved by the court, the omission to appoint the next friend, when such appointment was necessary, was cured, since the matter is not jurisdictional.
   [Ed. Note.—For other cases, see Infants, Cent. Dig. §§ 210–221; Dec. Dig. ⇐80.]

3. RELEASE ⇐17—VALIDITY—FRAUD.
   Where the master paid an injured servant his regular wages for several months after the accident, and in giving him the last check therefor requested him to sign a receipt to show at the office that the amount had

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

† Rehearing denied September 27, 1915.

been paid, which the servant did without reading the receipt, the servant is not bound by a provision therein releasing all claims for damages against the master, especially where the release was not pleaded as a defense.

[Ed. Note.—For other cases, see Release, Cent. Dig. § 32; Dec. Dig. ⟸17.]

4. Appeal and Error ⟸1051—Harmless Error—Admission of Evidence—Fact Otherwise Established.

The admission of evidence of an examination of a defective throttle on the engine, which plaintiff was operating when injured, made more than a month after the accident, without proof that the condition was the same then as at the time of the accident, was harmless, where the other evidence clearly showed that the throttle leaked at the time of the accident, and that complaint had been made thereof on that ground.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4161–4170; Dec. Dig. ⟸1051.]

5. Appeal and Error ⟸970—Evidence ⟸546—Review—Discretion of Trial Court—Expert Testimony.

In cases where it is doubtful whether the opinion of experts will be helpful in determining the ultimate fact, the admission or rejection of such evidence rests largely in the trial court's discretion, and will not be reviewed, unless manifestly erroneous.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3849–3851; Dec. Dig. ⟸970; Evidence, Cent. Dig. § 2363; Dec. Dig. ⟸546.]

6. Master and Servant ⟸270—Immaterial Issue.

Where plaintiff was injured in trying to start a well-pumping engine, after he had oiled it, because the throttle allowed steam to leak into the cylinder, so that when he moved the engine from dead center it started suddenly, it was not error to exclude answers by defendant's witnesses to questions whether the engine was reasonably safe and suitable for pumping.

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

Sanborn, Circuit Judge, dissenting.

In Error to the District Court of the United States for the Eastern District of Oklahoma; Frank A. Youmans, Judge.

Action by Steven Collier, a minor, by his next friend, Louis Collier, against E. N. Gillespie. Judgment for plaintiff, and defendant brings error. Affirmed.

W. A. Sipe, Jr., of Tulsa, Okl. (George E. Black, of Tulsa, Okl., on the brief), for plaintiff in error.

J. P. O'Meara, of Tulsa, Okl. (R. S. Sherman and James A. Veasey, both of Tulsa, Okl., and B. A. Lewis, of Dewey, Okl., on the brief), for defendant in error.

Before SANBORN, HOOK, and CARLAND, Circuit Judges.

HOOK, Circuit Judge. Steven Collier, a minor, suing by his next friend, recovered a judgment for personal injuries sustained in the service of E. N. Gillespie, who with others was engaged in the oil and natural gas business. The plaintiff had been a roustabout on the work, and was put in charge of a drilling machine, with boiler and engine. The negligence charged was that the engine was old and defective, in that the parts of the throttle were so worn that steam leaked into the

cylinder, though the only mechanical means had been used for shutting it off, and that he had not been instructed and was ignorant of the danger. On the occasion of the accident he had shut off the steam, as he supposed, and stopped the engine, and oiled it. The engine had stopped on a dead center, and while he was in the act of moving the flywheel, with a stick as a lever, one end between the spokes and the other under his arm, the steam which had leaked into the cylinder caused the wheel to revolve suddenly and violently. He was thrown upward and into the machinery, and severely injured.

[1, 2] It is urged by defendant that the action should have been dismissed, because there was no order of the court appointing the next friend of the plaintiff. But the Oklahoma civil procedure (section 4686, Rev. Laws 1910) applicable to cases like this does not require such an order. It provides that the action of an infant must be brought by his guardian or next friend, and confers power upon the court to dismiss it when brought by the next friend, "if it is not for the benefit of the infant, or substitute the guardian of the infant, or any person as the next friend." The plain implication from this provision is that the initiative in the selection of the next friend is not with the court, and that its power is subsequent and supervisory, in the interest of the minor. This is also the rule in Kansas, whence the Oklahoma statute was taken. See Abbott v. Abbott, 68 Kan. 824, 75 Pac. 1041. It may be further observed that the judgment recites that "the action of Louis Collier in suing as next friend of Steven Collier is by the court ratified and approved." Even though the court itself should have appointed the next friend, this approval in the judgment would cure the omission. See Hill v. Reed, 23 Okl. 616, 103 Pac. 855. The matter is not jurisdictional.

[3] Complaint is made of an instruction that plaintiff was not bound by a release of damages. The answer alleged that in consideration of certain payments made him plaintiff had acknowledged full satisfaction for his injuries, and had released and discharged the defendant from liability; also that plaintiff had not repaid or offered to repay the money. The evidence, which was uncontradicted, showed that plaintiff continued to receive his wages for about eight months after the accident, that when a representative of defendant gave him a check for the last monthly wage he requested him to sign a receipt "to show the office he paid the amount," that nothing was said about settling a claim for damages, and that plaintiff signed the paper without reading it. It contained the words "as payment in full for all damages." The receipt was not set up in the answer, nor was it even averred that plaintiff had given a written release or discharge of his claim. We think the instruction was right under the circumstances, regardless of the particular reason assigned by the court.

[4] A witness for the plaintiff was allowed to testify, over objection, to the defective condition of the throttle, as disclosed by an examination about 35 days after the accident. Some time after the accident, but just how long does not appear, the engine was put out of use, and was not again employed before the witness took the throttle off and inspected it. The rule is that, upon an issue as to the condition of

machinery or appliances at the time of an injury, evidence of a defective condition at a later time is inadmissible, without proof from which a reasonable inference may be drawn that there has been no substantial change. But the other evidence in the case showed so clearly the throttle was defective and leaked steam, and complaint of it had been made on that ground, that we think no prejudice resulted from the testimony of the witness. The examination of the throttle was made by the witness to verify what he thought was the cause of the leakage he noticed before the accident.

[5] Complaint is also made because the court sustained objections to questions calling for the opinions of witnesses as to whether the machine was "reasonably safe and suitable for pumping," whether "a little leak in the throttle would render the machine unsafe or unsuitable or dangerous to pump with," also what its condition was as to safety and suitability "for pumping or otherwise." The opinions of those who are learned or experienced in questions of science, skill, or trade, which are not within the understanding of men in general, are admissible in evidence, when helpful to the decision of the ultimate fact. But so various are the subjects and so frequently does the common understanding in the communities from which juries are drawn depend upon local conditions that no hard and fast line can safely be drawn, particularly by an appellate court. "Cases arise where it is very much a matter of discretion with the court whether to receive or exclude the evidence; but the appellate court will not reverse in such a case, unless the ruling is manifestly erroneous." Spring Co. v. Edgar, 99 U. S. 645, 658 (25 L. Ed. 487). In Gila Valley R. Co. v. Lyon, 203 U. S. 465, 27 Sup. Ct. 145, 51 L. Ed. 276, upon an issue whether a railroad company had performed its duty respecting the safety of a working place, witnesses were allowed to give their opinions that a buffer at the end of a track was unsafe, and that an overhead structure was too near the tops of cars. The Supreme Court said:

"In the cases of all the witnesses, we think the question of the admissibility of their evidence was one within the reasonable discretion of the trial court, and that the discretion was not abused. All the witnesses had had practical experience on railroads, and were familiar with structures and the character of buffers mentioned in the evidence. There was certainly enough to call upon the court to decide upon the admissibility of their opinions under these circumstances, and we ought not to interfere with the decision of the trial court in this case."

[6] That there are cases in which a trial court has a certain discretion in receiving or rejecting expert or opinion evidence was also recognized by this court in United States Smelting Co. v. Parry, 92 C. C. A. 159, 166 Fed. 407. This rule, however, is not really involved in the case at bar. The issue was not whether the engine was safe or dangerous to pump with. The engine was not at work when the plaintiff was injured. It had been shut down to be oiled, and was supposed to be at rest, and while truly in that condition the manual movement of the flywheel to throw the piston and crank out of alignment would manifestly not have been dangerous. A considerable leakage of steam might have impaired the efficiency or suitability of the engine for pumping, but without danger to the workman in his proper position

while pumping was going on. On the other hand, with the steam shut off and the engine believed to be fixed at rest, an unexpected movement might have been dangerous to a man at work about it as the plaintiff was. The questions asked the witness did not direct attention to the particular work at which the plaintiff was engaged at the time, and the court therefore properly excluded them. Moreover, one of the witnesses had already testified he had not observed the engine leaking steam, had never had occasion to shut it down, and had no reason to find out whether it leaked or not. The other witness of whom the remaining questions were asked had already substantially answered them. There is nothing else of moment in the case.

The judgment is affirmed.

SANBORN, Circuit Judge (dissenting). It is conceded that, upon an issue as to the condition of machinery and appliances at the time of an injury, evidence of a defective condition at a later time is inadmissible, in the absence of proof from which a reasonable inference may be drawn that there has been no substantial change. When the witness Ewing testified, over the objection and exception of the defendant, that 35 or 36 days after the accident he took the throttle of the engine out of its seat, found a flat place where it did not fit, and that it was leaking steam exceedingly, there had been no evidence introduced into the case from which an inference could lawfully be drawn that the throttle and the engine were in the same condition at that time that they were when the accident occurred. Moreover, the testimony taken subsequent to the admission of this evidence conclusively demonstrated that the throttle and the engine had been used after the accident, and therefore that they could not have been in the same condition 35 days thereafter that they were in at the time of the accident. The witness Hesher testified that he worked on the machine pumping with it about 4 hours immediately after the accident, and four or five shifts thereafter. It seems to me, therefore, that it was a fatal error to receive this testimony of the witness Ewing.

In the opinion of the majority, however, it is said that they think no prejudice resulted from this testimony, because the other evidence in the case proved so clearly that the throttle was defective and leaked steam, and because complaint had been made of that fact to a superior officer before the accident. The legal presumption, however, is that error produces prejudice. It is only when the fact appears beyond doubt that an error challenged, not only did not, but also could not, have prejudiced the complaining party, that the rule that error without prejudice is no ground for reversal can have effect. Deery v. Cray, 5 Wall. 795, 807, 808, 18 L. Ed. 653; Mexia v. Oliver, 148 U. S. 664, 673, 13 Sup. Ct. 754, 37 L. Ed. 602; Railroad Co. v. O'Reilly, 158 U. S. 334, 337, 15 Sup. Ct. 830, 39 L. Ed. 1006; Peck v. Heurich, 167 U. S. 624, 629, 17 Sup. Ct. 927, 42 L. Ed. 302; Crawford v. United States, 212 U. S. 183, 203, 29 Sup. Ct. 260, 53 L. Ed. 465, 15 Ann. Cas. 392; Choctaw, O. & G. R. Co. v. Holloway, 114 Fed. 458, 465, 52 C. C. A. 260; United States v. Gentry, 119 Fed. 70, 75, 55 C. C. A. 658, 663; Union Pacific R. Co. v. Field, 137 Fed. 14, 18, 69 C. C. A. 536, 540;

Armour & Co. v. Russell, 144 Fed. 614, 616, 75 C. C. A. 416, 418, 6 L. R. A. (N. S.) 602; United States v. Ute Coal & Coke Co., 158 Fed. 20, 29, 85 C. C. A. 302, 311; Mutual Reserve Life Ins. Co. v. Heidel, 161 Fed. 535, 539, 88 C. C. A. 477, 481; Alaska-Treadwell Gold Min. Co. v. Cheney, 162 Fed. 593, 600, 89 C. C. A. 351, 358; Norfolk & P. Traction Co. v. Miller, 174 Fed. 607, 611, 98 C. C. A. 453, 457; Stewart v. Brune, 179 Fed. 350, 353, 102 C. C. A. 534, 537; Pettine v. Territory of New Mexico, 201 Fed. 489, 492, 119 C. C. A. 581, 584.

This was an action for negligence. The crucial question was whether or not before the accident the throttle of the engine of the No. 7 Star drilling machine which Collier was using leaked so much steam that the leakage disclosed the fact that the engine was so out of repair that it was negligence for the defendant below to permit its use. The legal presumption was that it did not so leak, and that the defendant was not negligent, but that it exercised reasonable care in providing the machine, keeping it in repair, and permitting its use. All the evidence on the subject of the leakage of steam before the accident is embodied in the following testimony: Duffey testified that he had operated other engines of this type, that when they are in good condition they do not leak steam, that this engine leaked steam before the accident, and he asked Bill Gillespie to get a new one. Ewing testified that the engine leaked steam, that he knew this because, after the engine had been standing, the steam would crawl and creep and fill up, but that he did not notice the leaking so much until after Mr. Duffey had made a fuss about it a few mornings before the accident. Biddle testified that the throttle leaked a little steam, which was caused by its working loose and the steam cutting out a little more; that he had pulled rods with the engine a couple of times and had no trouble with it. Jackson testified that for 14 or 15 years he had been the representative of the Star drilling machines, that as a rule the throttles on all such machines leaked, and that if this means that they are out of repair then all are out of repair, the new as well as the old, and that he did not believe he ever saw one that did not leak some steam. Hartman testified that he had had three years' experience in the actual operation of Star drilling machines, that while Collier was pumping with this machine he and Collier used it in pulling rods at various times, that they took turns about at wrenching the rods and at operating the machine, that he could not say whether the throttle leaked any steam, but that he knew that it did not leak enough to be noticeable, or to amount to anything, and that if it had it could not have been used for pulling rods, because, as the rod goes down, it must be shut off altogether, or it cannot be operated—that is, if it leaks enough to amount to anything. Hesher testified that he had been following the oil business as pumper, tool dresser, and roustabout 15 years, that he had operated Star drilling machines 2 or 3 years, that he worked on the machine on which the plaintiff was hurt pumping with it about 4 hours after the accident and for four or five shifts after that, that he had no trouble operating it, that just before the accident it had been used for cleaning out a well, that he never observed it leaking steam, that he had no reason to find out whether it did or not, never having had occasion to shut it down to

fix anything, that he worked right along with it pumping the well and never had the least bit of trouble with it.

The foregoing is all the testimony on this subject, and reduced to its lowest terms it is by one witness, Duffey, that machines of this character do not leak steam when in good condition, and by another witness, Jackson, that all of them, new as well as old, leak some steam; by two witnesses, Duffey and Ewing, that the engine leaked so much steam that Duffey asked Gillespie to get a new one; by another witness, Hartman, that he worked on it with Collier just before the accident and knew it did not leak enough to be noticeable, or to amount to anything, because if it had it could not have been used for pulling rods; by another witness, Biddle, that it leaked a little steam but he pulled rods with it a couple of times and had no trouble with it; and by still another witness, Hesher, that he worked right along with it, pumping the well, never observed it leaking steam, and never had a bit of trouble with it. This evidence is very far from convincing my mind beyond doubt that the admission of the incompetent testimony of Ewing that 35 or 36 days after the accident he took the throttle out of the engine, found a flat place where it did not fit, and that it was then leaking exceedingly, did not prejudice, and could not have prejudiced, the defendant. On the other hand, it leads me to believe that it must have prejudiced, and did prejudice, the defendant.

Nor am I persuaded that it was within the discretion of the court below to reject the proposed answer of the witness Hesher to the question, "From your experience with this machine, would you consider it reasonably safe for pumping?" It seems to me to be altogether too narrow and technical an interpretation of the word "pumping" and of this question to say that they did not refer to and include the movement of crank and piston by the prying of the flywheel from a stationary to a moving condition after the machine had been for some time at rest. When this question was asked, evidence had been introduced which established these facts: "Just before the accident," Biddle "had been pumping with the machine." "Just before the accident" Collier "shut off the steam and oiled the engine, which was on center." Then he took his forgy stick and pried the flywheel into motion for the purpose of continuing the pumping. The issue on trial was whether or not the machine was dangerous to Collier at the time he pried the wheel to continue the pumping, and that fact was unavoidably in the minds of court, counsel, and witness when the question was propounded. Not only this, but Hesher had just testified that he had been working right along with the machine, that it "would sometimes stop on center, which necessarily happens at times in the case of any machinery and with Star drilling machines in the best of repair. By the engine getting on center is meant, when the piston rod and crank stand straight up and down with the cylinder and in the same straight line, so that the steam cannot get a purchase, and to get it off it has to be pried or pulled one way or the other before it will take steam. My method of getting it off was to shut off the steam, take hold of the balance wheel, and push or pull it whichever way I wanted it to take steam."

Such was the question at issue, and thus had the witness Hesher related his experience when he was asked, "From your experience with this machine would you consider it reasonably safe and suitable for pumping?" It seems to me that the question was clearly intended to ask, and did ask, the opinion of the witness as to the safety of the machine for the starting of it by the prying of the flywheel after it had been at rest, in order to continue the pumping it had been doing before it was stopped, as well as for the mere movement of crank and piston, while it was actually drawing the oil from the well, and I believe that court, counsel, and witness so understood it. In my opinion they could not have understood it otherwise, because there was no question of the safety of the machine while the crank and piston were actually drawing oil from the well, and the only question in controversy was as to its safety during the process of prying the flywheel into motion.

For the same reasons it seems to me that the question, "What was its condition with reference to whether it was safe and suitable for pumping or otherwise?" had the same meaning and was asked and understood by all of the parties in the same way. These questions and the question to Hartman, "Would you consider a little leak in the throttle would render the machine unsafe or unsuitable to pump with?" were asked, not only of witnesses who had been engaged in using machines of this character for years, but of two witnesses who had actually operated the machine on which Collier was injured just before his accident. It seems to me that if there ever was a case in which a litigant had the right to introduce the testimony of expert witnesses possessed of special knowledge, training, and experience relative to the crucial issue in the case which jurors of ordinary knowledge, observation, and experience could not have, this was that case, and that to hold that it was in the discretion of the trial court to reject the testimony of these witnesses is in effect to abrogate the rule that expert testimony is admissible, and to leave it within the discretion of the court to reject the evidence of all expert witnesses.

The authorities cited by the majority do not sustain the position that it is discretionary with the trial court to refuse to admit clearly competent expert testimony. They go no farther than to hold that the trial courts committed no error and did not exceed the limited and reasonable discretion they have to determine whether or not the witnesses offered are qualified as experts and whether or not their testimony is admissible under the established rule. This is an entirely different thing from holding that it is discretionary with the trial courts to reject the most competent expert testimony, and none could be more competent, as it seems to me, than that here offered. Thus in Spring Co. v. Edgar, 99 U. S. 645, 658, 25 L. Ed. 487, the testimony of experts on the question whether or not a male deer was dangerous at certain seasons of the year was admitted; in Gila Valley R. R. Co. v. Lyon, 203 U. S. 465, 27 Sup. Ct. 145, 51 L. Ed. 276, the testimony of experts on the question whether or not a railroad track on a trestle with a buffer at the end of it were reasonably safe for the operation of an engine and cars thereon was admitted in evidence; and in United

States Smelting Co. v. Parry, 166 Fed. 407, 92 C. C. A. 159, the testimony of a practical builder that a scaffold was not reasonably safe for use by workmen, was received. It is true that the appellate courts in the opinions in these cases remarked that the trial courts have a reasonable discretion in determining the admissibilty of expert testimony, and that in admitting the testimony described in these cases they did not exceed or abuse that discretion. But that is very far from holding that it would not have been an abuse of that discretion to have rejected this evidence. I take it that the meaning of the statements regarding the discretion of the trial courts in these opinions is that where the testimony offered is on the verge of inadmissibility the trial courts have a limited and reasonable discretion in determining its admissibility.

No authority has been cited to the effect, and I am unable to persuade myself, that a trial court has the discretion to reject the testimony of experts which is clearly competent under the well-established rule upon the subject. Such a discretion would not be a reasonable, but an unreasonable, discretion, and the exercise of it would abolish the rule. In the case last cited Judge Van Devanter, now Mr. Justice Van Devanter of the Supreme Court, delivered the opinion of this court after a thorough and exhaustive review of the authorities. After stating the general rule that witnesses are permitted to testify to the primary facts within their knowledge, but not to their opinions, he said:

"The most important qualification of the general rule before stated is that which permits a witness possessed of special training, experience, or observation, in respect of the matter under investigation, to testify to his opinion when it will tend to aid the jury in reaching a correct conclusion; the true test being, not the total dependence of the jury upon such testimony, but their inability to judge for themselves as well as is the witness. A reference to adjudicated cases will show the extent of this qualification, its application in actual practice, and the discretion accorded to the trial judge in that regard. In Transportation Line v. Hope, 95 U. S. 297 [24 L. Ed. 477], there was called in question a ruling of the Circuit Court whereby a witness of large experience in towing vessels was permitted to testify that in his opinion it was not safe or prudent for a tugboat in Chesapeake Bay to tow three boats abreast, with a high wind; that being the point to be decided by the jury. The ruling was sustained; it being said in that connection: 'The witness was an expert, and was called and testified as such. His knowledge and experience fairly entitled him to that position. It is permitted to ask questions of a witness of this class which cannot be put to ordinary witnesses. It is not an objection, as is assumed, that he was asked a question involving the point to be decided by the jury. As an expert he could properly aid the jury by such evidence, although it would not be competent to be given by an ordinary witness. It is upon subjects on which the jury are not as well able to judge for themselves as is the witness that an expert as such is expected to testify. Evidence of this character is often given upon subjects requiring medical knowledge and science, but it is by no means limited to that class of cases. It is competent upon the question of the value of land (Clark v. Baird, 9 N. Y. 183; Bearss v. Copley, 10 N. Y. 93); or as to the value of a particular breed of horses (Harris v. Panama Railroad Co., 36 N. Y. Super. Ct. 373); or upon the value of the professional services of a lawyer (Jackson v. New York Central Railroad Co., 2 Thomp. & C. [N. Y.] 653); or on the question of negligence in moving a vessel (Moore v. Westervelt, 9 Bosw. [N. Y.] 558); or on the necessity of a jettison (Price v. Hartshorn, 44 N. Y. 94, 4 Am. Rep. 645). In Walsh v. Washington Marine Insurance Co., 32 N. Y. 427, it was decided that

the testimony of experienced navigators on questions involving nautical skill was admissible. The witness in that case was asked to what cause the loss of the vessel was attributable, which was the point to be decided by the jury. The court sustained the admission of the evidence, using this language: "We entertain no doubt that those who are accustomed to the responsibility of command, and whose lives are spent on the ocean, are qualified as experts to prove the practical effect of cross-seas and heavy swells, shifting winds, and sudden squalls." The books give a great variety of cases in which evidence of this character is admissible, and we have no doubt of the competency of the evidence to which this objection is made.'"

Justice Van Devanter then proceeded to review Spring Co. v. Edgar, 99 U. S. 645, 25 L. Ed. 487, which has already been reviewed here, Connecticut Mutual Life Ins. Co. v. Lathrop, 111 U. S. 612, 4 Sup. Ct. 533, 28 L. Ed. 536, in which the admission of the testimony of non-professional witnesses based on their observations of his conduct to the mental condition of the insured, was affirmed; Union Ins. Co. v. Smith, 124 U. S. 405, 8 Sup. Ct. 534, 31 L. Ed. 497, wherein the admission of the testimony of experienced seamen relative to the good seamanship and prudence of towing a disabled vessel out of a port of repair and safety across Lake Erie, was sustained; Northern Pacific R. R. Co. v. Urlin, 158 U. S. 271, 15 Sup. Ct. 840, 39 L. Ed. 977, in which the admission of the testimony of physicians as to whether the examination of the plaintiff's person was made in a superficial or in a thorough and careful manner, was approved; Texas & Pacific Ry. Co. v. Watson, 190 U. S. 287, 23 Sup. Ct. 681, 47 L. Ed. 1057, in which the Supreme Court held that the answer of a qualified witness to the question whether or not if an engine conducted itself in a way particularly described he would say there was anything wrong with it, was properly admitted; Gila Valley R. R. Co. v. Lyon, 203 U. S. 465, 27 Sup. Ct. 145, 51 L. Ed. 276, which has been reviewed above; St. Louis, etc., Co. v. Edwards, 78 Fed. 745, 24 C. C. A. 300, wherein this court held that the testimony of an expert in handling cattle to the damage sustained by cattle from their long detention in cars, was admissible; Western Coal & Mining Co. v. Berberich, 36 C. C. A. 364, 94 Fed. 329, in which this court sustained the admission of the testimony of an experienced miner as to "whether or not that [the room in a mine] would be an ordinarily safe place to work"; Chicago Great Western Ry. Co. v. Price, 38 C. C. A. 239, 97 Fed. 423, in which this court sustained the admission of the testimony of a locomotive engineer that a rough and uneven railroad track had a tendency to jostle the pin out of a car coupling, and thus to part a train—and after citing a host of like authorities from the state courts Judge Van Devanter said that the most concise and satisfactory statement of the rule relative to the admissibility of the testimony of expert witnesses was found in Taylor v. Town of Monroe, 43 Conn. 36, 44, where the Supreme Court of Errors of Connecticut says:

"The true test of the admissibility of such testimony is not whether the subject-matter is common or uncommon, or whether many persons or few have some knowledge of the matter; but it is whether the witnesses offered as experts have any peculiar knowledge or experience, not common to the world, which renders their opinions founded on such knowledge or experience any aid to the court or the jury in determining the questions at issue."

The testimony rejected in this case stands the test. Years of observation and of experience in handling and operating Star drilling machines and the actual observation and operation just before the accident of the machine on which the accident occurred gave the witnesses Hesher and Hartman peculiar knowledge and experience, not common to the world, which made their opinions on the questions asked them of especial aid and value to the court and to the jury in determining the questions at issue in this case. Under the established and generally admitted rule, under the reason of that rule, under all the authorities which have been cited, that testimony was admissible. Its rejection, in my judgment, was a clear and complete violation of the universal rule. No authority has been cited to the effect that the discretion of a trial court in the receipt of evidence of experts of doubtful admissibility extends to the rejection of the testimony of expert witnesses which is clearly admissible under the rule. All the authorities concede that the rejection of such evidence or the reception of evidence clearly inadmissible is a fatal error. The testimony rejected in this case was, in my opinion, as clearly competent and admissible as any testimony of an expert witness presented to any court, and I think its rejection was a plain and fatal error.

For these reasons it seems to me that the judgment below should be reversed, and the case should be remanded to the court below, with instructions to grant a new trial.

E. A. KINSEY CO. v. HECKERMANN.

HECKERMANN v. E. A. KINSEY CO.

(Circuit Court of Appeals, Sixth Circuit. June 8, 1915.)

Nos. 2750, 2754.

1. MECHANICS' LIENS ⊂⊃32—SUBJECT OF LIEN—MACHINERY—"ALTERING A MANUFACTORY."

Under Page & A. Gen. Code Ohio, § 8308, giving every person, who furnishes machinery for altering a manufactory by virtue of any contract with the owner or lessee of any real estate, a lien to secure payment therefor on such manufactory and the machinery so furnished, and section 8310, providing that machinery so furnished on leased lands shall be held for the debt contracted for or on account thereof, also the leasehold term for such lot and land on which the machinery is erected, machines furnished to a manufacturer occupying one floor of a building under a lease, some of which machines were furnished to be used in making a different style of product, and others were to enable the manufacturer to make certain supplies which he had previously bought, and which machines were chattels and fixtures as between the manufacturer and his landlord, all were furnished for altering the manufactory, which was the leasehold interest in the premises and the equipment thereof, and are subject to lien.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 37; Dec. Dig. ⊂⊃32.]

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2. MECHANICS' LIENS ⟸5—STATUTES—CONSTRUCTION.
Those statutes are remedial in their nature and intent, and are to be liberally construed.
[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. §§ 3, 5; Dec. Dig. ⟸5.]

3. MECHANICS' LIENS ⟸32—SUBJECTS OF LIENS—CHATTELS IN LEASEHOLD.
The fact that the leasehold possessed no value above the rents reserved, so that the lien was only effective against the machinery, which was not a part of the realty, does not destroy the right to the lien, in view of the history of the legislation, which shows a purpose to enlarge the rights of persons furnishing such machinery.
[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 37; Dec. Dig. ⟸32.]

4. COURTS ⟸366—RULES OF DECISION—FEDERAL COURTS—INTERPRETATION OF STATE STATUTE.
Federal courts are bound by the construction which the Supreme Court of a state has placed upon its statutes.
[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 954–957, 960–968; Dec. Dig. ⟸366.
Conclusiveness of judgment between federal and state courts, see notes to Kansas City, Ft. S. & M. R. Co. v. Morgan, 21 C. C. A. 478; Union & Planters' Bank v. City of Memphis, 49 C. C. A. 468; Converse v. Stewart, 118 C. C. A. 215.]

5. FIXTURES ⟸27—AGREEMENT.
An agreement between a landlord and his tenant and one furnishing machinery to the tenant that the machinery shall not become a fixture is valid.
[Ed. Note.—For other cases, see Fixtures, Cent. Dig. §§ 5, 22, 25, 44, 45, 54; Dec. Dig. ⟸27.]

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

Petition by the E. A. Kinsey Company against A. W. Heckermann, trustee in bankruptcy of James L. Patton, to establish a lien on certain machinery sold to the bankrupt. From a decree establishing the lien as to a portion of the machinery, but denying it as to the rest, both the petitioner and the trustee appeal. Decree reversed, and cause remanded, with direction to enter a decree sustaining the lien as to all the machinery.

These are cross-appeals from a decree entered in the court below January 30, 1915. Patton, trading as the Commercial Packing Company, and also as the Patton Manufacturing Company, had been adjudicated a bankrupt and Heckermann appointed trustee. According to stipulation of the parties, the following in substance are the facts: At and before the bankruptcy, Patton was engaged in the manufacture of automobile electric lamp connectors. He was occupying and using as a manufactory the west half of the fourth floor of what is known as the Murdock Building, in Cincinnati. The building had been designed and intended to afford space for light manufacturing purposes, and the floor space mentioned was held by him under a lease for one year from February 1, 1913. Pursuant to contracts with Patton, the Kinsey Company sold and delivered to him in July, 1913, at the manufactory mentioned, certain machines at specified prices: 1 No. 0 B. & S. tool grinding machine, 2 No. 0 B. & S. wire-feed screw machines, and 1 B. & S. No. 2 wire-feed screw machines. The Kinsey Company, on November 10, 1913, filed in the office of the recorder of Hamilton county, Ohio, an instrument in due form asserting a mechanic's lien against this machinery. The occasion for the pur-

chase of the two No. 0 B. & S. wire-feed screw machines was a sudden change in demand of the trade, from double circuit connectors to single circuit connectors. These machines replaced an automatic screw machine theretofore furnished by the Kinsey Company, and this machine was returned to the Kinsey Company as a credit against the unpaid price therefor. The rest of the machinery so sold and delivered was added to the machinery equipment in the manufactory, for the purpose of enabling the bankrupt to manufacture parts of the product which had theretofore been specially made for him by others and at greater cost. The machines so supplied aggregated something more than 3,400 pounds in weight; one was fastened to a table and the others were screwed to the floor of the manufactory, and all were connected by belting and countershafting with an electric motor which supplied the power for the entire manufactory. The machines were capable of being removed without appreciable damage to the building, and were regarded by the parties and also the lessor as personal property, not as fixtures. The Kinsey Company consented to a sale of the machinery supplied by it, separately from the other assets, and to a transfer of its asserted lien to the proceeds of sale without prejudice. Further, no part of the machinery sold by the Kinsey Company to the bankrupt was used to alter or repair any other machine or equipment of the bankrupt. "It either supplanted and displaced other machinery and equipment or was added to the machinery and equipment owned by the bankrupt at the time" of the Kinsey sale to him.

The Kinsey Company filed a petition in the bankruptcy proceeding, in which it set out its claim for the machinery so supplied, alleged that the claim was unpaid, that the machinery was "furnished in good faith in and about the construction, alteration, and repair" of the manufactory, described the manufactory and the lot on which it is located, the steps it had taken to acquire the mechanics' lien, and prayed its enforcement. The referee denied the lien entirely. Upon review, the District Court allowed the lien upon part of the machinery and disallowed it as to the rest; but the claim, independently of the lien, does not appear to have been questioned. While the appeals are each general in form, yet, through the assignments, the effect of each is limited—that of the Kinsey Company to the portion of the decree disallowing, and that of the trustee to the portion allowing, the lien on part of the machinery.

Roy McLaughlin, of Cincinnati, Ohio, for petitioner.

Paul V. Connolly, of Cincinnati, Ohio, for trustee.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

WARRINGTON, Circuit Judge (after stating the facts as above). [1] The question presented is whether the lien claimed by the Kinsey Company is valid under any statute of Ohio. The only statute relied on or discussed by counsel is embraced in sections 8308 and 8310 (3 Page & Adams' Ann. Gen. Code Ohio), which in material parts are set out in the margin.[1] The District Court reversed the order of the

[1] "Sec. 8308. Every person who * * * furnishes machinery, material * * * for erecting, altering, repairing or removing a house, mill, manufactory, * * * by virtue of a contract, express or implied, with the owner, part owner or lessee, of any interest in real estate, * * * shall have a lien to secure payment thereof * * * upon such house, mill, manufactory, * * * and upon the material or machinery so furnished, and upon the interest, leasehold or otherwise, of the owner, part owner, or lessee in the lot or land upon which they may stand, or to which they may be removed."

"Sec. 8310. Every building erected, or other improvement made, or machinery or material furnished, as mentioned in section eighty-three hundred and eight, on leased lots or lands, shall be held for debt contracted for or on account thereof; also the leasehold term for such lot and land on which they are erected or made. * * *"

referee so far as it affected the two No. 0 B. & S. wire-feed screw machines, and affirmed the order as to the other machines. The theory of the reversal was that, although all the machines were regarded as personal property, the two just mentioned constituted an alteration in the manufactory, but that the other two machines should be treated simply as an addition to the equipment.

We agree with the learned trial judge to the extent of his reversal of the referee, though we do not see how his affirmance of any part of the referee's ruling can be sustained. If the change from a single machine producing double circuit connectors to the two machines producing single circuit connectors constituted an alteration within the meaning of the statute, it ought to follow that the introduction of machines to enable the owner to produce articles, instead of purchasing them, and for the purpose of reducing the cost of his output, also amounted to a like alteration, since it involved a change in the manufactory. The test in each instance is whether the thing done was "altering * * * a * * * manufactory." The means adopted in both instances was the installation of machinery and for the purpose of producing something which the owner was not in either instance manufacturing before. True, the single circuit connector replaced the double circuit connector, and the other articles produced replaced the purchased articles; but the manufactory had to undergo an alteration before either could be done. The manufactory is the thing here to be kept in mind; it had to be put into a changed condition; literally and practically, then, it was not thereafter the same manufactory as it was before, no matter which of the changes wrought may be considered. Stated otherwise, if the introduction of machinery to manufacture articles previously acquired through purchase was an addition, and not an alteration, then, since two wire-feed screw machines were introduced for the purpose of turning out a new and distinct product, while only one machine was removed, it is not easy to understand why, upon this theory of addition, at least one of these new machines should not also have been treated as an addition.

As it seems to us, however, this interpretation would be opposed to the apparent statutory object of employing the word "altering" as a token for the allowance of a lien. This object reaches the manufactory as the unit to consider, and not simply some of the machines there possessed and used. True, the bankrupt did not occupy an entire building; he was, however, a lessee in the possession and enjoyment of a distinct portion of a building which had been specially designed and constructed for separate manufactories; and his entire equipment for turning out his manufactured product was being rightfully maintained and used within this portion of the building. The unitary character, then, of such a manufactory, necessarily includes such interest in the building as the lessee may in fact have, together with the entire equipment and his right to maintain, change, and operate it within the portion of the structure leased. Schott v. Harvey, 105 Pa. 222, 227, 228, 51 Am. Rep. 201; Wells v. Christian, 165 Ind. 662, 664, 665, 76 N. E. 518. Still it is not meant to say that every article used in a manufactory can be made the subject of a mechanic's lien. The language of the statute is specific as to the subjects of the

lien, though it is comprehensive in prescribing conditions for allowance of the lien. We have an example here in respect of "machinery," which apparently entered integrally into the mechanism required for the manufacturing operation. The statute embraces machinery furnished "for erecting, altering, repairing or removing a * * * manufactory." Certainly it was not necessary to employ more words, or words more apt, in order to disclose the legislative purpose.

[2] Such an act in its essence and intent is remedial, and is to be liberally construed. Bullock v. Horn, 44 Ohio St. 420, syl. 1 and page 424, 7 N. E. 737; Vernon v. Harper, 79 Ohio St. 181, 187, 86 N. E. 882, 20 L. R. A. (N. S.) 44; Central Trust Co. v. Leuders & Co. (decided by this court March 2, 1915) 221 Fed. 829, 137 C. C. A. 387. It consequently will not admit of refined distinctions which would include part of this machinery as an "alteration," and exclude part as an "addition"; for that would be to ignore the prescribed token for allowance of the lien—the changed condition of the manufactory.[2] These views derive support, we think, from other parts of the statute and some of the decisions.

[3] We may therefore turn to the contention, which is made so earnestly on behalf of the trustee, that, as respects the lien claimed, none of this machinery falls within the language and intent of the statute. The argument is that the lien of a mechanic or materialman is one that can be had only for enhancing the value of the premises, and so must be upon something that becomes part of the realty, like a fixture, and not upon machinery which, as here, is intended to be retained as personalty. We have seen that the statute at least in terms applies to machinery and provides for a lien:

"Every person who * * * furnishes machinery * * * for * * * altering * * * a * * * manufactory, * * * by virtue of a contract * * * with the * * * lessee of any interest in real estate * * * shall have a lien to secure payment thereof * * * upon the * * * machinery so furnished. * * *"

It might be added that the lien so given is also expressly extended to the leasehold interest, as the statute in part quoted in the margin at an earlier portion of this opinion shows; but in view of the stipulation of the parties it is to be presumed that there was in this instance no value of importance in the leasehold, for nothing is claimed in that behalf; still this feature of the statute is not to be overlooked in determining the validity of the lien. It hardly seems necessary to discuss the facts admitted and before pointed out, nor a statute containing language as plain as this, in order to show the intent either of the parties or of the statute; such intent cannot be made plainer by argument.

[4] The rule is settled, of course, that the federal courts would be bound by any construction which the Supreme Court of Ohio might have placed upon this statute or any earlier statute substantially like

[2] Under statutes involving interpretation of the words "addition" and "alteration," rulings have been made upon facts which would require the introduction of these machines to be regarded as an alteration. Updike v. Skillman, 27 N. J. Law, 131, 132, 133; Kosidowski v. Milwaukee, 152 Wis. 223, 226, 139 N. W. 187.

it. There are many decisions of that court construing statutes creating liens in favor of mechanics and materialmen, but we find no such decision construing these particular statutory provisions. However, in Hart v. Globe Iron Works, 37 Ohio St. 75, a controversy was presented concerning a mechanic's lien which was perfected and enforced under circumstances kindred to those here involved. The syllabus, which according to the rule there maintained was sanctioned by the court, reads:

"Under an agreement with one engaged in manufacturing on premises of which he had a lease for two years, a mechanic furnished and attached to the manufactory certain machinery to be used in the prosecution of the business, after which the tenant made a general assignment of his property for the benefit of his creditors. *Held*, that this did not interfere with the right of the mechanic to perfect a mechanic's lien under the act of 1843 (1 S. & C. 833), and that the lien will extend to such machinery."

It was contended there, as it is here, that a mechanic's lien could not be obtained on personal property. This was equivalent to saying that the lien could not be asserted against a chattel interest like a leasehold for two years; but the ruling was that machinery attached to the building on the leased premises "became so much a part of the leasehold that the mechanic's lien will extend to the machinery." The tenant had the right to remove the fixtures, yet this was regarded as immaterial. In closing the opinion Judge Okey said (37 Ohio St. 77):

"Nor are the rights of the parties affected by the fact that the interest of the tenant in the building and ground was not sold by the assignee, being considered of no value. The things which, by being annexed to the building, had become an appurtenance of the leasehold, and a part thereof for the purposes of such lien, were sold, and the mechanic was entitled to payment of his judgment out of the fund arising from such sale."

Some other matters more or less affected by that decision are deserving of special attention here. The statute there construed was in some material respects the basis of the present mechanic's lien law (1 S. & C. 833). The act was carried into the revision of the Ohio statutes in 1880 under sectional numbers 3184–3206 (1 Ohio Rev. Stat. [Ed. 1880] pp. 825, 830); and the present section 8308 of the General Code is but an expansion of section 3184—that is, additional objects have been included in the section. Neither the act construed in the Hart Case, nor section 3184 as it stood at the date of the decision, in terms fastened the lien on machinery or upon a leasehold interest; and yet the court allowed the lien against the machinery, in spite of the fact that the purchaser of the machinery had no interest in the land, except through a lease for a term of two years, and without value. On April 15, 1889, section 3184 was amended so as to fix the lien directly upon machinery, as well as upon the interest of the landowner, though not upon a leasehold interest (86 O. L. 373). In 1892 the lien was extended to leasehold interests (89 O. L. 373); and although amendments have since been made, the provisions fixing the lien upon machinery, as well as upon leasehold interests, have been preserved. The purpose of this course of legislation is unmistakable; it was, so far as the case under review requires consideration, to enlarge the rights of persons furnishing machinery

for altering a manufactory. In view, then, of this legislation, we regard the Hart decision as in principle decisive of the question of the right to have and enforce such a lien.

The decision in Mutual Aid Building & Loan Co. v. Gashe, 56 Ohio St. 273, 46 N. E. 985, when considered in connection with the decisions below, shows that the court was not disturbed about the power to allow a mechanic's lien upon personalty, although, as far as the present question is concerned, virtually the same argument that was made by counsel there is urged here. The questions arose upon a proceeding instituted by Gashe, as assignee of an insolvent corporation, for the sale of real estate and an adjustment of liens. The property was sold and the rights of the lienors were transferred to the sales proceeds. Among other liens there were three mechanics' liens, but the facts are not sufficiently reported as to the nature of the articles furnished by the lienors to justify allusion to more than one of them. A copartnership, Arbuckle, Ryan & Co., had furnished to the corporation an engine, boiler, and pump, with heater and stone for the engine and the necessary fittings and connections, and had taken a mechanic's lien upon the company's land and the improvements thereon, to secure payment. Subsequently the copartnership entered into a written agreement with the Mutual Aid Building & Loan Company, a mortgagee of the insolvent corporation, waiving priority of the mechanic's lien on the real estate, but not upon the boiler, engine, pump, heater, etc., which, through further provision, "were not to become realty until paid for." The mechanic's lien, subject to the waiver, was sustained in the common pleas court, and the proceeds arising from the sale of the articles were ordered by that court to be paid to Arbuckle, Ryan & Co. Gashe v. Ohio Lumber Co., 5 Ohio Dec. 130, 136. This was affirmed by the circuit court (Mutual Aid Building & Loan Co. v. Gashe, 18 Ohio Cir. Ct. R. 681, 685); and although the decree below was in one respect, not material here, modified by the Supreme Court, it was said in the opinion (against contention that a mechanic's lien could be allowed only for material which becomes part of the realty) that subject to this modification the "court concurs in the order in which the courts below distributed the funds in controversy" (56 Ohio St. at page 295), and further that the funds arising from the sale of the boiler, engine, etc., furnished by Arbuckle, Ryan & Co. "were properly applied to the payment of the lien of that company" (56 Ohio St. 301).

In Pflueger v. Lewis Foundry & Machine Co., 134 Fed. 28, 67 C. C. A. 102, this court had occasion to consider the Ohio mechanic's lien act in substantially its present form, and portions of its interpretation of the act are quite apposite here. The court did not find it necessary, it is true, to place its decision upon the analysis thus alluded to; and still these features of the opinion are so in accord with our views of the statute, and the Ohio decisions there cited, that we quote the following pertinent and material parts. Said Judge Severens (134 Fed. 30):

"It would seem, as a matter of first impression, that the Legislature of Ohio did not intend by section 3184 to prescribe, as a test for the application of its

enactment, the question whether the thing furnished is something intended to become a fixture, and will be such when placed in the intended location and relation to the mill or manufactory. The statute makes a distinction between the mill or manufactory and the real estate and the machinery furnished by the lienor. If the machinery furnished becomes a fixture, there was no need to expressly declare that the lien should extend to it. The Ohio Supreme Court holds that the lien given by this statute arises when it is furnished, and it is not postponed until it is put in its place in the mill (Beckel v. Petticrew, 6 Ohio St. 247)—a conclusion wholly inconsistent with the idea that the lien attaches only when the machine or other thing is parcel of the realty, for nothing becomes a fixture until it is affixed. It was held by the Circuit Court of Appeals for the Fifth Circuit, affirming the decision of Judge Newman (In re Georgia Handle Co., 109 Fed. 632, 48 C. C. A. 571), that, under the statute of Georgia, which gives a lien upon the 'factory' to those furnishing materials or machinery for such factory, it was immaterial whether the machinery therein should be considered real or personal property. In either case it was subject to the lien. The record failed to show how the machinery was attached to the building. But it was held sufficient that it showed there was such attachment as was necessary to its operation."

The decisions of courts of the various states, construing their respective mechanic's lien acts, are necessarily affected by the particular provisions of the statutes involved; and such decisions can be safely accepted only upon comparison of the statutes there construed with the statute under consideration. Our attention has not been called to any further decisions in which a statute like the one now under review was involved, though, as illustrative of the trend of some of the decisions cited, we refer to Canton Roll & Machine Co. v. Rolling Machine Co., 168 Fed. 464, 468, 469, 93 C. C. A. 621 (C. C. A. 4th Cir.), where the lien was enforced against objects not specifically named in the statute.

[5] Upon the whole, we do not see any sufficient reason for denying enforcement of the lien in the present case. The statutory provisions involved do not purport to authorize the taking of a lien upon any property except through the assent, express or implied, of its owner. Gashe Case, 56 Ohio St. at page 296. Here, the parties in interest agreed that the machines should "not become affixed to the realty in the sense of permanent fixtures forming part of the freehold," but that they should remain "personal property." [3] There is nothing in the statute expressly requiring the lien to be taken both upon the machinery supplied and the interest of the purchaser in the realty, since, as we have seen,

[3] The validity of this agreement is not questioned; and the rule is that it is competent for the parties in interest so to agree with respect to machines of this character and attached as they were to the building. Teaff v. Hewitt, 1 Ohio St. 511, 534, 542, 543, 59 Am. Dec. 634; Fortman v. Goepper, 14 Ohio St. 558, syl. 3, and page 564; Tifft v. Horton, 53 N. Y. 377, 380, 13 Am. Rep. 537; Schumacher v. Edward P. Allis Co., 70 Ill. App. 556, 565, and citations; Arlington Mill & Elevator Co. v. Yates, 57 Neb. 286, 292, 77 N. W. 677; Landigan v. Mayer, 32 Or. 245, 250, 51 Pac. 649, 67 Am. St. Rep. 521; St. Joseph Hydraulic Co. v. Wilson, 133 Ind. 465, 470, 33 N. E. 113; Wheeler v. Bedell, 40 Mich. 693. The agreement was well within the principle declared in Teaff v. Hewitt, 1 Ohio St. at page 534: "An article attached to the land may be a fixture or a chattel according to the special agreement of the parties." Indeed, where the parties so agree, the principle is applicable to buildings. Long v. White, 42 Ohio St. 59, 61; Kinkead v. United States, 150 U. S. 483, 491, 14 Sup. Ct. 172, 37 L. Ed. 1152, and citations.

the act in terms authorizes the lien to be taken on the "machinery so furnished." True the relation of the purchaser to the manufactory as its lessee is a condition which, under the statute, extends the lien to the leasehold interest; but this neither prevents the lessee and lessor from agreeing that the machinery shall not become a fixture, nor deprives the person furnishing the machinery (pursuant to contract) of the right to take the lien. As Judge Okey said in the Hart Case:

"Here the agreement was that the tenant should have the right, at the expiration of or during the term, to remove such fixtures, but this did not affect the mechanic's rights."

And we have seen that the right to make such an agreement and enforce the lien accordingly, was in effect sanctioned in the Gashe Case. No one was concerned in the present instance except those persons whose property rights were involved and whose consent to the arrangement was given; and the case does not present any question of conflicting liens. What reason, then, has the present trustee to complain? It cannot be because of any value in the bankrupt's interest in the realty as lessee, nor of any failure of the bankrupt to provide against the right of the lessor to acquire an interest in the machinery as a fixture. Further, the bankrupt's estate is not being diminished through the enforcement of the lien, for the bankrupt never acquired any interest in the machinery, except subject to the express statutory right of lien; and even if the leasehold interest on its merits ever had any value, in excess of the burden of the rents reserved, such value is not claimed by the lienor in this proceeding.

It results that, since the lien was denied as to a portion of the machinery, the decree must be reversed, with costs of both appeals in favor of the Kinsey Company, and the cause is remanded, with direction to enter a decree sustaining the lien entire and allowing recovery accordingly.

NORFOLK & W. RY. CO. v. GILLESPIE.

(Circuit Court of Appeals, Fourth Circuit. July 17, 1915.)

No. 1309.

1. MASTER AND SERVANT ⊂=258—ACTIONS FOR DEATH—SUFFICIENCY OF DECLARATION.

In an action for the death of a railway engineer, caused by the derailment of his train, a count in the declaration alleging that it was defendant's duty to make reasonable rules for the speed of trains over curves, so as to make the operation of the trains safe to its employés, that in performance of such duty it did make a rule requiring a speed of 15 miles an hour, but that it required deceased to run his train at a greater rate of speed than it had fixed as reasonably necessary for safety, and that the derailment was due to this required speed, stated actionable negligence.

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

2. APPEAL AND ERROR ⊂=1047—HARMLESS ERROR—RULINGS ON EVIDENCE.

The tendency of the courts is to enlarge the sphere of discretion of the trial judge in the exclusion and admission of testimony, and a judg-

ment should not be disturbed for error in his rulings, unless the error is clearly shown to be materially prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4132, 4133, 4146–4152; Dec. Dig. ⊂⊃1047.]

3. EVIDENCE ⊂⊃474—OPINION EVIDENCE—QUALIFICATIONS OF WITNESS.
A person who had run as a railway fireman for some time, and therefore had had an opportunity to observe the effect of low joints, was qualified to express the opinion that the rocking of the tender of an engine, such as he saw just before the derailment of the engine, would result from a low joint in the track.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2196–2219; Dec. Dig. ⊂⊃474.]

4. EVIDENCE ⊂⊃498½—OPINIONS—COMPETENCY OF WITNESS—EVIDENCE AS TO QUALIFICATIONS.
A railway fireman, in showing his qualification to express an opinion that the rocking of the tender of an engine which preceded a derailment would result from a low joint, was properly permitted to testify that low joints were common, since, if they were common, he had had a greater opportunity to observe their effect.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2290, 2291; Dec. Dig. ⊂⊃498½.]

5. EVIDENCE ⊂⊃513—OPINION EVIDENCE—QUALIFICATIONS OF EXPERTS.
It was not error to permit a railroad roadmaster and a section foreman, each of whom had had experience and training in keeping railroad tracks safe, and in observing wrecks and their causes, the effects of curves and the speed of trains over them, and the effect of guard rails, to express an opinion as to the degree of curve which required a guard rail.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2317, 2318; Dec. Dig. ⊂⊃513.]

6. APPEAL AND ERROR ⊂⊃1047—HARMLESS ERROR—STRIKING TESTIMONY.
There was no reversible error in striking out a witness' answer, where he afterwards testified fully on the subject.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4132, 4133, 4146–4152; Dec. Dig. ⊂⊃1047.]

7. APPEAL AND ERROR ⊂⊃1050—HARMLESS ERROR—ADMISSION OF EVIDENCE.
In an action for the death of a railroad engineer, due to the derailment of his engine, plaintiff alleged negligence on the part of the railroad company in requiring the engineer by its schedules to run at a dangerous rate of speed around a curve, in violation of its own rule laying down a lower speed as safe, in failing to protect the train by a guard rail on the curve, in allowing a low joint or uneven place in the track, and in failing to have the outside rail sufficiently elevated. The conductor of the train was asked, with regard to the part of defendant's road where the accident occurred, what would be a fair rate of speed for freight trains, taking into consideration the stops for water and coal, and work done, and everything else, and he named between 13 and 14 miles an hour. The company's rule required a speed of not exceeding 15 miles an hour on curves; but there was evidence that the company's schedule required a higher speed, and that the usual speed on the particular curve where the derailment occurred was 20 to 25 miles an hour. *Held* that, while the conductor's testimony may have been immaterial, it was not apparent how it could have confused the jury.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153–4157, 4166; Dec. Dig. ⊂⊃1050.]

8. MASTER AND SERVANT ⊂⊃286—ACTIONS FOR DEATH—QUESTIONS FOR JURY.
In an action for the death of a railway engineer, killed by the derailment of his train while on a curve in the track, it appeared that the

company, for the safety of its employés, adopted a rule requiring freight trains to be run at a speed not exceeding 20 miles an hour, and on curves not exceeding 15 miles an hour, and there was testimony that other railroads had rules requiring the same limits, or even lower speed. There was also evidence tending to show that, contrary to this rule, the schedule required a higher speed, and that the usual speed on the curve where the derailment occurred was 20 to 25 miles an hour. *Held*, that whether the speed required by the schedule was reasonably safe was a question for the jury, though witnesses testified for defendant that a speed of 20 to 25 miles an hour on such curve was safe.

[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.]

9. MASTER AND SERVANT ⟸289—ACTIONS FOR DEATH—QUESTIONS FOR JURY.
In an action for the death of a railroad engineer, killed by the derailment of his train, where the evidence was conflicting as to whether he was running at a speed greater than that required by the schedule, it was a question for the jury whether the derailment was caused by the engineer's negligence in voluntarily running at an unusual and unnecessary speed.

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

10. MASTER AND SERVANT ⟸286—ACTIONS FOR DEATH—QUESTIONS FOR JURY.
In an action for the death of a railroad engineer, killed by the derailment of his train while on a curve in the track, evidence *held* to make a question for the jury as to whether the railroad company was negligent in not having a higher elevation of the outside rail.

[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.]

11. MASTER AND SERVANT ⟸129—LIABILITY FOR INJURIES—PROXIMATE CAUSE.
That some defect in the track or machinery, or in the operation of a train, must have contributed to its derailment while rounding a curve, did not eliminate the lack of a guard rail and the lack of proper elevation of the outside rail from consideration as proximate causes, as it made no difference what the other defects were, if due care required a guard rail and a proper elevation of the outside track to neutralize such defects and keep the train on the track.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 257–263; Dec. Dig. ⟸129.]

12. MASTER AND SERVANT ⟸278—ACTIONS FOR DEATH—EVIDENCE—INFERENCES.
Testimony that an engine rocked up and down just before its derailment, and that a low joint would cause such a motion, and that the first sign one witness saw of danger was the tender leaning to one side, was insufficient to warrant an inference that there was a low joint in the track, where an inspection after the accident did not disclose a low joint, as the apparent rocking of the engine and leaning of the tender might have been produced by other causes.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 954, 956–958, 960–969, 971, 972, 977; Dec. Dig. ⟸278.]

13. MASTER AND SERVANT ⟸286—ACTIONS FOR DEATH—QUESTIONS FOR JURY.
Whether, in view of the facts that on a curve in a railroad track the outside rail was insufficiently elevated and there was no guard rail, it was negligence for the railroad company to require its engineers to run over the curve at the speed required by its schedule, was a question for the jury, even assuming that the manner of constructing the track in-

volved an engineering problem left to the discretion of the railroad company, and that the question of the proper method of constructing the track should not be submitted to the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1008, 1010–1015, 1017–1033, 1036–1042, 1044, 1046–1050; Dec. Dig. ⟸286.]

14. MASTER AND SERVANT ⟸219—ACTIONS FOR INJURIES—ASSUMPTION OF RISK.

A railway engineer does not assume the risk of schedule speed on a track not reasonably safe for that speed, unless the defect in the track is obvious, as he is not charged with knowledge of what is necessary to make the track safe, but may assume that the railroad company knows and has taken the necessary precaution, and that its method of construction is reasonably safe.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 610–624; Dec. Dig. ⟸219.

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

In Error to the District Court of the United States for the Western District of Virginia, at Roanoke; Henry Clay McDowell, Judge.

Action by Louella Gillespie, administratrix of A. F. Gillespie, deceased, against the Norfolk & Western Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

The conductor, Davis, was asked, relative to the part of defendant's road where the accident occurred, what would be a fair rate of speed for freight trains, taking into consideration the stops for water and coal, the work done, and taking everything into consideration, and answered that he thought between 13 and 14 miles an hour.

W. J. Henson and Roy B. Smith, both of Roanoke, Va. (McCormick & Smith and Jackson & Henson, all of Roanoke, Va., and F. Markoe Rivinus and Theodore W. Reath, both of Philadelphia, Pa., on the brief), for plaintiff in error.

Barnes Gillespie, of Tazewell, Va. (W. H. Werth and Greever & Gillespie, all of Tazewell, Va., on the brief), for defendant in error.

Before KNAPP and WOODS, Circuit Judges, and WADDILL, District Judge.

WOODS, Circuit Judge. The defendant's freight train was derailed on June 8, 1913, near Cleveland, Va., and the engineer, A. F. Gillespie, was killed. In this action his administratrix recovered judgment on these charges of negligence on the part of the railroad company: (1) Requiring the engineer by its schedule to run at a dangerous rate of speed around a curve in violation of its own rule laying down a lower speed as safe; (2) failing to protect the train by a guard rail on the curve; (3) allowing a low joint or uneven place in the track, especially dangerous on a curve; and (4) failing to have the outside rail sufficiently elevated.

[1] The defendant's first position is that the court should have sustained the demurrer to the seventh count, brought into the declaration by amendment. The allegations of this count are: (a) That the defendant owed the duty of making reasonable rules for the speed of

the trains over the curves, so as to make the operation of its trains safe to its employés, and that in performance of this duty it did make a rule requiring a speed of 15 miles an hour, "in order that said employés might operate and run said freight trains over said curves with reasonable safety to themselves"; and (b) that the defendant required Gillespie, the deceased, as one of its engineers, to run freight trains at a greater rate of speed than it had fixed as reasonably necessary for safety on the curves, and that the derailment was due to this required speed. This means that the rule limiting speed to 15 miles an hour was necessary for the reasonable safety of the train, and that the defendant required a speed greater than that which was in fact, and which had been declared by the defendant, necessary to secure safety. Thus interpreted, the count alleges actionable negligence in requiring unsafe speed over the curves as the proximate cause of the death of the engineer. The demurrer was therefore properly overruled.

[2] The numerous objections to the exclusion and admission of testimony are not well founded. The tendency of the courts is to enlarge the sphere of discretion of the trial judge in the exclusion and admission of testimony, and a judgment should not be disturbed for error in his rulings, unless the error is clearly shown to be materially prejudicial.

[3, 4] Combs, who had been a railroad fireman, was allowed to say that such rocking of the tender as that which he saw just before the accident, as he stood about 75 to 100 feet away, would result from a low joint in the track. The objection that he was not qualified to speak on the subject is not well taken, for he testified that he had run as a fireman for some time, and therefore he had had the opportunity to observe the effect of low joints. In showing his qualification to speak on the subject, it was clearly competent for this witness to testify that low joints were common; for, if they were common, he had had the greater opportunity to observe the effect produced by running a train over them.

The question put to the witness Dye, whether he regarded it reasonably safe for the trains to run over these curves without guard rails, was excluded; but it was afterwards put and answered by the witness. This witness, in saying, "I would start with guard railing 10-degree curves, and go up from them," clearly meant that he thought curves of 10 degrees or more required guard rails.

[5] The witnesses, J. H. Lynch, roadmaster, and J. R. Patrick, section foreman, were allowed to express their opinions as to the degree of curve which required a guard rail. In view of the experience and training of these men in keeping the track safe, in observing wrecks and their causes, the effects of curves and the speed of trains over them, and the effect of guard rails, it cannot be said to be error of law for the trial judge to admit their opinions on the point, though they may not have been based on scientific knowledge.

[6] There was no reversible error in striking out the answer of the witness Antrim as to the life expectancy to which he referred being based on a risk, not hazardous or preferred, for the witness afterwards testified fully on the subject.

[7] The testimony of C. B. Davis, a conductor, as to a fair rate of speed for a freight train, may have been immaterial, as the defendant contends; but we do not perceive how it could have confused the jury.

The most important assignment of error is the refusal of the District Judge to direct a verdict at the close of all the evidence.

[8, 9] The rule alleged by the defendant to have been adopted for the safety of its employés requires freight trains to be run on a straight track at a speed not exceeding 20 miles an hour and on curves not exceeding 15 miles an hour. There was testimony adduced from a number of witnesses familiar with the subject that other railroads had rules requiring the same limits and in some instances even lower speed. There was evidence tending to show that, contrary to this rule of safety, the railroad company's schedule required a higher speed than that prescribed by the rule, and that the usual speed on this curve was 20 to 25 miles an hour. It is true the defendant had the testimony of a number of witnesses to the effect that a speed of 20 to 25 miles an hour on the curve was safe. But its own rules of safety, and the rules of other railroads requiring for safety a lower speed, made an issue of fact for the jury as to whether the speed required by the schedule was reasonably safe. 1 Labatt on Master and Servant, 16a, and authorities cited. The defendant's evidence that the engineer was running at a speed greater than that required by the schedule, and the opposing evidence that the speed was not in excess of the usual schedule speed, also made an issue of fact for the jury as to whether the derailment was caused by the negligence of the engineer in voluntarily running at an unusual and unnecessary speed.

To show probable contributing causes of the derailment of the train running at a speed alleged to be unsafe, the plaintiff introduced evidence which it is insisted tended to prove that safety required a guard rail at the curve which had not been supplied, that the outside rail was not sufficiently elevated, and that there was a low joint in the track. If it be assumed that a guard rail would not be necessary on such a curve as this for the safety of a train running at the speed of 15 miles an hour prescribed by the rule, there was evidence to the effect that a guard rail should be put on such a curve when the trains were run at a speed as high as that required by defendant's schedule at this place.

The court was requested to give the following instruction:

"The court instructs the jury that there is no sufficient evidence in this case to justify them in finding a verdict for the plaintiff under count 4 in the original declaration, which alleges that the track and roadbed upon the curve at which the accident happened was not in reasonably safe condition on account of gauge, alignment, spreading of track, elevation of rail, defective and unsound cross-ties, loose rails, ballasting, etc."

[10, 11] The charge that there was an insufficient elevation of the outside rail depends on the testimony of Stimson, an expert witness of the defendant, who testified that a curve of 13 degrees, with a track elevation of between 4½ and 5 inches, with the alignment, the ties, the ballast, the rails all good, with no guard rail, would be reasonably safe

for a freight train running at a speed of 25 miles an hour. But he further testified as follows:

"Q. What is the proper elevation of the outside rail on a 13-degree curve for a freight train running at the rate of 25 miles an hour? A. It is approximately 5 inches; it may be a fraction above. I do not carry in my mind all of those elevations; but there is a table given in there. Q. I will get you to examine the table, and see if it is not 5⅜ inches? A. It is something like that. I cannot possibly carry these various elevations in mind (witness examines book); 5⅜ inches elevation is right. Q. A track then that has an outside elevation from 4½ to 5 inches would not have the proper elevation for a speed of 25 miles an hour, would it? A. It wouldn't have it theoretically; it would not have the theoretical elevation, but I would not say a proper. Q. What is the difference between proper and theoretical? A. For this reason, a speed or an elevation that is a fraction of an inch less would be perfectly safe. Those tables are based on a theoretical elevation for good comfortable riding; in other words, a centrifugal force is neutralized by the elevation, they lean the car over enough to overcome that sensation of overturning which you experience as a train goes around a curve. Q. Isn't the elevation given in this table the proper elevation? A. It is the elevation that has been adopted as the normal elevation and the correct elevation. Q. And the proper elevation? A. Yes. Q. Anything less than 5⅜ inches is just that much less than what is considered the proper elevation, isn't it? A. For that speed, yes. Q. And the amount of the improper elevation will depend on the amount of the elevation less than 5⅜ inches? A. Yes, sir. Q. What is the proper elevation on a 13-degree curve for 30 miles an hour? A. I cannot state from memory. Q. Well, look at the book and tell us. A. (Witness examines book) 7¾ inches. Q. 7¾ inches for 30 miles an hour? A. Yes. Q. And as you increase the speed of a train on any given curve, you increase the ratio of the elevation of the outside rail, don't you? A. Yes, sir. Q. The safety of the running of a train decreases as you get away from the proper elevations, which are given in this table; is that not true, at the rate of speed given in the table? A. Yes, that is true."

The table prescribing an elevation of 5⅜ inches for a freight train running at 25 miles an hour, he testified, was prescribed by the American Railway Engineering Association. The variation from this elevation of three-eighths to seven-eighths of an inch was evidence from which the jury could infer that the elevation was unsafe. The court, therefore, could not take from the jury the question whether the defendant was negligent in not having a guard rail, or in not having a proper elevation of the outside rail. Of course, even if there was negligence in these respects, it would not avail the plaintiff, unless the jury could reasonably infer from the evidence that it was a proximate cause of the accident. There is no direct evidence that it was. Some defect in the track, machinery, or the operation must have contributed to the derailment; otherwise freight trains would not have been running without a guard rail and with the existing elevation for a very long time without accident. Yet this does not eliminate the lack of a guard rail and lack of proper elevation of the outside rail from consideration as proximate causes. Proper elevation of the outside rail was a necessary precaution to hold the train on the track, when, from excessive speed, there was a tendency to leave the track. The office of a guard rail is to hold the train on the track, when, from speed or defects in the engine, cars, or track, there will be a tendency to derailment. It makes no difference what the other defects were, if due care required a guard rail and proper elevation of the outside track to neutralize them and

keep the train on the track. The inference would not be unreasonable that the guard rail and proper elevation would probably have prevented the train from leaving the track, and that undue speed over a curve, without a guard rail or without proper elevation, contributed proximately to the derailment, though other causes, not alleged by the plaintiff and not discovered, may have co-operated.

It is insisted, however, that the defendant has shown affirmatively that a guard rail would not have prevented the derailment by proving that the tender turned over and that its wheels did not climb the rail. Without extended analysis of the evidence it seems sufficient to say that this inference would depend largely on the ascertainment of the exact point where the tender left the track; and the evidence on that point would support reasonably a conclusion that the wheels of the tender did not rise from the track at the moment of the derailment, but ran over the rail onto the cross-tie. In addition, the tender may have turned over at the moment the flange rode the rail and just as it reached the cross-ties. We think, therefore, that the instructions requested, that neither the absence of the guard rail nor the improper elevation could be considered by the jury as proximate causes of the derailment, were properly refused.

[12] The witness Combs testified that the engine rocked, or went up and down, and that a low joint would cause such motion. The engineer of the rear engine on the same train testified that the first sign he saw of danger was the tender leaning off to one side. The apparent rocking of the engine and leaning of the tender would be insufficient evidence from which to infer that there was a low joint in the track, for this appearance might have been produced by other causes, such as very high speed on a curve or defects in the wheels or trucks. Inspection after the accident did not disclose a low joint. A conclusion under these circumstances that there was a low joint, and that it was the cause of the derailment, would be based on conjecture. There was no separate request made for an instruction that there was no evidence of a low joint operating as a proximate cause of the derailment.

[13] It is insisted, next, that it is an engineering question, not proper to be submitted to the jury, whether a guard rail should have been provided, or whether there should have been a different elevation. The principle is thus laid down in Tuttle, Adm'x, v. Detroit Railway Co., 122 U. S. 189, 7 Sup. Ct. 1166, 30 L. Ed. 1114:

"We have carefully read the evidence presented by the bill of exceptions, and, although it appears that the curve was a very sharp one at the place where the accident happened, yet we do not think that public policy requires the courts to lay down any rule of law to restrict the railroad company as to the curves it shall use in its freight depots and yards, where the safety of passengers and the public is not involved; much less that it should be left to the varying and uncertain opinions of juries to determine such an engineering question. * * * The interest of railroad companies themselves is so strongly in favor of easy curves as a means of facilitating the movement of their cars that it may well be left to the discretion of their officers and engineers in what manner to construct them for the proper transaction of their business in yards, etc. It must be a very extraordinary case, indeed, in which their discretion in this matter should be interfered with in determining their obligations to their employés."

The rule is also stated in Potomac R. R. v. Chichester, 111 Va. 152, 68 S. E. 404. The language above quoted from Tuttle v. Detroit Ry. Co. has been held to be a dictum in Gordon v. Railway Co., 129 Iowa, 747, 106 N. W. 177.

But, even if it be regarded an accurate statement of the law, the question whether the method of using the track after it is constructed is negligent or not is an issue for the jury. As already indicated, this case does not depend upon the bald issue whether the defendant was negligent in constructing its track with a 13-degree curve, without a guard rail, and with insufficient elevation; for it is not denied that that construction would be safe for trains run at a speed suitable to it. The issue which was properly submitted to the jury was whether, considering the method of construction which the defendant had chosen to adopt, it was not negligence to require its engineers to run over the curve at the speed required by the schedule. Patton v. Southern Railway Co., 82 Fed. 979, 27 C. C. A. 287.

[14] It is next contended that the engineer assumed the risks of running on the curve without a guard rail and insufficient elevation. An engineer does not assume the risk of schedule speed on a track not reasonably safe for that speed, unless the defect in the track is obvious. He is not charged with knowledge of what is necessary to make the track safe, but may assume that the railroad company knows and has taken the necessary precaution, and that its method of construction is reasonably safe. The rule is thus laid down in Seaboard Air Line v. Horton, 233 U. S. 492, 34 Sup. Ct. 635, 58 L. Ed. 1062:

"Such dangers as are normally and necessarily incident to the occupation are presumably taken into the 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. 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. These distinctions have been recognized and applied in numerous decisions of this court."

This principle was restated and applied in a case analogous to this. Gila R. Co. v. Hall, 232 U. S. 94, 34 Sup. Ct. 229, 58 L. Ed. 521.

All of the assignments of error with respect to giving or refusing instructions are determined by what has been said, or were covered by proper instructions given. This case has been presented with marked ability on both sides, but the labor of this court and the trial court has been greatly increased by very numerous requests to charge, presenting such shadowy distinctions that it is perfectly manifest the jury would be confused rather than enlightened by them.

Affirmed.

UNITED STATES v. E. W. BLISS CO.

(Circuit Court of Appeals, Second Circuit. June 8, 1915.)

No. 132.

UNITED STATES ⇐70—CONSTRUCTION OF CONTRACTS—CONTRACT TO MANUFACTURE TORPEDOES FOR NAVY—RESTRICTIVE PROVISIONS.

A provision in a contract for the manufacture by defendant of torpedoes for the United States Navy that defendant should not "make use of any device the design for which is furnished to it by [the United States] in any torpedo constructed or to be constructed, for any person or persons, firms, corporations, or others, or for other governments," *held* to apply to all devices furnished by the United States, without regard to whether they were patentable, or were within the prior art, or known to defendant, and also to a device so furnished, although it was patented in this and other countries; the American patent being assigned to the United States, and the foreign patents to defendant, the question being one of contract, and not of patent rights.

[Ed. Note.—For other cases, see United States, Cent. Dig. § 53; Dec. Dig. ⇐70.]

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

On cross-appeals from a decree of the District Court for the Eastern District of New York. The defendant seeks to reverse that portion of the decree which restrains it from making use of the "balanced turbine" in any torpedo constructed for any corporation, individual or government other than the complainant and from exhibiting or communicating to any such corporation, individual or government any torpedo which shall contain the said balanced turbine. The complainant seeks to reverse that part of the decree which dismisses the bill and refuses an injunction as to other parts of the torpedo which the complainant contends were designed by its officers, agents and servants, such, for instance, as ball bearings for the gyroscope. The complainant also seeks to reverse the decree for the reason that the court should have decided that the disclosure of any of the alleged novel constructions was a violation of the law of the United States known as the National Defense Act of March 3, 1911.

The following is the opinion of Van Vechten Veeder, District Judge, in the court below:

In this suit the complainant seeks to enjoin the defendant from communicating the complete construction and operation of the existing type of Bliss-Leavitt torpedo, so called, and from making any demonstration thereof, to a representative of Messrs. Whitehead & Co., or to any other person or government. The complainant bases its claim to relief partly upon contract provisions, and, in the alternative, upon the provisions of Act Cong. March 3, 1911, c. 226, 36 Stat. 1084, 1085 (Comp. St. 1913, §§ 10210–10212), commonly called the National Defense Act.

It appears that the defendant has been making torpedoes for the use of the United States Navy since November 22, 1905. Pursuant to the terms of various contracts between the parties, several lots of torpedoes have been delivered to the complainant, but there remain undelivered some of the torpedoes called for by a contract of June 12, 1912, as well as all those specified in contracts subsequent thereto. The only contracts in evidence are

those of November 22, 1905, and June 12, 1912, mentioned in the complaint, and one of the intervening contracts, dated June 16, 1909. In the 1905 contract there was the following provision, which it is admitted was embodied in all the subsequent contracts:

"Nineteenth. It is hereby expressly further stipulated, covenanted, and agreed that the party of the first part will not make use of any device the design for which is furnished to it by the party of the second part in any torpedo constructed or to be constructed for any person or persons, firms, corporations, or others, or for other governments than the party of the second part hereto; that the party of the first part will not exhibit such device, or in any way describe it to, or give any information in regard to it to, any person or persons, firms, corporations, or others, or to other governments, or their representatives, than the party of the second part hereto; that the party of the first part will not exhibit the performance of any torpedo containing such device, either in shop or in service tests, to any person or persons, firms, corporations, or others, or to other governments, or their representatives, than the party of the second part hereto; that, in case of breach of these provisions on the part of the party of the first part, the party of the second part shall be at liberty to cancel this contract and to proceed with the manufacture, by contract or otherwise, of the torpedoes herein contracted for, including all improvements, without payment of royalty, license fee, or other charge, on account of the use therein or in the manufacture thereof of any models, designs, devices, appliances, methods, or ideas, or other features invented and communicated to the party of the first part by the party of the second part or its representatives; that in case of such breach all torpedoes, with the designs, drawings, patterns, models, and prepared material therefor, on account of which payment in any amount shall have been made under this contract, shall become the property of the party of the second part, and shall on demand therefor be delivered to it by the party of the first part, and any and all sums of money or payments due the party of the first part by the party of the second part under this contract shall be forfeited to the party of the second part, and the party of the second part shall thereby and thereupon be released and discharged from all and every claim or demand of any and all kinds whatsoever on account of this contract: Provided, furthermore, that no device or design shall be considered as coming within the provisions of this clause unless the party of the second part shall state to the party of the first part in writing, at the time when the said device or design is itself conveyed to the party of the first part by written communication from the party of the second part, that the party of the second part considers that the said device or design is embraced within the provisions of this clause."

In the contract of June 12, 1912, the foregoing clause became clause 20. The 1912 contract contained, however, in the second clause, the following new matter, which (save that part inclosed by brackets) had not been included in previous contracts:

"[Second. The manufacture of said torpedoes]—the word 'torpedoes' as used throughout this contract being intended to include everything covered by the drawings, plans, and specifications above referred to—[shall conform in all respects to and with said drawings, plans, and specifications,] including duly authorized changes therein, but said drawings, plans, and specifications are not hereto annexed or made a part hereof. They contain information of a confidential character that cannot be made public without detriment to the government's and the contractor's interests, and they are to be treated as confidential by the parties of this contract, it being understood, however, that nothing in this clause shall be construed as depriving the party of the first part of the right to make and sell such torpedoes to any other party or government whatsoever, except as limited by clause twentieth of this contract."

Eventually the defendant, desiring to negotiate with Messrs. Whitehead & Co. for the sake of the right to manufacture the Bliss-Leavitt torpedo in certain foreign countries, and being met by the opposition of the Bureau of Ordnance, communicated to the Secretary of the Navy on May 9, 1913, its desire to submit the issue to judicial decision, adding: "As a means to this end we notify you hereby that it is our intention to communicate the complete construction and operation of the existing type of Bliss-Leavitt torpedo, and to

make a demonstration of the operation of said torpedo, to a representative of Messrs. Whitehead & Co. on or immediately after June 1, 1913."

Thereupon this suit was brought. Although the issue arose over the use of the so-called balanced turbine, the bill of complaint sets forth four devices the design for which is claimed to have been furnished by the complainant to the defendant in accordance with the restrictive terms (as quoted above) of the contracts: (1) The balanced turbine; (2) ball bearings in the gyroscope; (3) superheater; and (4) compound air regulator. In addition to the foregoing devices, the complainant specifies four other principles, designs, and devices, which, although not furnished by the complainant to the defendant in accordance with the terms of the nineteenth and twentieth clauses of the contracts, are nevertheless claimed to have been communicated or suggested to the defendant by the complainant, and the disclosure of which, together with those already mentioned, is prohibited, it is contended, by the National Defense Act of March 3, 1911 (36 Stat. 1084, 1085, c. 226): (a) Changes in location and area of vertical rudders; (b) changes in method of starting torpedoes; (c) changes in type of depth engine; and (d) changes in curved fire gyro. All the foregoing devices and designs are alleged to be contained in the existing type of Bliss-Leavitt torpedo.

I construe the agreement between the parties to mean that the Bliss Company was free from the beginning to make and sell torpedoes to any other party or government, save as limited by the restrictive clause relating to devices the design for which had been furnished by the government; that is to say, the additional clause in the 1912 contract made explicit that which was implicit in the contract of 1905 and intervening contracts. The Bliss Company agrees that "it will not make use of any device the design for which is furnished to it by the party of the second part in any torpedo constructed or to be constructed for any person or persons, firms, corporations, or others, or for other governments." The defendant contends that the word "furnished" must be construed to mean the furnishing of devices which were unknown, not only to the defendant, but in the prior art as well; in other words, such devices only as were patentable at the time the design was furnished. I am unable to assent to such a construction. It is warranted neither by the plain wording of the contract nor by the surrounding circumstances. The evidence shows that the Navy Department was carrying on extensive independent experiments with torpedoes, utilizing the skill and experience of its own officers. The defendant was occupied in developing its torpedo in conformity with the wishes of its sole customer. Inasmuch, however, as the defendant was not prohibited from making torpedoes for others, some provision was necessary to protect the government in its contributions to the joint result. The contract provision indicates, as the evidence shows, that this method was deliberately adopted by the government as the most secure and efficient method of protecting its interest. There would be no security for that interest if the defendant, incorporating devices furnished by the government, could afterwards sell those devices to other persons or governments, unless the Navy Department could establish patentable invention in each instance.

It seems plain to me that, in the consideration of any contribution made by the government, the prior art, as well as the defendant's actual knowledge, with respect thereto, is as irrelevant as the question whether any such device was or is more or less efficient than another device which was available and might have been used. "Furnish," as used in the context, means simply supplying a device not then in use in the torpedo. It is urged that this conclusion will bear heavily upon the defendant, since it may conceivably result in depriving it of the commercial use of devices available to others as part of the prior art; but if the consequences of its formal agreement were at all relevant to the issue, it would be reasonable to suppose that they were carefully considered in the formation of its very valuable business relations with the government, and, in any event, it would be obviously inequitable to permit it to use, for a period of years, in making torpedoes for the government, a device furnished by the government, and then, when it seeks to sell the developed torpedo to other persons or governments, to raise for the first time an issue of prior knowledge or prior art.

It appears from the evidence that three of the devices relied upon by the

government were furnished under the 1905 contract and the fourth under the 1912 contract, and the claim is made by the defendant that, since the 1912 contract superseded the previous contracts, an injunction can issue only against violations of that contract. A subsequent contract covering the same subject-matter as a prior contract doubtless supersedes the earlier contract. Here, however, each successive contract, while relating to torpedoes, covered different subject-matters. In this case it appears that the restrictive provision concerning devices furnished by the government was incorporated in substantially the same terms in each successive contract, and I have no doubt that, when once the design is furnished and notice given under any contract, the restrictive covenant applies under subsequent contracts so long as the device continues to be used in torpedoes made under those contracts.

The Bliss Company has notified the government that it proposes to communicate the complete construction and operation of the existing type of Bliss-Leavitt torpedo to a prospective purchaser. The expression "existing type" would ordinarily mean every type in existence or use; but inasmuch as the Bliss Company expressly refers, at the outset of its notice, to the 1912 contract, and the evidence is not clear whether any other type is at present in existence or use, the type of torpedo called for by that contract may be accepted as the type involved in this suit. Accordingly, in the absence of any contention by the defendant that the penalty prescribed in the contract is exclusive, I have only to find which, if any, of the four devices relied upon by the government were furnished by it in accordance with the terms of the contract, and which, if any, of the devices thus furnished are embodied in the existing type of torpedo.

I find that designs for the following devices were furnished to the defendant by the government, and that, at the time such devices or designs were conveyed to the defendant by written communication from the government, the government stated to the defendant in writing in each instance that the device or design was embraced within the provisions of the restrictive clause of the contract: (1) The balanced turbine, as specified in Exhibits 28 and 29, dated January 10, 1907; (2) ball bearings in the gyroscope, as specified in Exhibits 52 and 53, dated March 31, 1906; (3) improvement in inside superheater, as specified in Exhibits 54 to 57, inclusive, dated September 18, 1906. Of the foregoing three devices, I find that the balanced turbine is embodied in the existing type of torpedo. In reaching this conclusion, my criterion has been: Do the essential features and function of the device appear? If they do, then mechanical alterations, though they add to its efficiency, or even improvements which disclose invention, are immaterial.

A defense special to the balanced turbine has been strenuously urged by the defendant. It appears that the balanced turbine was invented and patented by Lieutenant Commander G. C. Davison, U. S. N. He applied for a patent under date of October 19, 1906, the patent was allowed on December 6, 1906, and was issued under date of June 25, 1907. Meanwhile, on December 27, 1906, Davison had assigned to the United States Navy Department the full and exclusive right to his invention; and on or about January 10, 1907, the design, Exhibit 28, had been conveyed to the Bliss Company by the government. In October, 1907, Davison applied for a patent in Great Britain, and in the following year patents were issued to him in that country and several others. These foreign patents were assigned by Davison to the defendant. Davison testified that he told the commandant of the torpedo station and the chief of the Bureau of Ordnance of these assignments to the defendant. On these facts the defendant contends that the government waived the restrictive covenant. That covenant, it asserts, was nothing more than a secrecy clause, and the balanced turbine having been published to the world by the issue of the patents, it would be inequitable to forbid the defendant, the assignee of the foreign patents, the use of a device available to others.

The obvious answer to this argument has already been pointed out. While some of the provisions of the restrictive clause directly prohibit disclosure, it is also expressly agreed that "the party of the first part will not make use of any device the design for which is furnished to it by the party of the second part in any torpedo constructed or to be constructed for any person * * * or for other governments." And even with respect to secrecy it is apparent

that there is no disclosure in the patent of what part, if any, of that invention is embodied in Exhibit 28 or in the existing type of torpedo. It seems necessary to point out that this suit is based upon contract, not upon patent infringement. For the defendant has indulged in some reflections upon the futility of an injunction against it as the assignee of foreign patents for the balanced turbine. But the government does not sue as the assignee of a patent limited to the territorial boundaries of the United States. It sues for an injunction to prevent the breach of a contract provision subject to no such territorial limitation.

The government further contends that by virtue of the National Defense Act of 1911 the defendant should be restricted from disclosing, and therefore from making and selling, torpedoes containing, not only all the devices already considered, but several others (specified above), which, although suggested to the defendant by the complainant with more or less particularity, were actually worked out by the defendant, and were not accompanied by any actual design, or by the notice required by the restrictive covenant. I am of opinion that such a contention is not sound. The National Defense Act is a criminal statute, and a court of equity ordinarily has no jurisdiction to enjoin the commission of a crime. When, however, some interference, actual or threatened, with property or proprietary rights appears, the jurisdiction of a court of equity is not ousted by the fact that such interference is accompanied by, or is itself, a violation of the criminal law. If, in this instance, the exhibition and demonstration of the existing type of Bliss-Leavitt torpedo to any other person or government be a violation of the penal statute, doubtless the defendant would be subject to prosecution for the offense; if such exhibition and demonstration violates the property rights of the government, no doubt the court may grant such equitable relief as the case requires; but the fact that it was a violation of the criminal law would not be material to the consideration of equitable relief. Now, the complaint does not set up the violation of the penal statute as a separate cause of action, but avers that the defendant intends "thereby to violate the laws of the United States," and prays that the defendant be enjoined from violating such laws. But the court can grant relief in this case only to prevent a violation of the complainant's contract rights. And, apart from the rights acquired by the government pursuant to the terms of the agreement, the Bliss-Leavitt torpedo is the defendant's property.

Inasmuch as the existing type of torpedo contains a device the design for which was furnished by the government pursuant to contract, the complainant is entitled to a permanent injunction.

Archibald R. Watson, of New York City, John H. Harrington, and Melville J. France, of Brooklyn, N. Y., for the United States.

Arthur C. Fraser, Albert B. Boardman, Frank H. Platt, and Robert H. Elwell, all of New York City, for defendant.

Before COXE, WARD, and ROGERS, Circuit Judges.

COXE, Circuit Judge. Clause 19 of the contract of November 22, 1905, which became clause 20 in the contract of June 12, 1912, is the clause out of which the controversy between the parties principally arises. The contract provides that the Bliss Company will make and deliver at Newport, R. I., 300 torpedoes of the Bliss-Leavitt 5-meter 12-inch mark 1 type. The manufacture of these torpedoes is to conform to plans and specifications annexed to the contract and the work is to be done and the materials are to be furnished under the supervision of inspectors appointed by the Secretary of the Navy. When completed, the torpedoes are to be tested and need not be accepted by the government unless they comply with all the requirements of the specification. Clause 19 also provides that the Bliss Company will not

make use of any device the design for which is furnished by the United States, represented by the Bureau of Ordnance, in any torpedo constructed for persons or governments, other than the United States. This clause further provides that the Bliss Company will not exhibit, describe or give information in regard to such devices to any firms, corporations or governments other than the United States. The Bliss Company agrees that it will not exhibit any torpedo containing such device to any governments, or to their representatives, other than the United States. In case of the breach of these provisions by the Bliss Company the United States shall be at liberty to cancel the contract and proceed with the manufacture of torpedoes contracted for in the agreement, including all improvements, without the payment of royalty, license fee or other charge on account of the use therein of any models, designs, devices, appliances or other features invented and communicated to the Bliss Company by the United States or its agents. The clause further provides that in the case of a breach by the Bliss Company, all torpedoes with the designs, drawings, patterns, models and prepared material therefor, on account of which payment in any amount shall have been made, shall become the property of the United States. Clause 19 concludes as follows:

"Provided furthermore, that no device or design shall be considered as coming within the provisions of this clause unless the party of the second part shall state to the party of the first part in writing, at the time when said device or design is itself conveyed to the party of the first part by written communication from the party of the second part, that the party of the second part considers that the said device or design is embraced within the provisions of this clause."

In 1912 another contract was made between the parties for the manufacture of one hundred and twenty additional torpedoes of the same type, in which it is stated that the torpedoes are to conform in all respects to the drawings referred to which are not annexed to the contract for the reason that:

"They contain information of a confidential character that cannot be made public without detriment to the government's and the contractor's interests, and they are to be treated as confidential by the parties to this contract, it being understood, however, that nothing in this clause shall be construed as depriving the party of the first part of the right to make and sell such torpedoes to any other party or government whatsoever, except as limited by clause twentieth of this contract."

The bill alleges that the feature of the balanced turbine was invented by the officers composing the Bureau of Ordnance in 1906–07 and due notice thereof under clause 19 was given to the defendant; that in like manner the complainant gave notice, through its agents, of changes in the vertical rudder, the method of starting the torpedo, in the engines, the fire gyro, the independent spin, the ball bearings of gyro and compound regulation of the air.

This case illustrates the importance of a great government like the United States having a manufactory of its own for the manufacture of torpedoes and other implements of war which are improved and changed from time to time by the addition of ingenious mechanism which should clearly be kept secret, unless our enemies are to profit

equally with ourselves in every improvement which the ingenuity of our army and navy officers may suggest. The futility of attempting by agreement to give to an outside contractor the benefit of such improvements as he may suggest while keeping secret other improvements in the same machine devised by officers of the navy and their assistants, is demonstrated by the testimony in the case at bar. How is it possible for the Bliss Company to make public their own improvements and suggestions, in the construction of a given type of torpedo, and at the same time keep secret the suggestions and improvements made by the officers of the navy and their assistants? The defendant insists that all of the improvements in controversy were suggested and embodied in working models by it or its employés. Mr. Leavitt, defendant's chief engineer, testifies that the defendant got no assistance whatever from the government officials and that though they made many suggestions, not a single one was adopted by the Bliss Company. On the other hand, the government insists that all of the improvements now in controversy were the result of the experiments made by the Bureau of Ordnance of the United States Navy.

Stated concretely the question now to be considered is whether or not the Bliss Company has a right to exhibit and sell to the representatives of foreign nations the so-called Bliss-Leavitt torpedo. We think it is clear that it cannot do so. The language of the nineteenth clause is explicit and its purpose is obvious, viz., to keep secret the construction of any torpedo which contains a device the design for which is furnished by the United States or its agents and to bind the defendant not to disclose the performance of any torpedo containing such device to any one other than the United States. The contract should be construed in view of what must have been the intention of the United States. She was not engaged in procuring a perfected torpedo for the benefit of foreign nations. Her officers and experts were endeavoring to secure some device which was better than those possessed by foreign nations. That she should wish her experiments kept secret is too obvious for argument. Indeed, it might almost be inferred without specific provisions. The contention of the defendant is very clearly stated in the letter of May 9, 1913, in which it says:

"We have repeatedly insisted that said article of the contract (20) did not apply for the protection of any principle, but merely to 'any device the design for which was furnished for us by the government'; that the specific design furnished has been and will be kept a secret; that the 'principle' having been made public by the grant by the government of a patent for it, which patent the government afterwards purchased, the 'principle' of the balanced turbine is no longer a confidential matter and we cannot be held to a secrecy which the government has itself waived."

We think this takes too narrow and superficial a view of the matter and if followed will leave the government practically remediless unless she makes her munitions of war in her own factories. It is true that the contents of the Davison patent were made public when the patent was issued, but the government purchased it and no one can use its disclosures without infringing unless he has obtained a license so to do. "A principle" is not the subject of a patent except through the instrumentalities by which the principle is carried out. No one can

secure a patent for the principle of striking the enemy's ship under water with a loaded torpedo. As the means disclosed by Davison's patent belong to the complainant, it is not easy to see what rights the defendant acquired by the granting of the Davison patent. If it owned the patent or if it were licensed under it, a different question would arise, but being, in a sense, the confidential agent of the government in the making of torpedoes, it acquired no rights adverse to those of the government. We fail to see how the defendant has acquired a right to do what it promised it would not do because a patent has been issued which makes public some of the methods and devices used in the manufacture of the Bliss-Leavitt torpedo. In this connection it is interesting to note that the defendant agreed with this view in December, 1912, when it wrote to the Bureau that the publication of the patents in no way prevented the real construction of the fundamental parts of the torpedo from being kept secret.

There can be no doubt, we think, that the balanced turbine was the invention of Lieutenant Commander Davison, acting for the United States, and that the government did not lose the benefits of the invention because the patent subsequently issued in his name, and assigned to the government, "disclosed" the invention to the world. Certainly the fact that foreign patents were issued which were subsequently purchased by the defendant did not give the defendant the right to make, use or sell the patented structure in this country without the license of the owner of the patent.

The contract of June 12, 1912, provides that the drawings, plans and specifications used by the defendant in making the government torpedoes should not be disclosed to any one. Although the Bliss Company might sell torpedoes to other nations and individuals it could not sell such torpedoes if they contained a device designed by the government, acting through its officers and experts.

Throughout the entire record, in the contracts, correspondence and dealings of the parties, the importance of secrecy is everywhere manifest. The nature of the services rendered was such that secrecy might almost be implied. It is difficult to imagine a nation giving to one of its citizens contracts to manufacture implements necessary to the national defense and permitting that citizen to disclose the construction of such implement or sell it to another nation. The very nature of the service makes the construction urged by the defendant untenable. We are of the opinion, therefore, that the injunction should include all designs, drawings, plans and specifications used by the defendant in making the Bliss-Leavitt torpedo for the government which were approved by the Ordnance Bureau, notice of which was given to the Bliss Company pursuant to the provisions of clauses 19 and 20 of the contracts in question.

The decree should be amended by adding such a provision and, as so amended, it should be affirmed with costs.

AMERICAN SURETY CO. v. FREED et al.

In re BREAKWATER CO.'S ESTATE.

(Circuit Court of Appeals, Third Circuit. July 24, 1915.)

No. 1933.

1. BANKRUPTCY ⟸223, 368—REFEREE—TRUSTEE—COMPENSATION—STATUTORY PROVISIONS.

Bankr. Act July 1, 1898, c. 541, §§ 40a, 48a, 30 Stat. 556, 557, as amended by Act Feb. 5, 1903, c. 487, §§ 9, 11, 32 Stat. 799, and Act June 25, 1910, c. 412, § 9, 36 Stat. 840 (Comp. St. 1913, §§ 9624, 9632), providing that referees shall receive as full compensation from assets which have been administered 1 per cent. commission on all moneys distributed to creditors, and that trustees shall receive commissions on all moneys disbursed or turned over to any person including lienholders, when considered with section 72 (Comp. St. 1913, § 9656), providing that neither the referee nor trustee shall in any form receive, nor shall the court allow him, any other compensation than that expressly prescribed, provide for compensation for services rendered by referees and trustees based on a difference in disbursements, and their commissions are controlled by the one test, which is that the two shall receive as full compensation commissions on moneys disbursed.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 571, 888–894; Dec. Dig. ⟸223, 368.]

2. BANKRUPTCY ⟸223, 368—REFEREE—TRUSTEE—COMPENSATION—STATUTORY PROVISIONS—"MONEY DISTRIBUTED"—"MONEY DISBURSED."

Where the assets of a bankrupt corporation were mortgaged to secure claims, and a plan was devised to preserve the bankrupt's property, whereby its assets were to be transferred to a new corporation, the secured and unsecured creditors to receive stock for their claims, and in pursuance of the plan the assets were sold subject to the liens for a small sum, the commissions of the referee and trustee must be determined on the cash actually received, for it was the only money distributed or disbursed within Bankr. Act, §§ 40a, 48a, as amended by the acts of 1903 and 1910, fixing compensation of referees and trustees, based on commission on moneys distributed and disbursed.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 571, 888–894: Dec. Dig. ⟸223, 368.

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

Petition for Review and Appeal from the District Court of the United States for the Eastern District of Pennsylvania; J. Whitaker Thompson, Judge.

In the matter of the Breakwater Company, a bankrupt. There was an order (220 Fed. 226) dismissing the petition of the American Surety Company for a review of an order allowing commissions to Rhine Russell Freed, trustee, and Edward F. Hoffman, referee, and petitioner petitions for review of and appeals from the order of dismissal. Reversed.

William H. Hotchkiss, of New York City, for appellant.

Owen J. Roberts, of Philadelphia, Pa., for appellees.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

WOOLLEY, Circuit Judge. The petitioner asks a revision of an order of the District Court for the Eastern District of Pennsylvania, dismissing its petition for a review of an order of a referee in bankruptcy. The referee's order was made in the bankrupt estate of the Breakwater Company, and allowed commissions to the referee and trustee each in the sum of $6,500.

The Breakwater Company was a corporation engaged chiefly in constructing breakwaters for the United States government in its home ports and in the ports of its colonial possessions. An involuntary petition in bankruptcy was filed against it, adjudication followed, and in due course the administration of its estate devolved upon the respondents as trustee and referee respectively. The assets of the bankrupt consisted of stone quarries and their equipment, owned and leased in various states of the United States, in Canada and the Hawaiian Islands, together with a great quantity of floating equipment, such as tugs, derrick barges, pocket barges, etc., well distributed over the waters of the northern half of the Western Hemisphere. The assets were appraised at something over $1,000,000, a part of which was retained by the government upon incompleted contracts.

A considerable part, if not all, of the physical property of the bankrupt was covered by a mortgage for $1,000,000, issued to secure bonds for a like amount. As the mortgage was not filed in certain jurisdictions in which property of the bankrupt was located, there arose a question whether the mortgage was a lien upon a portion of the bankrupt's property, worth about $200,000.

Property of the character indicated, its distribution over a wide area, and the bankrupt's liability upon its incompleted contracts with the government, made the estate difficult of administration. The trustee of the mortgage threatened, and in fact instituted, proceedings of foreclosure. The trustee of the estate was unable to interest outside parties in the purchase of the property as a going concern. Sold otherwise, it was obvious that the property would produce little more than its value as junk. The situation was further complicated by the floating property of the bankrupt being libelled for maritime liens. The cost of litigation and conservation was making rapid and substantial inroads upon the estate's limited quantity of ready funds.

In this condition of affairs, a bondholders' protective committee proposed to the trustee a plan for the purchase of all the property purported to be covered by the mortgage, including the portion in dispute. The plan involved a private sale of the property by the trustee, approved by the referee, for the purchase price of $75,000, of which $35,000 was to be paid upon the acceptance of the offer, and $40,000 to be paid when required for distribution. The proposed sale of the bankrupt's assets was to be made subject to the mortgage of $1,000,000, and accrued interest, and also subject to maritime liens, aggregating about $75,000.

The creditors of the bankrupt were, as usual, of two classes, secured and unsecured. The holders of the bonds under the mortgage were secured creditors to the amount of $1,000,000, and interest. They did not file claims against the estate. The claims of unsecured

creditors filed against the estate amounted approximately to the sum of $1,300,000.

The plan contemplated, first, the purchase, for the consideration stated, of the physical assets of the Breakwater Company, encumbered with all liens; then a re-capitalization of those assets by the formation of a new corporation to be known as the Coast & Lakes Contracting Company, with stock sufficient to care for and discharge the entire indebtedness of the Breakwater Company by the exchange of preferred stock for the bonds of secured creditors and common stock for the assigned claims of unsecured creditors. By this means, the property purchased was to be disencumbered and the bankrupt's indebtedness to its secured creditors, cancelled. The scheme, however, did not include the discharge of the bankrupt's indebtedness to its unsecured creditors. Creditors of this class were required to transfer and assign to the new corporation their proven claims, so that it might receive all dividends declared thereupon. Into this arrangement all creditors, both secured and unsecured, entered, except the American Surety Company, the petitioner.

As the bondholders' committee was to furnish the $75,000 cash consideration for the proposed purchase, and as the new corporation would become the holder by assignment of the claims of the unsecured creditors, and therefore would become the principal, if not the sole, creditor entitled to dividends, the committee was naturally anxious to preserve to it in dividends as much of the cash advanced as possible, and was therefore interested in seeing that that sum was not absorbed by administration charges and costs. The bondholders' committee, therefore, drove a bargain with the referee and the trustee, who, while maintaining that they were entitled to commissions computed on the entire amount of the bankrupt's indebtedness discharged by the capital stock of the new corporation, agreed to a deduction, and stipulated that they would each be content with and would charge as commission no more than the sum of $6,500.

These matters were very generally discussed and agreed to at informal meetings between the bondholders' protective committee, the referee and the trustee, and resulted in the trustee presenting a petition to the referee praying for an order to sell the assets of the bankrupt at private sale. This petition did not recite the scheme of reorganization contemplated by the parties, but presented, in the usual way, the character of the bankrupt's property, the fact that it was incumbered with a mortgage for $1,000,000 and other liens, the advantage of selling its assets as a going concern, the receipt of an offer to purchase the same at private sale, subject to the lien of the mortgage and all other liens, for the sum of $75,000; that the trustee believed the offer to be a fair one, and "that the price mentioned in said offer is more than 75 per cent. of the appraised value of the said property, amounting as it does in the total to at least $1,125,000, for the reason that the said sale is made subject to the lien of the mortgage and all other valid liens and thus relieves the bankrupt's estate of any claim or charge, by reason of said mortgage or any other claims which are represented by liens, whether maritime or

otherwise." Pursuant to the prayer of the petition, an order was entered for the sale of the property. The sale was afterward made and confirmed, and the referee and trustee each allowed commissions to the extent of $6,500.

The American Surety Company presented to the District Court a petition for a review of the order allowing the commissions stated. The District Court dismissed the petition and affirmed the allowance of commissions, in an opinion appearing in 220 Fed. 226. The American Surety Company now asks a revision of that order.

[1, 2] The provisions of the statute, authorizing and prescribing the commissions to be allowed referees and trustees in bankruptcy, are section 40a and section 48a of the Bankruptcy Law, as amended by the acts of 1903 and 1910, and are as follows:

"Sec. 40a. Referees shall receive as full compensation for their services, * * * from estates which have been administered before them one per centum commissions on all *moneys disbursed to creditors* by the trustee. * * *"

"Sec. 48a. Trustees shall receive for their services, * * * such commissions on all *moneys disbursed or turned over to any person, including lien holders*, by them, as may be allowed by the courts, not to exceed. * * *"

The commission legally payable to the referee or trustee being thus controlled and measured by the "moneys disbursed," or "moneys disbursed or turned over," the learned judge found, in accordance with the fact, that only $75,000 had been delivered or was deliverable to the trustee from the sale of the property, to be actually disbursed or turned over; that the property, which included the portion encumbered by liens, subject to which the property was sold, was recapitalized, and against it stock of a new company was issued, which stock was employed in paying or discharging the debts of the bankrupt, and he therefore concluded that the discharge of the debts of the bankrupt estate by stock representative of the value of the bankrupt's assets, amounted to a constructive disbursement thereof by the trustee to its secured and unsecured creditors, and entitled the referee and trustee to commissions calculated thereupon, or to a lesser sum, if they agreed to a reduced compensation, and for authority cited Varney v. Harlow, 210 Fed. 824, 127 C. C. A. 374; In re Cramond (D. C.) 145 Fed. 966; In re Sanford Co. (D. C.) 126 Fed. 888.

The authorities cited and relied upon, are cases in which the assets of a bankrupt estate were sold *clear of liens* and not subject to liens, and in which the secured creditor became the purchaser and was permitted to use his security in meeting his purchase, that is, in paying for the property with his bonds instead of cash. In such a case, nothing came into the hands of the trustee for distribution or disbursement either to the lien holder himself or to other creditors. But in such a case, the courts have held that when the secured creditor becomes the purchaser, he is in a sense a party to the bankruptcy proceeding, and though not receiving anything by actual disbursement, he nevertheless receives a payment of his debt by acquiring the property, and that something equivalent to money has passed in the transaction and constructively has passed through the hands of and been disbursed by the trustee, and therefore the officers of the court should not be

deprived of their compensation merely because the lien holder, who becomes a purchaser, finds it more convenient to pay in securities than in money.

The case under review does not require us to approve or follow that law. We are asked, however, upon its authority, to go somewhat beyond it, or rather to do what we believe to be an altogether different thing. We are not asked to hold that the consideration for which bankrupt property is purchased, when not actually paid, may, under certain circumstances, be considered constructively received and disbursed, for in this case the consideration for the purchase was actually paid, and has been, or will be, actually disbursed. We are asked to hold, when bankrupt property is sold subject to liens, and when by arrangement between the purchaser and the creditors of the bankrupt estate, the property is afterwards employed in releasing the liens and thereby in discharging the estate of a part of its indebtedness, that the "*indebtedness* was constructively disbursed by the trustee," meaning, we assume, that the trustee permitted or participated in a transaction, the result of which was equivalent to the disbursement of money and the payment of the estate's indebtedness, and therefore commissions to the court's officers should be based upon the amount of indebtedness cancelled by the transaction, as well as upon the amount of the consideration actually paid for the property and disbursed. This is a novel proposition, unsupported by authority.

In this case, the only thing that came to the trustee from the sale of the bankrupt property was the cash consideration for which it was sold, namely, $75,000. It does not appear from the petition for an order of sale or from the decree ordering the sale, or from any feature of the general plan of reorganization, that anything other than the cash consideration was to be paid to or to be received by the trustee. The property was sold cum onere, and because the burden of the debts was considerable, the cash consideration was correspondingly inconsiderable. The trustee sold for a small consideration his only salable interest in the property, namely, the value of the property, over and above the liens on the property. The bondholders bought nothing except the equity of redemption and for that they paid cash. In substance, they were already the owners of the rest of the mortgaged property (In re Torchia, 188 Fed. 207, 208, 110 C. C. A. 248), and after they bought the equity of redemption, they owned the whole of the property and could do with it as they pleased. That nothing but the equity of redemption was sold or attempted to be sold by the trustee is disclosed by the statement of the trustee in his petition for an order to sell at private sale, wherein, to bring the matter within the requirement of the statute, he stated that $75,000, the amount offered, was "more than 75 per cent. of the appraised value of the property, * * * for the reason that the said sale is [to be] made subject to" all liens.

While the title to the whole property was vested in the trustee, and while, for the price stipulated, he sold the whole of it, nevertheless the amount of the purchase price was determined by the value of the property above its encumbrances. The purchase price of $75,000 was all

the return from the sale of the bankrupt property that could have come into the hands of the trustee, and all that by the terms of the plan of reorganization was intended to come into his hands. No actual disbursement of the stock of the new corporation, in taking up the secured and unsecured claims of the bankrupt, was contemplated to be made by the trustee. In fact, such a thing could not actually have been done even within the scope of the scheme, for first the bondholders or secured creditors did not prove their claims, and no disbursements could have been made by the trustee to persons who were not claimants; and second, delivery of stock to the unsecured creditors was not intended either as payment or cancellation of their claims against the bankrupt. The effect of the stock transaction with the unsecured creditors was simply to substitute in their hands the stock indebtedness of the new corporation for the contractual indebtedness of the bankrupt corporation, the latter of which was not discharged nor disturbed, but remained alive in the hands of the new corporation as assignee. The trustee, therefore, did nothing and could do nothing, either in disbursing moneys beyond what was actually received or in discharging or cancelling the bankrupt's indebtedness by any constructive action of his own. The indebtedness of the corporation cancelled under the plan of reorganization, was cancelled after the property was purchased and acquired by those who used it in capitalizing a new corporation, and in persuading certain of the bankrupt's creditors to accept the stock obligations of the new corporation in lieu of their claims against the old corporation, a matter wholly outside of the Bankruptcy Court. The case, therefore, is resolved into one question, whether the referee and trustee may claim and receive commissions based upon the discharged indebtedness of the bankrupt.

Claims for commissions by referees and trustees in the cases cited, based upon "moneys [constructively] disbursed," may be distinguished from the claims for commissions in this case, based upon indebtedness cancelled. Within the principle of the claims in the cases cited, property is sold *free of liens*. The bid made is for the full value of the property. The purchase price paid is for its full value. What is purchased is property unencumbered with debts of the bankrupt. What is constructively disbursed is that which is received for its full value. In the case under consideration, the bid was made not with respect to the full value of the property, but with especial regard to its encumbrances, which were not dislodged by the sale but were transferred with and remained upon the property. The consideration paid, represented but a part of the value of the property, because the rest of the value of the property was affected and covered by encumbrances; but the consideration paid and disbursed represented all the value of the property which the trustee had to sell, and for which a consideration was to be received and disbursed by him. When the property was sold subject to liens, the lien holders looked to and afterwards resorted to the property to discharge their debts, and not to the bankrupt estate, or at least not primarily to the bankrupt estate. This was the thing done by the secured creditors who, in failing to file claims against the estate, declined to look to the estate for the payment of

its indebtedness. They looked to the property which they had bought subject to their liens. This was done not in the course of the official administration of the estate, but by a transaction which in its nature was private in the sense of being unofficial. It was done by the creditors themselves, and though made possible by the assent of the referee and trustee, it was not done by those officials. The result, so far as the estate is concerned, was the release of debts which, though not proven, might have been proven; and in discharging the indebtedness of the estate by resorting to the property secured by the lien, the secured creditors chose to do by agreement what they could have done by foreclosure proceedings. As no claim for commissions could have been made by the referee and trustee, based upon the amount of indebtedness discharged by foreclosure proceedings instituted and prosecuted by the lienors without relation to the bankruptcy administration, is it not equally certain that no claim for commissions can be based upon a like amount of indebtedness discharged by other means employed by the lienors in reducing their securities either to cash or possession?

The only authority for the payment of commissions to referees and trustees is found in the bankruptcy law, which has already been cited. Compensation to the two officers, as provided by law, is based upon a difference in disbursements. Their commissions are alike controlled, however, by one general test, which is that the two officers shall receive as *full* compensation for their services, commissions on "moneys disbursed," and whether the disbursement be "to creditors" or "to any person, including lienholders," is unimportant for present consideration. The question is, whether the transaction in issue amounted to a disbursement of moneys by the trustee. That this was all that the law contemplated should be received by these two officers, is further shown by section 72 of the act, which provides "that neither the referee * * * 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 by this act." This section was originally enacted by the act of 1903 and was part of an act which enlarged the compensations to referees and trustees in bankruptcy over what was provided by the original act. It is therefore apparent that Congress intended by the amendments to section 40a and section 48a to provide what it considered ample compensation for services to be rendered by referees and trustees, and by section 72, to relieve the courts of the necessity of determining what constitutes legal compensation for those officers.

The fees allowed the referee and trustee in this case were not based upon moneys disbursed, as those words are used in the statute (except the cash consideration of $75,000), nor upon moneys constructively disbursed, as that term is employed in the cases cited, but were based upon debts discharged by the creditors of the estate voluntarily cancelling a part of the obligations of the estate and looking to other sources for reimbursement.

It was a transaction above, beyond and wholly outside of the bankruptcy court. If the referee and trustee had attempted such a thing

as the recapitalization of the bankrupt's property and the issue and distribution of the stock of the new corporation, a claim for commissions, based upon the volume of indebtedness thereby discharged, would have been as fully without sanction of law as the transaction itself. If the same thing is done by others, the referee and trustee are no more entitled to commissions than if they had done the thing themselves.

We can find no authority in the law for an allowance of referee and trustee commissions upon such a basis. It is to be regretted that there is no law authorizing compensation to a referee and a trustee proportionate to the difficulties encountered in administering an estate of the character of the bankrupt in this case. That this estate was well managed by the referee and trustee is not denied even by the American Surety Company. This company, in petitioning for the disallowance of commissions, admits its sole object to be the maintenance of as large a fund in the hands of the trustee as may be, so that it may hereafter present a claim of preference for the whole of that fund.

The decree dismissing the petition for review of the order of the referee, and affirming the order of the referee, is reversed.

NG YOU NUEY v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. June 8, 1915.)

No. 2595.

1. ALIENS ⟸26—CHINESE EXCLUSION ACTS—APPLICABILITY.

The Chinese Exclusion Acts do not apply to a person born in this country of parents of Chinese descent, who, though subjects of China, have a permanent domicile and residence and are carrying on business in this country.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 83; Dec. Dig. ⟸26.

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—CHINESE EXCLUSION ACTS—PROCEEDINGS TO DEPORT—PROOF OF CITIZENSHIP.

Under Act May 5, 1892, c. 60, § 3, 27 Stat. 25 (Comp. St. 1913, § 4317), providing that any Chinese person or person of Chinese descent arrested thereunder shall be adjudged to be unlawfully within the United States, unless such person shall establish by affirmative proof, to the satisfaction of the justice, judge, or commissioner, his lawful right to remain in the United States, where a person sought to be deported admitted that he was of Chinese descent, but claimed to be a native-born citizen, he was put to his proofs touching such citizenship, and was not entitled to the dismissal of the proceeding, since, though citizenship is a right, to exact proof of the fact of citizenship is not an attempt to destroy such right.

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

3. ALIENS ⟸32—CHINESE EXCLUSION ACTS—DEPORTATION—COUNTRY TO WHICH DEPORTATION SHOULD BE MADE.

Under Act May 5, 1892, § 2 (Comp. St. 1913, § 4316), providing that a person of Chinese descent, when adjudged to be not lawfully entitled to

remain in the United States, shall be removed therefrom to China, a person of Chinese descent was properly ordered deported to China, though it was not shown that he came from China, especially as there is a presumption that a person of Chinese descent, who fails to show that he is a native-born citizen, is a subject of the republic of China.

[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 Ohio; John E. Sater, Judge.

Proceeding to deport Ng You Nuey. From a decree affirming an order of deportation, defendant appeals. Affirmed.

Complaint was filed before a United States commissioner for the Southern district of Ohio, February 21, 1913, charging that appellant "is a Chinese manual laborer and is now within the limits" of such district "without the certificate of residence required by the act of Congress entitled 'An act to prohibit the coming of Chinese persons into the United States,' approved May 5, 1892 (27 Stat. 25, c. 60), and the act amendatory thereof, approved November 3, 1893 (28 Stat. 7, c. 14), and the act amendatory thereof, approved April 27, 1904" (33 Stat. 428, c. 1630, § 5). Appellant appeared upon warrant before the commissioner. The complaint was "fully read and explained" to him, whereupon he entered a plea of "not guilty." The matter was subsequently heard before the commissioner, with counsel representing both parties. Two witnesses were sworn and examined on the part of the government; a typewritten draft of certain questions and appellant's answers thereto, together with a lease of certain property held by appellant under another name as lessee, were introduced in evidence. Thereupon the government rested its case, and appellant moved to dismiss. The motion was overruled, and appellant declined to introduce testimony. The commissioner found the complaint to be true, and entered an order of deportation to China. The matter was appealed to the District Court, and there tried upon proofs offered by both sides. The government called a witness to show that appellant, Ng You Nuey, "is a person of Chinese descent." This was admitted by Nuey's counsel, but with the limitation that the admission should not imply that Nuey "was born in China." The government then rested its case, motion to dismiss Nuey was overruled, and no exception reserved. Nuey then offered his proofs, the government presented proofs in rebuttal, the court affirmed the order of the commissioner, and Nuey appeals.

C. C. Williams, of Columbus, Ohio, for appellant.

H. E. Burns, Asst. U. S. Atty., of Columbus, Ohio, for appellee.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

WARRINGTON, Circuit Judge (after stating the facts as above). The defense relied on is in effect that appellant is a native-born citizen of the United States. Admitting that he is a person of Chinese descent, appellant testifies that he was born in 1879 in Vina, Cal.; that his father told him this, although at the age of 8 or 9 years the boy was sent to Ohio, and had never thereafter seen his father. He sought in several ways to corroborate his testimony. Three Chinamen were offered as witnesses in this behalf. Their testimony relates to matters said to have occurred with more or less frequency between appellant's early infancy and shortly before his arrest and trial in this case. It is also said that his parents resided and were engaged in business in San Francisco in 1879, and for some years later, when the mother died; and that the father remained until 1907, when he re-

turned to his home and died in China. But in our view of the record there are too many improbable circumstances, and, indeed, contradictions, in the testimony alike of appellant and these Chinese witnesses, as well as in portions of the proofs, to warrant interference with the findings of the commissioner and the District Court. The learned trial judge gave full opportunity to present the testimony and proofs. Two interpreters were present, one for appellant and the other for the government, and appellant's interpreter states that the testimony as ultimately translated and given to the stenographer is correct. The opinion of the trial judge shows most careful consideration of the facts, and he was "constrained to hold that the defendant and his three witnesses are not credible and that the defense made fails."

It is contended that, in view of some of the proofs, this testimony cannot rightfully be discredited. For example, a photograph of appellant, and another purporting to be that of his father, accompanied by certain affidavits, were introduced. These papers were obtained, it is said, with a view of identifying appellant on a proposed trip with his father to China. One of these affidavits is by appellant, and has attached to it his photograph; another appears to be the affidavit of appellant's father, with the father's photograph. Two other affidavits seem from the printed record to have each been signed by only one of appellant's Chinese witnesses, though we infer that one of them was signed also by another of these witnesses. While it is true that the affidavits of appellant and these witnesses were verified before competent and reputable officials of Ohio, and the affidavit of the father before a notary public of San Francisco, yet when the dates of execution and a statement contained in two of the affidavits are considered, the affidavits cannot be reconciled. Those of the appellant and one of his witnesses were taken in Ohio and dated, respectively, February 17 and May 12, 1908. The father's affidavit was signed in San Francisco, September 30, 1907, and the remaining one in Ohio, November 18, 1907. This latter affidavit distinctly refers to that of appellant, which, as we have seen, was not then executed, nor until some three months later; and the father's affidavit, although executed more than four months before that of his son, refers in express terms to the son's affidavit. Moreover, the learned trial judge, having the instruments before him, states that the affidavit executed in Ohio, November 18, 1907, and the one made in California, September 30th of that year—

"* * * are both carbon copies of the originals. They are on paper of the same kind and quality, of the same size, and have the same ruling and watermark. On each the venue and date of subscription were left blank, to be filled in when used. The affidavits in question contradict material portions of the evidence concerning them given by the defendant and his witnesses."

[1, 2] However, we cannot review the evidence in this opinion; it could serve no useful purpose. We appreciate the serious consequence to appellant of any mistake that might be made as to his citizenship. For it is perfectly plain that if he was in truth born in California, of parents of Chinese descent, who, although subjects of

China, had a permanent domicile and residence and were carrying on business in California, as appellant claims, the Chinese Exclusion Acts of Congress would not apply (United States v. Wong Kim Ark, 169 U. S. 649, 653, 705, 18 Sup. Ct. 456, 42 L. Ed. 890); yet it is equally plain that a defense of this character must be shown, not assumed.

It is contended that the court erred in declining to dismiss appellant upon his refusal to admit that he was born in China, though conceding that he was of Chinese descent. This would not be to interpret, it would be to frustrate, the third section of the Exclusion Act, which provides that a person of Chinese descent "shall establish by affirmative proof * * * his lawful right to remain in the United States" (27 Stat. 25). Thus the nature of the "lawful right to remain" is neither defined nor limited.[1] Citizenship is a fact, as well as a right, and to exact proof of the fact is not an attempt to destroy the right, but is to apply a rule of evidence to ascertain the truth or not of its existence. In Kum Sue v. United States, 179 Fed. 370, 371, 102 C. C. A. 648 (C. C. A. 2d Cir.), when speaking of testimony offered to show that appellants were born in Oakland, Cal., Judge Coxe, speaking for the court, said:

"This testimony was of so general a character that it is manifestly impossible for the government to obtain evidence to contradict it. The commissioner and the judge found it so inherently improbable that they did not believe it, and we are not prepared to hold that their action was arbitrary or their finding erroneous or clearly against the weight of evidence."

Chu King Foon v. United States, 191 Fed. 822, 823, 112 C. C. A. 336 (C. C. A. 2d Cir.); Moy Guey Lum v. United States, 211 Fed. 91, 94, 127 C. C. A. 515 (C. C. A. 7th Cir.). These decisions logically follow from the conclusion reached in Chin Bak Kan v. United States, 186 U. S. 193, 200, 22 Sup. Ct. 891, 46 L. Ed. 1121, that it is "competent for Congress to empower a United States commissioner to determine the various facts on which citizenship depends." Lee Yuen Sue v. United States, 146 Fed. 670, 671, 77 C. C. A. 96 (C. C. A. 9th Cir.), holds that the "statutes of the United States cast the burden upon appellant to prove to the satisfaction of the court that he was born in the United States." And to the same effect, United States v. Hung Chang, 134 Fed. 19, 22, 23, 67 C. C. A. 93 (C. C. A. 6th Cir.); Bak Kun v. United States, 195 Fed. 53, 55, 115 C. C. A. 55 (C. C. A. 6th Cir.); United States v. Chin Tong, 192 Fed. 485, 487, 112 C. C. A. 647 (C. C. A. 5th Cir.); Toy Tong v. United States, 146 Fed. 343, 348, 76 C. C. A. 621 (C. C. A. 3d Cir.); Guan Lee v. United States, 198 Fed. 596, 598, 117 C. C. A. 304 (C. C. A. 7th Cir.); Yee Ging v. United States (D. C.) 190 Fed. 270, 271, 272; United States v. Too Toy (D. C.) 185 Fed. 838, 840. See, also, Ah How v. United States, 193 U. S. 65, 76, 24 Sup. Ct. 357, 48 L. Ed. 619. It is enough to say of the reliance placed by counsel for appel-

[1] It is not claimed, as it could not well be, that it was not within the power of Congress to enact the provision, in this form. Bak Kun v. United States, 195 Fed. 53, 55, 115 C. C. A. 55 (C. C. A. 6th Cir.), and citations; Ah How v. United States, 193 U. S. 65, 76, 24 Sup. Ct. 357, 48 L. Ed. 619.

lant upon Moy Suey v. United States, 147 Fed. 697, 78 C. C. A. 85 (C. C. A. 7th Cir.), and Gee Cue Beng v. United States, 184 Fed. 383, 106 C. C. A. 493 (C. C. A. 5th Cir.), that independently of the question of burden of proof the courts appear to have been satisfied that the evidence offered by appellants was sufficient to establish citizenship.

We conclude, in the present case, that appellant was rightly put to his proofs touching his asserted citizenship, and that the proofs presented distinctly fail to establish his birth in the United States.

[3] It is urged that the order of deportation is erroneous, because it is not shown that appellant came from China. It would suffice to say that his admission of Chinese descent and his failure to show that he is a native-born citizen of the United States give rise to a presumption that he is a subject of the republic of China; but the very language of section 2 of the Exclusion Act of May 5, 1902, is that a person of Chinese descent when adjudged "to be not lawfully entitled to remain in the United States, shall be removed from the United States to China" (27 Stat. 25).

The decree must be affirmed.

NEW ENGLAND CONFECTIONERY CO. v. NATIONAL WAFER CO.

(Circuit Court of Appeals, First Circuit. June 18, 1915.)

No. 1105.

TRADE-MARKS AND TRADE-NAMES ⊂=59—INFRINGEMENT—SIMILARITY IN APPEARANCE.

A registered trade-mark, consisting of "the coined word 'Necco,' as shown in the accompanying fac simile," *held* not infringed by the word "Nawaco," printed in different type and altogether different in appearance from that of the registered fac simile.

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

Imitation or simulation of trade-mark or trade-name as unfair competition, see note to John H. Rice & Co. v. Redlich Mfg. Co., 122 C. C. A. 447.]

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

Suit in equity by the New England Confectionery Company against the National Wafer Company. Decree for defendant, and complainant appeals. Affirmed.

The following is the opinion of Dodge, Circuit Judge, in the court below:

This bill complains that the defendant has infringed a certain registered trade-mark belonging to the plaintiff. The relief it can obtain in this suit is limited to that which can be afforded for such an infringement. Relief against other unfair competition by the defendant is not within the jurisdiction of this court to grant, there being no diverse citizenship of the parties. Both are Maine corporations. A similar situation was presented in Thaddeus Davids Co. v. Davids (C. C.) 165 Fed. 792; Id., 178 Fed. 801, 102 C. C. A. 249; Id. (D. C.) 190 Fed. 285; Id., 192 Fed. 915, 114 C. C. A. 355.

The particular trade-mark alleged to have been infringed is that set forth in the certificate of registration No. 49,295, issued to the plaintiff on January 30, 1906. The certificate describes it as consisting of "the coined word 'Necco,' as shown in the accompanying fac simile." The fac simile presents the words in capital letters of uniform size and uniform distinctive character. As shown in the fac simile, they are in solid black-faced type.

It appears that the plaintiff owns another registered trade-mark, described in certificate No. 49,239, issued on the same date as the other, which states that the mark consists, "as shown in the accompanying fac simile," "of a heavy black circle inclosing three fields—namely, a central red field, on which appear the words 'Necco Sweets,' and two white fields, respectively above and below the central field. The outer edges of all three fields are bordered by lines which are concentric with the black circle, and the edges of the upper and lower fields, which are adjacent to the central field, are separated therefrom by double curved lines as shown."

But there is no allegation in the bill that the latter trade-mark has been infringed. The word "Necco" therein, as presented in the fac simile last referred to, is in letters of a character widely different from those used in the fac simile shown by the certificate of registration to which the bill refers.

The alleged infringement consists in the use of a trade-mark which, as the bill itself alleges, has been also registered by the defendant. It is described in certificate No. 78,340, issued to the defendant June 7, 1910, "as the trade-mark shown in the accompanying drawing." The drawing shows the word "Nawaco," in ornamental capital letters of uniform size and character, rather larger in size than those shown in the plaintiff's fac simile, and noticeably different in character. The defendant's letters have no broad black faces; they are defined by outlines only, between which there is no filling in.

There is thus a difference between the respective marks, not merely in the two words used, but also in the manner in which the two words appear. The total difference is to my mind sufficient to prevent the conclusion that the defendant's trade-mark infringes that of the plaintiff whereon this suit is based. The defendant's mark is plainly not identical with the plaintiff's, nor do I think it can fairly be described as colorably resembling it, or as having any such near resemblance to it as might be calculated to deceive. The trade-name differs from the trade-mark, as has been said, in that one appeals to the ear more than to the eye. N. K. Fairbank Co. v. Luckel, etc., Co., 102 Fed. 327, 331, 42 C. C. A. 376. But this cannot be regarded as a suit for the protection of a trade-name. The plaintiff did not, as in Thaddeus Davids Co. v. Davids, above cited, register its word, however printed, as its trade-mark irrespective of any distinctive lettering. See 165 Fed. 793, 794. Though it may have secured the exclusive right to its identical word, used as a mark, even when shown in different lettering, I do not think its registration enables it to say that another word, though having some resemblance to its own, infringes when shown in lettering which makes the difference between the two so readily distinguishable by the ordinary observer. See Warner Bros. Co. v. Wiener, 214 Fed. 30, 130 C. C. A. 424.

The view of the case above taken has required the disregard of all allegations and evidence relating to charges of unfair competition merely on the defendant's part. How far the defendant's packages or labels are like the plaintiff's in general appearance, how far the word registered and used by the defendant resembles or may be made to resemble in sound the plaintiff's word, or how far purchasers have been or are likely to be misled by such resemblances, do not seem to me questions involved in the only issue which this court can determine, regarded as the pleadings have presented it. No infringement of the particular registered trade-mark in question being in my opinion established by the plaintiff, I must order its bill dismissed, with costs.

James L. Putnam, of Boston, Mass. (William L. Putnam, James L. Putnam, and Putnam, Putnam & Bell, all of Boston, Mass., on the brief), for appellant.

John Noble, of Boston, Mass. (Samuel Vaughan and Loring, Coolidge & Noble, all of Boston, Mass., on the brief), for appellee.

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

ALDRICH, District Judge. We think the District Court was right in basing its determinations upon the single question whether the complainant's trade-mark, consisting of the coined word, "Necco," was infringed by the defendant's use of its trade-mark, "Nawaco."

The original bill put in issue that question only, and in its prayers for relief the complainant asked, among other things, for an injunction against the National Wafer Company, restraining it from using its trade-mark, "Nawaco," upon the ground that the name was so near that of "Necco" that it should be treated as a copy, or at least as a colorable imitation.

Evidence was taken under issues joined upon such a theory of the complainant's case; the cause was argued upon the merits; there was a decision adverse to the complainant through an opinion handed down by the District Court August 27, 1914.

Nearly a month thereafter, the complainant moved for a rehearing and for leave to amend its bill, by describing certain other trade-marks, under which it was claimed that the trade-mark designs, described by these certificates, among other things, embraced certain settings, like a circle with upper and lower fields, separated from a central field by double curved lines, as shown.

The object of this amendment was, of course, to enlarge the scope of the issues, and to make the case more one of unfair competition than of trade-mark infringement, pure and simple, and yet there was no allegation that the trade-mark described as "Necco Sweets," which was the trade-mark of the proposed amendment, and one having a setting in the fields to which we have referred, had been infringed.

The fourth assignment of error is directed against the refusal of the District Court to allow this amendment.

The question whether the amendment should be allowed at such a stage of the proceedings was doubtless one of discretion, and, if it were open to revision here, we should quite likely take the view that the discretion was properly exercised.

Holding this view as to the single issue involved, we have only to consider the question whether "Nawaco" should be accepted as identical with the word "Necco," and, if not identical, whether it is so near like it as to be in colorable imitation, and therefore to be accepted as a name used in infringement of the complainant's rights under its trade-mark based upon the coined word "Necco."

We do not think it was either. The words "Necco" and "Nawaco" are not identical nor colorably the same. On the contrary, we think they are so far different in sound and looks as to be easily "distinguishable by the ordinary observer."

It must be borne in mind that the trade-mark under which relief is sought was the coined word "Necco," as shown in the fac simile which is annexed to the application for registration, and in the declaration, accompanying the statement of the trade-marks sought to be established it is said that no other has the right to use said trade-mark,

either in the identical form or in any such near resemblance thereto as might be calculated to deceive.

Having seen that the word "Nawaco" is neither identical nor in colorable imitation, when tested by the eye or by the ear, without expressly defining what weight the setting of the words "Necco" and "Nawaco" upon the labels, in commercial use, should have in a strictly trade-name or trade-mark case, we see nothing in the type, or the labels, which reasonably brings the word "Nawaco," with its commercial setting, into such similitude with the word "Necco," and its setting, as used by the complainant, as to make it a label or mark calculated to deceive the purchasing public.

Judge Dodge, in his opinion, particularly differentiates the characteristics of the two words and the different labels, and we see no occasion to enlarge the discussion upon that phase of the case.

We do not look upon the testimony of witnesses sent out by the complainant to call for "Necco," to whom in some instances "Nawaco" was passed out by the tradesman, as at all conclusive. The witnesses were not deceived, and the testimony bears more upon the fair dealing of the shopkeepers than upon the question as to whether the purchasing public would be misled into buying something different from what they called for. While Mr. Justice Brewer's reasoning in the case of Lorillard v. Peper, 86 Fed. 956, 960, 30 C. C. A. 496, had reference to instances where the purchasers were actually misled, it applies with still greater weight to testimony of witnesses who are sent out to see what the storekeepers would pass out when they called for "Necco."

We do not think we are required to review the various trade-name and trade-mark cases referred to by Judge Dodge, and by counsel, as authorities supposed to have some bearing by way of analogy upon the issue here, because we think the case is plainly against the complainant upon the face of the names and their settings.

While there might be differences of opinion on the question of colorable imitation, and while in isolated instances members of the public might possibly be misled, evidence which comes through an inspection of the names, the labels, and the packages is of great weight, if not controlling, with the court having the responsibility to decide. Lorillard Co. v. Peper, 86 Fed. 956, 960, 30 C. C. A. 496.

The decree of the District Court is affirmed, with costs of this court.

C. A. SMITH LUMBER & MFG. CO. v. PARKER.

(Circuit Court of Appeals, Ninth Circuit. July 12, 1915.)

No. 2504.

EVIDENCE ⊂⊃397—PAROL EVIDENCE—RELEASE—CONTRACTS.

An instrument executed by an injured employé and his employer, which recites that for a specified money consideration the employé acknowledges full satisfaction and discharge of all claims from the accident causing the injury, is not a mere release by the employé, but is contractual in nature, and cannot be controlled by parol evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1756–1765; Dec. Dig. ⊂⊃397.]

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

Action by John A. Parker against the C. A. Smith Lumber & Manufacturing Company. There was a judgment for the plaintiff, and defendant brings error. Reversed and remanded, with directions.

John D. Goss, of Marshfield, Or., for plaintiff in error.

Wm. T. Stoll, of Marshfield, Or., and Isham N. Smith, of Portland, Or., for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. This was an action at law, in which a verdict was returned in favor of the plaintiff, upon which verdict judgment was entered against the defendant (plaintiff in error here) for certain damages and costs. The real point in the case is whether a certain oral agreement alleged by the plaintiff to have been made by him with the defendant was open to consideration in view of the written contract of the parties.

The complaint alleged in substance that in the month of December, 1908, the plaintiff was in the employ of the defendant at its sawmill as a millwright, and that in that month and year, while so engaged in the performance of his duties, his left leg was injured, which injury he attributed to the negligence of the defendant and so notified it, and that by reason of the careless and unskillful manner in which the company's physician and surgeon treated the plaintiff the latter's right hand had to be amputated, which was done on the 6th day of February, 1909, in consequence of which the plaintiff claimed to have a cause of action against the defendant for damages; that subsequently the plaintiff and the defendant made and entered into an agreement in writing in these words and figures:

"For the sole consideration of the sum of four hundred and ten $^{75}/_{100}$ dollars, this 25th day of September, 1909, received from C. A. Smith Lumber & Manufacturing Company, I do hereby acknowledge full satisfaction and discharge of all claims, accrued or to accrue, in respect of all injuries or injurious results, direct or indirect, arising or to arise from an accident sustained by me on or about the 16th day of December, 1908, while in the employment of the above.

"$410.75. [Signed] J. A. Parker. [Seal.]

"Witness: Arno Mereen, Marshfield, Or.

"Witness: David Nelson, Marshfield, Or."

The complaint further alleges that the defendant then and there paid the plaintiff $200 in cash, and at the same time orally agreed with the plaintiff as a further consideration for such release to give him employment so long as he wanted it, at any work in the defendant's said mill that the plaintiff could do—that is to say, to measure lumber in the yards, or to operate a trimmer, or to act as timekeeper, or to look after the stores—and would pay the plaintiff therefor the same wages as were paid to other men for the same services, which agreement was assented to by the plaintiff and defendant in all particulars, and was accepted by the plaintiff in satisfaction and discharge of his said cause of action; that thereupon, and pursuant to such agreement, the plaintiff entered the employ of the defendant, filling a num-

ber of different positions for the period of about eight months, whereupon he was permanently put in charge of a trimmer, which is an automatic machine that trims up all the board lumber that goes through the mill, and which is a machine that can be operated by a man with one hand, and continued in that position continuously until the 31st day of January, 1913, the plaintiff performing all such duties to the satisfaction of the defendant; that the plaintiff continued capable of performing such duties, the regular wages of which were and are $3.50 a day; and that, notwithstanding the plaintiff's ability and willingness to continue in the performance of such duties, the defendant, on the 31st day of January, 1913, in violation of its said alleged agreement with the plaintiff, and without any cause, unlawfully and fraudulently discharged the plaintiff, and has ever since refused to give him employment of any kind, by reason of which the plaintiff has been damaged in the sum of $30,000.

A demurrer interposed by the defendant to the complaint, mainly upon the ground that the alleged release and settlement constituted a written contract, which could not be varied by parol evidence showing an additional consideration from that stated therein, was overruled by the trial court, resulting in an answer thereto on behalf of the defendant to the action, making various admissions and denials, and setting up, among other things, that the said alleged written agreement was the "only settlement or agreement ever made between the plaintiff and defendant subsequent to the 6th day of February, 1909, and was the only release or settlement agreement ever executed by the plaintiff and the defendant, and was intended and understood by all the parties thereto to be and was a full and complete settlement of all the claim of the plaintiff against the defendant by reason of any of the matters alleged in the complaint herein, and was intended to and did set forth the full consideration therefor," and as a further and separate defense alleged that "by reason of said written agreement and receipt the plaintiff is estopped to set up any further promise, agreement, or consideration than the sum so set out and receipted therefor therein, and that the plaintiff is forbidden by the laws of the state of Oregon, and especially by section 713, L. O. L., to vary the terms of said written agreement."

The answer of the defendant admits, among other things, that its superintendent "voluntarily informed the plaintiff that, as long as conditions were satisfactory and his work properly performed, he, on behalf of the defendant, would be glad to employ the plaintiff at such work as he could properly perform, but denied that said settlement or agreement was entered into upon consideration of any terms to that effect, or that, as a part of or an inducement to said settlement, any promise or agreement to that effect was made or entered into by or on behalf of the defendant, or that there was any promise or agreement or consideration whatsoever for said settlement other than that set forth and included in said writing above set forth." The answer also set up, among other things, that the plaintiff stopped work for the defendant of his own accord and without cause, and has since been and is employed in other occupations and earning $3 a day and more.

There was some evidence tending to show that the plaintiff ceased work for the defendant without cause, but that issue was determined against the defendant to the action by the verdict of the jury, which awarded the plaintiff $2,500 as damages. If the ruling of the learned judge of the court below upon the demurrer to the complaint was right, it results that his instructions to the jury, which followed in substance that ruling, were also without error, and as the instructions were otherwise unobjectionable, the judgment should be affirmed. But, as already indicated, the real question is whether the view taken by the trial court on the demurrer to the complaint was correct—its view being shown by this excerpt from its opinion:

"Upon reading the complaint, my first impression was that the demurrer was well taken, and that the receipt or acquittance should be treated as containing all the terms of the settlement, and consequently parol evidence was not admissible to show an additional consideration from that stated therein. But I find the adjudged cases to be to the contrary. The holdings are that an acquittance not contractual in form is a mere receipt, and is conclusive only as to the amount of money paid; that parol evidence is permissible to establish the parts of the contract, if any, not contained in the writing, unless the consideration as stated in the writing is contractual in its nature. It was so held in Pennsylvania Company v. Dolan [6 Ind. App. 109], 32 N. E. 802 [51 Am. St. Rep. 289], a case quite similar to the one at bar, and to the like effect in Allen v. Tacoma Mill Company [18 Wash. 216], 51 Pac. 372, and the recent case in the state Supreme Court of Holmboe v. Morgan [69 Or. 395, 138 Pac. 1084]. Demurrer overruled."

The case clearly turns upon the true nature of the instrument, which has been set out in full. If it was a receipt only for the amount of money specified in it, the judgment below was undoubtedly right, for it is undisputed that a mere receipt is not evidence of a contract, but of payment, and is not even conclusive of the amount of that, if any mistake was made between the parties in the matter of the adjustment of their account.

But we are unable to construe the instrument in this case as a mere receipt. The evidence shows, and the complaint itself alleges, that it was given in settlement of a disputed claim made by the plaintiff against the defendant for damages growing out of the loss of his hand as the alleged result of an injury to his leg, which latter injury was alleged to have been received by the plaintiff while working for the defendant; that the respective parties settled that claim by agreement, and in writing the plaintiff declared that:

"For the sole consideration of the sum of four hundred and ten $^{75}/_{100}$ dollars, this 25th day of September, 1909, received from C. A. Smith Lumber & Manufacturing Company, I do hereby acknowledge full satisfaction and discharge of all claims, accrued or to accrue, in respect of all injuries or injurious results, direct or indirect, arising or to arise from an accident sustained by me on or about the 16th day of December, 1908, while in the employment of the above."

To hold that such an instrument, executed under such circumstances and for such a purpose, is not contractual in its nature, would be, in our opinion, a clear violation of its unambiguous language. Similar releases, few, if any, of which were stronger in terms, and some not so strong, were held contractual in their nature, and therefore no more to be disputed or controlled by parol evidence than any other instrument

in writing witnessing an agreement of the parties, in the cases of St. Louis & S. F. Ry. Co. v. Dearborn, 60 Fed. 880, 9 C. C. A. 286; The Cayuga, 59 Fed. 483, 8 C. C. A. 188; Cummings v. Baars, 36 Minn. 350, 31 N. W. 449; Chaplin v. Gerald, 104 Me. 187, 71 Atl. 712; Williams v. Chicago, R. I. & P. Ry. Co., 109 Ark. 82, 158 S. W. 967; Jessup v. Chicago & N. W. Ry. Co., 99 Iowa, 189, 68 N. W. 673; Myron v. Union R. Co., 19 R. I. 125, 32 Atl. 165; Rapid Transit Ry. Co. v. Smith, 98 Tex. 553, 86 S. W. 323; Atchison, T. & S. F. Ry. Co. v. Vanordstrand, 67 Kan. 386, 73 Pac. 116; White v. Richmond & D. R. R. Co., 110 N. C. 456, 15 S. E. 198; Tate v. Wabash Ry. Co., 131 Mo. App. 107, 110 S. W. 623; Budro v. Burgess, 197 Mass. 74, 83 N. E. 318; Coon v. Knap, 8 N. Y. 402, 59 Am. Dec. 502; Squires v. Inhabitants of Town of Amherst, 145 Mass. 192, 13 N. E. 609; Allen v. Ruland, 79 Conn. 405, 65 Atl. 140, 118 Am. St. Rep. 146, 8 Ann. Cas. 344; Denver & R. G. R. Co. v. Sullivan, 21 Colo. 302, 41 Pac. 504; Vaughan v. Mason et al., 23 R. I. 348, 50 Atl. 390; Moore v. Missouri, K. & T. Ry. Co., 30 Tex. Civ. App. 266, 69 S. W. 997; English v. New Orleans & N. E. R. Co., 100 Miss. 575, 56 South. 665; Matthews v. Phœnix Ins. Co., 160 Mo. App. 557, 140 S. W. 968.

The judgment is reversed, and the cause remanded, with directions to the court below to sustain the demurrer to the complaint.

NEW YORK CENT. & H. R. R. CO. v. BANKER.

(Circuit Court of Appeals, Second Circuit. June 22, 1915.)

No. 249.

1. MASTER AND SERVANT ⊂=286—ACTIONS FOR DEATH—QUESTIONS FOR JURY.
In an action for the death of a railroad engineer, whose train was derailed by a derailing device intended to minimize disaster by preventing trains on a side track from running onto the main line in case danger signals failed to work or were disregarded by the engineer, evidence *held* to make a question for the jury as to whether the signals were so operated as to mislead the engineer, and lead him to believe that the track was clear.

[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 ⊂=286—ACTIONS FOR DEATH—QUESTIONS FOR JURY—SIDING.
A railroad engineer was killed by the derailment of his train at a point where a side track nine miles long ran into the main track; the switch then being set to run his train onto a derailing device to keep the main track clear for a passenger train. There were two types of derail in common use; one, varying in length from 2 or 3 feet to 15 or 18 feet, being usually used in yards, and the other, from 50 or 60 feet to 250 or more, being generally used where main tracks came together. It was clear, however, that whether a track was a "siding" depended upon the use made of it, rather than its length, and that the long type of derail was used when the track was one on which trains might be expected to run at a high speed, and the other type where they were confined to a low speed. *Held*, that the question of which type should have been used at the par-

ticular place was an engineering problem, which should not have been left to the jury's decision.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1008, 1010–1015, 1017–1033, 1036–1042, 1044, 1046–1050; Dec. Dig. ⊂⊃286.]

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

This cause comes here upon appeal from a judgment entered upon the verdict of a jury in favor of defendant in error, who was plaintiff below. The action was brought under the federal Employers' Act to recover damages resulting from the death of Timothy S. Banker, a locomotive engineer, who was killed by the derailment of a train he was running.

Alex. S. Lyman, of New York City (Robert A. Kutschbock, of New York City, of counsel), for plaintiff in error.

Edwin W. Sanford, of Albany, N. Y. (John Vernou Bouvier, Jr., and Wm. Montague Geer, Jr., both of New York City, of counsel), for defendant in error.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

LACOMBE, Circuit Judge. The accident happened on the Hudson River Railroad at Castleton, about nine miles south of East Albany, where the tracks run on an embankment parallel to and several feet above the river. Movement of trains on the south-bound (westerly) track, on which all passenger trains run, when not on sidings, is regulated by a succession of semaphore signals on tall posts, which inform the engineer whether the block ahead of him is clear or closed—i. e., occupied by another train. These signals at the block in question are operated from a tower (No. 95). Running alongside of the south-bound main track and to the west of it is another track, called by the employés the "hog track," and used by freight trains. This track runs into the main south-bound track a little over 100 feet north of the tower. Trains on the side or hog track are forbidden to exceed a speed of 15 miles an hour; their movement is regulated by a succession of signals, located west of the track on posts much lower than the main semaphore posts, known as "dwarf" signals. These also are operated by the same towerman, who receives word from a tower or towers to the north of him when a south-bound train is approaching, either on main or on side track. The accident occurred about 4 a. m., and the signals were differently colored lights. All signals, at normal, are such in position or color as indicate "danger"; they can be changed to "safety" only by the movement of levers by the man in the tower. About 50 feet south of the last dwarf signal by the side track, said track runs into the main track over a switch, which also is operated by a lever under the control of the towerman. When it is moved one way, the switch leads the train from the side track to the main one; when it is moved the other way, it leads the train into what is called a "derail." This is a device to minimize disaster. Should the dwarf signals fail to work, or should the

engineer disregard them and run on, instead of stopping his train, it will in a very few feet run off the rail heads into open ground, where there is no roadbed, and after plowing along a bit will perforce have to stop and may be wrecked. But by so doing the risk of precipitating it into the side of a crowded passenger train is avoided. The levers and all the operating parts are ingeniously co-ordinated with each other, so as to eliminate as far as possible any carelessness on the part of the towerman. For instance, the switch leading from side to main track being in place and the main track signals indicating danger, the towerman cannot move the levers which change these signals to safety, until he has first moved the lever which throws the switch from main to derail, and has thus eliminated all chance of a train from the side track crashing into the train on the main which the safety signals invite to proceed, often at a high rate of speed. There is nothing in the testimony to suggest that this interlocking mechanism controlling signals and rails was not in perfect order on the night of the accident. Indeed, no charge of that sort was made in the complaint.

What happened was this: A freight train, of which deceased was the locomotive engineer, came down this side track from East Albany to the place of the accident. In the cab with deceased were three other men; he was on the right-hand side, where he could look ahead and pick up the series of dwarf signals; the speed of the train did not exceed the 15 miles which the rules required, probably it was nearer 10 miles an hour. Turning a curve about 1,000 feet above the dwarf signal near tower 95, the train ran upon a straight tangent, which led down to the switch between main track and derail. About the time the train ran upon this tangent the sound of a train on the south-bound main track was heard in the cab. The deceased was at his post, awake, and apparently attentive—he answered a question of one of the men in the cab as to the time. He ran the train, without further reducing speed or stopping, past the dwarf signal, and, the derail being open, it ran off the tracks, and after going a few feet along the untracked ground turned over to the right and fell on the slope, killing Banker, who was found with his hand on the throttle. The question whether or not deceased was negligent was a prominent one in the case. The theory of defendant was that from the time Banker rounded the curve onto the tangent he was confronted with a danger signal (purple light) on the dwarf post, but disregarded it and ran past through the derail. The theory of plaintiff was that no danger signal was displayed to him. The evidence tending to show that the light on the dwarf signal was purple (danger) was direct. The evidence tending to show that the light was green (safety) was inferential. It was contended that an experienced engineer, familiar with the locality, as he was, would not have run past a danger signal, especially when he heard (as presumably he did, since a witness in the cab heard) the rumble of a train on the main track next to him. The verdict gives us no enlightenment as to what conclusion the jury reached as to the alleged negligence of deceased. The action was under the federal Employers' Liability Act, which provides that contributory negligence shall not defeat recovery, but may require an apportionment of damages. The verdict was for

$14,500, and no one can tell whether that sum indicates full damages, or apportioned damages. Incidentally it may be remarked that it will be helpful in all trials under this act to have the jury indicate whether they find negligence on the plaintiff's side, and, if so, by how much they have reduced the verdict against defendant.

The charges of negligence are two-fold:

A. That the signals were so operated as to mislead deceased.
B. That the derail was of a type which it was negligent for defendant to maintain at the place in question.

[1] A. The normal signal on the dwarf post was danger (purple), indicating that the switch was closed to main track and opened to the derail. It was physically impossible for the towerman to change that signal to green (safety) until after he had moved the lever which turned the switch from derail to main track. The evidence to support the theory that there was a green light on the dwarf signal from the time the train left the curve till it passed the switch is, as we have seen, inferential only; but the jury was warranted in considering it for what it is worth. One witness, the head brakeman, who was in the cab, testified on a former trial, and his evidence was read in the case at bar. As printed in the record at folio 203, it would seem to indicate that he saw a purple light on the dwarf post; but we are rather inclined to think that there is some confusion in reporting or transcribing what he said—that he was speaking generally as to what signals would be shown. He was on the left-hand side of the cab, not watching the dwarf signals to the right of the track. The defendant called Smith, the towerman, who testified over and over again that after he got there that night, not long before the accident, the dwarf signal was normal (danger, purple light), and that he did not change it down to the time of the derailment. Of course, if this were so, the accident happened because deceased ran past a danger signal which had been opposed to him for 1,000 feet. This would mean, not merely that he was negligent, but it would account for the derailment without any negligence on the part of defendant touching the exhibition of signals.

However, the towerman was an interested witness, human life was lost, and he was anxious to clear himself of responsibility therefor. The jury could give that circumstance proper weight, especially since he admits that at one time after he saw the freight coming he started to change the situation by closing the passenger track and opening the freight track; that he got so far in effecting this change that he had the home and distant signals on main back set at normal, which would stop the passenger train; that he then changed his mind, and cleared the passenger track again by restoring the home signal to come on. Incidentally the engineer of the freight train might have seen the change of passenger track semaphore from clear to danger, and have supposed it would naturally be followed immediately by the change of his own signal from danger to clear. The jury might think these sudden changes on the eve of catastrophe were careless, and that defendant should be held liable for thus misleading deceased to suppose that he could safely continue speed, and would find his last dwarf signal showing safety by the time he reached it. Indeed, the jury might have

altogether disbelieved the towerman, and reached the conclusion that his first intended change was carried to completion, main track closed, and side track opened, and that thereafter he tried to change back again, having in the meantime misled the engineer to his destruction.

If the cause had gone to the jury solely on the first charge of negligence, the evidence is such that we would not be warranted in disturbing its finding. But both charges of negligence were sent to them, and we must therefore consider the second one.

[2] B. There are two types of derail. One, the one-point derail, is short, varying from 2 or three feet to 15 or 18 feet. The other is long, anywhere from 50 or 60 feet to 250 or more, and ending, sometimes, in a bumper or a bank of earth. Both are of common use in railroading. In yards, the short or one-point type is practically universal. Where main tracks come together, the long type is apparently generally used. The one-point seems to be generally used where "sidings" run into the main track. Much testimony was taken as to what a "siding" is, and it was strenuously contended that this nine-mile stretch of track could not properly be considered a siding. It seems quite clear from the testimony that the long rail is used when the track to which it is applied is one on which trains may be expected to run at high speed, and the one-point is used when the trains running on that track are confined to a low speed; that whether piece of track is a "siding" or not depends, not at all upon its length, but upon the use made of it. In view of the very general use of one-point derails, it seems to us that the question, which type should be used at a particular place, is an engineering problem, depending on many considerations, which should not be left to a jury's decision—at least not in a case such as the testimony in this case presents.

Because we cannot determine from the verdict which charge of negligence the jury found against defendant, there must be a new trial.

Judgment reversed.

WEBER v. FREED, Collector of Customs.

(Circuit Court of Appeals, Third Circuit. July 19, 1915.)

No. 1966.

1. CONSTITUTIONAL LAW ⇐48—STATUTES—VALIDITY—JUDICIAL POWER.
Only in a clear case may the courts declare an act unconstitutional.
[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 46; Dec. Dig. ⇐48.]

2. COMMERCE ⇐55—FOREIGN COMMERCE—POWER OF CONGRESS.
Act July 31, 1912, c. 263, 37 Stat. 240 (Comp. St. 1913, §§ 10416–10418), making it unlawful to bring into the United States any film of any prize fight, which is designed to be used or may be used for purposes of public exhibition, is a valid exercise of the power conferred by the commerce clause, though it may indirectly interfere with the police power of the states.
[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 72–102; Dec. Dig. ⇐55.]

3. COMMERCE ⊂⊃8—FOREIGN COMMERCE—POWER OF CONGRESS.

The right to determine what articles, offered for import, shall be admitted into the country, is solely for Congress, and the right to admit on terms implies the plenary right to refuse admission on any terms, though after an article has once been admitted, and has become part of the common stock of property, Congress may lose control over it; but an article does not become subject to the power of the states until it has been admitted into the country.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 5; Dec. Dig. ⊂⊃8.]

4. COMMERCE ⊂⊃55—FOREIGN COMMERCE—POWER OF CONGRESS—STATUTES—CONSTRUCTION.

An importation of moving picture films of a prize fight is within the prohibition of Act July 31, 1912, prohibiting the importation of prize fight films, designed to be used or which may be used for purposes of public exhibition, for the films are articles of commerce, capable of being sold or leased, and the mere fact that the importer has no present intent of using them for any other purpose than exhibition does not change their character or remove them from the subject of commerce.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 72–102; Dec. Dig. ⊂⊃55.]

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

Suit by Lawrence Weber against Frederick S. Freed, Collector of Customs. From a decree denying relief, plaintiff appeals. Affirmed.

Charles A. Towne, of New York City, for appellant.

J. L. Bodine, of Trenton, N. J., for appellee.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

McPHERSON, Circuit Judge. On July 31, 1912, Congress passed an act declaring it unlawful to deposit in the mails or with any express company or other common carrier for interstate transportation,—"* * * or to bring or to cause to be brought into the United States from abroad, any film or other pictorial representation of any prize fight or encounter of pugilists under whatever name, which is designed to be used, or may be used, for purposes of public exhibition," and punishing any violation of the act by fine or imprisonment at labor, or both, at the discretion of the court. Subsection 380 of section 1 of the Tariff Act of 1913 (Act Oct. 3, 1913, c. 16, 38 Stat. 114 [Comp. St. 1913, § 5291]) imposes a specified duty on "photographic-film positives, imported in any form, for use in any way in connection with moving-picture exhibits," etc., and adds a proviso to the effect that all films so imported shall be subject to such censorship as may be imposed by the Secretary of the Treasury. As yet the Secretary has not exercised the power given him by this proviso.

Early in April, 1915, the plaintiff brought to the port of Newark, N. J., from the Island of Cuba, moving picture films of the prize fight or pugilistic encounter between Willard and Johnson, and offered them for entry. The collector refused to admit them, basing his action upon the foregoing act of 1912, and the plaintiff thereupon filed the

pending bill in equity to enjoin the collector from persisting in such refusal. The District Court declined to grant a preliminary injunction (treating the case, however, as if on final hearing), and the appeal before us attacks the correctness of this order. The plaintiff concedes that the letter of the statute supports the collector and the District Court, but asserts that the act is in substance unconstitutional, and should therefore be disregarded. In brief, the argument is that Congress, while in form exercising its power under the commerce clause, is in reality attempting to exercise the police power that belongs solely to the states.

[1-3] We do not take this view of the situation. It is needless to say that only in a clear case may an act be declared unconstitutional; but it is equally true that, if such a case be presented, the duty of a court is plain. In our opinion the statute under review belongs undoubtedly to a class of which numerous examples exist, namely, statutes that fall directly under the commerce clause, but affect indirectly the field of the police power. It can hardly be doubted that the right or the power to determine what articles offered for import shall be admitted into this country belongs solely to Congress, and that the right to admit on certain terms implies the plenary right to refuse admission on any terms. It is true that after an article has once been admitted, and has thus become part of the common stock of property, Congress may so far lose control over it that the regulation of its future use may fall properly within the jurisdiction of the states; but the article does not become subject to the state until it has passed the custom house, and, if Congress chooses to exclude it altogether on the ground, for example, that the public health or the public morals would probably suffer if it be admitted, we are of opinion that such exclusion is permitted by the Constitution. Manifestly, the power must exist somewhere, and as the states do not possess it there is no other depositary except the federal government. Indirectly, no doubt, the police power of the states may thus be interfered with. If, for example, a state should not be unwilling, or should perhaps even be desirous, to allow moving pictures of a prize fight to be exhibited, such a policy would of course be hampered by the act in question; but the interference would be indirect, merely an unavoidable consequence of the exercise by Congress of its sovereign and undoubted power to regulate, and therefore to prohibit, commerce with foreign countries. In Brolan v. United States, 236 U. S. 216, 35 Sup. Ct. 285, 59 L. Ed. ——, the Supreme Court quotes with approval the following paragraph from Buttfield v. Stranahan, 192 U. S. 470, 24 Sup. Ct. 349, 48 L. Ed. 525:

"The power to regulate commerce with foreign nations is expressly conferred upon Congress, and, being an enumerated power, is complete in itself, acknowledging no limitations other than those prescribed in the Constitution. Lottery Case, 188 U. S. 321, 353–356 [23 Sup. Ct. 321, 47 L. Ed. 492]; Leisy v. Hardin, 135 U. S. 100, 108 [10 Sup. Ct. 681, 34 L. Ed. 128]. Whatever difference of opinion, if any, may have existed or does exist concerning the limitations of the power, resulting from other provisions of the Constitution, so far as interstate commerce is concerned, it is not to be doubted that from the beginning Congress has exercised a plenary power in respect to the exclusion of merchandise brought from foreign countries; not alone directly by

the enactment of embargo statutes, but indirectly, as a necessary result of provisions contained in tariff legislation. It has also, in other than tariff legislation, exerted a police power over foreign commerce by provisions which in and of themselves amounted to the assertion of the right to exclude merchandise at discretion. This is illustrated by statutory provisions which have been in force for more than 50 years, regulating the degree of strength of drugs, medicines, and chemicals entitled to admission into the United States, and excluding such as did not equal the standards adopted. 9 Stat. at L. 237, c. 70, Rev. Stat. § 2933, U. S. Comp. Stat. 1901, p. 1936."

[4] The declaration in the bill that the films in controversy are intended, not for sale, but solely for exhibition, is not controlling. Indeed, the allegations of the bill as a whole leave no room for doubt that the object of exhibiting the films is the large gains that are expected to accrue therefrom, and we see little, if any, difference between such an object and the sale or leasing of the films themselves. The plaintiff intends to sell the privilege of looking at the moving pictures, and from the very nature of such films this is precisely the use for which they are designed. But in any event the films are articles of commerce, capable of being sold or leased, and the mere fact that the plaintiff has no present intention of using them for any other purpose than exhibition does not change their essential, material, character, or remove them from the class of tangible things that are the subject of "commerce" in any definition of that word.

We need not prolong the discussion. Not infrequently Congress has been sustained in a similar exercise of power. In Buttfield v. Stranahan, 192 U. S. 470, 24 Sup. Ct. 349, 48 L. Ed. 525, the exclusion of inferior tea was upheld; Brolan v. United States, supra, sustained the exclusion of opium; in The Abby Dodge, 223 U. S. 176, 32 Sup. Ct. 310, 56 L. Ed. 390, sponges gathered at a certain season of the year were denied admission; imitations of coins were excluded in United States v. Marigold, 9 How. 560, 13 L. Ed. 257; in Reid v. Colorado, 187 U. S. 137, 23 Sup. Ct. 92, 47 L. Ed. 108, the interstate transportation of diseased cattle was forbidden, and in the Lottery Cases, 188 U. S. 321, 23 Sup. Ct. 321, 47 L. Ed. 492, the interstate transportation of lottery tickets; Hoke v. United States, 227 U. S. 308, 33 Sup. Ct. 281, 57 L. Ed. 523, 43 L. R. A. (N. S.) 906, Ann. Cas. 1913E, 905, sustained the constitutionality of the so-called white slave act; and in Hipolite Co. v. United States, 220 U. S. 45, 31 Sup. Ct. 364, 55 L. Ed. 364, the prohibition of transporting a food product was sustained on the ground that Congress had made the product an outlaw. The government's brief contains a list of nearly 20 statutes in which Congress prohibits the importation or carriage of various articles that we need not enumerate.

The decree is affirmed.

MACY et al. v. BROWNE et al.

(Circuit Court of Appeals, Second Circuit. June 8, 1915.)

No. 158.

1. CUSTOMS DUTIES ⟸22—IMPORTATION OF TEA—STATUTORY REGULATIONS—CONSTRUCTION.

The Tea Law (Act March 2, 1897, c. 358, 29 Stat. 604), as amended by Act May 16, 1908, c. 170, 35 Stat. 163 (Comp. St. 1913, § 8786), providing for the creation of a Board of Tea Appeal, for the adoption of standard samples, and confiding to the board the authority to determine whether samples for tea offered for entry are up to the standards, and requiring that the purity, quality, and fitness for consumption of tea shall be tested, prohibits the importation of tea which falls below the standard in purity, quality, and fitness for consumption, but does not authorize the rejection of tea containing coloring matter, unless the coloring matter and other impurities make the tea below standard in purity, quality, or fitness for consumption.

[Ed. Note.—For other cases, see Customs Duties, Cent. Dig. § 18; Dec. Dig. ⟸22.]

2. CUSTOMS DUTIES ⟸22—IMPORTATION OF TEA—FINDINGS OF TEA BOARD.

The Board of Tea Appeal, created by Tea Law, as amended by Act May 16, 1908, with authority to determine whether samples of tea offered for entry are or are not inferior to the standards in purity, quality, or fitness for consumption, has the exclusive power to determine whether tea offered for importation is equal to the standards in purity, quality, or fitness for consumption, provided it follows the directions of the statute in determining the question, and the board may not reject tea containing coloring matter not sufficient in quantity or character to bring the tea below the standard in purity, quality, or fitness.

[Ed. Note.—For other cases, see Customs Duties, Cent. Dig. § 18; Dec. Dig. ⟸22.]

3. INJUNCTION ⟸112—GOVERNMENT OFFICERS—NECESSITY FOR RELIEF.

Where tea brought to this country for importation has once been rejected, though superior to the standard in purity, in quality, or in fitness for consumption, on the ground that it contains coloring matter, not affecting its purity, quality, or fitness, a suit by the importer to restrain the federal tea board from excluding the tea was not premature.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 197; Dec. Dig. ⟸112.]

4. CUSTOMS DUTIES ⟸22—IMPORTATION OF TEA—STATUTES—CUSTOMS REGULATIONS.

Under Tea Law, as amended by Act May 16, 1908, providing for a Board of Tea Appeal, with authority to determine whether samples of tea offered for entry are or are not inferior to standards in purity, quality, or fitness for consumption, and empowering the Secretary of the Treasury to enforce the act by appropriate regulations, treasury regulations directing the board to reject tea which contains any coloring matter, though the board may be convinced, as the result of all the tests they may apply under the statute, that the coloring matter is present in such harmless quantity that the tea is not inferior to the standards in purity, quality, or fitness, are inconsistent with the statute.

[Ed. Note.—For other cases, see Customs Duties, Cent. Dig. § 18; Dec. Dig. ⟸22.]

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

This cause comes here upon appeal from a decree of the District Court, Southern District of New York, dismissing the bill. Complainants are importers of tea. Respondents, United States General Appraisers, are members of the appellate board, created under the act of March 2, 1897 (as amended May 16, 1908), known as the Tea Law, to re-examine teas already examined by tea examiners appointed under the same act. The function of these examiners and re-examiners is to determine whether or not teas offered for import comply with the requirements, imposed by the Tea Law for admission into the United States.

The act is entitled "An act to prevent the importation of impure and unwholesome teas." Its first section makes it unlawful "to import or bring into the United States any merchandise as tea, which is inferior in purity, quality and fitness for consumption to the standards provided in section 3 of this act." The third section provides that the Secretary of the Treasury, upon recommendation of the board, shall fix and establish uniform standards of purity, quality and fitness for consumption of all kinds of tea imported, and shall procure and deposit in certain custom houses duplicate samples of such standards, in sufficient number to supply the importers and dealers in tea at all ports desiring the same at cost. All teas, or merchandise described as tea, "of inferior purity, quality and fitness for consumption to such standards," are declared to be within the prohibition of the first section. Details as to examination and re-examination are provided for, the seventh section concluding with the statement: "That in all cases of examination and re-examination of teas, or merchandise described as tea, by examiners or Boards of United States General Appraisers under the provisions of this act, the purity, quality, and fitness for consumption of the same shall be tested according to the usages and customs of the tea trade, including the testing of an infusion of the same in boiling water, and, if necessary, by chemical analysis."

The standards have been duly established and duplicate samples deposited in the custom houses. Certain green teas of complainants were offered by them for import, were rejected by the examiner, and are now before respondents for re-examination. The contention of complainants is that respondents threaten, upon such re-examination, to adopt a method of examination and to apply a criterion for judging the admissibility of the teas, neither of which is authorized by the Tea Act.

Section 10 gave to the Secretary of the Treasury "power to enforce the provisions of this act by appropriate regulations." He has prescribed a code of regulations, to two of which, Nos. 22 and 23, complainants take exception. They provide for what is called the "Read test," to determine whether the tea being examined contains "artificial coloring or facing matter." They further provide that "as soon as coloring or facing matter is identified, then the tea should be rejected," but "if the tea is clearly equal to the standard as regards coloring or facing matter" apparently it is not to be rejected. In other words, if the standard of a particular kind or grade of tea contains no coloring or facing matter, offered tea which contains any coloring or facing matter, however small in quantity, must be rejected. If the standard contains some such coloring or facing matter, all tea which contains such matter in excess of the standard must be rejected. The examiner rejected complainant's teas "for color; that is to say, on the ground that they were inferior in purity to said standards established as aforesaid, by reason of the alleged inclusion therein of certain coloring matter."

The opinion of Judge Hough will be found in 215 Fed. 456.

Evarts, Choate & Sherman, of New York City (J. H. Choate, Jr., of New York City, of counsel), for appellants.

W. L. Wemple, Sp. Asst. Atty. Gen., of New York City, for appellees.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge. Much testimony was taken, and the District Court found that when complainants offered their tea for entry the standard samples contained no coloring matter whatever, but did contain a far greater amount of other foreign substances than did complainants'; that the tea refused entry is worth in the open market nearly four times as much per pound as is the standard sample by which its acceptance or rejection was gauged; that the sole cause for rejecting the tea in question is that it showed coloring matter, to wit, Prussian blue, in proportion ranging from 9 to 19 parts of blue in a million of other and unobjected to elements. It is conceded by both sides that Prussian blue cannot be proved to produce any deleterious results; that it is found in the United States Pharmacopeia as a drug sometimes used for common purposes. A careful study of the testimony results in the conclusion that these findings of fact are entirely accurate.

[1, 2] Manifestly Congress undertook to deal fully with the subject of tea importation. It provided for the creation of this Board of Tea Appeal; also for the adoption of physical standard samples; to the members of the board it confided the authority—and the sole authority—to determine whether samples of tea offered for entry are or are not inferior to the standards in the particulars specified. Congress, however, has specified carefully the particulars in which this inferiority must be found in order to reject the tea. The question to be answered upon every examination is: Are the teas "of inferior purity, quality, and fitness for consumption to such standards"? Although the sentence is conjunctive, we think it may fairly be construed disjunctively, as providing that tea shall be prohibited which falls below the standard either in purity, in quality, or in fitness for consumption.

It is now contended for the government that although the board may be satisfied that a certain lot of tea is fully equal, indeed superior, to the standard—in purity, in quality, and in fitness for consumption—the board must nevertheless reject it, if they find that it contains coloring or facing matter. It does not seem to us that the statute warrants such rejection, unless the coloring matter plus other impurities makes the tea below standard *in purity, or* the coloring matter makes the tea below standard *in quality, or* the coloring matter makes the tea less *fit for consumption* than the standard. Within the field of investigation confided to them the Board of Examiners are the sole judges; but they have been given no authority to extend the field of investigation beyond the limits staked out by Congress. If Congress had intended that tea should be rejected because of coloring matter which was not sufficient in quantity, or such in character as to bring it below standard in the three particulars specified, it must be presumed that Congress would have so stated in the act. We do not see that Buttfield v. Stranahan, 192 U. S. 470, 24 Sup. Ct. 349, 48 L. Ed. 525, applies. That case held merely that the board was the final judge in its allotted field; it did not indicate that the board had any power to extend that field.

The record shows that this tea is superior to standard in all three specified requirements. It also shows that nevertheless it will be re-

jected as soon as the board examines it, because of a fourth unspecified requirement. The members of the board are appointed by the Secretary, who has the power to remove them; it is not disputed that they will act in conformity to the requirements he has prescribed for their guidance in regulations 22 and 23. Indeed, upon inquiry as to the issues by the District Judge, counsel for the government conceded that it was the intention of the officers of the government "to keep out all the tea that has any coloring matter in it, no matter whether such matter was put into it, so far as the observer can discover, for the purpose of coloring it or not, or whether it is mere carelessness or accident"; also that teas will be rejected "if the said teas are found to contain matters adapted for use as coloring or facing of any kind or in any quantity, irrespective of whether the same is or is not used or applied so as to conceal damage or inferiority."

[3] If the government officers have no authority to reject teas, superior to the standard in all the requirements specified by law, such rejection would be an invasion of the rights of complainants, who, relying on the statute, have brought to this country teas which the statute advised them they could enter. This is no academic construction of a statute in advance of its application; we are dealing with a concrete case; the teas have been bought and brought here at large expense in reliance upon the statute; they have been once rejected, and unless the injunction be granted they will inevitably be again rejected, with the result that they must be removed from this country or destroyed. There is no ground for the contention that the application is premature, on the theory that non constat what is shown the board may finally admit the teas; the record establishes the converse of this proposition. Time will be saved and loss reduced by now enjoining a threatened injury, if the action which is threatened is without authority of law. Merritt v. Welsh, 104 U. S. 694, 26 L. Ed. 896; Philadelphia Company v. Stimson, 223 U. S. 605, 32 Sup. Ct. 340, 56 L. Ed. 570; Williams v. Mollther, 198 Fed. 460, 117 C. C. A. 220; Vicksburg Waterworks Company v. Vicksburg, 185 U. S. 65, 22 Sup. Ct. 585, 46 L. Ed. 808.

[4] As to the so-called Read test, we do not think it necessary to discuss the question whether such a method of investigation may or may not be properly described as "chemical." To the board exclusively is left the determination of the question whether offered teas are equal to the standards in purity, quality, or fitness for consumption; whatever means they may adopt to satisfy themselves as to the degree of purity, of quality, or of fitness it would seem they may use. But in applying the information obtained by such use to the question, "Shall this tea be admitted or rejected?" they must follow the directions only of the statute and of such regulations as are not inconsistent with the statute. That they intend to follow the directions of regulations 22 and 23 is undisputed. In our opinion these regulations are inconsistent with the statute, because they undertake to direct the board to reject tea which contains any coloring matter, although the board may be convinced as the result of all the tests they apply that the coloring matter is present in such harmless quantities that the tea is not inferior

to the statutory standards in purity, quality, or fitness for consumption.

The decree is reversed, and cause remitted, with instructions to decree in conformity with this opinion.

CLERE CLOTHING CO. v. UNION TRUST & SAVINGS BANK.

In re PRAGER-SCHLESINGER CO.'S ESTATE

(Circuit Court of Appeals, Ninth Circuit. July 12, 1915.)

No. 2563.

BANKRUPTCY ⊂⊃308—CLAIMS—ALLOWANCE.

The C. Corporation, a creditor of the P. Company, effected a compromise with other creditors of the P. Company, subjected to involuntary bankruptcy proceedings, advancing for the purpose money which it borrowed from a bank. The trustee, by order of court, made to C. Corporation a bill of sale of the merchandise, furniture, and fixtures of the P. Company. The C. Corporation took over the property, put them on sale at retail through its sales agents, and subsequently turned the same over to the P. Company as selling agent, to turn over the proceeds to the bank, to be credited on the indebtedness. The P. Company was reorganized, and of its 500 shares 498 were turned over to the president of the C. Corporation, and 1 share was given to the attorney of the C. Corporation. Subsequently the C. Corporation purported to sell the merchandise to the P. Company, and took notes therefor. There was no written evidence of the sale. An expert accountant stated that there was not any change in the ownership of the business of the P. Company, and that there were no records of any bills payable in the books that would indicate a sale. *Held*, that the P. Company from its reorganization was an agent for the C. Corporation, and on the subsequent bankruptcy of the P. Company the C. Corporation could not establish its claims based on the notes.

[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 Northern Division of the Eastern District of Washington; Frank A. Rudkin, Judge.

In the matter of the estate of the Prager-Schlesinger Company, a bankrupt. Proceedings by the Clere Clothing Company against the Union Trust & Savings Bank, trustee in bankruptcy, to establish claims. From a decree rejecting the claims, the Clere Clothing Company appeals. Affirmed.

Belden & Losey, of Spokane, Wash. (Charles P. Harris, of Spokane, Wash., of counsel), for appellant.

Wakefield & Witherspoon, of Spokane, Wash., for respondent.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge. This is an appeal from a decree of the court below, under section 25a of the Bankruptcy Act, rejecting two claims of the Clere Clothing Company, in the sums of $30,640 and

$1,610.67, respectively, against the Prager-Schlesinger Company, a corporation, bankrupt. The claim of $30,640 is founded upon a promissory note alleged to have been given to the Clere Clothing Company by the bankrupt corporation on January 25, 1913, in payment of a stock of merchandise and fixtures alleged to have been sold by the Clere Clothing Company to the bankrupt. The claim of $1,610.67 represents the alleged purchase price of certain merchandise sold to the bankrupt by the Clere Clothing Company some time subsequent to January 25, 1913.

The trustee filed a petition for the rejection of both claims, upon the ground that, while the business of the bankrupt was conducted under the name of Prager-Schlesinger Company, nevertheless the ownership, management, and control thereof rested in the Clere Clothing Company, the claimant, and that the entire capital stock of the Prager-Schlesinger Company was owned, held, and controlled by the Clere Clothing Company; that the Clere Clothing Company was liable for the debts of the Prager-Schlesinger Company while so operated and controlled, and was not entitled to participate as a creditor in the assets of the bankrupt corporation.

The referee in bankruptcy found as a fact that the Clere Clothing Company and the Prager-Schlesinger Company were one and the same, the latter being merely an adjunct or instrumentality of the former; that to allow the Clothing Company's claims would be to permit it to prove debts against itself in fraud of creditors. The claims were accordingly disallowed and rejected. Upon review by the court below the order of the referee was affirmed. Upon this appeal the only question for our determination relates to the sufficiency of the evidence to sustain the finding of the referee.

In April, 1912, the Prager-Schlesinger Company was subjected to involuntary bankruptcy proceedings in the United States District Court for the Eastern District of Washington. In that proceeding the Clere Clothing Company, a creditor, effected a composition with the other creditors, advancing for that purpose approximately $26,000, which it borrowed on its note from the National Bank of Commerce of Spokane; and the trustee thereupon, by order of the court, made to the Clothing Company a bill of sale of the merchandise, furniture, and fixtures belonging to the Prager-Schlesinger Company. The Clothing Company took over the goods and fixtures, and in May, 1912, put them on sale at retail through its sales agents, H. L. Gilmore & Co., authorizing that company to sell the goods and pay the proceeds into the National Bank of Commerce, to be applied to the loan made by that bank to the Clothing Company. The agents sold portions of the goods, paying the proceeds to the bank, until the latter part of July, 1912. During this period the Clothing Company had shipped about $21,000 worth of goods to its agents, who had also from time to time replenished the stock by small outside purchases. In the latter part of July, 1912, Gilmore & Co., under instructions from Mr. Thomas H. Clere, the president of the Clere Clothing Company, turned over the stock of merchandise to the Prager-Schlesinger Company. This delivery was likewise with the understanding that the Prager-Schlesinger Company was

to act simply as selling agent, and was to turn over the proceeds realized from sales to the National Bank of Commerce, to be credited on the indebtedness of the Clothing Company to the bank. In the same month a reorganization of the Prager-Schlesinger Company was made, wherein Louis Schlesinger was made president and manager, and H. R. Newton, one of the attorneys for the Clere Clothing Company, was made secretary. Of the 500 shares of the capital stock of the Prager-Schlesinger Company, 498 shares were turned over to Thomas H. Clere, the president of the Clothing Company, 1 share was given to Newton, and 1 share was retained by Louis Schlesinger. On July 29, 1912, there was given to the National Bank of Commerce a signature card authorizing L. A. Schlesinger to sign checks on the Clere Clothing Company account. There is also in evidence a second signature card, authorizing the payment of checks on the Clere Clothing Company account, when signed "Prager-Schlesinger Company, by L. A. Schlesinger."

The affairs of the two concerns proceeded on this basis until the 25th day of January, 1913, when the Clere Clothing Company claims to have sold outright the goods and stock of merchandise then on hand to the Prager-Schlesinger Company for the sum of $30,640, taking the note of the latter company for that amount. No written contract or other evidence of the sale was entered into. This note forms the basis of one of the claims in the present proceedings. The other claim ($1,-610.67) represents, as we have stated, the alleged purchase price of certain merchandise which, according to the testimony of Clere, was sold outright to the Prager-Schlesinger Company by the Clere Clothing Company subsequent to January 25, 1913. After these alleged sales the capital stock of the Prager-Schlesinger Company continued to remain in the names of Clere, Newton, and Schlesinger. At a special meeting of the board of trustees of the Prager-Schlesinger Company held on July 8, 1913, pursuant to notice issued at the request of Clere, and attended by Clere and Newton, a resolution was passed that the Prager-Schlesinger Company admit its insolvency and willingness to be adjudged a bankrupt. On July 15, 1913, a special meeting of the board of trustees was held, attended by Clere, Newton, and Schlesinger, at which the secretary (Newton) was authorized to consent to the appointment of a receiver. The same persons then met as stockholders and ratified the action of the board of trustees in the meetings of July 8th and 15th.

Josiah Richards, an expert accountant, who examined the books of the bankrupt company, was called as a witness by the trustee. In reply to the question whether, from his examination of the books, he could say that there was any change in the ownership of the business, or in the management at all, of the Prager-Schlesinger Company, from the first week in August, 1912, up to July, 1913, he stated as follows:

"The books indicate that there was no change during that period from June 1st to the last entry in the books in July, 1913; that is, from June 1, 1912, the accounts continued during the entire time. There are no closing entries. There was no inventory taken; there is no record of any bills payable in the books that would indicate a sale. Every account continues during this period without having been closed."

The books of the defunct company show an account running from the 9th of August, 1912, until June 2, 1913, covering monthly payments of interest on an indebtedness to the National Bank of Commerce. These payments are charged as expenses against the business. But there is nothing on the books to indicate that the Prager-Schlesinger Company was indebted to that bank. On the other hand, as we have stated, the Clere Clothing Company was indebted to that bank on the note given by it in order to effect the composition in the first bankruptcy proceeding of the Prager-Schlesinger Company. The bank account was carried in the name of the Clere Cothing Company from the time it was opened until the bankruptcy proceedings were instituted. The vice president of the bank testified with respect to this feature of the case that the reason the bank account was carried in the name of the Clere Clothing Company was because "they were the only people we were doing business with. They were the only people that we had any business with."

We are of opinion that the evidence indicates conclusively that, commencing with the reorganization of the Prager-Schlesinger Company in July, 1912, down to and including the filing of the voluntary petition in bankruptcy by that company in August, 1913, it was acting solely in the capacity of agent for the Clere Clothing Company and that the presentation for payment of the claims involved in this proceeding is a deliberate attempt on the part of the latter company to prove debts against itself in fraud of legitimate creditors of the bankrupt corporation. The fact that the two companies preserved separate entities does not detract in the slightest degree from the force of the facts adduced in the testimony and hereinabove referred to. The Clere Clothing Company and the Prager-Schlesinger Company, during the period referred to, were, as it were, one corporation. The scheme of the Clothing Company is easily discerned. It proposed to play safe, regardless of the ultimate financial condition of the Prager-Schlesinger Company. If the latter company should be successful, there can be no doubt that the profits would have gone to the Clere Clothing Company, or to the National Bank of Commerce in payment of the indebtedness of the Clothing Company. If the Prager-Schlesinger Company should fail, as it did in fact fail, the Clothing Company proposed to be in position to present and insist upon the payment of its alleged claims. Such tactics are not to be commended. A corporation may not for a period of over a year so intertwine its affairs and business transactions with a second company as to virtually create the relationship of principal and agent, and then upon the insolvency of the second company insist upon the payment of alleged debts incurred in the very transactions by which the relationship was created.

The conclusion reached is in accord with that of the Supreme Court of the state of Washington in the case of Spokane Merchants' Association v. Clere Clothing Company (decided on April 5, 1915) 147 Pac. 414. That was an action by the Spokane Merchants' Association, assignee of the Spokane Dry Goods Company, against the Clere Clothing Company, to recover a balance due on an account for goods sold by the Dry Goods Company to the Clere Clothing Company, during the

period between August 31, 1912, and June 3, 1913. The goods were purchased by Schlesinger and charged to the Clere Clothing Company. The value of the goods was $2,003.83, of which $1,498.36 had been paid on account by checks, one in the name of the Clere Clothing Company, and the other in the name of the Prager-Schlesinger Company. All of the checks were signed by Louis Schlesinger, and all were charged against the bank account of the Clere Clothing Company. It appeared from the testimony in that case that Schlesinger at first endeavored to have the goods charged to the Prager-Schlesinger Company, but, in view of the former bankruptcy of that company, the Dry Goods Company refused to sell to it. On Schlesinger's assurance that he represented the Clere Clothing Company, and that the two companies were one and the same, the Dry Goods Company finally sold the goods on the credit of the Clere Clothing Company, after inquiring at the National Bank of Commerce and learning that Schlesinger was running a checking account in the name of the Clere Clothing Company. The Clere Clothing Company resisted the action on the ground that the seller of the goods was not justified in charging the goods to it. The trial court overruled this contention, and upon appeal to the Supreme Court of the state the judgment of the court was affirmed. That court said:

"The appellant claims that it never did business in this state, other than the isolated transaction of effecting the composition with the other creditors in the first bankruptcy proceedings. This claim is untenable. That transaction was a purchase by the appellant of the bankrupt stock. This is conceded. But it is argued that the deliveries of the goods to Gilmore & Co., and subsequently to the Prager-Schlesinger Company, were consignments. In the broad, loose sense of the term, they were, but not in the sense that even a qualified title passed to the consignee. The evidence makes it too plain for argument that the delivery to Gilmore & Co. and the original delivery to the Prager-Schlesinger Company were not consignments in the ordinary commercial sense of a transmission to an independent merchant or factor for sale on commission. They were mere deliveries to the appellant's agents, to sell at retail and deposit the proceeds to the appellant's credit. The appellant financed the business in both instances and retained absolute control of the goods. The possession of the goods was at all times that of the appellant by its sales agent. The fact that the Prager-Schlesinger Company was a corporation does not alter the case. The reorganization of that company at the time of the original delivery to it of the goods was for the confessed purpose of giving the appellant an absolute control and oversight of its agent. This emphasizes the correctness of our conclusion. Clere at all times acted for and in behalf of the appellant. When he and the appellant's attorney took over, solely in consideration of the agency, practically the entire capital stock of the Prager-Schlesinger Company, that company by every just and reasonable intendment became a subsidiary corporation of the appellant. This status being once established, as it clearly was if evidence short of an admission can establish anything, it was incumbent upon the appellant to show that the Prager-Schlesinger Company was rehabilitated as an independent entity, with complete control of its own functions and destiny, at the time of the alleged sale of the goods to it on January 25, 1913. This the evidence wholly fails to establish. All of the capital stock of the corporation save one share was still in effect owned and in reality controlled by the appellant, through its president and attorney, who still constituted two of the three trustees. The attorney was still retained as secretary. The appellant's bank account was still used ad libitum by the Prager-Schlesinger Company. True, the appellant's officers claim this was unauthorized and unknown to them; but it taxes credulity to assume that it knew nothing of the state of its own bank ac-

count for months, especially since it had at the situs of the whole transaction its own attorney, who was also trustee and secretary of the Prager-Schlesinger Company, confessedly so constituted for the appellant's protection. The very fact that no former bill of sale was made and no chattel mortgage taken to secure the payment of the alleged purchase price of the goods further lends strong color to the view that the Prager-Schlesinger Company was still what it had been from the date of its reorganization, a subsidiary company of the appellant. Many other circumstances in evidence point to the same conclusion. We are by no means satisfied that the trial judge erred in holding, as he evidently did hold, that the Prager-Schlesinger Company was a mere agent or instrumentality through which the appellant was transacting its own business in the city of Spokane up to the commencement of this action. * * * Courts no longer hesitate to look through forms to substance, and ignore a mere colorable corporate entity, to the end that rights of third parties shall be protected. In re Rieger, Kapner & Altmark (D. C.) 157 Fed. 609; Montgomery Web Co. v. Dienelt, 133 Pa. 585, 19 Atl. 428, 19 Am. St. Rep. 663; First National Bank of Chicago v. Trebein Co., 59 Ohio St. 316, 52 N. E. 834; Donovan v. Purtell, 216 Ill. 629, 75 N. E. 334, 1 L. R. A. (N. S.) 176."

See, also, In re Muncie Pulp Co., 139 Fed. 546, 71 C. C. A. 530; Glidden & Joy Varnish Co. v. Interstate Nat. Bank, 69 Fed. 912, 16 C. C. A. 534.

The decree of the court below is affirmed.

In re MIDLAND MOTOR CO.

HERSCHELL-SPILLMAN CO. v. McCULLOCH.

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

No. 2179.

1. SALES ⟸121—RESCISSION FOR FRAUD—WAIVER OF RIGHT TO RESCIND.
Claimant was induced to sell property to the bankrupt by a fraudulent misrepresentation of its financial condition, and subsequently it received notes for the amount due without knowledge of the fraud. On learning of the bankruptcy, its president commenced an investigation, and in the course of the investigation presented one of the notes, which was not then due, at the bank where it was payable. *Held*, that this was not such a waiver of the fraud or reliance on the contractual obligation as prevented claimant from retaking the property.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 296–301; Dec. Dig. ⟸121.]

2. BANKRUPTCY ⟸116—RECLAMATION OF PROPERTY—ELECTION OF REMEDIES.
Claimant was a creditor of a bankrupt on open account for nearly $500, and also had a right to retake certain property, the sale of which was induced by fraud. Its attorney signed its name to a petition to set aside an order of sale, claimant being described as a creditor for $10,000. *Held*, that this did not prevent claimant from reclaiming the property, the error as to the amount of its claim not having been relied upon or acted upon by any one, and, moreover, as the owner of property obtained by fraud, it had an even better standing than a creditor to have the sale set aside, and the allegation that it was creditor, instead of a defrauded vendor, was immaterial.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. ⟸116.]

3. BANKRUPTCY ⟸116—RECLAMATION OF PROPERTY—ELECTION OF REMEDIES.
An attorney, directed by a seller of goods to a bankrupt to reclaim such goods, had no authority to sign its name as a creditor to a petition to

set aside an order of sale, and his act in so doing was not an election by the seller to prove its claim as a creditor, since the acts of an attorney beyond the scope of his authority are without effect upon the client, except so far as the court or third parties, relying upon the apparent or presumptive authority, may have acted thereon.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. ⊂=116.]

4. BANKRUPTCY ⊂=116—RESCISSION FOR FRAUD—CONDITIONS—RESTORATION OF PAYMENTS.

The claimant was induced by fraud to sell to the bankrupt motors on which $1,460 of the purchase price had been paid, and it sought to reclaim from the trustee in bankruptcy the motors in the trustee's possession. A number of them had been sold by the bankrupt, and the proceeds of those sold exceeded the payment by the bankrupt. *Held*, that the return of this payment was not a condition to the reclamation of the motors, though it was too late for the claimant to file a claim to the proceeds of the motors sold, and hence, where the motors on hand were by stipulation sold by the receiver in bankruptcy, the $1,460 could not be deducted from the proceeds of such sale in paying such proceeds to the claimant.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. ⊂=116.

Misrepresentation and concealment by vendee of goods as to financial condition as affecting validity of contract of sale, see note to William Openhym & Sons v. Blake, 87 C. C. A. 126.]

5. BANKRUPTCY ⊂=140—CLAIMS—SALES INDUCED BY FRAUD.

Where motors, which the claimant was induced by fraud to sell to the bankrupt, had been resold by the bankrupt, the claimant was entitled to the proceeds thereof, if it could trace them, and, if not, it was a general creditor therefor, not under its contract, but on the quasi contractual obligation arising from the fraudulent misappropriation of its property.

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

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

In the matter of Midland Motor Co., bankrupt; Edward D. McCulloch, trustee. From an order denying a petition by the Herschell-Spillman Company for the reclamation of certain property, the petitioner appeals. Reversed and remanded, with directions.

Appellant, a manufacturer of motors in New York, was induced, by a most glaringly fraudulent misrepresentation of the financial condition of the bankrupt as of November 30, 1912, to enter into an agreement in January, 1913, for the sale to the bankrupt of 200 motors, payments to be made on the 10th, 20th, and 30th of each month for all motors shipped up to those dates. Thirty-three motors delivered in April, 1913, the purchase price of which was $11,109, were not paid for, except to the extent of $1,460. While appellant's suspicions as to the financial standing of the bankrupt had been aroused in March, 1913, through a notification from Dun & Co. that its rating had been taken away, the bankrupt removed these suspicions by an additional statement as of February 28, 1913, showing an even better condition than in November, and various letters which reasonably satisfied appellant that the mercantile agency was wrong. In May, 1913, appellant dunned the bankrupt hard for payment of the overdue account, and finally, through its salesman, accepted notes, dated May 23, 1913, payable in 10 and 20 days, for the $9,649 balance on the April shipments and $479.57 due on the open account. At the time the notes were accepted, the bankrupt was a going concern, and appellant claims to have relied upon the correctness of the former financial statements, believing them to be true.

About May 27th appellant received word that the motor company was in trouble. On May 28th petition in bankruptcy was filed and appellant was notified. Its president and its attorney spent May 29th, 30th, and 31st at Moline, Ill., investigating the condition, and discovered the real situation. During this investigation one of the notes, though not yet due according to its terms, was presented at the bank where it was payable. On June 9th the Midland Company was adjudicated a bankrupt and the present trustee was appointed receiver. The attorney took the notes back with him to New York, and on June 21st sent them, together with the claim, to Meese, a local attorney, after having wired him that they wanted to rescind the credit and reclaim the motors on hand, and asking whether he could handle the matter. In sending him the notes, the New York attorney wrote that, in his judgment, the filing of a claim thereon would be a waiver of the right to recover back the motors, and expressly stated that, while he thought a claim could be filed for unliquidated damages, he wanted to get back such of the motors as were on hand, and that the claim for damages would be a later consideration.

On June 24th a petition, signed by various attorneys representing a number of creditors, was presented to the District Judge, asking that an order of sale theretofore entered be set aside. Appellant's name was signed to this petition by Meese, as its attorney. He appeared at the hearing as attorney for other creditors and stated: "But I also represent the Herschell-Spillman Company. We have not made up our minds just exactly what we are going to do yet." The motion of the creditors was denied. The following month the notes were tendered to the receiver and the reclamation petition filed. By stipulation the motors on hand were sold, and it was agreed that, in the event of the recovery by the petitioner, the proceeds should be accounted for at the rate of $200 per motor. Of the 33 motors unpaid for, 19 were on hand.

The special master found that at the time petitioner took the notes, on May 23, 1913, it did not know of the falsity of the statements; that the appearance of Meese before the District Judge and his joining in the petition did not constitute an election or waiver of the right to reclaim; that the presentation of one of the notes to the bank was made merely in the course of investigation, and that full knowledge of the condition of the bankrupt was not acquired until May 31st or June 1st; that the reclamation petition was filed in due time, and that under the stipulation there was due the petitioner $3,800; that as against this, however, there was to be deducted $1,460 paid on account. The petitioner excepted to the deduction; the trustee, to the other findings. The District Judge found that the petitioner had acquired knowledge of the fraud in May, 1913, that taking the notes was a waiver of the fraud, and that the several acts of the petitioner showed that it regarded itself as a creditor of the bankrupt.

Norman D. Fish, of North Tonawanda, N. Y., for appellant.
Ira J. Covey, of Peoria, Ill., for appellee.

Before BAKER, KOHLSAAT, and MACK, Circuit Judges.

MACK, Circuit Judge (after stating the facts as above). The gross fraud is conceded; the resulting right to reclaim unpaid-for goods found in the possession of the receiver, unless waived, is not contested. The several acts relied upon as creating a waiver of the fraud and an election to ratify the sales are the acceptance of the notes with knowledge of the fraud, the presentation of one of them for payment after the entire fraud had been disclosed, and the appearance of the vendor in the bankruptcy proceedings as a creditor, through the action of Meese in signing its name as a $10,000 creditor to a petition to set aside an order for the sale of the property in the receiver's possession.

The first two acts raise questions of facts, the last a question of law. All were resolved against the trustee by the special master before whom

the testimony was taken. Not only are we unable to say that the evidence fails to support his conclusions of fact; a careful consideration thereof has led us to the same results. The verbal testimony that a knowledge of the fraud was not acquired until after the petition in bankruptcy had been filed is supported by the documentary evidence and the surrounding circumstances. While demands for the payment of the overdue account were incessant in the first half of May, they give no hint of any knowledge of the fraud; on the contrary, petitioner expressly stated its belief that the delay was due more to "a lack of attention than lack of funds." And when the notes were taken, petitioner's agent went through the plant and found it running. Whatever suspicion as to the vendee's condition in May, 1913, the delay in payment may have aroused, the record discloses no basis whatsoever for a finding that petitioner knew, believed, or even suspected that the financial statements of November and February were fraudulent.

[1] Assuming that the note was presented for payment after a knowledge of the fraud had been obtained (an assumption not clearly supported by the evidence), did this amount to an election? Petitioner's president and attorney were endeavoring to learn what they could. For this purpose they called at the bank; the bank would not and could not rightfully pay the note after the petition in bankruptcy had been filed; the note was not even due. The parties knew these facts; they knew that a presentation for payment must be utterly ineffectual, except as offering a method of obtaining further information. It cannot, therefore, fairly be said to evidence even the slightest intention of waiving the fraud and relying on the contractual obligation.

[2] While Meese's act, if authorized, might be deemed some evidence of a waiver, it is unnecessary for us to consider whether the filing of such a petition, the prayer of which was denied by the court, would be a binding election. First National Bank v. Barse Com'n Co., 198 Ill. 232, 64 N. E. 1097. Petitioner was a creditor for nearly $500 on the open account; as such, it had a right to join in the petition to set aside the order of sale. That it was therein described as a creditor for $10,000, instead of $500, was clearly an error on the part of the attorney, susceptible of explanation, especially as it was not relied upon by any one, and was totally ineffective in inducing any action by the court. Moreover, the petitioner, as owner of the property obtained by fraud, had even a better standing than a creditor to have the order of sale set aside; the allegation that it was a creditor, instead of a defrauded vendor endeavoring to reclaim the goods, was, in this aspect, too, an immaterial error upon which no one relied.

[3] We do not, however, rest our conclusion on these grounds, for, in addition thereto, there was a total lack of authority in Meese to sign petitioner's name as a creditor. He had been directed to reclaim the goods on hand, not to file a general claim as creditor, or to represent petitioner as a creditor in any part of the proceedings. His authority was limited; the acts of an attorney beyond the scope of his authority are without effect upon the client, except in so far as the court or third parties, relying upon the apparent or presumptive authority, may have acted thereon. The unauthorized position taken by

Meese could not evidence an election by petitioner, except by estoppel, and every element of estoppel is lacking.

While a rescission because of fraud must be made promptly after the discovery thereof, the time element is of little importance when bankruptcy precedes the discovery. No one but the claimant can be injured by the delay. Here, however, the petition was filed on the day set for the first meeting of creditors, six weeks after the bankruptcy proceedings had been begun, with sufficient promptness for all purposes.

[4, 5] One further question must be considered. On April 12, 1913, a check for $4,690 was sent. This paid in full for all motors delivered before April 1st and left $1,460 to be applied on the account for motors shipped thereafter. If all the motors which petitioner had the right to reclaim had been on hand, repayment of the $1,460 would have been a condition precedent to their return. But a large number had been sold by the bankrupt; petitioner would be entitled to the proceeds thereof, if it could trace them; if not, it becomes a general creditor therefor, not under the contract as vendor, but on a quasi contractual obligation arising from the fraudulent misappropriation of the petitioner's property. As against this claim, the bankrupt would have a set-off for the moneys paid and credited, not as against any specific motors, but on general account. Inasmuch as the claim greatly exceeds the payment, the balance, after allowing the set-off, is in favor of the petitioner. That it is now too late to file the claim in no manner affects the right of petitioner to retain the $1,460 on account thereof. The situation presents no question of the application of payments to one of several classes of debts. Neither the trustee nor the bankrupt could require the vendor to hold moneys paid on general account as a partial payment on account of motors, which, because of the fraud, the vendor could treat as never having been sold. It follows, therefore, that the special master erred in deducting this amount from the $3,800 allowed by him to the petitioner.

The order of the District Court denying the prayer of the petitioner will therefore be reversed, and the cause remanded, with directions to enter an order in accordance with the stipulation for the payment to the petitioner of the sum of $3,800, together with its costs.

In re DESNOYERS SHOE CO.

DOZIER v. SANGAMON LOAN & TRUST CO. et al.

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

No. 2106.

1. CORPORATIONS ⟸88—STOCK SUBSCRIPTIONS—RESCISSION—RECOVERY OF PAYMENT.

An Illinois corporation in January received $50,000 from D. under a contract which provided that it was to become a part of the capital stock as soon after July 1st as an increase in the capital stock could be arranged; that it was to become special capital until it could be merged into the general capital stock; that it was to bear the same percentage

of dividends as regular stock from January 1st, and in addition interest until July 1st; that, if D. or his son desired to become officers and directors, such arrangement would be made; and that the president would give the son every legitimate opportunity of learning the business. The son was employed by the corporation. The corporation gave out a financial statement stating that D.'s investment was special capital until July 1st, when it was intended to increase the capital stock. Interest was paid to September 1st, but no dividends were paid, and in August the corporation was adjudicated a bankrupt. *Held*, that while the president and directors of an Illinois corporation have no authority to sell a prospective, but unauthorized, increased issue of stock, and therefore payment in advance under such a contract could be recovered, D. could not recover his payment on this theory, since the payment was not merely an advance payment on account of stock, and even if treated as a loan, until the increase of the stock, the implied obligation of the corporation to repay the loan was an enforceable counter promise for the payment, and barred a rescission, notwithstanding the lack of enforceability of the promise to issue the stock.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 337–364, 425–428; Dec. Dig. ⟸88.]

2. CORPORATIONS ⟸88—STOCK SUBSCRIPTIONS—RESCISSION—RECOVERY OF PAYMENT.

D. could not rescind as for a failure of consideration, as the engagement of his son and the promise to pay, in addition to interest, a sum equal to dividends, were partial considerations for the payment, though the son derived little, if any, benefit through his employment, and the company's condition made it extremely improbable that dividends could be declared, and hence there was at most only a partial failure of consideration, which gives no right of rescission.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 337–364, 425–428; Dec. Dig. ⟸88.]

3. CORPORATIONS ⟸566—INVESTMENT OF "SPECIAL CAPITAL"—RIGHTS AS AGAINST CREDITORS—"CAPITAL."

Even if D. was entitled to priority in the distribution of the funds of the corporation as against stockholders, he did not have the standing of a creditor as against other creditors, since the "capital" of a stock company or of a business is the fund intended to be subject to the risks of the business, and contributed to meet the obligations of the business, and to be repaid to the contributors only after all other obligations have been satisfied, and, while the phrase "special capital" in reference to a corporation has no established legal meaning, the parties evidently intended that the investment should be subject to the risks of the business, and share in the profits in exactly the same way as the actual capital.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2283–2286; Dec. Dig. ⟸566.

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

4. ESTOPPEL ⟸83—REPRESENTATIONS AS TO FINANCIAL STANDING—INVESTMENTS—STOCKHOLDER OR CREDITOR.

In an event, D. was estopped as against those creditors relying on the financial statement, as, even though it was not expressly authorized by him, it stated the facts in exact accordance with the agreement, and was therefore impliedly authorized by him.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 218, 227–229; Dec. Dig. ⟸83.]

Appeal from the District Court of the United States for Southern Division of the Southern District of Illinois; Arthur L. Sanborn, Judge.

In the matter of the Desnoyers Shoe Company, bankrupt. An order of the referee allowing the claim of Lewis D. Dozier over the objections of the Sangamon Loan & Trust Company, trustee in bankruptcy, and another, was reversed by the District Judge (210 Fed. 533), and the claimant appeals. Affirmed.

Appellant, Dozier, a wealthy business man, after some conversations with W. L. Desnoyers, president of the bankrupt Desnoyers Shoe Company, as to the advisability of his investing money in the Desnoyers business and of having them provide a place for his 21 year old son, expressed his willingness to put in $50,000 and asked Desnoyers to draw up a paper covering the arrangement reached. Thereupon, Desnoyers dictated the following document, dated January 24, 1911, on the letterhead of the company:

"Mr. L. D. Dozier, Sr., St. Louis, Mo.—Dear Sir: In accepting your check for $50,000, receipt of which is hereby acknowledged, we wish to cover all the points of the agreement between us, of which your payment is the initial step. The $50,000 received from you, and referred to above, is to become a part of the capital stock of the Desnoyers Shoe Company as soon after July 1st as we can legally arrange for an increase to our capital stock, the increase to be from the present $300,000 to $500,000 and to be all paid in in cash or its equivalent, except $50,000, which is to be carried for the account of the undersigned until such time as the dividends on same shall have paid for the principal or until it shall be paid for in cash, or, in the event of my death, it shall become treasury stock for the company, with exception of such parts as have already been paid for in the manner outlined above. The $50,000 which you are now paying, it is understood, is to become special capital until such time as we are able to merge it into the general capital stock in the manner outlined above, and it is to bear the same percentage of dividends as regular stock beginning from the 1st of January; and, in addition to this, as a premium for prepayment, we will pay you 6 per cent. per annum for interest on the said amount from to-day until the 1st of July. It is further understood to become a part of this agreement that if you, or Lewis, or both, should desire to become officers and directors, or both, of this company, that such arrangements will be made. It is further understood that the writer is to give Mr. Lewis D. Dozier, Jr., every legitimate opportunity to increase in knowledge in the shoe business or such general business as comes before the writer. It is further understood that the salary basis under which I am now working will be changed after July 1st, and that, in lieu of the commission I have been getting, that I shall receive a salary of $——— per year, as per my conversation with you.

"Desnoyers Shoe Company,
"W. L. Desnoyers, Pres.

"W. L. Desnoyers."

He handed this document to Dozier, who, after reading it, said, "You seem to have covered the case completely," and thereupon handed him his check for $50,000, payable to the bankrupt. At the same time, Desnoyers gave Dozier a check for $1,316.67 as interest at 6 per cent. on the $50,000 to July 1st. On the following day the $50,000 check was cashed. On June 27, 1911, Dozier received a further check of $516.67, as interest from July 1st to September 1st. Entries covering each of these transactions were made on the general ledger of the bankrupt in an account opened up with Dozier. No other entries appear on this account. The testimony does not show that Dozier had any knowledge of how his account was carried on the company's books.

At a directors' meeting, held February 6, 1911, some question was raised as to the right of Desnoyers to assure Dozier that the stockholders of the company would carry out the agreement. Desnoyers said, in answer to an inquiry of one of the directors as to what would happen if the stockholders failed to increase the stock, that in that event the money would be paid back to Dozier. While Desnoyers' testimony is, in some respects, apparently contradictory and uncertain, it seems clear from his entire testimony that at no time did he and Dozier discuss the possibility of a failure to increase the capital stock, or of any circumstance under which the money should or must be returned. Dozier, because of ill health, did not appear as a witness.

The minutes of the directors' meeting of February 6th show the following resolution: "It was moved and seconded that the president be authorized to advise Mr. L. D. Dozier that the members of the board of directors would be glad to have Mr. Dozier associated with them as a stockholder, and that a proposal to increase the capital stock of the company would be submitted at the next annual meeting of the stockholders of the company. This motion was unanimously carried, all of the directors present voting in favor thereof."

Subsequently Desnoyers gave out the following statement to commercial agencies and to some of the large creditors:

"Statement of the Desnoyers Shoe Company, Jan. 1st, 1911.

"Assets.

Real estate, machinery, etc.		$230,913.61	
Bills receivable		2,600.00	
Accounts receivable	$88,712.33		
Less doubtful	800.00	87,912.33	
Inventories and prepaid items		250,941.67	
Cash L. D. Dozier	$50,000		
Cash	11,832.02	61,832.02	
			$634,199.63

"Liabilities.

Accounts payable	$254,539.10	
	20,000.00	
		$274,539.10

"The real estate item consists of modern brick factory building in Springfield, Ill., with an area of 75,000 square feet of floor space, all thoroughly sprinklered (insurance rate 15 cents per hundred dollars), having a frontage of 320 feet on a paved avenue, by 420 feet on the Wabash Railroad. This is not outlying property, but is well downtown and surrounded on all sides by the homes of working people.

"All the items as listed above were compiled by Price, Waterhouse & Co., and certified by them, except the item of cash listed as L. D. Dozier. This item represents an increase to our capital stock of $50,000.00 paid by Mr. L. D. Dozier of this city. This is to be special capital until the 1st of July, at which time it is the purpose of the company to increase its capital stock from $300,000 to $500,000, and this special capital will then become part of the general fund.

Desnoyers Shoe Company,
"W. L. Desnoyers, Pres."

A number of creditors extended additional credit or refrained from pressing their claims in reliance upon this statement. The evidence does not show that Dozier expressly authorized or had any knowledge of the statement. Dozier, Jr., was employed in the business at a salary of $50 a month. No dividends were paid subsequent to January 1, 1911, either to the stockholders or to Dozier. August 2, 1911, the company was adjudicated a bankrupt. In November, 1911, Dozier filed his claim as a creditor in the sum of $50,000 for money had and received as an advance payment for $50,000 par value of the proposed increase of capital stock, basing his right thereto on the failure of the stockholders to authorize the increase, the lack of further subscriptions, the impossibility of further performance by reason of the bankruptcy, and the want of any consideration actually received by him for the amount so paid.

Objection to the claim was filed by the trustee and by one of the large creditors. The order of the referee, allowing the claim, was reversed by the District Judge.

Chas. M. Polk and John F. Lee, both of St. Louis, Mo., for appellant.

William L. Patton and O. S. Humphrey, both of Springfield, Ill., for appellee.

Before BAKER, KOHLSAAT, and MACK, Circuit Judges.

MACK, Circuit Judge (after stating the facts as above). The relations between Dozier and the Desnoyers Shoe Company, in our judgment, are to be determined from the written agreement of January 24th. The testimony establishes that this document was intended to embody, and was regarded by the parties as covering, their entire agreement. Claimant correctly alleges that it was ratified by the board of directors, so that we are not now concerned with any question of Desnoyers' lack of authority to enter into this kind of an agreement on behalf of the company. It is to be observed, too, that the document purports to be executed, not only by Desnoyers as president of the company, but also by him in his individual capacity. The consideration for the $50,000, as expressed in the agreement, was, first, to issue stock to that amount to Dozier, as part of a larger increase of stock to be voted after July 1st; second, to pay Dozier an amount equal to any dividend that might be declared on a similar amount of stock after January 1, 1911; third, to pay, in addition, interest at the rate of 6 per cent. until July 1st (subsequently, by implication resulting from the actual payment and receipt, extended to September 1st); fourth, to give the son an opportunity to learn the business.

[1] While both the president and the board of directors of an Illinois corporation are without authority to sell a prospective, but unauthorized, increased issue of stock, and while, therefore, payment made in advance under such a contract could be recovered (Wolf v. Chicago S. P. Co., 233 Ill. 501, 84 N. E. 614, 13 Ann. Cas. 369), the present contract does not fall within the principle of the Wolf Case for several reasons.

Unless the statement that the $50,000 "is to become special capital until such time as we are able to merge it into the general capital stock" is to be entirely disregarded as meaningless, the money cannot be said to have been paid merely as an advance payment on account of the stock to be issued. Even if these words were to be interpreted as indicating a loan to the company until July 1st and such reasonable time thereafter as might be necessary to effectuate the increase of the stock (an interpretation to be hereafter considered), the implied obligation of the company to repay the loan, with the interest thereon, would be an enforceable counter promise for the payment, and, notwithstanding the lack of enforceability of the additional promise to issue the unauthorized stock, would bar a rescission of the agreement on the part of the lender.

[2] Appellant, however, contends that he has a right to rescind, not only under the principle of the Wolf Case, but also because of a total failure of consideration received by him for his $50,000. Inasmuch as the engagement of Dozier, Jr., in the business was deemed by the parties to be a real, and, indeed, an important, element in the transaction, and, as the promise to employ him was an actual partial consideration for the money deal, the failure of consideration is at best but partial, and therefore gives no right of rescission; this remains true, even though Dozier, Jr., may have derived but little, if any, benefit through his employment in a business concern whose condition was so far different from that which his father believed it to be at the time of the

employment and the investment. Moreover, the promise to pay, in addition to interest, a sum equal to dividends on a similar amount of stock was a valuable part consideration for the money payment; and that, too, despite the fact that the company's condition, unknown to Dozier, made it extremely improbable that dividends could be declared.

We need not consider what Dozier's rights would be if he had relied upon fraud or fraudulent misrepresentations as a ground of rescission of the entire contract, inasmuch as no such contention is made. Whatever claim, therefore, Dozier may have against the bankrupt because of the $50,000 advanced by him, the basis thereof is not money had and received and equitably due the plaintiff after a rescission based either on illegality, total failure, or total lack of consideration. The claim as filed was, therefore, properly rejected.

[3] Inasmuch, however, as an amendment of the claim would be allowable, we proceed to consider whether, in any aspect, Dozier has a standing as a creditor of the bankrupt. The document of January 24th discloses clearly that Dozier intended, by handing over the $50,000, not merely to make an advance payment for the stock to be thereafter issued, but also to give the company the absolute right to use the money for its business until the stock should be issued. Compensation for this use was specifically provided for. Unless there be something contrary thereto in the agreement, such a transaction would be a loan to the company until the issuance of stock, with the right to cancel the indebtedness on the issuance and in payment thereof. If this were the true construction of the agreement, whatever other rights he might have, Dozier would, in any event, be a creditor of the company for the entire $50,000 on a claim for money loaned.

The parties, however, agreed that this $50,000, from the time of payment until it could be "merged into the general capital stock," should become "special capital"; that Dozier should receive therefor, in addition to interest, exactly the same compensation that a stockholder to the extent of $50,000 would receive, namely, dividends. The capital of a stock company or of a business has a well-defined meaning. It is the fund intended to be subject to the risks of the business, the fund contributed to meet the obligations of the business, and to be repaid to the contributors only after all of the other obligations should have been satisfied. While the phrase "special capital," in reference to a corporation, has no established legal meaning, it would seem to be clear that what the parties had in mind was that the $50,000 should be subject to the risks of the business and should enjoy the profits thereof in exactly the same way as the actual capital of the business until such time as it could be legally exchanged for capital stock. In other words, something in the nature of a joint venture was entered upon by Dozier and the company.

If, as between Dozier and the stockholders of the company, the former would be entitled to priority in the distribution of the funds as if he were a lender, by his express agreement he has subjected any such claim to the prior rights of creditors. Advances to individuals and corporations for the very purpose of bettering their financial condition by increasing their assets without correspondingly increasing their liabilities as against other creditors are not uncommon, and there

would seem to be no reason, irrespective of any question of estoppel, for refusing to enforce the agreed subordination of the rights of such a lender to those of other creditors. Wallerstein v. Ervin, 112 Fed. 124, 50 C. C. A. 129. The claim of Dozier was, therefore, properly rejected as against all the other creditors, and, as it is apparent that the assets are insufficient to pay such creditors in full, we need not consider the rights inter sese of Dozier and the stockholders of the company.

[4] While these considerations dispose of the case, it may be well to point out that Dozier would, in any event, be estopped, as against many of the largest creditors; for, while he did not expressly authorize any part of the financial statement in reliance upon which they gave additional credit or refrained from enforcing their demands, the sentence therein that his $50,000 was to be "special capital until the 1st of July" was in exact accordance with the document of January 24th, and was therefore impliedly authorized by him.

The order appealed from will therefore be affirmed.

REED v. UNITED STATES et al.

(Circuit Court of Appeals. Ninth Circuit. July 12, 1915.)

1. EXTRADITION ⇐21—INTERSTATE—OFFENSES.
   It is only on a charge of crime that extradition may be resorted to, under Const. art. 4, § 2, par. 2, relating thereto.
   [Ed. Note.—For other cases, see Extradition, Cent. Dig. § 26; Dec. Dig. ⇐21.]

2. COURTS ⇐405—APPELLATE JURISDICTION—JURISDICTION OF UNITED STATES CIRCUIT COURT OF APPEALS.
   Where an appeal presents other questions than that of constitutional rights, the appeal may, at the option of appellant, be taken to the United States Circuit Court of Appeals.
   [Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1097–1099, 1101, 1103; Dec. Dig. ⇐405.]

3. EXTRADITION ⇐36—INTERSTATE—JUDICIAL REVIEW.
   In extradition proceedings, a large measure of conclusiveness will be accorded to the proceeding before the Governor on whom the demand is made, and the fugitive has no constitutional right to be heard, and the Governor's warrant for removal is sufficient, until presumption of its legality is overthrown by contrary proof in a legal proceeding to review his action.
   [Ed. Note.—For other cases, see Extradition, Cent. Dig. §§ 40–43; Dec. Dig. ⇐36.]

4. HABEAS CORPUS ⇐92—EXTRADITION—JUDICIAL REVIEW.
   On habeas corpus for the discharge of an alleged fugitive from one state to another, the court will not inquire into the sufficiency of the indictment charging the offense as a matter of technical pleading.
   [Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 81, 83, 87–96; Dec. Dig. ⇐92.
   Scope of review on habeas corpus to procure release of person sought to be extradited, see note to Bruce v. Rayner, 62 C. C. A. 506.]

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5. HABEAS CORPUS ⟸103—EXTRADITION—INDICTMENT—SUFFICIENCY.
An indictment charging that accused obtained from prosecutor a draft drawn on a bank of Iowa for a specified sum by means of false pretenses and with intent to defraud, and alleging that accused falsely and with intent to defraud represented to prosecutor that accused was the owner of land described, free of incumbrances, and that he would warrant the same to the prosecutor, each and all of which representations prosecutor believed and relied on, when accused did not own the land and the same was not free of incumbrances, sufficiently charges the offense of false pretenses, under Code Iowa, 1897, § 5041, punishing any person who by false pretenses and with intent to defraud obtains from another any property, to authorize the extradition of accused, and the court, on habeas corpus for his discharge under extradition proceedings, will remand him to custody.
[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 90, 91; Dec. Dig. ⟸103.]

6. HABEAS CORPUS ⟸92—EXTRADITION—JUDICIAL QUESTIONS.
The question of whether the crime charged against a fugitive from justice is barred by the statute of limitations of the demanding state will not be determined by the court on habeas corpus for the discharge of accused under extradition proceedings, and the question will be left to the decision of the courts of the demanding state.
[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 81, 83, 87–96; Dec. Dig. ⟸92.]

7. HABEAS CORPUS ⟸85—INTERSTATE—FUGITIVE FROM JUSTICE—PRESUMPTIONS—EVIDENCE.
Where, on habeas corpus for the discharge of a fugitive from justice of another state, it appears that the indictment charged the commission of an offense in the demanding state by the fugitive, the presumption that he is a fugitive, within the Constitution and laws of the United States, arising from the mere fact that he is found in another state, may be overcome by proof that he was not in the demanding state at the time of the commission of the offense.
[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 77, 78; Dec. Dig. ⟸85.
Fugitives from justice under extradition laws, see note to In re Strauss, 63 C. C. A. 104.]

Appeal from the District Court of the United States for the Southern Division of the Southern District of California; Benj. F. Bledsoe, Judge.

Habeas corpus by Ernest C. Reed against the United States of America, Charles E. Sebastian, Chief of Police of the City of Los Angeles, and Patrick J. Phelan, agent of the State of Iowa, for the discharge of petitioner, restrained under an extradition warrant. From an order discharging the writ and remanding petitioner to custody, he appeals. Affirmed.

R. V. Whiting, of San Francisco, Cal., and Collier, Shelton & Schlegel, of Los Angeles, Cal., for appellant.

Percy V. Hammon and C. A. Stutsman, both of Los Angeles, Cal., for appellees.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge. This is an appeal from the order of the court below discharging a writ of habeas corpus, and remanding the

petitioner, the appellant herein, to custody. The petition represented in substance that the petitioner was illegally restrained of his liberty by the chief of police of the city of Los Angeles, and one Phelan, an agent of the Governor of the state of Iowa, under and by virtue of a certain demand for his extradition made by the Governor of Iowa, founded upon an illegal indictment by a grand jury of that state, and a writ of rendition issued thereupon for the petitioner's apprehension by the Governor of the state of California; that the petitioner's imprisonment and detention are illegal, for the reasons that the requisition of the Governor of Iowa is wholly insufficient to empower the state of Iowa to ask for the petitioner's extradition; that the indictment which was found against the petitioner in the state of Iowa was insufficient, for the reason that it did not state facts sufficient to constitute a public offense, in this: That it does not appear that the person alleged in said indictment to have been defrauded by petitioner was defrauded of anything of value, and that there is no such crime as the crime of false pretenses known to the laws of Iowa; that it cannot be determined from the indictment whether the petitioner is charged with cheating by false pretenses; that it cannot be determined therefrom whether the person alleged to have been defrauded intended to part with the title of the property or thing, or what he was to receive for his property, and it does not appear what representations the petitioner made as to what period of time the real property described in said indictment was free and clear of incumbrances, or at what date the petitioner owned the same. Other similar alleged defects in the pleading to the indictment are pointed out, and it is further alleged that prosecution of the offense with which the petitioner was charged was barred by the statute of limitations of the state of Iowa, and it is also alleged that the petitioner is not a fugitive from justice.

[1] There is no allegation of diversity of citizenship, and no allegation whatever that the petitioner is held in custody in violation of any statute of the United States or of any provision of the federal Constitution. We may assume, however, that the jurisdiction of the court below was invoked upon the allegation in the petition that the facts charged in the indictment are not sufficient to constitute a crime, for it is only upon a charge of crime that extradition may be resorted to under article 4, § 2, par. 2, of the Constitution. Pierce v. Creecy, 210 U. S. 387, 28 Sup. Ct. 714, 52 L. Ed. 1113.

[2] The appellee moved to dismiss the appeal on the ground that, since a question of the construction of the Constitution of the United States is involved, the appellate jurisdiction of the Supreme Court is exclusive. But that jurisdiction is not exclusive in cases where, as here, the appeal presents other questions than that of constitutional rights. In such a case, at the option of the appellant, the appeal may be taken to the Circuit Court of Appeals. American Sugar Refining Co. v. New Orleans, 181 U. S. 277, 21 Sup. Ct. 646, 45 L. Ed. 859; MacFadden v. United States, 213 U. S. 288, 29 Sup. Ct. 490, 53 L. Ed. 801. The motion to dismiss must be denied.

[3] In extradition proceedings a large measure of credence and conclusiveness must be accorded to the proceeding before the Governor

upon whom the demand is made, for those proceedings are summary in character, the person demanded has no constitutional right to be heard, and the Governor's warrant for removal is sufficient "until the presumption of its legality is overthrown by contrary proof in a legal proceeding to review his action." Munsey v. Clough, 196 U. S. 364, 25 Sup. Ct. 282, 49 L. Ed. 515.

[4] Upon habeas corpus the sufficiency of the indictment, as a matter of technical pleading, will not be inquired into. Ex parte Reggel, 114 U. S. 642, 5 Sup. Ct. 1148, 29 L. Ed. 250; Pearce v. Texas, 155 U. S. 311, 15 Sup. Ct. 116, 39 L. Ed. 164; Bergemann v. Backer, 157 U. S. 655, 15 Sup. Ct. 727, 39 L. Ed. 845; Munsey v. Clough, 196 U. S. 364, 25 Sup. Ct. 282, 49 L. Ed. 515. Said the court in Pierce v. Creecy, 210 U. S. 387, 403, 28 Sup. Ct. 714, 719, 52 L. Ed. 1113:

"The Constitution does not require, as an indispensable prerequisite to interstate extradition, that there should be a good indictment, or even an indictment of any kind. It requires nothing more than a charge of crime."

[5] It is clear that the indictment in the present case contains a charge of crime. Section 5041, Annotated Code of 1897 of the state of Iowa, under the head of "False Pretenses," denounces a penalty upon any person who designedly and by false pretense, or by any privy or false token, and with intent to defraud, obtains from another any money, goods or other property. The indictment here charges that the accused obtained from one Sargent a draft drawn on a bank of Iowa for $5,537, and that he did this designedly and by means of false pretenses and with intent to defraud, and alleges that the accused falsely and with intent to defraud represented to Sargent that he (the accused) was then the owner of a certain described tract of land which was free and clear of incumbrance, and that he would warrant the same to the said Sargent against every person lawfully claiming the same, each and all of which representations the said Sargent believed and relied upon, when in truth the accused did not own the land, and the same was not free or clear of incumbrance.

[6] The indictment alleges that the offense was committed on June 7, 1909, and that from that date until the finding of the indictment, which was November 20, 1914, the accused has not been publicly a resident within the state of Iowa. The question of the alleged bar by the statute of limitations of Iowa is one that should be left to the decision of the courts of that state upon demurrer or motion in arrest of judgment. Pierce v. Creecy, supra.

[7] To the allegation of the petition that the petitioner was not in fact a fugitive from justice it is sufficient to refer to the language of the indictment which charges him with the actual commission of the offense in the state of Iowa. If he was in that state at the time when the offense was committed, he is, whenever he is thereafter found in another state, presumed to be a fugitive from justice, within the meaning of the Constitution and the laws of the United States, no matter for what purpose or reason, or under what circumstances, he left the state. Appleyard v. Massachusetts, 203 U. S. 222, 27 Sup. Ct. 122, 51 L. Ed. 161, 7 Ann. Cas. 1073; McNichols v. Pease, 207 U. S. 100, 28 Sup. Ct. 58, 52 L. Ed. 121; Marbles v. Creecy, 215 U. S. 63, 30 Sup.

Ct. 32, 54 L. Ed. 92. That presumption might be overcome by proof that the petitioner was not in the state of Iowa at the time of the commission of the offense alleged. Hyatt v. Corkran, 188 U. S. 691, 23 Sup. Ct. 456, 47 L. Ed. 657; Bassing v. Cady, 208 U. S. 386, 28 Sup. Ct. 392, 52 L. Ed. 540, 13 Ann. Cas. 905. No such proof was produced, and although it appears that the order discharging the writ contains the following: "That the application for leave to introduce evidence herein be and the same is hereby denied"—it does not appear that the evidence so offered was for the purpose of showing that the petitioner was not in the state of Iowa at the time when the offense was alleged to have been committed. On the contrary, it appears from the assignments of error that the testimony was offered by the petitioner for the purpose of showing that he was publicly a resident within the state of Iowa for more than three years after the alleged commission of the crime, "and was therefore not a fugitive from justice."

We find no error. The order of the District Court is affirmed.

ROSS, Circuit Judge (concurring). My views upon the points involved in the present case were stated in the similar case of Ex parte Graham, reported in 216 Fed. 813. For the reasons there stated, I concur in the judgment here given in the present case.

PLANTEN v. GEDNEY.

(Circuit Court of Appeals, Second Circuit. June 22, 1915.)

No. 307.

1. TRADE-MARKS AND TRADE-NAMES ⊂=59—COLORABLE IMITATION OF TRADE-MARKS.

The trade-mark, "Gedney's C. & C. (Black) Capsules," is a colorable imitation of the trade-mark, "Planten's C. & C. or Black Capsules."

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

Imitation or simulation of trade-mark or trade-name as unfair competition, see note to John H. Rice & Co. v. Redlich Mfg. Co., 122 C. C. A. 447.]

2. TRADE-MARKS AND TRADE-NAMES ⊂=6—NAMES AND MARKS SUBJECT TO APPROPRIATION—DESCRIPTIVE WORDS OR LETTERS.

The letters, "C. & C." used in connection with capsules intended for a certain class of diseases, either alone or in connection with the name of the manufacturer, used exclusively by the manufacturer as a trade-mark for 10 years prior to Act Feb. 20, 1905, c. 592, 33 Stat. 724, providing for the registration of trade-marks, are a valid trade-mark, though at common law the descriptiveness of the letters "C. & C." might make it invalid, in view of the fact that for many years the letters have been used by manufacturers of and dealers in drugs as indicating particular drugs, for it was the purpose of the act to protect descriptive trade-marks used as such for 10 years prior to 1905.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 10; Dec. Dig. ⊂=6.]

3. TRADE-MARKS AND TRADE-NAMES ⊂=93—REGISTRATION—VALIDITY.

A registration by complainant of a trade-mark, "Planten's C. & C. or Black Capsules," was secured in 1906 ex parte after notice in the Of-

ficial Gazette. As early as 1890, complainant or his predecessor applied to his boxes the words "Planten's C. & C. or Black Capsules (Trade-Mark)," and also similarly applied the same to the wrappers of packages containing several boxes, and continuously applied the mark ever since, and extensively advertised the product from about 1890. No use by defendant, or his predecessor, of the "C. & C.," or the "Gedney's C. & C. or Black Capsules," as a trade-mark, was shown until after date of registration. For many years, including the period from February 20, 1895, to February 20, 1905, there was inclosed in defendant's boxes a folded leaflet, headed "Gedney's Capsules." In the course of the description of the product, the term "Gedney's C. & C. Capsules," and the term "C. & C.," and the word "Black" appeared, and also the term "Gedney's C. & C. (Black) Capsules." *Held* to justify a finding that complainant's trade-mark was validly registered under the act of 1905, and that defendant infringed it, entitling complainant to relief under section 16 of the act (section 9501, Comp. St. 1913).

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 104–106; Dec. Dig. ⊂⊃93.]

4. COURTS ⊂⊃300—UNFAIR TRADING—JURISDICTION OF FEDERAL COURTS.

The United States District Court has no jurisdiction of a suit for unfair trading, where the parties are not citizens of different states.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 847, 850; Dec. Dig. ⊂⊃300.]

Coxe, Circuit Judge, dissenting.

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

This cause comes here upon appeal from a decree dismissing the bill in a suit for infringement of two trade-marks, registered under the act of February 20, 1905. The opinion of the District Judge will be found in 221 Fed. 281.

S. J. Cox, of New York City, for appellant.

May & Jacobson, of New York City (I. N. Jacobson, of New York City, of counsel), for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge. The first registration, No. 51,356, registered April 10, 1906, is of a "trade-mark for filled gelatin capsules," and consists of the words and characters "Planten's C. & C. or Black Capsules." The statement declares that the class of merchandise to which this trade-mark is appropriated is capsules, and the particular description of goods on which it is used is filled gelatin capsules. It also states that the trade-mark is usually displayed upon printed labels of various kinds intended for application to boxes containing such capsules and to packages of such boxes. The second registration, No. 66,108, registered November 12, 1907, is of a "trade-mark for certain medicine * * * remedy for the treatment of chronic and acute gonorrhea" and other enumerated diseases. It is shown in the accompanying drawing as consisting of the letters "C. & C." printed in one color on a field of another color. The statement declares that it "is applied or affixed to the goods by providing boxes containing the goods in gelatin capsules with labels and packages of such boxes with wrapper labels on each of which the trade-mark is printed."

[1] The suit was begun June 24, 1914. It is not disputed that at and prior to that time defendant was offering for sale packages of boxes containing his gelatin filled capsules (inclosing the same two drugs) in a wrapper on which were printed the words and characters "Gedney's C. & C. (Black) Capsules." Until about two years before the beginning of the suit the inscription of defendant's wrapper did not contain the words last above quoted; the most prominent inscription was "Gedney's Capsules," accompanied with the statement that they contained "Balsam Copaiba and Oil of Cubebs." Under the decision of the Supreme Court in Thaddeus Davids Co. v. Davids, 233 U. S. 461, 34 Sup. Ct. 648, 58 L. Ed. 1046, and our decision in Warner v. Weiner, 214 Fed. 30, 130 C. C. A. 424, the trade-mark "Gedney's C. & C. (Black) Capsules" is a colorable imitation of "Planten's C. & C. or Black Capsules."

For very many years the letters "C. C." have been used by manufacturers and dealers in drugs as indicating Balsam Copaiba and Oil of Cubebs, just as the letters "C. S." have been used as an abbreviation of Cubebs and Sandal and "C. O." of Castor Oil. Also for many years purchasers of a remedy containing these ingredients have asked for it as "C. & C." It is therefore contended that the letters are descriptive and cannot be appropriated as an exclusive trade-mark by any one. It was on that ground that Judge Evans decided the case, and it is the principal matter in dispute here.

The act of 1905 was intended to crystallize the law as to trade-marks used in interstate commerce; the courts had been filled with cases presenting many questions not always harmoniously disposed of. Congress in this act, deals exhaustively with the subject. It provides that no future trade-mark shall be registered which is personal (giving the name of an individual), geographical, or descriptive. Wishing apparently not to destroy all existing rights which might have resulted from a "secondary meaning" having been acquired by words ordinarily geographic, descriptive, or what not, it provides that nothing in the act contained shall prevent the registration of any mark used by the applicant or his predecessors in foreign or interstate commerce when such mark was "in actual and exclusive use as a trade-mark of the applicant or his predecessors * * * for ten years next preceding the passage of this act"—i. e., for 10 years prior to February 24, 1905. Before a certificate can be issued the trade-mark must be published for 30 days in the Official Gazette, within which time any one may file objections. It will, of course, quite frequently happen that such published notice fails to reach some person interested, and therefore objections which the Patent Office might have considered fatal to the application are not presented. In consequence registration will sometimes be improvidently granted; the Office being misled as to the length in time of prior use, or as to its exclusive character. For such cases the act provides, in the thirteenth section, a remedy by application to the Commissioner of Patents for a cancellation of the registration. The remedy is full, fair, and summary, with appeal from examiner to Commissioner, and with no time limit for the application. It may be strongly argued that for an improvident registration this

remedy should be exclusive, leaving it for the tribunal, which had decided on insufficient evidence that there had been 10 full years exclusive use, to reach a different conclusion on fuller testimony. Many other defenses to a suit upon registered trade-mark can be disposed of only in a suit—title (as to which under section 16 registration is prima facie evidence), estoppel, license, laches, etc.; but it may be that Congress intended that as to the two questions whether prior use was for 10 full years and was exclusive the Patent Office should decide. Such question of practice, however, need not be decided in this cause.

[2] The main defense relied on is that the letters "C. & C." alone or in combination with the maker's name cannot be held to be a valid trade-mark, because they are descriptive, indicating that the article covered by them is a compound, essentially, of cubebs and copaiba. The evidence indicates that these letters have been so understood in the trade and by some, possibly many, users for many years. But, as we understand the decision in the Davids Case, 233 U. S. 461, 34 Sup. Ct. 648, 58 L. Ed. 1046, that circumstance does not prevent their being registered as a valid trade-mark under this act, if they have been exclusively used as such by complainant for 10 years prior to 1905. It was one purpose of the act to protect just such a situation. If the applicant satisfied the Patent Office that the conditions required in section 5 existed—10 years' exclusive use—he should get his registration, even though the mark were descriptive; and registration made his trade-mark a valid one, although at common law its descriptiveness might make it invalid.

[3] A further defense asserted is that the registration was obtained fraudulently. Judge Evans reached the conclusion that the evidence does not sustain this charge, and we fully concur with him. The registration was obtained ex parte, no one appearing to object in response to the notice published in the Official Gazette; defendant did not know that application was pending. He now contends:

(1) That complainant or his predecessors did not use the registered trade-mark, for 10 years prior to February 24, 1905.

(2) That, even though they did, defendant or his predecessors during the same period were using the same trade-mark, and therefore applicant's use was not exclusive. For which reasons it is contended that the registration was improvident and has no validity.

Not passing upon the proposition that these two grounds of objection should be first presented to the Commissioner of Patents upon an application to cancel, we have examined the testimony adduced in support of them.

(1) The evidence fully establishes the proposition that as early as 1890 complainant (or his predecessor) applied to his boxes in a prominent position, so printed and spaced as to strike the eye of an observer, the words "Planten's C. & C. or Black Capsules (Trade-Mark)," and also similarly applied the same to the wrappers of packages, containing several boxes. Also that he has so applied this mark ever since and has extensively advertised it from about 1890 to the beginning of the suit.

(2) No use by defendant or his predecessor of the "C. & C." or the "Gedney's C. & C. or Black Capsules" as a trade-mark on boxes or wrappers is shown until some time after the date of registration. It was shown that for many years

(including the period from February 20, 1895, to February 20, 1905) there was inclosed in defendant's boxes a folded leaflet, headed "Gedney's Capsules." It contains about 30 lines, describing his remedy, its uses and benefits, all in small type, except that whenever the words "Gedney's Capsules" appear (as they do seven times) they are printed in capitals. In the course of this description there appears the suggestion, also in small type: "When purchasing, ask for Gedney's C. & C. Capsules, better known as Gedney's Black Capsules." Three advertisements only containing the words "C. & C." and "Black" were proved. The first is in a price list of McKesson & Robbins, wholesale druggists. It contains the words in large full-faced black type "Gedney's Capsules," accompanied with a wood cut showing a man's head with a capsule marked "Gedney" between his lips and surrounded with a circular inclosed space containing the words "Trade-Mark." Below the words "Gedney's Capsules" is the statement in small type that "Gedney's C. & C. (Black) Capsules have a world-wide reputation for reliability and purity for the past sixty-four years." The second advertisement is in the price list for 1900 of the Houston Drug Company (of Texas), in which the description of the article is headed with the words—in large capitals—"Gedney's C. & C. (Black) Capsules." The third advertisement appeared in the 1903 price-list of Berry Demoville Company, wholesale druggists of Nashville, Tenn. In this also the description is headed, in large capitals, with the words "Gedney's C. & C. (Black) Capsules."

The evidence fails to satisfy us that during the 10-year period the defendant was undertaking to advise the consuming public, either by marks upon his boxes or wrappers, or by advertisements of a sort adapted to reach them, that the letters and characters "C. & C. (Black)" were a mark which would identify his goods. We are not persuaded that the Patent Office improvidently granted these registrations. The trade-marks thus registered are valid, they have been infringed, and complainant is entitled to the relief accorded to him by section 16 of the act of 1905.

[4] The complainant includes a charge of unfair trading. Since the parties are not citizens of different states, that part of the bill was correctly dismissed without prejudice.

The decree is reversed, with costs of appeal, and cause remanded, with instruction to decree in conformity with this opinion.

COXE, Circuit Judge, dissents.

MONADNOCK MILLS v. FUSHEY.

(Circuit Court of Appeals, First Circuit. July 5, 1915.)

No. 1109.

1. MASTER AND SERVANT ⟸286—DUTY OF MASTER TO INSTRUCT—PERFORMANCE—QUESTION FOR JURY.

In an action against the employer by the administrator of a deceased servant, whether it was consistent with due regard for the servant's safety to permit him alone to remove the covers from certain kiers, with no instruction except such as was given him by the superintendent and another servant, *held* for the jury under the evidence.

[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.]

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

2. MASTER AND SERVANT ⟸270—INJURIES TO SERVANT—EVIDENCE.
Where a mill employé was scalded to death while removing the cover from a kier containing hot bleaching solution, in his administrator's action for the death, testimony by a witness, who had been employed at the mill to perform the same duties as the deceased servant from about 18 months before the accident until 3 or 4 weeks before it, as to what he observed during the time in regard to the clamps, safety valve, and pressure gauge belonging to the kier, found partially open immediately after the accident, was admissible.

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

3. MASTER AND SERVANT ⟸270—INJURIES TO SERVANT—EVIDENCE.
In an administrator's action for death of a mill servant, scalded to death while removing the cover from a kier containing hot bleaching solution, testimony of a former employé of the mill as to whether H., the servant who had instructed the decedent as to the operation of the kiers, was clear-headed and clear-minded, or otherwise, H. not being before the jury, his testimony being taken by deposition, was admissible.

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

4. WITNESSES ⟸268—CROSS-EXAMINATION.
In an administrator's action for death of a mill servant while removing the cover of a kier full of hot bleaching solution, where the defendant examined its superintendent as to instructions given by him and as to statements by the deceased servant after receiving the instructions, plaintiff's cross-examination of such superintendent as to whether, judging from his knowledge of the deceased servant and from his character, he would have followed instructions, had he understood them, was proper cross-examination.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 931–948, 959; Dec. Dig. ⟸268.]

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

Action by Henry E. Fushey, as administrator, against the Monadnock Mills. Judgment for plaintiff, and defendant brings error. Affirmed.

Henry N. Hurd, of Claremont, N. H. (William E. Kinney and Hurd & Kinney, all of Claremont, N. H., on the brief), for plaintiff in error.

Joseph Madden, of Keene, N. H., for defendant in error.

Before PUTNAM, DODGE, and BINGHAM, Circuit Judges.

DODGE, Circuit Judge. The defendant in error, hereinafter called plaintiff, has recovered judgment in the New Hampshire District Court against the plaintiff in error, hereinafter called defendant, for injuries sustained at some time during the early morning of April 6, 1913, in the defendant's mill at Claremont, N. H., by Paul Paulette, then a watchman in the defendant's employ. Paulette died from the injuries received April 13, 1913. The plaintiff sues as his administrator, for damages such as he might have recovered had he survived, and damages for his death, as provided by Pub. Laws N. H. c. 191, § 12. The suit is brought under the New Hampshire Employers' Liability and Workmen's Compensation Act (Laws 1911, c. 163). Although Paulette

and the defendant were both New Hampshire citizens, and although the plaintiff is administrator by appointment of a New Hampshire probate court, he is a citizen and resident of Vermont. The District Court overruled an objection to the jurisdiction; but this, though assigned as an error in the record, has not been insisted on as error here.

The sixth, seventh, and eighth assignments of error, based upon the contention that the evidence was insufficient for any verdict in the plaintiff's favor, are the assignments principally relied on by the defendant.

Paulette had been on duty alone in the mill during the night referred to, and was alone there at the time when his injuries were received. There was, therefore, no witness who saw the accident happen, and no statement by him before his death regarding the manner of its occurrence was before the jury.

As part of his duties he was expected, at or about 4 o'clock in the morning, to "blow off," or stop the operation of, four large vats, called "kiers," containing fabric undergoing a bleaching process effected by an alkali solution, caused to circulate through the fabric under the pressure of live steam introduced into the kier through a central pipe. Each kier was of sheet iron, and provided with a closely fitting, heavy iron cover over its top. While in operation each cover was held down by twelve screw clamps. To release these clamps, or any of them, while there was pressure within the kier, involved danger of injury from the hot bleaching solution, which was liable to be forced out of the kier, underneath the cover, so long as such pressure continued. The proper method was, after first shutting off the live steam and opening the safety valve until the gauges showed no pressure, to let cold water run into the kier for at least 10 or 15 minutes; and not until after all this had been done was all risk of having hot solution expelled from the kier upon release of the clamps at an end. The clamps were then to be unscrewed and the cover raised by a brake.

Paulette, according to the uncontradicted evidence, was burned and scalded by hot solution from the interior of a kier. After receiving his injuries, he succeeded in reaching his home, which was close to the mill. Until he got there, no one knew that he had been hurt. Two of the four kiers were thereupon found to have been properly blown off and filled with water. Another had not been touched. The remaining kier had one of the clamps which secured its cover on; the other 11 clamps were off and lying on the floor. A considerable quantity of the solution which it had contained was on the floor around it. The steam had been shut off from it, but there was no cold water running into it, when the kier was first examined after the accident. The fabric in the kier was steaming, but it had not been injured by heat, as would have been the case had the admission of cold water been delayed long enough after the steam was shut off and circulation of the bleaching solution thereby stopped.

Had there been nothing further in the evidence, the only reasonable conclusion might have been that Paulette released the clamps before the pressure within the kier had been sufficiently reduced, and had thus been the sole cause of his own injuries. The statute above referred

to, while providing that an employed workman should not be held to have assumed the risk of injury caused by any negligence on the part of his employer or of other employés, or by any defect or insufficiency, due to such negligence, in the condition of plant, ways, works, machinery, equipment or appliance, provided also against liability of the employer for—

"any injury to which it shall be made to appear by a preponderance of evidence that the negligence of the plaintiff contributed."

If Paulette, having been sufficiently instructed as to the danger, knowingly released the clamps without first taking the proper precautions, and thus contributed to his own injury, the statute did not permit him to recover.

But there was also evidence tending to charge the defendant with negligence such as might have caused Paulette's injuries without contributory negligence on his part. This evidence tended to show that there had been a failure to instruct him properly regarding the operation of the kiers, and the dangers incident thereto, before leaving him to operate them without assistance; also to show a defective condition of the clamps used to hold the cover down, or a defective condition of the safety valve and steam gauges, rendering the latter unreliable as an indicator of the amount of pressure in the kier. On each of the above points there was conflicting evidence, and as to neither of them are we able to hold that the only reasonable conclusion which the jury could have drawn from all the evidence before them must have been in the defendant's favor.

Paulette, it appeared, was nearly 73 years old, and had been in the defendant's employ less than 4 weeks before the accident. The instructions shown to have been given him in regard to the kiers had been given him for the most part by Hurley, another employé, whose duties were to run the kiers during the daytime and to open them on weekday mornings. The accident was on a Sunday morning, and it was only on Sunday mornings that Paulette was expected to open them by himself; Hurley being then off duty. Hurley's deposition, taken by the defendant, but offered in evidence by the plaintiff, described the instructions he had given Paulette. Hurley stayed with him in the mill every night for a week, but he does not appear to have had anything to do with the opening of the kiers until a Sunday morning, during which Hurley showed him how to take the covers off, afterward letting him take them off from one kier himself, watching him while he did it. According to Hurley, he made Paulette understand all the various steps of the operation and the dangers to be avoided therein, until Paulette said he could do it all right alone. Hurley's evidence left it doubtful whether the accident happened on the next following Sunday morning, or the next but one. The only other instructions shown to have been given were by McCusker, the defendant's superintendent, who testified that, both before and after Hurley's instructions, he had himself shown Paulette the valves and warned him not to remove the clamps until he had the cold water running in from 10 to 15 minutes. According to McCusker, Paulette had opened the kiers alone, without accident, on one Sunday morning before

that on which he was injured, and had expressed to McCusker, after having done so, confidence in his own ability to open them properly.

[1] Although Hurley and McCusker both testified that Paulette understood their instructions and was capable of following them by himself, it was a question for the jury, in view of all the evidence before them, some of it relating to Paulette's previous experience and general capacity, whether or not it was consistent with due regard for his safety to let him undertake alone an operation attended with dangers such as might have been found to have attended it, without instruction other than that described by these two witnesses. The defendant was not entitled to a ruling by the court that he had been adequately instructed, or that there was no evidence sufficient for finding that he had not been adequately instructed. This would have been true, had there been no evidence tending to show that the appliances above mentioned were unreliable; it is certainly no less true in view of that evidence.

Whether or not this accident was caused by negligence on the defendant's part, either in failure to give Paulette adequate instructions, or in failure to have the above appliances free from defect, or in both, and, if so, whether or not negligence on Paulette's part contributed, were questions which the jury had to determine, without any direct evidence as to the actual manner of occurrence of the accident, by a choice between possible divergent inferences from surrounding facts and circumstances. In this respect the case resembles the following previous cases before this court: Griffin v. Overman Wheel Co., 61 Fed. 568, 9 C. C. A. 542; Id., 67 Fed. 659, 14 C. C. A. 609; So. Pac. Co. v. De Valle Da Costa, 190 Fed. 689, 111 C. C. A. 417; Odell Mfg. Co. v. Tibbetts, 212 Fed. 652, 129 C. C. A. 188. In those cases, as here, the refusal to direct a verdict for the defendant, upon the ground that the evidence was insufficient to justify a verdict for the plaintiff, was assigned as error; but in neither case was the exception sustained. An examination of the evidence in the record leaves us unable to sustain it in the present case.

The remaining errors assigned relate to admissions of testimony against the defendant's objection.

[2] The witness Perkins, employed at the defendant's mill to perform the same duties as were afterward performed by Paulette, from a time about 18 months before the accident until 3 or 4 weeks before it, was permitted to state what he observed during that period in regard to the clamps, safety valve, and pressure gauge belonging to the kier found partially open, as above, immediately after the accident. We cannot say the court was wrong in refusing to exclude this as too remote in time. There was other evidence for the plaintiff tending to show that the condition of the appliances referred to, described by Perkins, continued until the accident.

[3] Perkins was also permitted, after stating that he had known Hurley for 20 years or more, to "describe Hurley's characteristics as to being clear-headed and clear-minded or otherwise." The jury did not see Hurley, or hear his testimony, which was brought before them only by deposition. We cannot say the court was wrong in allowing

what the witness had observed regarding his characteristics to be considered by the jury upon the question of the adequacy of the instructions given by him to Paulette according to his deposition.

[4] After McCusker, the witness above referred to, had been examined by the defendant, the plaintiff was permitted to ask him in cross-examination whether, judging from his knowledge of Paulette and from his character, Paulette would follow his instructions if he understood them. The defendant having examined McCusker regarding the instructions given by him, and regarding statements by Paulette after he had received those instructions, we are unable to hold that the inquiry objected to exceeded the limits of proper cross-examination.

The record discloses no grounds of objection, stated at the time, to the testimony admitted as stated in the two assignments of error last above considered. That objections for which no ground is so stated may be disregarded is a familiar rule in the federal courts. Penna. Co. v. Whitney, 169 Fed. 572, 95 C. C. A. 70; Robinson v. Van Hooser, 196 Fed. 620, 624, 116 C. C. A. 294; Penna. Co. v. Cole, 214 Fed. 948, 951, 131 C. C. A. 244.

The judgment of the District Court is affirmed, with interest, and the defendant in error recovers his costs of appeal.

THE BRAND.

THE E. STARR JONES.

(Circuit Court of Appeals, Third Circuit. June 28, 1915.)

No. 1929.

1. COLLISION ⟸93 — STEAM AND SAILING VESSELS CROSSING — OBSCURED LIGHTS.

A schooner *held* solely in fault for a collision with a crossing steamship at night in Delaware Bay for carrying her side lights in such position that the one on the side next the steamship was obscured by the sails and could not be seen from the steamship until too late to avoid the collision.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 194, 195; Dec. Dig. ⟸93.]

2. COLLISION ⟸136—DAMAGES RECOVERABLE—LOSS OF TIME IN REPAIRING.

Loss through delay while making repairs is an element of the damages recoverable for collision, and where the injured vessel was under a time charter the rate of charter hire may be accepted as prima facie fixing the measure of damages.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 290; Dec. Dig. ⟸136.]

Appeal from the District Court of the United States for the Eastern District of Pennsylvania; Joseph Buffington, Judge.

Suit in admiralty for collision by Herbert L. Heyliger, master of the schooner E. Starr Jones, against the steamship Brand, and cross-suit by Edward Ballestad, master of the Brand, against the schooner. Decree for cross-libelant (214 Fed. 266), and libelant appeals. Affirmed.

Howard M. Long, of Philadelphia, Pa., for appellant.
Henry R. Edmunds, of Philadelphia, Pa., for appellee.

Before McPHERSON and WOOLLEY, Circuit Judges, and THOMSON, District Judge.

THOMSON, District Judge. On October 13, 1912, about 4:30 o'clock a. m., a collision occurred in the Delaware Bay, between the American schooner E. Starr Jones, and the Norwegian steamer Brand, in which both vessels sustained considerable injury. Cross-libels were filed to recover damages, which resulted after trial in a decree sustaining the libel of the Brand and dismissing that of the E. Starr Jones. After decrees entered, the cases were consolidated and combined into one action for the purpose of appeal.

The E. Starr Jones is a four-masted sailing vessel, 185 feet long and 38 feet beam, and was on a voyage from Philadelphia to Porto Rico with a cargo of coal and carrying a crew of seven men. The Brand is a steamer 280 feet long and 37 feet beam, and was bound from Nova Scotia to Chester, Pa., on the Delaware river, with a cargo of plaster. The schooner was under tow by a steam tug until about 3:30 a. m., when the tug was cast loose and the schooner proceeded under her own sails down the bay in a southeasterly course. For a period of about two hours prior to the collision the schooner's sails were being set. The master and some of the witnesses for the schooner say that the sails were all set before the collision, while the mate testifies that they were just finishing that work, pulling the main topsail at the time of the collision. The weather was clear, with wind from the north. There was no mist or haze. The stars were shining, and, although dark, it was a good night for lights to be seen. The approaching vessels were on a wide part of the Delaware Bay. No other vessels were in the immediate vicinity, and each had ample sea room in which to maneuver. It is clear, therefore, that the collision was not the result of inevitable accident, but of fault on the part of one of the vessels.

[1] The learned trial judge exonerated the steamer, holding the schooner to be wholly at fault, and in this conclusion we concur. The finding of the learned judge fixes the cause of the collision to be in so placing the schooner's green light on the starboard side that it was screened or obscured by the sails, and was thus not visible from the approaching steamer. This finding seems to be in harmony with the facts as shown by the testimony. While the law does not regulate just where the side lights on a sailing vessel shall be placed, it does require that the starboard light shall be so located as to show from a point straight ahead to two points abaft the beam on the starboard side, and the port light shall show a similar arc of the circle on the port side. The testimony indicates with considerable certainty that the schooner's side lights were placed in the fore-rigging high above the deck—some witnesses say 14 feet above the rail, or about 18 feet above the deck and over 4 feet inside the rail. It appears that the forestaysail boom measured 29 feet forward, while the distance from the center of the mast, where the boom is, was about 13 feet. The course of the schooner being southeast, with the wind from the north or northwest,

she would have the wind on her port quarter, her booms and sails would all be well off to the starboard side, and it is claimed with much force that her green light would thus almost necessarily be obscured. This inference which could fairly be drawn from the location of the light and the position of the sails, due to the course of the vessel and the point of the wind, is borne out by the witnesses on the Brand. Assuming that these witnesses are credible, and were ordinarily careful and efficient seamen, their testimony is very convincing.

About 4:15 a. m. the steamer took on board a licensed pilot, said to be one of the most experienced on the Delaware river and Bay. Her lights were properly set and burning. On the lookout bridge was a competent seaman, while the licensed pilot, the captain, second mate, and helmsman were on the main bridge. She was running north by west at about eight knots per hour. It is not controverted that the lights on the Brand were seen and reported from the schooner. The lookouts on each vessel saw and reported the lights on a tug with barges, which was going up the bay. The officers of the schooner, relying on her lights being seen by the approaching steamer, held to her course until a collision was imminent, when her helmsman, in the exigency of the case, put her wheel hard astarboard, changing her course sharply to port. The lookout on the Brand was on the lookout bridge, which extended from side to side of the steamer. The substance of his testimony is that the first thing he saw of the schooner was her fore and top sails when she was about 150 feet away on the port side; that this was the first knowledge he had of her presence; that he had been looking, but saw no light; that, very soon after he saw her sails, he saw her green light for the first time; that she was then close to them, and that her booms were far on the starboard side. The licensed pilot says, in substance, that the first he knew of the schooner's presence was when he saw her sails about four points on the steamer's port bow; that he could see no lights; that as soon as he saw her sails he ordered the helm of the steamer to be put hard aport, which threw her head to starboard about three points, and that he saw her green light just before the collision; that her sails must have obscured her lights, or he would have seen them.

This testimony is corroborated by the second mate and the master, who were on the upper bridge with the pilot. The second mate, a seaman of 20 years' experience, was on watch at the time of the collision. He says the first he saw of the schooner was her sails when she was about 25 or 30 fathoms away; that he looked for lights, but could see none; that right after he saw her sails he made out her green light, and that it must have been obscured by her sails. The master says he first saw the schooner's sails 30 or 35 fathoms away on the steamer's port bow; that he then looked for lights, but could not see any; that as soon as they saw the sails the pilot gave orders to hard aport the helm of the steamer, and that he then went and helped the man at the wheel; that just before the collision he saw for the first time the schooner's green light, and expresses the opinion that the only way he could have missed seeing her lights was by their being obscured by the schooner's sails.

We have, then, three concurring facts, or groups of facts, which sustain the conclusion of the learned trial judge as to the cause of the collision: First, the reasonable probability of the light being screened from its location in the rigging and the position of the boom and sails, due to the course of the vessel and the direction of the wind; second, the fact that competent officers, whose position on the steamer and the conditions of navigation surrounding their vessel required the exercise of special care and vigilance, saw the sails of the near approaching schooner, but at that time saw no lights upon it; third, the fact that very shortly thereafter the green light appeared, and was seen by all of them, in connection with the admitted fact that about that time the schooner's head was swung to port, which would naturally bring her green light into range.

We therefore concur in the findings of the learned trial judge that the schooner was solely at fault, and that the cause of the collision was the screening of her light by the sails, so that it was not visible to the lookout on the Brand until too late to avoid the collision. The evidence also supports the learned judge's view that neither vessel was at fault in the steps which they severally took to avoid a collision when the same became imminent. Viewed with deliberation after the accident, the course adopted might not be approved as the best; but in emergencies men must act quickly, and the law looks with much leniency on an error of judgment committed in an honest attempt to avoid a threatened danger.

[2] A number of assignments allege error in awarding to the steamer Brand the sum of $1,212.39 as damages for detention of the vessel during 9 days and 16 hours while undergoing repairs. It is entirely clear that one of the elements of damage to which the appellee was entitled was the loss of the use of the vessel while being repaired, whatever that loss might be. It is said in The Potomac, 105 U. S. 630, 26 L. Ed. 1194:

> "The rules of law governing this question are well settled, and the only difficulty is in applying them to the peculiar facts of the case. In order to make full compensation and indemnity for what has been lost by the collision, restitutio in integrum, the owners of the injured vessel are entitled to recover for the loss of her use while laid up for repairs. When there is a market price for such use, that price is the test of the sum to be recovered. When there is no market price, evidence of the profits that she would have earned, if not disabled, is competent; but from the gross freight must be deducted so much as would in ordinary cases be disbursed on account of her expenses in earning it. In no event can more than the net profits be recovered by way of damages."

What was the loss of the use of the vessel? The vessel at the time of the collision was under charter to the Keystone Plaster Company. The charter hire for 9 days and 16 hours, under the monthly rate stipulated in the charter, was $1,212.39, which amount the charterers deducted in the settlement with the owners. No other evidence was offered by either side on the question of damages. Conceding that, when there is a market price for the use of the vessel, that price is the test in the first instance of the sum to be recovered, is not the stipulated rate of damage in the vessel's charter at least prima facie evidence of the

loss occasioned by the detention? It was so held by the Circuit Court in Orhanovich v. The America, 4 Fed. 337. In the case of The Columbia, 109 Fed. 661, 48 C. C. A. 596, the court said:

"Taking the facts of this case into consideration, we are of opinion that the evidence as to the provisions of the charter party was competent to be admitted. Conceding that it may not be conclusive in all cases, it nevertheless makes out a prima facie case, which, in the absence of any proof to the contrary, justifies the rendition of a decree in accordance therewith. The court did not err in allowing the damages."

In The Governor Ames, 187 Fed. 40, 109 C. C. A. 94, the appellate court held that where a vessel was injured in a collision for which the other vessel was in fault, and her detention was not such as to require the discharge of her crew, or prevent her from completing her voyage, the rule is settled that the agreed damage under her charter may properly be accepted as fixing prima facie the amount of her damages for the detention. This case quotes approvingly from the opinion of Judge Butler in the case of The Rebecca v. The America, Fed. Cas. No. 11,619a, on the question of damages, where that judge said:

"This rule has been pronounced, by those having the largest experience and the highest intelligence on the subject, the safest thing under general circumstances that can be pursued."

Other authorities might be cited to the same effect.

The assignments of error are overruled, and the decree is affirmed.

F. B. WASHBURN & CO. v. UNITED STATES.

(Circuit Court of Appeals, First Circuit. July 16, 1915.)

No. 1111.

1. FOOD ⇐22—FOOD AND DRUGS ACT—VIOLATION.

In a prosecution for violation of the Food and Drugs Act of June 30, 1906, c. 3915, 34 Stat. 768 (Comp. St. 1913, §§ 8717-8728), where there was evidence that macaroons are made: (1) Of ground almonds, sugar, and white of eggs; (2) of cocoanut, sugar, and white of eggs; and (3) of cocoanut, sugar, white of eggs, and glucose—and defendant was charged with having adulterated macaroons made by him by the addition of glucose, the question of the normal composition of the article of food known as a "macaroon" was for the jury.

[Ed. Note.—For other cases, see Food, Cent. Dig. § 23; Dec. Dig. ⇐22.

What constitutes a violation of pure food regulations, see note to Brina v. United States, 105 C. C. A. 559.]

2. FOOD ⇐5—FOOD AND DRUGS ACT—ADULTERATION.

In a prosecution for violating the Food and Drugs Act of June 30, 1906, by adulterating macaroons by the addition of glucose, if the only respect in which glucose differed from cane sugar, the ingredient for which it was substituted, was in its degree of sweetness, no standard of sweetness for macaroons being fixed by the law or otherwise, the defendant was not guilty.

[Ed. Note.—For other cases, see Food, Cent. Dig. § 1; Dec. Dig. ⇐5.]

3. FOOD ⇐5—FOOD AND DRUGS ACT—"ADULTERATION."

In a prosecution of a macaroon manufacturer under the Food and Drugs Act of June 30, 1906, where the evidence showed that a macaroon is a

mixed food composed of various ingredients, that its name is distinctive, and that the glucose which the defendant added, producing the charged adulteration, was not poisonous or deleterious to health, the defendant was not guilty of "adulteration" under section 8 (section 8724) of the act, providing that a mixture known by a distinctive name shall not be regarded as adulterated if it does not contain any added poisonous or deleterious ingredient.

[Ed. Note.—For other cases, see Food, Cent. Dig. § 1; Dec. Dig. ⟸5.

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

4. FOOD ⟸22—FOOD AND DRUGS ACT—MISBRANDING.

In a prosecution under the Food and Drugs Act of June 30, 1906, for misbranding macaroons, where there was evidence that a macaroon, as commonly understood, was made of ground almonds, sugar, and white of eggs, and that the defendant's product was made of cocoanut, sugar, white of eggs, and glucose, the question of misbranding was for the jury.

[Ed. Note.—For other cases, see Food, Cent. Dig. § 23; Dec. Dig. ⟸22.]

5. FOOD ⟸15—FOOD AND DRUGS ACT—"MISBRANDED."

In a prosecution for misbranding macaroons, brought under the Food and Drugs Act of June 30, 1906, section 8 (section 8724) providing that an article of food is misbranded if it be an imitation of or offered for sale under the distinctive name of another article, or if the package containing it, or its label, shall bear any statement regarding the ingredients or substances contained therein, which statement shall be false or misleading in any particular, if a macaroon consists of cocoanut, sugar, and white of eggs, articles shipped by defendant containing glucose in addition, and branded "Macaroons," were "misbranded" within the act.

[Ed. Note.—For other cases, see Food, Cent. Dig. § 14; Dec. Dig. ⟸15.

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

In Error to the District Court of the United States for the District of Massachusetts; Frederic Dodge, Judge.

F. B. Washburn & Co. was convicted of violating the Food and Drugs Act of June 30, 1906, c. 3915, 34 Stat. 768 (Comp. St. 1913, §§ 8717–8728), and it brings error. Decree affirmed in part and reversed in part, verdict set aside, and case remanded for further proceedings not inconsistent with the opinion.

Frederick W. Fosdick, of Boston, Mass., for plaintiff in error.

James S. Allen, Jr., Asst. U. S. Atty., of Boston, Mass. (George W. Anderson, U. S. Atty., of Boston, Mass., on the brief), for the United States.

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

BINGHAM, Circuit Judge. This is an information brought by the United States under sections 2, 7, and 8 of the Food and Drugs Act of June 30, 1906 (34 Stat. at Large, p. 768, c. 3915). It contains two counts. In the first count the government charges that, on August 1, 1910, the respondent, at Brockton, in the district of Massachusetts, unlawfully and knowingly shipped and delivered to a carrier for shipment and carriage from said Brockton to Greensburg, in the state of Pennsylvania, certain food called "macaroons," which food was adulterated within the meaning of the act of Congress, approved June 30, 1906, "in that a substance, to wit, glucose, had been mixed and

packed with said food so as to reduce and lower and injuriously affect its quality or strength." In the second count it was charged that the food shipped as aforesaid was misbranded within the meaning of the act—

"in that the label on said food and its containers, and the package containing the same, did bear a certain statement regarding said food which was false and misleading in certain particulars; that is to say, the statement, in substance and effect, following: 'Marcaroons'—whereas in truth and in fact said food was not macaroons."

There was a trial by jury, and a verdict of guilty was rendered on each count. The case is now here on the respondent's bill of exceptions, and the errors assigned are to the refusal of the court to direct verdicts for the respondent at the close of all the evidence, to its refusal to give certain requested instructions and to the admission of certain evidence.

The provisions of the statute relied upon to sustain the first count read as follows:

"Sec. 7. That for the purpose of the act an article shall be deemed to be adulterated: * * *

"In the case of food:—

"First, if any substance has been mixed and packed with it so as to reduce or lower or injuriously affect its quality or strength."

It was stipulated between the parties, and the stipulation was put in evidence, that the food in question was shipped by the respondent in interstate commerce, as set forth in the information, that it contained 29.44 per cent of commercial glucose, and that the package containing the food was labeled as the information alleged. There was also evidence that the food contained 42.76 per cent of cane sugar.

[1] At the trial, the principal question in dispute was as to what the article of food known as a "macaroon" consisted. There was evidence tending to show that it consisted: (1) Of ground almonds, sugar, and the white of eggs; (2) of cocoanut, sugar, and the white of eggs; and (3) of cocoanut, sugar, the white of eggs, and glucose. On the count for adulteration, one of the government's positions was that a macaroon was an almond cake, but, whether it was a cake of almond or cocoanut, it was adulterated if glucose was added. The respondent's position was that a macaroon was a cake made of cocoanut, sugar, the white of eggs and glucose, and it requested the court to charge the jury, in substance, that if they found a cake so made was a macaroon, they should acquit the defendant of the charge of adulteration. The court refused to give this instruction, and charged the jury that the question for them to consider on this count was whether the cakes which the respondent admitted having shipped in interstate commerce were adulterated, in that glucose had been mixed and packed with them so as to reduce or lower or injuriously affect their quality or strength, and that, in considering that question, they need not determine whether the cakes shipped by the defendant were properly called "macaroons" or not, but should consider that they were macaroons notwithstanding they had cocoanut in them. It thus appears that the court, in its charge, did not permit the jury to deter-

mine, on the first count of what the article of food known as a macaroon consisted, but charged them, as a matter of law, that it consisted of cocoanut, sugar, and the white of eggs, and that they might find the product adulterated if the glucose, which the respondent admitted it put into its cakes, reduced or lowered or injuriously affected their quality or strength. The respondent, in view of the evidence, was entitled to have the jury, before reaching a conclusion upon the question of adulteration, determine what a macaroon was. Indeed, it was essential, in view of the theory on which this branch of the case was tried, for them to do so in order to reach a correct result. If the jury found that it consisted of ground almonds, sugar, and the white of eggs, the respondent was entitled to be discharged, for there was no evidence that it shipped in interstate commerce macaroons made of almonds to which glucose was added. Then, again, if the jury found that a macaroon consisted of cocoanut, sugar, the white of eggs and glucose, the respondent was entitled to be discharged, for the evidence disclosed that the article which it shipped in interstate commerce was so composed. There was only one contingency presented by the evidence and the allegations of this count on which the respondent could be found guilty, and that was in case the jury found that a macaroon consisted of cocoanut, sugar, and the white of eggs, and that the respondent, by adding glucose, thereby reduced or lowered or injuriously affected its quality or strength. This requested instruction should have been given, and the refusal to do so was error.

[2] As to whether the food product of the respondent was adulterated by the addition of glucose—it being assumed that the article known as a "macaroon" was made of ground cocoanut, etc., without glucose—the evidence tended to show that commercial glucose or corn syrup was a corn product chemically produced; that it was a white, sweet syrup and in no way injurious to health; was about three-fifths as sweet as cane sugar, and contained greater food properties than cane sugar; that it was a viscid or sticky substance, and gave to the macaroon and caused it to retain a chewy quality; that a macaroon containing glucose was less pleasing to the taste, but whether this was due to a difference in the degree of sweetness between it and cane sugar, or because of the character of the taste, the evidence did not disclose. The only evidence on this point was that some of the witnesses said that they did not like a macaroon made with glucose as well as they did one made with cane sugar.

The respondent requested the court to charge the jury that the law fixed no standard for sweetness in a macaroon, and also that they were not to consider, in determining the innocence or guilt of the respondent on the question of adulteration, the sweetness of corn syrup as compared with the sweetness of cane sugar. It is true that the law fixes no standard for sweetness of a macaroon; it is also true that the evidence disclosed that the degree of sweetness in a macaroon, whether made of cocoanut or almond, varies with different makers; that they use a greater or less amount of sweetening as their fancy dictates. The court declined to charge the jury, as requested, in these respects, and simply told them that there was no dispute as

to glucose not being as sweet as sugar—that it was only three-fifths as sweet as sugar—and that, while the defendant's evidence was that this loss in sweetness was compensated for by other advantages in the use of glucose, so that, on the whole, the cakes were not reduced or lowered or injuriously affected in quality or strength by its addition, that was for the jury to determine. From this it appears that the court told the jury they might find that a macaroon made of cocoanut in which glucose was used was adulterated, because glucose was less sweet than cane sugar, unless they found that other advantages derived from the use of glucose so made up for the loss of sweetness as, on the whole, not to reduce or lower or injuriously affect its quality or strength. As the law fixed no standard of sweetness for macaroons, the respondent was entitled to have the jury so instructed, and, as the evidence was such as not to warrant the jury in finding that there was, in fact, any standard of sweetness for a macaroon, they could not consider the question of the degree of sweetness in arriving at a verdict on the question of adulteration; and, if the evidence would warrant no other conclusion than that of a difference in the degree of sweetness, then a verdict should have been directed for the respondent on this count. If, however, in view of the fact that the jury were permitted, in the course of the trial, to eat macaroons made according to the formula of the respondent, and macaroons made with sugar without glucose, it can be said that they had evidence before them as to the character of the taste of macaroons produced with sugar as compared with those made of sugar and glucose, and that, because of this difference, macaroons made with sugar and glucose were less palatable than those made with cane sugar alone, then there may have been some evidence on which to submit the question to the jury. But this view of the evidence was not presented to the jury by the charge, and the verdict was based apparently upon the evidence showing a difference in the degree of sweetness. For these reasons we are of the opinion that the verdict on this count must be set aside.

[3] Furthermore, it seems to us that the trial on the first count proceeded upon a wrong theory, and that the allegations and proofs offered would not warrant a conviction for adulteration within the meaning of the act. The evidence discloses that a macaroon is a mixed food composed of certain ingredients; that the name by which it is known is distinctive; and that the added ingredient, glucose, which the respondent used in its cakes was not poisonous or deleterious to health. It is provided in section 8, subd. 4 (1), that a mixture known by a distinctive name shall not be regarded as adulterated if it does not contain any added poisonous or deleterious ingredient. The added ingredient here in question was neither poisonous nor deleterious, and, as the mixture or compound was known by a distinctive name, it was not adulterated within the meaning of the act. United States v. Forty Barrels of Coco-Cola, 215 Fed. 535, 132 C. C. A. 47; Id. (D. C.) 191 Fed. 432.

[4] Upon the second count the contention of the government was: (1) That a macaroon, as commonly understood, was made of ground

almonds, sugar, and the white of eggs, and if an article made of ground cocoanut was labeled and shipped as a "macaroon," it was misbranded; and (2) that whether, on the evidence, a macaroon should be found to consist of ground almonds or cocoanut, sugar, and the white of eggs, as those branded and shipped by the respondent also contained glucose, they were not macaroons, and were misbranded.

As there was evidence on this count from which the jury could have found that a macaroon, as commonly understood was made of ground almonds, sugar, and the white of eggs, and that those shipped by the respondent contained cocoanut, but were branded "Macaroons," the government was entitled to go to the jury on this count as to this matter.

[5] There was also evidence on this count, from which the jury could have found that a macaroon, as commonly understood, was made of ground cocoanut, sugar, and the white of eggs, and that those shipped by the respondent in interstate commerce were thus made up, except that glucose was added; and the question is suggested whether the jury would be warranted in finding that, by the addition of glucose, the articles ceased to be macaroons, so that the respondent misbranded them by labeling them "Macaroons." In the first count, the court charged the jury that a cake made of cocoanut, sugar, and the white of eggs was a macaroon for the purpose of adulteration, and that, if they found those shipped by the respondent in interstate commerce contained glucose, they might find that they were adulterated, if their quality or strength was thereby lowered. The respondent urges that this produces this dilemma: That a cake made of cocoanut, sugar, and the white of eggs is a macaroon which may be adulterated by the addition of glucose, and also that it may be found not to be a macaroon, for the purpose of misbranding, if glucose is added. But, in view of the conclusions reached with reference to the first count, we find it unnecessary to consider this contention. If the jury found that a macaroon consisted of cocoanut, sugar, and the white of eggs, then, inasmuch as those shipped by the respondent contained glucose and were branded "Macaroons," they were misbranded within the meaning of section 8, subdivisions 1 and 4 (1), for they were "an imitation of or offered for sale under the distinctive name of another article," and were labeled so as to deceive and mislead the purchaser. United States v. Forty Barrels of Coco-Cola, supra.

We do not find it necessary to consider the question of evidence to which exception was taken, as it relates solely to the first count.

The decree, so far as it relates to the count for misbranding, is affirmed; but, so far as it concerns the count for adulteration, it is reversed, the verdict is set aside, and the case is remanded to the District Court, for further proceedings not inconsistent with this opinion.

In re AMERICAN PRODUCT CO.

TITLE GUARANTY & SURETY CO. v. SHATTUCK et al.

(Circuit Court of Appeals, Third Circuit. July 19, 1915.)

No. 1961.

1. MUNICIPAL CORPORATIONS ⟸347—CONTRACTS—BONDS—OBLIGATION OF PRINCIPAL AND SURETY.

An obligation by one, as principal, a city contractor, and another, as surety, to secure persons furnishing labor or material to the principal, is a joint and several obligation as to persons furnishing labor or material, and each is liable as principal to such persons, though as between themselves the principal is the principal debtor and the surety is surety only.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 876, 877; Dec. Dig. ⟸347.]

2. BANKRUPTCY ⟸345—CLAIM—SURETIES.

An obligation by a contractor and his surety was joint and several as to third persons. The principal by contemporaneous agreement indemnified the surety company against any payments that the latter might make under the obligation. The surety paid into court the penal sum of the obligation, which was distributed ratably among creditors; each receiving about 50 per cent. The contractor was adjudged a bankrupt after the surety had paid the money into court. *Held*, that the surety was entitled to subrogation, and its claim against the contractor for the amount paid must be allowed, while a creditor of the contractor, secured by the obligation, must credit the amount received on the distribution of money paid into court and confine himself to the balance.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 531, 532, 534, 539, 540; Dec. Dig. ⟸345.]

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

In the matter of the American Product Company, bankrupt. From a decree (222 Fed. 126) disallowing a claim of the Title Guaranty & Surety Company, it appeals. Reversed, with instructions to reinstate the orders of the referee.

Frank R. Donahue, of Philadelphia, Pa., for appellant.

Walter L. Sheppard, of Philadelphia, Pa., for appellees.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

McPHERSON, Circuit Judge. This appeal is from a decree of the District Court entered April 28, 1915, disallowing a claim of the Title Guaranty & Surety Company, and allowing another claim that will be referred to hereafter. As will appear, the two subjects are so closely related that they were properly disposed of by one order below, and need not be separated here.

[1, 2] The undisputed facts are as follows: The bankrupt, the American Product Company, was a successful bidder on certain work to be done for the city of Philadelphia during the year 1913, and the Surety Company joined in giving a bond to the city in the penal sum of $34,395. This obligation complied with the municipal ordinances, and

inter alia was intended to secure persons furnishing labor or material to the Product Company; the bond being substantially in the form required by the federal statutes from contractors with the United States. In express terms the obligation was joint and several, and thus imposed a separate and independent liability upon each of the obligors. Morrison v. Surety Co., 224 Pa. 41, 73 Atl. 10. In other words, each was directly liable as a principal to such persons as might furnish labor or material, although of course (as between themselves) the Product Company was the principal debtor, and the Surety Company was a surety only. By a contemporaneous agreement, the Product Company indemnified the Surety Company against any payments that the latter might make under the bond. About nine months afterwards the Product Company fell into financial difficulty and failed to carry out its contract with the city. Accordingly the contract was canceled on October 2, 1913, and all persons in interest soon learned that the Product Company had become indebted for work and material under the contract to the amount of nearly $60,000. A number of creditors sued both obligors in the Philadelphia courts of common pleas, and as a result of these suits, coupled with its knowledge of the fact that the claims under the bond would approximate nearly double the penal sum, the Surety Company asked and obtained leave from one of the courts of common pleas to pay into court $34,395 in discharge of its obligation. This was done, in order that the creditors might share the money ratably. The court thereupon appointed an auditor, who heard and adjudicated the claims under the bond, and in the following April distributed the money paid into court; each claimant receiving about 50 per cent. of his debt.

Meanwhile, on November 11, 1913, two weeks after the Surety Company had paid the money into court and had thus discharged its obligation in full, an involuntary petition was filed against the Product Company, and after some controversy an adjudication was entered in the following May. In addition to its claim against the Product Company arising out of the payment into court, the Surety Company on September 30, 1913, had also entered a judgment on the bond by virtue of a warrant of attorney contained in the agreement of indemnity. Afterwards the plant of the Product Company was sold, producing a net fund of about $32,000, which came into the hands of the trustee in bankruptcy, and the present dispute grows out of the distribution of this fund. The Surety Company presented its claim to the referee for $34,395, based upon the money paid (for which it also held a judgment), and the creditors, who had already received from the common pleas about half their debts, also presented their claims; some creditors asking to prove the full amount, without deduction, while others credited the dividend paid by the state court, and claimed only the balance. The referee allowed the claim of the Surety Company and refused to allow the claim of the Thompson-Lockhart Company for the full amount, holding that the claimant must credit the dividend received from the common pleas and confine itself to the balance. The District Court reversed both orders, and the present appeal challenges the correctness of this decision.

In our opinion the referee was right in both rulings. In effect the Thompson-Lockhart Company had been paid one-half its claim before the bankruptcy proceedings were begun. The money for this purpose had been deposited in the court of common pleas, and nothing remained to be done except to ascertain the proportion that should go to each creditor. This the Surety Company had no means of ascertaining, but the state court undertook the task and carried it out. When the petition was filed, therefore, one-half the debts under the bond had in substance been paid, and only the balance could be proved.

And it is also true that at the date of the bankruptcy the Surety Company had paid all it was bound to pay, and had become in equity the creditor of the Product Company to the full amount of the bond. It had never undertaken to pay all the debts of the Product Company; its promise was to pay them up to the limit of the penal sum, and, having discharged that obligation it was bound no further to those creditors, either legally or equitably. In our opinion, the argument in support of the decree goes astray just at this point. The position of counsel is based on the evident assumption that the Surety Company is still under some obligation to these creditors, and therefore cannot be allowed to share in the fund until the creditors themselves have been paid in full. But we do not so understand the facts. In substance the situation is this: The Surety Company agreed to pay as much of these debts as could be discharged with $34,395, and it met this obligation faithfully. Being a surety, it was thereupon entitled to subrogation, and stepped into the creditors' shoes, thereby acquiring their rights against the principal debtor. Moreover, all this was done before the petition was filed, so that the situation is exactly the same as if on October 27 the Surety Company had paid each of these creditors one-half his claim and had taken an assignment thereof. On November 11, therefore, the Surety Company was the equitable owner of half these claims, and was entitled to prove that fraction against the bankrupt.

The decree is reversed, with instructions to reinstate the orders of the referee.

LANSTON MONOTYPE MACH. CO. v. CURTIS.

(Circuit Court of Appeals, Second Circuit. June 25, 1915.)

No. 279.

1. COMMERCE ⇐60—INTERSTATE COMMERCE—VALIDITY OF STATE LAW.
Personal Property Law N. Y. (Consol. Laws, c. 41) § 65, provides that when articles are sold, title to remain in the vendor until payment of the price, and they are retaken by the vendor, they shall be retained for 30 days, during which time the vendee may comply with the contract; that after such period, if the terms of the contract are not complied with, the vendor may cause the articles to be sold at public auction; and that, unless they are so sold within 30 days after the expiration of such period, the vendee may recover of the vendor the amount paid on such articles under the contract. *Held*, that while, as applied to a sale of property

to be sent from Pennsylvania to New York, this statute indirectly affects interstate commerce, it is in no sense a regulation thereof.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 91–95; Dec. Dig. ⊂⊃60.]

2. SALES ⊂⊃481—CONDITIONAL SALES—RETAKING PROPERTY—RECOVERY OF PAYMENTS.

Where a contract for the conditional sale of property to be sent from Pennsylvania to New York was executed in New York, and the property was to be used there and paid for there, the vendor, when it retook the chattels upon the vendee's default, did so subject to the New York law, and, not having sold the property at public auction, as required by Personal Property Law N. Y. § 65, it was liable to the vendee for the amount paid by him on account.

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

3. SALES ⊂⊃481—CONDITIONAL SALES—RETAKING PROPERTY—RECOVERY OF PAYMENTS.

Where a vendor of property sold conditionally agreed to accept advertising in a magazine in part payment, and it subsequently retook the property because of the vendee's default in making stipulated cash payments, and did not sell the property at public auction, as required by Personal Property Law N. Y. § 65, the purchaser was entitled to recover the amount paid by publishing the advertisement, though it was not shown that he paid anything for the advertising, parted with any value, or suffered any detriment in relation thereto.

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

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

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

Joline, Larkin & Rathbone, of New York City (L. H. Freedman, of New York City, of counsel), for plaintiff in error.

Esselstyn & Haughwout, of New York City (Everett J. Esselstyn and J. A. Haughwout, both of New York City, of counsel), for defendant in error.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

WARD, Circuit Judge. December 27, 1911, a contract was executed by William B. Curtis and one Green, agent for the Lanston Monotype Company, for the conditional sale for $5,519 of certain machinery to be shipped by the company from Philadelphia f. o. b. to William B. Curtis at New York. The material provisions were as follows:

"The purchaser hereby agrees to buy said property as above specified and to pay therefor the said sum of fifty-five hundred nineteen and $^{00}/_{100}$ dollars ($5,519.00) in the following manner: Beginning March 1, 1913, forty (40) equal consecutive monthly payments of fifty and $^{00}/_{100}$ dollars ($50.00) each, and one month after the last of these payments a final payment of fifty-nine and $^{00}/_{100}$ dollars ($59.00). The balance, $3,240, to be paid in advertising as per rider attached to and made part of this contract."

"It is further agreed that the title to the said property shall remain in the Monotype Company until such mortgage be given, or until the purchase price, with interest, has been fully paid, and that, in case of any default in any of the terms of this contract, the Monotype Company shall have the right to

take immediate possession of the property, together with all accessories and appurtenances delivered under this contract, as though this contract had never been made. And it is further agreed that the amount of the payments already made, plus the amount of any past-due purchase notes given to sesure installments of payments, or the amount of any past-due installments of payments as the same shall be on the day of the resumption of possession of the property by the Monotype Company shall be fixed and determined as the liquidated measure of compensation to the Monotype Company for the use of the property by the purchaser.

"It is further agreed that, in exercising its right to resume possession for any default in any of the terms of this contract, the Monotype Company may enter upon the premises of the purchaser, and any other premises where the property may be found, and take away, repossess, and enjoy the said property, without any liability, accountability, or responsibility of the Monotype Company to the purchaser or any other person or persons for so doing. * * * The Monotype Company retains the right, for seven days from the receipt hereof by it at its office at Philadelphia, to cancel this contract upon giving notice in writing of its intention so to do to the purchaser."

The rider attached to the contract provided:

"For the final payment of thirty-two hundred and forty $^{00}/_{100}$ dollars ($3240.00) specified in the contract to which this is attached and made part, the Monotype Company agrees to take a full-page advertisement on the back cover of the Publishers' Guide for fifty-four (54) consecutive monthly issues, beginning with the issue for January, 1912, upon the following conditions:

"First. That during the life of this contract the purchaser agrees to use in his magazines the product of no other composing machine but the monotype and to install or operate in his own plant no composing machines but monotypes.

"Second. That in the event of the purchaser not being able to furnish the advertising specified above, the purchaser agrees to pay to the Monotype Company sixty and $^{00}/_{100}$ dollars ($60.00), with 6 per cent interest from one month after date of the bill of lading, for the equipment specified in the contract to which this is attached and made part, for each month the Monotype Company's advertisement is not carried as specified above."

Curtis delivered to the company his 40 promissory notes for $50 each and one for a final payment of $59, no one of which has been paid, and he paid on account the sum of $1,330 in the shape of a full-page advertisement on the back cover of 16 issues of the Publishers' Guide at $60 each, $960, and three inside page advertisements, of the value of $50 each, $150, and $220 acknowledged to have been paid on the execution of the contract.

July 16, 1913, Curtis having defaulted in the payment of several of the installment notes, the Monotype Company entered upon his premises, retook all the machinery, and reshipped it to Philadelphia, without conforming to the Personal Property Law of New York regulating conditional sales, which provides:

"Sec. 65. Sale of Property Retaken by Vendor.—Whenever articles are sold upon the condition that the title thereto shall remain in the vendor, or in some other person than the vendee, until the payment of the purchase price, or until the occurrence of a future event or contingency, and the same are retaken by the vendor, or his successor in interest, they shall be retained for a period of thirty days from the time of such retaking, and during such period the vendee or his successor in interest, may comply with the terms of such contract, and thereupon receive such property. After the expiration of such period, if such terms are not complied with, the vendor, or his successor in interest, may cause such articles to be sold at public auction. Unless such articles are so sold within thirty days after the expiration of such period, the

vendee or his successor in interest may recover of the vendor the amount paid on such articles by such vendee or his successor in interest under the contract for the conditional sale thereof."

April 1, 1914, Curtis brought this suit against the Monotype Company to recover $3,619; that is, the amount paid on account as above, $1,330, together with the amount of notes not matured at the time of the retaking. In its answer the Monotype Company set up a defense that the Personal Property Law of New York was a regulation of commerce, and therefore void as to a contract of sale of property to be sent from Pennsylvania to New York. It also pleaded a counterclaim of $1,140 for the use of the machinery at the rate of $60 a month between the time Curtis received it, December 27, 1911, and the day preceding the retaking by the Monotype Company, July 15, 1913. Judge Hough held that the contract was governed by the law of New York, refused to receive evidence of the reasonable value of the machinery while in the possession of Curtis, and directed a verdict in his favor for $1,330, without interest. From the judgment entered thereon this writ of error is taken.

[1] We do not think the section of the Personal Property Law relied upon by the defendant was a regulation of interstate commerce. No doubt it does indirectly affect such commerce, but it is in no sense a regulation of it. The purpose of the legislation is to protect the public against onerous and unreasonable contracts of conditional sale very likely to be misunderstood. Kidd v. Pearson, 128 U. S. 1, 23, 9 Sup. Ct. 6, 32 L. Ed. 346.

[2] The contract having been executed in New York, and the Monotype Company not having exercised its right to cancel, the same is in our opinion a New York contract, to be governed by the law of that state. The parties evidently contracted with reference to the law of New York. The machinery was to be used there, and paid for there, and in case of the purchaser's default the remedies of the vendor were to be availed of there. Hence, when the Monotype Company retook the chattels, it did so subject to the provisions of the New York law regulating conditional sales. Not having sold the machinery at public auction as required by that law, it was liable to Curtis for the amount paid by him on account.

[3] The Monotype Company made a further objection that the advertisements furnished by Curtis were not payments to it within the meaning of the statute; there being no evidence that he ever paid the Publishers' Guide anything for the advertising, or that he parted with any value or suffered any detriment in relation thereto. We think these considerations immaterial. Curtis gave the Monotype Company the advertising he undertook to furnish, and it is of no consequence how he obtained it.

The judgment is affirmed.

NEW YORK CENT. & H. R. R. CO. v. MURPHY et al.

(Circuit Court of Appeals, Second Circuit. June 8, 1915.)

No. 285.

COMMERCE ⇐86—INTERSTATE COMMERCE—DISCRIMINATION—FINDINGS OF INTERSTATE COMMERCE COMMISSION.

The Interstate Commerce Commission, stating the facts in its opinion and order directing railroad company to discontinue its practice of exacting track storage charges and to pay to complainants appearing before the Commission the money paid by them as track storage charges, need not, to comply with Interstate Commerce Act Feb. 4, 1887, c. 104, § 14, 24 Stat. 384 (Comp. St. 1913, § 8582), insert in its opinion and order the findings of fact on which the award was made to complainants, to justify maintenance by complainants of an action for the award under section 16 (section 8584).

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 140; Dec. Dig. ⇐86.

What constitutes an unlawful preference or discrimination by a carrier under interstate commerce regulations, see note to Gamble-Robinson Commission Co. v. Chicago & N. W. Ry. Co., 94 C. C. A. 230.]

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 of the United States for the Southern District of New York. The complainants in the action below, hereinafter referred to as complainants, were copartners in business, under the firm name of Murphy Bros., and resided and did business in the Southern district of New York.

On May 10, 1910, the complainants filed a complaint before the Interstate Commerce Commission as to certain charges, alleged to be unreasonable, unfair, and unjust charges, in connection with railroad transportation and delivery of merchandise made by and collected by the New York Central & Hudson River Railroad Company, and which were collected from the complainants among others. The complainants were sustained, and the Interstate Commerce Commission directed the railroad company to discontinue its practice of exacting its unreasonable track storage charges, and it also directed it to make reparation and pay damages to the complainants for certain amounts of money which the complainants had theretofore paid to the railroad company as track storage. The Commission by an order dated December 11, 1911, directed the railroad company on or before February 1, 1912, to pay to complainants the sum of $443, with interest at 6 per cent. per annum from May 1, 1910; and by an order dated February 5, 1912, the Commission directed the railroad company to pay to complainants on or before March 15, 1912, the sum of $73, with interest at the rate of 6 per cent. per annum from July 1, 1911.

The railroad company conformed to those parts of the orders which required it to desist from the collection of the unjust and unfair charges. It, however, refused and neglected to pay to complainants the amounts of reparation or damages ordered to be paid. In consequence of this default this action was commenced to recover the amounts which the railroad company had been directed to pay in the two orders made by the Interstate Commerce Commission. The court below directed judgment to be entered against the defendant in the sum of $947.66.

Alex. S. Lyman, of New York City (William Mann, of New York City, of counsel), for plaintiff in error.

George H. Pettit, of New York City, for defendant in error.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge (after stating the facts as above). This action is brought under the provision of the Interstate Commerce Act. Section 13 of the act authorizes any person, firm, or corporation, complaining of anything done or omitted to be done by any common carrier subject to the act, to apply to the Commission by petition, and authorizes the Commission to investigate the matters complained of in such manner and by such means as it deems proper. Section 14 provides that whenever an investigation is made by the Commission it shall be its duty to make a report in writing in respect thereto, and state its conclusions together with its decision or order; and in case damages are awarded the report is required to include the findings of fact on which the award is made. Section 16 provides that if the Commission determine that any party complainant is entitled to an award of damages under the provisions of the act the Commission shall make an order directing the carrier to pay to complainant the sum to which he is entitled on or before a day named. It then goes on to provide that, if the carrier does not comply with the order for the payment of money within the time limit named in the order, the person for whose benefit the order was made—

"may file in the Circuit Court of the United States for the district in which he resides, or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, or in any state court of general jurisdiction having jurisdiction of the parties, a petition setting forth briefly the causes for which he claims damages and the order of the Commission in the premises. Such suit in the Circuit Court of the United States shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the Commission shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the Circuit Court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. [24 U. S. Stat. 379, as amended, U. S. Comp. Stat. 1913, §§ 8581, 8582, 8584; 36 Stat. 550, 34 Stat. 589.]"

The defendant relies upon what it alleges to be the failure of the Interstate Commerce Commission to insert in its orders and opinion "the findings of fact on which the said purported award was made, as required by section 14 of the said act to regulate commerce," and it asserts that because of this omission of findings the orders of the Commission, in so far as they require the payment of reparation and damages to the complainants, are invalid and void. In making his claim counsel appear to be unmindful of the decision of this court in Lehigh Valley R. Co. v. American Hay Co., 219 Fed. 539, 135 C. C. A. 307 (1914). In that case we held that the Interstate Commerce Commission is not required to make formal findings, but that its findings can be contained in the colloquial statements of an opinion. In the opinion which had been filed by the Commission in that case there were no

formal, marked, and numbered set of findings; and this court said, speaking through Judge Lacombe:

"Findings are findings just as well when imbedded in the colloquial statements of an opinion."

In the case at bar it is quite easy to spell out from the deliverances of the Commission the following findings:

1. The railroad makes demurrage charges at a certain rate per day, which cover use of a car while it stays unloaded.

2. The railroad also makes track storage charges at a certain rate per day, which cover use of the yard track on which the car stands while it stays unloaded.

3. It waives demurrage charges for each day when weather conditions prevent unloading.

4. It does not waive storage charges when weather conditions prevent unloading.

5. The Commission finds that it is not reasonable to collect track storage charges for days when the weather condition is such that the railroad waives demurrage charges.

6. The railroad has collected such charges from the complainants and the amount of such collections is not disputed.

The Commission, and not this court, determines the reasonableness or unreasonableness of the charges. The Commission has found the track storage charges unreasonable under the conditions as they are found to exist. We have no right to review that finding; but, if we had, we see no reason whatever for supposing that the finding was not justified in all respects.

The objections made by the defendant seem to us to be frivolous. The Commission's report contains all the facts, and they could not be stated plainer, if stated in separate paragraphs under the heading "Findings of Fact." To reverse the judgment and send the case back to the Commission to state the facts, which all appear in the record in a different form, would cause delay and unnecessary expense, and put the parties and the Commission to unnecessary trouble without any corresponding advantage to any one.

It was plainly the duty of the defendant to have complied with the orders made by the Commission, and to have paid to the complainants the moneys to which they were found to be entitled. Not having done so, the complainants had a right under the act to bring this action, and to obtain the judgment which has been rendered.

Judgment affirmed.

LEWIS et al. v. HOLMES et al. (two cases).

(Circuit Court of Appeals, Seventh Circuit. February 11, 1915. Rehearing Denied May 25, 1915.)

Nos. 2134, 2135.

1. EQUITY ⟸452—BILL OF REVIEW—TIME FOR FILING.

A decree that a defendant in his lifetime held property in the possession of a receiver in trust for a church and its members, that the trust estate was insolvent and unprofitable to hold, that it was for the best interests that a sale be had for distribution among those entitled to the proceeds, that defendant's title was such that he could not devise or bequeath it by will, that his interest had passed to the receiver by a conveyance made by defendant and a codefendant pursuant to an interlocutory order, that trustees under the will of defendant, since deceased, took nothing under the will as against the receiver and the trust beneficiaries, that the trustees should be enjoined from asserting any right in any of the property, and that the receiver should be authorized to sell the property, reserving questions of distribution, decides the rights and liabilities of the parties, and is final, so that neither it nor orders preceding it are subject to bills of review not filed within the time allowed for appeal from such decree.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 1101–1109;* Dec. Dig. ⟸452.]

2. JUDGMENT ⟸678—RES JUDICATA.

Where a final decree adjudged that a defendant had no interest in property, except to hold it in trust for beneficiaries, and that his interest had passed by a conveyance to a receiver pursuant to an interlocutory order, his successors were excluded by the decree from any interest, and so long as the decree stood the manner of its further execution could not be questioned by them.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1195–1199, 1221; Dec. Dig. ⟸678.]

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois; Julian W. Mack, Judge.

Bills of review by John A. Lewis and another, as executors of John Alexander Dowie, deceased, against William B. Holmes and others. From decrees dismissing the bills, complainants appeal. Affirmed.

These appeals are from decrees dismissing bills filed by complainants for the purpose of reviewing the proceedings in the suit of William B. Holmes v. John Alexander Dowie et al., 148 Fed. 634, commenced in the United States Circuit Court July 7, 1906. The cases, because of the substantial identity of controverted questions, were argued and will be disposed of together. The litigation and its relevant facts, forming the subject-matter of the bills of review now before us, are, in brief:

Holmes, on July 7, 1906, filed a bill against Dowie and others, charging, among other things, that he (complainant) had purchased "shares of stock" in the industrial and commercial enterprises particularly named; that Dowie and others had established a church known as the Christian Catholic Apostolic Church in Zion, wherein complainant was a member in good standing, and which (as well as said industries) was located at Zion City, Lake county, Ill.; that the industries were unincorporated, but were conducted in Dowie's name; that Dowie was acting as trustee for complainant and others similarly situated in respect of the church and the industries established as stated. Dowie was possessed of no considerable property other than that contributed

by the members of the voluntary church organization, and the contributions thus made were for the benefit of the church and its members, and in respect thereof he became the trustee, both for the members of the church and the stockholders and creditors of the industrial associations, except as to 5 per cent. thereof, which was bestowed upon him for his sole use and enjoyment. Reference is made to Dowie's will, wherein recognition is given to the status of the funds so contributed, and to his trust relationship thereto, excepting as to such 5 per cent. It was averred that, upon Dowie's failing health and his departure from Zion in 1905, he left the management of his affairs to others; that the industries had suffered enormous losses, and the indebtedness thereof, or of the trusts alleged to exist, aggregated about $5,000,000, against assets which, upon liquidation, would prove insufficient; that, during Dowie's absence Voliva (one of the defendants in the present bills), claiming to act on his behalf, conveyed to Alexander Granger (another defendant) the so-called Zion City property. In April, 1906, Dowie commenced suit to cancel the Voliva conveyance. In May following, Dowie having been adjudged bankrupt, the proceedings in the suit against Voliva were, by stipulation, carried into and consolidated with the bankruptcy proceedings. There were general allegations of wasting of the trust estate, and the bill prayed that the court take possession of and administer the industries and properties, and declare the existence of a trust estate therein in favor of the complainant and those associated with him, as against Dowie and Granger, and that new trustees be selected to the succession of the church property, and that a receiver be appointed, etc.

To the bill, thus filed by Holmes, Dowie answered, controverting the allegations respecting the existence or breach of any trust relation; the defendants Voliva and others admitted the allegations of the bill, and averred that Granger, who held the legal title, had executed a declaration of trust; and, at this stage of the case, the court, upon a hearing which, by stipulation, was had in the bankruptcy proceedings, appointed a receiver. The latter was directed to take possession of the properties, Dowie and Granger being ordered to convey the properties claimed by them; and this was done, not only without objection by any one, but apparently pursuant to agreement between the various parties in interest.

The present bills, after giving the substantive character of the proceeding, set out, as further subjects of proposed review, sundry orders and proceedings made and had therein, viz.: (1) An order directing the receiver to hold an election for the office of general overseer of the church, the holding thereof, and confirmation of its results. (2) An order made May 31, 1907, upon the receiver's petition, which order contains the adjudication and the directions to the receiver hereafter (in the opinion) referred to. (3) Sundry orders made in confirmation of the receiver's reported compliance with the directions contained in the last-mentioned order of May 31, 1907. (4) Sundry steps in the litigation respecting payments to various persons, transfers of property, reports of administration, and confirmation thereof from time to time by the court.

One of the bills of review was filed April 10, 1909; the other, on January 14, 1911. Demurrers or motions to dismiss, interposed in each case, were sustained on March 17, 1914, on the ground that the bills failed to show a final decree to have been entered in the Holmes suit at the time the bills of review were filed, but, in the original bills affected by the determination just noted, the order of May 31, 1907, was not included; and complainants asked and obtained leave to amend each bill by its inclusion as a subject of review, and the decree of dismissal in each case was made effective as to such amended bill. Thereupon these appeals were taken.

Morton S. Cressy, of Chicago, Ill., for appellant.

Eli B. Felsenthal and Nathan G. Moore, both of Chicago, Ill., for appellees.

Before BAKER and SEAMAN, Circuit Judges, and GEIGER, District Judge.

GEIGER, District Judge (after stating the facts as above). [1] The order or decree, entered May 31, 1907, in the Holmes suit, adjudged: (1) That Dowie in his lifetime acquired, and, when the Holmes bill was filed, held, the properties in the receiver's possession, in trust for the church and its members, as averred in the bill; (2) that the trust estate is insolvent, burdensome, and unprofitable to hold, and that its and the parties' best interests demand a sale or conversion into money for distribution among those entitled thereto; (3) that Dowie's title was such that he could not devise or bequeath it by will, and that his interest, such as it was, "was intercepted and passed to the receiver herein by virtue of the conveyance made by him and the said defendant Alexander Granger * * * pursuant to the interlocutory order entered herein July 27, 1906"; (4) that Lewis (and others, trustees under the will of Dowie, then deceased, and who are complainants in the bills of review) "took and take nothing thereunder [Dowie's will] as against" the receiver and the trust beneficiaries; (5) that Lewis and the others—trustees under Dowie's will—be "perpetually enjoined from asserting any right, title, or interest" in any of the property described in the bill or then in possession of the receiver; (6) that the receiver is authorized to sell all the property upon terms deemed for the best interests of the trust estate subject to confirmation, etc.; (7) that questions of distribution be reserved for further consideration.

This decree responds directly to the claims asserted by complainant in his bill, and controverted by Dowie and his codefendants in their answers. It decides the case by fixing the rights and liabilities of the parties, and determining their interest, or want of interest, in the trust estate respecting whose existence and administration the jurisdiction of the court was invoked—and it is final. Therefore as to such decree —as well as all orders preceding it—neither of the present bills of review was filed in time, and each is subject to dismissal on that ground.

[2] Manifestly, with respect to the proceedings taken after its entry, the reviewing complainants can have no concern, because, by its express terms, Dowie, their predecessor in interest and in the litigation, is adjudged not to have any interest in the subject-matter except as trustee, and that his interest, such as it was, had been surrendered by the conveyance referred to in the decree; hence his successors were likewise excluded by such decree from any interest. In other words, the decree is such that, so long as it stands, the manner of its further execution cannot be questioned by those who are excluded from having any interest in the property affected by it.

The decree in each case is affirmed.

MYERS v. MORGAN.

(Circuit Court of Appeals, Eighth Circuit. June 22, 1915.)

No. 4362.

1. CRIMINAL LAW ⟸1216—TRIAL—PUNISHMENT—JURISDICTION OF COURT.
Accused, under an indictment charging two offenses, was convicted of violating the Mann Act (Act June 25, 1910, c. 395, 36 Stat. 825 [Comp. St. 1913, §§ 8812–8819]), and sentenced to imprisonment for ten years. The maximum punishment provided in the act for one offense is five years. Nothing appeared to show that the offenses were continuous in their nature. *Held* that, under the circumstances, the court did not exceed its jurisdiction in sentencing petitioner for ten years, for one sentence may be imposed on a conviction for two or more offenses, where the sentence is not in excess of the maximum allowed by law for all of the offenses of which accused has been convicted.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3310–3319; Dec. Dig. ⟸1216.]

2. CRIMINAL LAW ⟸995—PUNISHMENT—SENTENCE—SUFFICIENCY.
Under Code of Law D. C. 1901, § 925, declaring that, whenever the punishment shall be imprisonment for more than one year, it shall be sufficient for the court to sentence defendant to imprisonment in the penitentiary without selecting the penitentiary, and the imprisonment shall be in such penitentiary as the Attorney General shall from time to time designate, a sentence which did not specify the penitentiary is warranted.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2518, 2521, 2523–2526, 2528½, 2530, 2536–2543; Dec. Dig. ⟸995.]

3. CRIMINAL LAW ⟸1178—APPEAL—WAIVER OF ERRORS.
A contention on appeal, unsupported by citation of authority or argument, oral or written, may be considered waived.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3011–3013; Dec. Dig. ⟸1178.]

Appeal from the District Court of the United States for the District of Kansas; John C. Pollock, Judge.

Petition by Edward E. Myers for a writ of habeas corpus against Thomas W. Morgan. From a judgment denying the writ, petitioner appeals. Affirmed.

Turner W. Bell, of Leavenworth, Kan., for appellant.

L. S. Harvey, Asst. U. S. Atty., of Kansas City, Kan. (Fred Robertson, U. S. Atty., and Francis M. Brady, Asst. U. S. Atty., both of Topeka, Kan., on the brief), for appellee.

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

TRIEBER, District Judge. This is a petition for a writ of habeas corpus to release the petitioner from imprisonment in the United States penitentiary at Leavenworth, Kan. The petition having been denied, this appeal is prosecuted.

[1] There are two grounds upon which the appellant relies: (1) That the sentence is beyond the maximum prescribed by the statute, and is therefore a nullity; (2) that the sentence of the court fails to specify the place of confinement.

The defendant was indicted in the Supreme Court for the District of Columbia for a violation of the Mann Act, commonly called the "White Slave Act." Act June 25, 1910, c. 395, 36 Stat. 825. There were two counts in the indictment, charging the defendant with having induced and coerced a woman named Rose M. Keefer to go from one place to another in interstate commerce; that is to say, from the city of York, in the state of Pennsylvania, to the city of Washington, in the District of Columbia, for the purpose of engaging in the practice of prostitution and debauchery in the said city of Washington. The same woman is referred to in both counts. Having been found guilty by the verdict of a jury on both counts, the sentence of the court was:

"That for his offense the said defendant be imprisoned in the penitentiary (as designated by the Attorney General of the United States) for the period of ten years, to take effect from and including this date."

The maximum punishment provided in the act for one offense is five years' confinement. In pursuance of the designation made by the Attorney General of the United States, the defendant was incarcerated in the United States penitentiary at Leavenworth, Kan. It is now claimed that, appellant having served the full period of the maximum punishment provided for one offense, less the commutation allowed by law for good behavior, he is now entitled to his discharge.

The principal case upon which counsel for appellant relies is In re Snow, 120 U. S. 274, 7 Sup. Ct. 556, 30 L. Ed. 658; but in our opinion that case is inapplicable to the issues in this case. The indictment there charged, in several counts, illegal cohabitation with more than one woman, in violation of section 3 of the act of Congress of March 22, 1882 (22 Stat. 31, c. 47), and it was held, as that was a continuing offense, the different counts only charged one offense, and for that reason the court was without jurisdiction to impose a punishment in excess of the maximum provided by the statute for one offense. The court there said:

"A distinction is laid down in adjudged cases, and by text-writers, between an offense continuous in its character, like the one at bar, and a case where the statute is aimed at an offense that can be committed uno actu." 120 U. S. 286, 7 Sup. Ct. 562 (30 L. Ed. 658).

See Ebeling v. Morgan, 237 U. S. 625, 35 Sup. Ct. 710, 59 L. Ed. —.

In the instant case the defendant was charged with, and convicted of, two separate offenses committed more than six months apart. So far as the record in this case shows, we are unable to know whether at the trial it was not shown that the woman, after having been taken to Washington the first time for the purpose of prostitution, did not escape from the house of prostitution, and then, six months later, was again transported by the defendant for the same purpose. The first count in the indictment charges the offense to have been committed in July, 1911, and the second count charges the offense to have been committed in January, 1912. As the record does not show the facts upon which he was convicted on the two counts, and this being a collateral proceeding, we are only concerned with the question whether the court which imposed the sentence on the petitioner had jurisdiction, and whether it acted in excess of its jurisdiction. The record shows that

the court had jurisdiction, and in our opinion the court did not act in excess of its jurisdiction in imposing a sentence of ten years in one judgment for two distinct offenses. That the court may impose one sentence on a conviction for two or more offenses, provided the sentence is not in excess of the maximum allowed by law for all the offenses of which the defendant has been found guilty, has been determined in Re Henry, 123 U. S. 372, 8 Sup. Ct. 142, 31 L. Ed. 174, In re De Bara, 179 U. S. 316, 321, 21 Sup. Ct. 110, 45 L. Ed. 207, Hyde v. United States, 198 Fed. 610, 119 C. C. A. 493, decided by this court, and Howard v. Moyer (D. C.) 206 Fed. 555.

In United States v. Peeke, 153 Fed. 166, 82 C. C. A. 340, a different conclusion was reached, but in view of the rulings in the cases above cited we are unable to follow that decision.

[2, 3] As to the second proposition, the appellant was tried under the Code of Law for the District of Columbia. Section 925 provides:

"Whenever the punishment shall be imprisonment for more than one year, it shall be sufficient for the court to sentence the defendant to imprisonment in the penitentiary without specifying the particular prison, and the imprisonment shall be in such penitentiary as the Attorney General shall from time to time designate."

On May 13, 1912, before the appellant was removed from the District of Columbia to a penitentiary, the Attorney General, by proper order, designated the United States penitentiary at Leavenworth, Kan., as the place of confinement of prisoners convicted in the District of Columbia whose sentences were for more than two years.

Counsel for petitioner fails to cite any authorities to the effect that this designation by the Attorney General is void for any reason. In fact, neither in his brief nor in the oral argument before us did he refer to that contention. We would therefore be justified in treating it as abandoned; but, in view of the fact that the liberty of a person is involved, we have carefully considered the question, and are of the opinion that the Attorney General was duly authorized to designate the prison where a defendant is sentenced in the courts of the District of Columbia to imprisonment exceeding one year, and that his designation in this case was in proper form.

The judgment is affirmed.

WM. A. ROGERS, Limited, v. NICHOLS et al.

(Circuit Court of Appeals, First Circuit. June 18, 1915.)

No. 1107.

1. TRADE-MARKS AND TRADE-NAMES ⇐90—INFRINGEMENT—ACTIONS—JURISDICTION.

Personal liability of officers of a corporation for damages for infringement of a trade-mark is not enforceable in equity as a sole and single ground of equitable relief.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 100; Dec. Dig. ⇐90.]

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

2. TRADE-MARKS AND TRADE-NAMES ⊂=91—INFRINGEMENT—PARTIES.
In a suit against the officers of a corporation to restrain them from infringing a trade-mark and for damages, the corporation alleged by complaint to have been formed in pursuance of a conspiracy by the officers is an indispensable party, since the ordinary right of corporate trade through officers may not be restrained through injunction on that ground, without giving the corporation an opportunity to be heard.
[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 101; Dec. Dig. ⊂=91.]

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

Suit by William A. Rogers, Limited, against John J. Nichols and another, for an injunction to restrain defendants from infringing a trade-mark and for damages. From a decree denying relief, complainant appeals. Affirmed.

H. S. Duell, of New York City (Charles H. Duell and Frederick P. Warfield, both of New York City, and George P. Dike, of Boston, Mass., on the brief), for appellant.

George A. Rockwell, of Boston, Mass., for appellees.

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

ALDRICH, District Judge. The complainant, Wm. A. Rogers, Limited, is a corporation organized under the laws of the province of Ontario, in the dominion of Canada, having its principal place of business at Toronto, and having offices and places of business and manufacturing establishments at Niagara Falls, in New York, and Northampton, in Massachusetts.

The defendants herein, John J. Nichols and William E. McIsaac, are citizens of Massachusetts, and, according to the bill of complaint, are officers and directors in the H. O. Rogers Silver Company, a corporation organized under the laws of the state of Rhode Island, and the corporation of which they are officers is not a party. The relief sought is for an injunction or restraining order against the defendants and damages.

The bill was dismissed upon the ground that the corporation was an indispensable party. Manifestly an injunction against agents of a corporation operating under the right of trade in different states would affect the interests of the corporation, and its interests being thus involved, the corporation would be entitled to be heard, and that being so, it is an indispensable party.

[1, 2] While the cases are numerous in which directors of corporations have been held personally liable for damages in actions of law for acts of infringement, we do not understand that such personal liability is one enforceable in equity as a sole and single ground of equitable relief. It is quite likely, if a situation were presented in which an injunction were admissible, that, as an incident of such familiar equitable relief, damages would be ascertained and established. But an injunction ought not to be issued in the case before us,

because restraint upon the officers of the corporation would directly affect the corporate right of trade, and an invasion of such a right of trade, through injunction, ought not to be made without hearing the corporation.

There are exceptional cases in which officers of corporations have been restrained in instances where the corporation was not a party, but we do not think they apply to the situation here.

Judge Dodge points out in his opinion that the distributive ownership of the stock is not made clear by the bill, and in effect that the acts complained of are stated to be the acts of the corporation, and that there is no apt allegation that the defendants were personally doing the things complained of.

While we do not question the correctness of this interpretation of the allegations of the bill, we think the stronger ground is that the complainant, the Wm. A. Rogers corporation, alleges in effect that the H. O. Rogers Rhode Island corporation, of which the defendants are officers, is a fictitious one, and in effect that the state of Rhode Island corporation was created through conspiracy. To be more exact, the bill alleges:

"That in furtherance of said conspiracy (a conspiracy which the bill had previously set out in detail) said Nichols and said McIsaac thereupon caused to be incorporated under the laws of Rhode Island the H. O. Rogers Silver Company."

This allegation is followed by a further description of the character of the conspiracy complained of.

According to our view, for purposes of injunction, the bill puts in issue the question whether the Rhode Island corporation is fraudulent and fictitious, and thus the issue tendered presents a vital question, upon which the corporation, which was brought into existence under the forms of state law, is entitled to be heard, and under such circumstances we think the corporation is an indispensable party. As to what the appropriate remedy would be for trying a question whether corporate authority was obtained through fraud and conspiracy, we make no suggestion; but we think it perfectly clear that the ordinary right of corporate trade, through agents and officers, should not be restricted through injunction, upon that ground, without giving the corporation an opportunity to be heard in some appropriate proceeding.

The suggestion has been made that, if this proceeding is not sustained, the result will be a practical denial of justice. Quite likely that question is not before us, but it seems obvious that a proceeding in Rhode Island against the corporation, its officers and directors, would give the complainant such relief as it is entitled to.

The decree of the District Court is affirmed, with costs of this court.

ANDREWS et al. v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. July 12, 1915.)

No. 2508.

1. CRIMINAL LAW ⊂⊃1149—APPEAL—REVIEW—DISCRETIONARY MATTERS.
The trial court, in ruling upon an application by the defendants in a criminal case for permission to withdraw their plea of not guilty for the purpose of demurring to the indictment, exercises a discretion, and its ruling is not reviewable.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3039–3043, 3058; Dec. Dig. ⊂⊃1149.]

2. CRIMINAL LAW ⊂⊃901—MOTION FOR DIRECTED VERDICT—WAIVER.
A motion at the close of the government's testimony that the jury be instructed to acquit defendants on the ground that the prosecution had not made a prima facie case was waived by defendants by thereafter introducing testimony in their defense.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2124; Dec. Dig. ⊂⊃901.]

3. CRIMINAL LAW ⊂⊃1156—APPEAL—REVIEW—MOTION FOR NEW TRIAL.
The denial of a new trial in a criminal case is not assignable as error, though affidavits of newly discovered evidence are filed in support of the motion for a new trial.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3067–3071; Dec. Dig. ⊂⊃1156.]

4. CRIMINAL LAW ⊂⊃1147—APPEAL—REVIEW—MOTION IN ARREST OF JUDGMENT.
A motion in arrest of judgment has no more effect than a motion for a new trial, and cannot be reviewed on a writ of error.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3038, 3072, 3073; Dec. Dig. ⊂⊃1147.]

5. CRIMINAL LAW ⊂⊃1056—APPEAL—RESERVATION OF GROUNDS OF REVIEW—EXCEPTIONS.
Alleged error in an instruction will not be reviewed, where no exception is taken.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2668, 2670; Dec. Dig. ⊂⊃1056.]

In Error to the District Court of the United States for the First Division of the Northern District of California; Maurice T. Dooling, Judge.

Thomas Andrews, alias Thomas J. Murphy, and others, were convicted of conspiring to commit a crime against the United States, and they bring error. Affirmed.

Wm. F. Rose and Bruce Glidden, both of San Francisco, Cal., for plaintiffs in error.

John W. Preston, U. S. Atty., of San Francisco, Cal.

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

GILBERT, Circuit Judge. The plaintiffs in error were convicted and sentenced upon two counts of an indictment, the first of which charged them with conspiring to commit a crime against the United

States by importing opium from Mexico into the United States, and the second charged them with conspiring together for the purpose of unlawfully transporting and concealing contraband opium theretofore unlawfully brought into the United States from Mexico.

[1] There are five assignments of error, the first of which is that the trial court erred in overruling the motion of the plaintiffs in error, made prior to the trial, for permission to withdraw their pleas of not guilty for the purpose of interposing a demurrer to the indictment. In ruling upon that motion, the court exercised a discretion which was vested in it, and its ruling is not reviewable here. 12 Cyc. 896; United States v. London (D. C.) 176 Fed. 976; United States v. Lewis (D. C.) 192 Fed. 633.

[2] Error is assigned to the denial of the motion of plaintiffs in error, which it is said "was made at the close of the case," for an instruction to the jury to acquit the plaintiffs in error, and to the refusal to permit counsel to argue the motion. The record shows, however, that no such motion was made at the close of the case. The motion was made, at the close of the testimony for the government, that the jury be instructed to acquit the plaintiffs in error, for the reason that the prosecution had not established a prima facie case. That motion was waived by the act of the plaintiffs in error in thereafter introducing testimony in their defense. Notwithstanding the failure of the plaintiffs in error to request such instruction at the close of all the testimony, we have examined the testimony, and are convinced that it fully sustains the verdict.

[3] The ruling of the court below in denying the motion of the plaintiffs in error for a new trial is not assignable as error. Pickett v. United States, 216 U. S. 456, 30 Sup. Ct. 265, 54 L. Ed. 566. The fact that affidavits of newly discovered evidence were filed in support of the motion creates no exception to the thoroughly established rule. Holmgren v. United States, 156 Fed. 439, 84 C. C. A. 301, affirmed in Holmgren v. United States, 217 U. S. 509, 30 Sup. Ct. 588, 54 L. Ed. 861, 19 Ann. Cas. 778; Mitchell v. United States, 196 Fed. 874, 116 C. C. A. 436.

[4] Error is assigned to the denial of the motion of plaintiffs in error in arrest of judgment. In Street Railroad Co. v. Hart, 114 U. S. 654, 5 Sup. Ct. 1127, 29 L. Ed. 226, the court said that such a motion "had no more effect than a motion for a new trial, and therefore, under our settled practice, cannot be reviewed here on this writ of error."

[5] Error is assigned to a portion of the charge in which the court quoted to the jury the provisions of Act Feb. 9, 1909, c. 100, 35 Stat. 614 (Comp. St. 1913, §§ 8800, 8801), which makes it unlawful to import into the United States opium in any form. It is not shown how the instruction could possibly have prejudiced the rights of the plaintiffs in error; but it is unnecessary to discuss the question, for the reason that no exception was taken to that or any other portion of the instruction.

We find no error. The judgment is affirmed.

UNITED STATES v. QUAN WAH.

(Circuit Court of Appeals, Second Circuit. June 8, 1915.)

No. 246.

1. ALIENS ⟸32—CHINESE—DEPORTATION PROCEEDINGS—BURDEN OF PROOF.
In proceedings to deport a Chinese unlawfully in the United States, the burden of showing the right to remain within the United States is on him.
[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 84, 92–95; Dec. Dig. ⟸32.]

2. ALIENS ⟸32—DEPORTATION OF CHINESE—EVIDENCE—SUFFICIENCY.
Evidence *held* to show that a Chinese had no right to remain in the United States, and could be deported.
[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 84, 92–95; Dec. Dig. ⟸32.]

3. ALIENS ⟸28—CHINESE—RIGHT TO REMAIN IN UNITED STATES—MERCHANTS.
An adult merchant in China may himself apply for papers which may insure his entry into the United States under the treaty with China; but his father, in the United States as a merchant, may not send to him in China a paper which will secure his admission.
[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 88–90; Dec. Dig. ⟸28.
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, reversing an order of deportation made by the United States commissioner.

Melville J. France, U. S. Atty., of Brooklyn, N. Y.
James A. Donegan, of New York City, for appellee.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

LACOMBE, Circuit Judge. The defendant is a Chinese person, who was found by the inspector in a laundry, in Marion street, Brooklyn; he was cooking in the back part of the laundry. He was examined by the inspector, through the government interpreter, the examination being reported by the stenographer, and told the following story:

He was 26 years old; born in China; married there at 23, his wife and a child born after he left China being still there. He came to this country about 2½ years before his arrest on April 22, 1913. He was farming in China just before he left there; was a farmer when he was a boy, but when old enough went into business in Sum Woey. His father came here before he did, and when Quan Wah reached New York his father was a laundryman on Mott street, where defendant saw him working on his arrival. This statement he made in response to several questions; said he was positive about it. His father did not live long after defendant came here; he died in New York but defendant did not know where he was buried. Quan Wah came here via Vancouver. Asked how he entered, he said he had a "merchant paper

of a laundry." Elsewhere he said that his father gave it to him after he entered the United States. Upon his testimony being read to him, he corrected this last statement, saying that his father gave it to his older brother, who gave it to himself, before the brother went back to China, where he died. When Quan Wah arrived here, this older brother was doing laundry work in Brooklyn. He (defendant) had been a laborer ever since he entered the United States. Interrogated as to the whereabouts of this so-called "merchant paper," he said that it might be in the store of the Sam Woh Company on Pell street, New York, in the trunk of a cousin of his who was working somewhere else, he did not know where.

The story he told before the commissioner was in some material respects quite different. In substance it was this:

When arrested he was on a visit to the Marion street laundry; had been there two days only, and was cooking a meal; had never done any laundry work. He had lived in Hartford for three years, where he was a merchant, connected with the firm of "Wing Lee Company," in which he had an interest of $1,000. He had been a merchant in Sun Woey, in the grocery business, having an interest of $1,500, which he sold for $1,400 before starting for the United States. His father was a merchant in Hartford, 124 State street, a member of the Wing Lee Company. After defendant arrived, his father turned over his interest in the firm to defendant, went back to China, and died there. He had a "merchant's paper" when he came to Vancouver, which his father had sent to him; when he received this paper his father was in Hartford. Upon receiving the paper, defendant went to Canton, when the United States consul examined him and indorsed the paper, defendant also putting his signature on it. There was no Chinese writing on the paper, but it had a photograph attached. This paper which the consul indorsed was lost in a fire at No. 12 Pell street, a short time after he arrived here.

No other witness was examined, except the inspector and the interpreter. Upon this testimony the commissioner ordered deportation. Manifestly this testimony was conflicting in several essential particulars. Moreover, important parts of it, if true, could have been readily corroborated; but no witness was called to show that his father as recently as three or four years before had been a merchant in Hartford, or that defendant himself had been a merchant there for three years.

[1, 2] This case came before the District Judge with three others, no additional testimony being taken in Quan Wah's case. The judge wrote an opinion covering all of them. It is quite evident that Judge Chatfield found this unpersuasive testimony sufficient to call for a reversal of the commissioner's decision, because he held that a Chinese person did not have the burden of showing his right to remain in this country, and that it was for the government to show affirmatively that he was not a merchant, nor a merchant's son, and that he never had a statutory certificate. Since we construe the statute differently, and have held (U. S. v. Hom Lim, 223 Fed. 520, —— C. C. A. ——), that the burden of showing his right to remain is on the Chinese person, we reach a different conclusion upon the same proof.

[3] Moreover, we do not find anything in the statute or the regulations which provides for the sort of "merchant paper" that defendant says he had. Even if his father were a merchant here, defendant was not a minor son when he left China; he was 23 years of age. We know of no paper his father could have sent from here which would secure his admission. If defendant were, as he says, a merchant in China, he could himself apply there for papers, which might insure his entry under the treaty. Such papers have been produced before us in other cases, and they always contain some writing in Chinese.

The order of the District Court is reversed.

TAM SHI YAN v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. June 22, 1915.)

No. 320.

1. CRIMINAL LAW ⟸1159—APPEAL—REVIEW—VERDICT AGAINST WEIGHT OF EVIDENCE.

An assignment of error by one convicted of crime that the verdict was against the weight of the evidence presents no question for review by the circuit court of appeals.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074–3083; Dec. Dig. ⟸1159.]

2. CRIMINAL LAW ⟸442—EVIDENCE—LETTER—IDENTIFICATION OF HANDWRITING.

In a prosecution of a Chinese for manufacturing smoking opium without a bond, a letter found in defendant's pocket, written in Chinese, but which had never been signed or sent, and which he denied having written, is admissible, where two genuine signatures of accused were admitted without objection for the purpose of comparison, and a witness familiar with Chinese had testified that the letter in question was in the same handwriting as the signatures on the others, giving his reasons for his belief.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1027; Dec. Dig. ⟸442.]

3. POISONS ⟸9—WITNESSES ⟸405—EVIDENCE—ADMISSIONS.

In a prosecution for manufacturing smoking opium without bond, the fact that defendant smoked opium is not a collateral matter as to which his reply is binding on the prosecution, but is relevant, and a written statement by him that he had been unable to give up smoking is admissible after he denied that he smoked.

[Ed. Note.—For other cases, see Poisons, Cent. Dig. § 6; Dec. Dig. ⟸9; Witnesses, Cent. Dig. §§ 1273, 1275; Dec. Dig. ⟸405.]

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 convicting defendant of violation of the statute forbidding the manufacture of smoking opium without having filed a bond.

R. M. Moore, of New York City, for plaintiff in error.

R. B. Wood, Asst. U. S. Atty., of New York City.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge. [1] The third assignment of error asserts that the verdict was against the weight of evidence; this raises no question in this court. The other two assignments are of the most general character; the first asserting that the government introduced improper evidence, and the second that certain pertinent evidence offered by defendants was rejected. There is no statement as to what any of this testimony—the admitted or the rejected—is, and since neither side has filed a brief we have no specification as to what the asserted errors are. The charge was full and fair, and no exception was taken to any part of it.

[2] Upon the argument reliance was had on an exception to the admission in evidence of part of a letter, written in Chinese, but neither signed nor sent. It was contended by the government that it had been written by defendant; he denied that it was in his handwriting. Two other documents, the signatures to which he admitted were in his handwriting, were submitted to the jury with the disputed writing for purposes of comparison. This was not objected to, nor was the instruction of the court that they might examine the handwriting themselves and reach a determination. One of the government witnesses (not a Chinese person), who had been educated in China and was familiar with Chinese, testified upon examination of the three documents that in his opinion the one offered by the government was written by the same hand which signed the other. He gave his reasons for reaching this conclusion. The jury were expressly cautioned that his evidence was of an advisory nature only, and was to be weighed by them with all other evidence, including the document to be compared. We find no error in this.

[3] The unsigned letter was found in defendant's pocket. It was apparently written to some friend, who had urged him to cease smoking opium, and contained the sentence: "I have tried to break myself of the habit of smoking opium, but cannot." Upon cross-examination of the defendant, counsel for the government asked him if he ever smoked opium, to which he answered in the negative. Objection was therefore raised to the introduction of the statement in the letter above quoted, on the ground that the smoking of opium by defendant was a collateral matter; that, having asked the defendant if he did smoke, counsel for the government was bound by his answer, and could not contradict such answer, by introduction of the letter, or in any other way. We do not think the matter inquired about was a collateral matter. An opium smoker can easily make his own mixture from crude opium or yen shee. It is a relevant circumstance, if it can be shown, that a man, in whose possession appropriate materials and utensils are found, is himself a smoker, and therefore under a temptation to supply himself with smoking opium.

The judgment is affirmed.

MILLER v. SIRE et al. (two cases).

(Circuit Court of Appeals, Second Circuit. June 22, 1915.)

Nos. 312, 313.

FRAUDS, STATUTE OF ⊂=139—CONTRACT COMPLETELY PERFORMED—RIGHTS OF CREDITORS.

The New York statute of frauds (Consol. Laws, c. 41, § 31), making void an oral promise in consideration of marriage, does not invalidate as against creditors a transfer of a mortgage made just before the marriage in fulfillment of an oral promise for such transfer in consideration of the marriage, where the transferee did not participate in any intent to defraud the creditors of the transferror.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 334–341; Dec. Dig. ⊂=139.]

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

This cause comes here upon two appeals, both prosecuted by Lilian R. Sire. The main appeal is from a decree of the District Court, Southern District of New York. The other appeal is from an order of the judge who tried the cause denying a motion by defendant Lilian R. Sire to open a so-called default, on the ground that she had not sufficient opportunity to present her side of the main controversy at the trial.

Edward M. Grout and Paul Grout, both of New York City (Edward M. Grout, F. Sidney Williams, and Charles B. La Voe, of counsel), all of New York City, for appellant.

True P. Pierce, of New York City (William Hughes and W. H. K. Davey, of New York City, of counsel), for appellees.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge. The main appeal may be first considered. Miller is the trustee in bankruptcy of Clarence D. Sire. The bill of complaint is not found in the record, which contains only what some one has decided to be the "essential portions of the bill." This is bad practice; it is for this court, when appeal is taken, to determine what parts of the bill are essential. However, there is enough in the record to show that Clarence D. Sire filed a petition in bankruptcy some time in 1913, and was adjudicated a bankrupt on August 7th of that year. Miller was appointed trustee, on what date the record does not disclose. He brought this suit (when the record does not disclose) to set aside a conveyance by the bankrupt to the codefendant on the ground that it was made with intent to hinder, delay, and defraud creditors. The bill further alleges that the codefendant conspired with him and was party to the fraud. This conveyance, the validity of which was challenged, and which the court held void, undertook to convey a certain mortgage which defendant then owned. It was executed on or about December 3, 1910.

The circumstances attending the conveyance are these: Clarence Sire was soliciting Lilian D. Silverberg to marry him. She declined

to do so unless he would agree to settle some property upon her. He agreed with her orally that he would assign this mortgage to her, and on December 3, 1910, he did execute the assignment, and on the same day she married him. For aught that appeared, transfer and marriage were substantially simultaneous, although possibly it is the fact that upon receiving the assignment Miss Silverberg at once married the bankrupt.

The sole reliance of complainant, so far as the record discloses, was on the statute of frauds of the state of New York; certainly it was on that ground that the court decided the cause. The testimony does not show any conspiracy; Miss Silverberg apparently doubted Sire's financial condition, and would not marry him until he turned over to her property to an amount which she thought was sufficient. This circumstance does not establish any participation on her part in a conspiracy to hinder, delay, or defraud his creditors.

The New York statute of frauds (section 31, c. 45, Laws 1909 [Consol. Laws, c. 41]) provides:

"Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking * * * is made in consideration of marriage, except mutual promises to marry."

As we understand this statute and the decisions under it, it provides that, in the specified cases, a party to an alleged contract cannot enforce its execution if it be oral only. When, however, the oral contract has been fully carried out according to its terms, it is an accomplished fact, and the statute of frauds no longer cuts any figure in the transaction. That such is the view of the state courts seems manifest from the many authorities which hold that the statute of frauds is a *defense,* which to be availed of must be pleaded. When the statute says the oral contract is *void,* it seems void between the parties to it. When the parties carry it out *fully,* it ceases to be void, just as, under the statute, it ceases to be void when *part* consideration is paid. We fail to see how this statute designed merely to protect the parties to the oral contract affects third parties.

If Sire had *sold* his mortgage to an innocent third person for a cash sum, not so small as to furnish persuasive evidence that the purchaser was not innocent, the sale would have been good against existing creditors. Marriage is surely a valuable consideration, and when the transfer is made before marriage—indeed, in this case, on the day of marriage—in exchange for the consideration then fully paid, we cannot see any difference between such a transaction and a cash sale. We do not find sufficient evidence to show such knowledge on the part of Miss Silverberg as would indicate participation in a fraud on creditors.

Referring to the New York cases cited on the briefs, we have not here a conveyance to a *wife,* in compliance with some alleged oral agreement made *before marriage.* We have a conveyance made to an unmarried woman, upon receipt of which she pays the consideration she agreed to give for it; i. e., marries the man who has already transferred the property. If, having received the transfer, she had refused

to marry him—i. e., to pay the consideration—he could have recovered the property.

Inasmuch as the record is quite imperfect, and the trial was inartificially conducted by reason of the refusal of the gentleman Mrs. Sire asked to represent her to proceed, his other engagements preventing him, we think the ends of justice will be best served by reversing the decree, opening the default, and so insuring a new trial, when additional testimony may possibly alter the situation.

SHEA et al. v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. June 12, 1915.)

1. COURTS ⊜405—APPELLATE PROCEDURE—CITATION—RETURN—EXTENSION OF TIME.

Though Circuit Court of Appeals rules for the Sixth Circuit, rule 18, subd. 2 (202 Fed. xii, 118 C. C. A. xiv), authorizing the judge to sign the citation on writ of error, or any judge of the Circuit Court of Appeals to enlarge the time for return of citation at or before the expiration of such time, does not authorize such judges to extend the time after the return day, the court itself may grant such extension at any time during the term to which the citation was made returnable.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1097–1099, 1101, 1103; Dec. Dig. ⊜405.]

2. COURTS ⊜405—CITATION—RETURN—EXTENSION OF TIME.

Where plaintiffs in error secured an extension of time within which to present their bill of exceptions, but neglected to have the return day for the citation extended, and some of the assignments of error were proper, and the time for taking out a writ of error had not yet expired, so that a new writ could be taken, the writ of error will not be dismissed, but the time for return of the citation will be extended.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1097–1099, 1101, 1103; Dec. Dig. ⊜405.]

John J. Shea and others were convicted of a crime, and they bring error. On motion of the United States to docket and dismiss the case, and petition of plaintiffs in error for an order enlarging the time for return of citation. Motion denied, and petition for order granted.

Webster, Kirtley & Conolly, of Toledo, Ohio, for plaintiff in error.
E. S. Wertz, of Cleveland, Ohio, U. S. Atty.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

PER CURIAM. Plaintiffs in error were convicted in the District Court for the Northern District of Ohio, January 29, 1915, and sentences of fine and imprisonment imposed. On March 27, 1915, writ of error and citation were issued, returnable April 26, 1915. On April 24th, two days before the return day, the District Judge made an order extending the time for preparing and filing bill of exceptions until May 30th. No extension of time for return has ever been made, and return has not been filed in this court. After the return day was past, application made to the District Judge for an extension of time for

return of citation was refused, on the ground that he had no authority to make it. On May 14th the United States moved to docket and dismiss the case, and on the same day plaintiffs in error filed a petition for the docketing of the cause and for order enlarging the time for return of citation until May 30th.

[1] Subdivision 2 of our rule No. 18 (202 Fed. xii, 118 C. C. A. xiv) provides that for good cause shown the judge who signed the citation, or any judge of this court, may enlarge the time for return "at or before its expiration, the order of enlargement to be returned with the record and filed with the clerk of this court." Assuming that the District Judge had no authority to extend the time for return after it had once passed (Chamberlain Transp. Co. v. South Pier Coal Co. [C. C. A. 7] 126 Fed. 165, 61 C. C. A. 109), and that a judge of this court is equally without such power, it is nevertheless clear that the court itself to which the writ is returnable has the power to extend the time for return at any time during the term to which the writ is made returnable. Evans v. State Bank, 134 U. S. 330, 331, 10 Sup. Ct. 493, 33 L. Ed. 917; Green v. Elbert, 137 U. S. 615, 11 Sup. Ct. 188, 34 L. Ed. 792; Gould v. United States (C. C. A. 8) 205 Fed. 883, 126 C. C. A. 1; Pender v. Brown (C. C. A. 4) 120 Fed. 496, 56 C. C. A. 646. The term to which the writ was made returnable has not yet passed.

[2] Having jurisdiction to extend the time for return, we should exercise it; for it is clear that the failure to procure an extension of time before the return day was an oversight, and while some of the assignments of error are imperfect, all are not so, and, moreover, this court has jurisdiction to allow necessary amendments. Additional reason for extending the return day is found in the fact that the time for taking out writ of error has not yet expired, and, whether or not the first writ was dismissed, a second writ could be taken. Evans v. State Bank, supra; Chamberlain Transp. Co. v. South Pier Coal Co., supra; Gould v. United States, supra.

The application to docket and dismiss is denied, and the time for returning writ of error and citation and for docketing the cause in this court is extended until June 30, 1915.

BARRETT v. O'BRIEN (two cases).

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

Nos. 2058, 2059.

TAXATION ⇐378—ASSESSMENT—CORPORATIONS—STATUTE.

Laws Ind. 1893, c. 170, § 7, requiring the state tax commissioners, in assessing an express company, to ascertain the true cash value of the entire property owned by the corporation, for that purpose taking the aggregate value of all its shares of capital stock in case such shares have a market value, and in case they have none taking the actual value thereof, does not require the commissioners to be governed by the market value of a few shares of the stock, and where there is a market value for all

the stock not as a single lot but in the aggregate cannot be found, its actual value may be resorted to.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 626–628, 632; Dec. Dig. ⇐378.]

Appeal from the District Court of the United States for the District of Indiana; Albert B. Anderson, Judge.

Separate suits for injunction by William M. Barrett, president of the Adams Express Company, against William H. O'Brien, Auditor of the State of Indiana. Decrees for defendant, and complainant appeals. Affirmed.

Joseph S. Graydon, of Cincinnati, Ohio, for appellant.

Richard M. Milburne, of Jasper, Ind., and James E. McCullough, of Indianapolis, Ind., for appellee.

Before SEAMAN, KOHLSAAT, and MACK, Circuit Judges.

MACK, Circuit Judge. Appellant, in the two cases, sought to enjoin the enforcement of the alleged excessive amount of taxes levied against it for the years 1909 and 1910, respectively, on the ground that the state board of commissioners of Indiana acted illegally in determining the true cash value of appellant's property, in that it failed to ascertain whether or not the shares had a market value before finding their actual value.

Section 7 of the act of March 6, 1893, regulating the assessment of express and certain other companies, whether incorporated or not, reads in part as follows:

"Said state board of tax commissioners shall first ascertain the true cash value of the entire property owned by said * * * company; * * * from said statements or otherwise, for that purpose taking the aggregate value of all the shares of capital stock, in case said shares have a market value, and in case they have none, taking the actual value thereof."

No question of fraud or discrimination is raised; the sole basis of the attack is appellant's contention that under section 7, "if there is a market value for any of the shares of such company on the 1st of March, the board is required to take the aggregate of all the shares, that is, to multiply the value per share of such shares as have a market value by the total number of shares"; that the board made no inquiry as to whether there was such a market value, but investigated only as to whether or not there was a market value of all the shares; that in fact there was a market value for some shares, and if the calculation had been based thereon, the resulting true cash value of the company's property would have been much less than the amount found by the board to be the actual value of all the stock.

In our judgment, however, appellant's contention as to the interpretation of section 7 is not to be supported. The investigation into market values was for the purpose of finding the "true cash value," not of shares owned by and to be assessed against individuals, but "of the entire property owned by the company," represented in this case by 120,000 shares. The inquiry to be made is not whether on or about

March 1st a single share or a 100-share lot was bid, offered, or sold, and at what price, on the New York Stock Exchange, and, on the other hand, not whether a purchaser could have been found for the entire 120,000 shares offered in a single lot, but whether, at that time, all of the shares of the company in the aggregate had a market value.

This inquiry the board made; it ascertained the total sales of this stock on the New York Stock Exchange where it was listed (in each of the years ending March 1, 1909, and 1910, less than 610 shares), the prices at which they had been sold, the bid and asked prices during this period, and the days on which bid and asked quotations were made. The investigation showed that there was a market price on some days, other than March 1st, however, for some small part of the stock; the board determined that there was no market value for all the shares in the aggregate. As counsel for appellant, in a letter presented to the state board five years before, very aptly said:

"Calculations based on sales of a few shares of stock are misleading and the result is artificial. I suppose that hardly 1,000 shares of Adams were sold last year; that does not mean a market price for 120,000 shares."

As we concur fully in the board's conclusion, it is unnecessary to decide whether its action in this respect, even if erroneous, would be a proper subject-matter for judicial review.

Decree affirmed.

NOTE.—Judge SEAMAN concurred in the decision for the reasons stated in the foregoing opinion. He did not, however, read the opinion.

RYAN v. MT. VERNON NAT. BANK et al.

(Circuit Court of Appeals, Second Circuit. June 22, 1915.)

No. 268.

1. BANKS AND BANKING ⟸248—STOCKHOLDER'S LIABILITY—FRAUD IN SALE OF STOCK.

One who bought stock in a national bank from an officer thereof cannot, after the failure of the bank, avoid his liability for the assessment on such stock for the benefit of the bank's creditors because the bank officer fraudulently misrepresented the financial condition of the bank at the time the stock was bought.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 913–915, 919–931; Dec. Dig. ⟸248.

Liability of transferrors and transferees of corporate stock for assessments, see note to Campbell v. American Alkili Co., 61 C. C. A. 322.]

2. BANKS AND BANKING ⟸243—SALE OF STOCK—FRAUD—EVIDENCE.

In a suit to cancel a purchase of national bank stock belonging to an officer of the bank, evidence *held* not to show that the officer represented that the stock was treasury stock.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 904–908; Dec. Dig. ⟸243.]

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

This cause comes here upon appeal from a decree dismissing a bill in equity. The cause was before us on appeal from a decree sustaining demurrer; the averments of the bill are quite fully set forth in our opinion, which will be found in 206 Fed. 452, 124 C. C. A. 358.

John C. Wait, of New York City (Charles A. Winter, of New York City, of counsel), for appellant.

Barber, Watson & Gibboney, of New York City (Stuart G. Gibboney and George M. Burditt, both of New York City, of counsel), for appellees.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

LACOMBE, Circuit Judge. The relief prayed for is as follows:

First. That a certificate owned by complainant purporting to represent 50 shares of the stock of the Mt. Vernon National Bank be canceled and declared null and void.

Second. That all proceedings in an action at law by the receiver of the bank to recover Ryan's proportion of an assessment levied on the stockholders be stayed and a bond canceled.

Third. That complainant may have judgment against the bank for $6,075.

Fourth. That complainant may have such general relief as may seem proper.

The application for relief is based upon alleged false representations made by Jennings, the vice president of the bank, which Ryan says induced him to become a stockholder. In May, 1908, he bought these 50 shares at $121.50 a share; they were transferred to his name on the books of the bank, and from time to time he received dividend checks, which he cashed, and blank proxies to vote at stockholders' meetings, which he signed and returned. The bank suspended business in March, 1911, a receiver was appointed in April, 1911, and on September 11, 1911, an assessment of $100 per share was levied upon its stockholders. An action was begun by the receiver on February 13, 1912, to recover his share of this assessment from Ryan.

[1] The question reserved by the Supreme Court in Lantry v. Wallace, 182 U. S. 549, 21 Sup. Ct. 878, 45 L. Ed. 1218, and by this court on former appeal in this cause, 206 Fed. 452, 124 C. C. A. 358, is now presented again. In our opinion, plaintiff is not entitled to the relief prayed for against the receiver. The creditors are entitled to have the statutory liability, which, for their security, the National Bank Act has imposed upon stockholders, enforced against all persons who were stockholders when the bank failed. At that date Ryan was a stockholder de jure and de facto of the Mt. Vernon Bank; indeed, he is so still. Whatever remedy he might have against Jennings for alleged false representations, or against the bank itself on any theory that it was responsible for the misrepresentations of its officer, he certainly can have no relief which would operate to annul or impair the rights of the creditors of the bank to have the assessment upon his 50 shares collected from him.

[2] As to the other part of the controversy, we find no satisfactory proof of any false representations by Jennings as to the financial con-

dition of the bank. Undoubtedly the 50 shares sold to Ryan belonged to Jennings; they were not treasury stock. Apparently, also, complainant supposed he was getting treasury stock; but as to any representation that it was treasury stock the evidence is not persuasive. Ryan testified that Jennings told him: "I would like to sell 50 shares of stock that the bank has got." Jennings testified: "I am positive I did not tell him [Ryan] that it was the stock of the bank. I can go still further and say I did not intimate it." Judge Rose, who saw and heard both witnesses, reached the conclusion that it was not proved "that Jennings told the complainant the stock belonged to the bank, although doubtless he was careful not to say anything to suggest to Ryan that it belonged to him." In that conclusion we concur.

Decree affirmed, with costs.

LEE DOCK et al. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. June 8, 1915.)

1. CRIMINAL LAW ⊂⊃622, 1148—SEPARATE TRIALS FOR DEFENDANTS JOINTLY INDICTED—DISCRETION OF TRIAL COURT.
   Refusal to grant defendants, jointly indicted, separate trials, is within the trial court's discretion, and will not be disturbed, in the absence of abuse of discretion.
   [Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1380–1383, 1385, 1386, 1388–1390, 3050–3052; Dec. Dig. ⊂⊃622, 1148.]

2. CRIMINAL LAW ⊂⊃1159—EVIDENCE—SUFFICIENCY.
   Where there was evidence, if believed, to justify a conviction, the court on appeal will not disturb a verdict of guilty.
   [Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074–3083; Dec. Dig. ⊂⊃1159.]

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

On writ of error to the United States District Court for the Eastern District of New York to review a judgment entered upon the verdict of a jury finding the defendants guilty under an indictment containing two counts, the first charging the defendants with manufacturing opium, not being citizens of the United States, and the second charging them with having manufactured opium without having given the bond required by law.

Michael H. Rose, of Brooklyn, N. Y. (L. Victor Fleckles, of Brooklyn, N. Y., on the brief), for plaintiffs in error.

Melville J. France, U. S. Atty., of Brooklyn, N. Y. (Samuel J. Reid, Jr., of New York City, of counsel), for the United States.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

COXE, Circuit Judge. [1] The refusal to grant the defendants separate trials was within the discretion of the trial court and, in the absence of any valid contention that this discretion was abused, no exception will lie to the ruling. United States v. Ball, 163 U. S. 662,

672, 16 Sup. Ct. 1192, 41 L. Ed. 300. There was no ground for an exception to the question whether these defendants had given a bond for the manufacture of opium. The answer of the witness, "None to my knowledge," in connection with the rest of his testimony, was competent and sufficient, in the absence of any denial or proof to the contrary.

[2] The case is one of circumstantial evidence; no one saw these defendants actually making opium prepared for smoking, but there was evidence from which the jury might have reached the conclusion that the premises where the utensils were found were actually leased and occupied by the defendants. This being so, it is hardly probable that these utensils were there without the defendants' knowledge and consent. The testimony that the utensils were used in the manufacture of opium is too clear to admit of doubt. The evidence warranted the finding of the jury that the manufacture of smoking opium was carried on in the room leased by the defendants, who paid rent for the same; sometimes it was paid by Lee Dock and sometimes by Lee Leung. When they were not there the door of the room where the utensils were found was padlocked.

One of the Treasury agents, Peter J. Sullivan, testified that while he was watching the defendant Lee Dock he saw him go to a wall in the back of the store where a Chinese coat was hanging. His testimony on this subject is as follows:

"He grabbed the coat and he fumbled in the pocket, and ran through a sort of alcove into an alley. Here's the store and a pair of stairs like. He took the key and threw it out, and I brought him back."

This key opened the lock on the door, where the "paraphernalia" was found. It is, however, unnecessary to review the evidence in detail from which the jury were justified in drawing the conclusion that the defendants were engaged in manufacturing smoking opium. It is sufficient that there was such evidence and if the jury believed it to be true they were justified in finding a verdict of guilty. There were no exceptions to the charge and no requests to charge were made by the defendants.

The judgment is affirmed.

HARRIS v. DODGE et al.†

(Circuit Court of Appeals, Eighth Circuit. June 16, 1915.)

No. 4253.

BANKRUPTCY ⇐303—VOIDABLE TRANSFERS OF PROPERTY.

Evidence *held* to sustain the allegations of a bill by a trustee in bankruptcy that certain corporate stock, which prior to the bankruptcy and when the bankrupt was insolvent was taken over by creditors, who were relatives, and sold and the proceeds applied largely in payment of their own claims, was owned by the bankrupt, and not by his son, as claimed, and to entitle complainant to recover the sums so received by defendants as voidable preferences.

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

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

† Rehearing denied September 27, 1915.

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

Suit in equity by James A. Harris, trustee in bankruptcy of the estate of J. W. Wallace, against H. E. Dodge, C. C. Palmer, W. G. Gibbons, the First State Bank of Wagoner, Okl., and the Chesnutt-Gibbons Grocer Company. Decree for defendants, and complainant appeals. Reversed.

O. L. Cravens, of Neosho, Mo., for appellant.

A. A. Davidson, of Tulsa, Okl. (N. B. Maxey, of Muskogee, Okl., on the brief), for appellees.

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

HOOK, Circuit Judge. This is a suit by the trustee in bankruptcy to recover the value of certain shares of stock of the Wagoner Cotton Oil Company, alleged to have been the property of the bankrupt and to have been disposed of to hinder, delay, and defraud his creditors, or to recover, as voidable preferences, the amounts received from the proceeds. The stock was sold for $21,250, most of which was distributed among creditors of the bankrupt, all but one of whom were his relatives by blood or marriage, or business concerns of which relatives were officers. If the stock belonged to the bankrupt, and not to his son, all the elements of voidable preference clearly existed. The referee reported with some doubt that the stock was not the bankrupt's, the report was confirmed, and the trustee's bill dismissed.

The decision below rests largely upon the testimony of one man, but we think it is inconsistent with so many significant circumstances, either admitted or clearly proved, that it should not prevail. Commencing with the known insolvency of the bankrupt, his free property of considerable value was taken over and administered by relatives largely for their own advantage. Part of it could not be traced. The testimony of some of them who personally managed his affairs was evasive and contradictory, and noticeably adapted to the exigency of the moment. There were many purposeful incomplete disclosures by those who must have been well informed. When the bankruptcy proceedings were commenced, the bankrupt was in the state; but he left shortly afterwards, and refrained from attending the meeting of creditors, from submitting to examination, and from filing schedules. His son, for whom the stock was claimed, was also absent, and did not testify at the trial. The defendants seemed to rely largely upon the difficulties under which the trustee labored in bringing the facts to light. Defendants received payments from the proceeds of the stock as follows: May 13, 1909, C. C. Palmer, $2,374.65; May 5, 1909, Chestnutt-Gibbons Grocer Company, $2,205.30; and May 13, 1909, W. G. Gibbons, $2,574.15. We think the trustee should recover these sums, with interest, from those who received them.

The decree is reversed, and the cause remanded, with direction to enter a decree in conformity with the above.

DODGE et al. v. HARRIS. †

(Circuit Court of Appeals, Eighth Circuit. June 16, 1915.)

No. 4258.

BANKRUPTCY ⊜165—LIENS—PLEDGE WITHIN FOUR-MONTHS PERIOD.

A bank, which, when a bankrupt was insolvent and within four months prior to his bankruptcy, advanced money to be used in redeeming stock owned by the bankrupt from a valid pledge of the same to another bank, and which then, in accordance with the agreement, took the stock as collateral to its own note, *held* entitled to retain payments received on its note, and to enforce its lien for the balance due thereon.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 259, 260, 266; Dec. Dig. ⊜165.]

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

Suit in equity by James A. Harris, trustee in bankruptcy of Joseph W. Wallace, against H. E. Dodge, W. G. Gibbons, C. C. Palmer, the Wagoner Land & Investment Company, W. I. Wallace, J. A. Daugherty, and the First State Bank of Wagoner, Okl. Decree for complainant, and defendants appeal. Reversed.

A. A. Davidson, of Tulsa, Okl. (N. B. Maxey, S. V. O'Hare, and W. C. Franklin, all of Muskogee, Okl., on the brief), for appellants.

O. L. Cravens, of Neosho, Mo., for appellee.

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

HOOK, Circuit Judge. The trustee in bankruptcy sued to recover $10,000 par value of capital stock of the Wagoner Land & Investment Company, claimed as belonging to the bankrupt's estate, and also certain sums of money received from sales of the company's property. He prevailed in the trial court, and the defendants appealed.

About a year before the bankruptcy proceedings were begun, the bankrupt, then the owner of the stock, borrowed $7,000 of a national bank on his note and pledged the stock as collateral. The validity of this debt and lien is unquestioned. Within four months of the commencement of the proceedings, and when the bankrupt was insolvent, defendants Dodge, Gibbons, and Palmer, who had taken over the management of his affairs, caused the debt to the national bank to be paid. The wife of the bankrupt raised $2,000 of the amount necessary, and the balance, of $5,000, was borrowed from defendant the First State Bank upon the note of the Wagoner Land & Investment Company, with the stock in controversy as collateral. Dodge, Gibbons, and Palmer were the managing officers of the Land & Investment Company, and Dodge was the president of the First State Bank. All of them knew of the bankrupt's insolvency and the conditions affecting the validity of the transactions attacked by the trustee. At a time uncertain in the evidence the pledged shares of

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

† Rehearing denied September 27, 1915.

stock were transferred to Gibbons and Palmer on the records of the Land & Investment Company. There was also a separate transfer to a brother of the bankrupt, but without delivery of the certificates. Some property of the company was sold, and $4,500 of the proceeds, allottable to the stock in controversy, was paid on the $5,000 note to the First State Bank, reducing the principal to $500. By the decree of the trial court the stock was adjudged to the trustee in the right of the bankrupt free of all liens, the note of the Land & Investment Company to the First State Bank was declared invalid, and the trustee was awarded a recovery from the latter of the amount paid from the sales of property and interest.

The evidence was clear that, aside from lien claims, the stock belonged to the bankrupt and passed to the trustee. The pledge to the defendant bank, and the transfers to Gibbons and Palmer and the bankrupt's brother, assuming them to have been valid, were for security, and with no intent to affect the ownership otherwise. To that extent we agree with the trial court. We think, however, that the claim of the bank to retain the amount paid to it upon the note and for the balance due, with interest, and with lien upon the stock, should be sustained. Its money was loaned to discharge the prior valid lien, and was so used. It was agreed it should in turn have the stock as security for repayment, and the stock was accordingly pledged to it. Had this not been done, the stock might have been lost to the bankrupt's estate, or the prior lien would have remained as against the trustee. In no way was the estate of the bankrupt prejudiced, or the creditors hindered, delayed, or defrauded. The bank parted with its money to discharge a valid lien, on assurance it would be likewise secured itself. The use of the name of the Land & Investment Company as the maker of the note was irregular, but we do not regard the circumstance as sufficient to overthrow the equitable position of the bank. We express no opinion upon the validity of the claims of the other parties to liens upon the stock. In view of the result in cause No. 4253, just decided (Harris v. Dodge, 224 Fed. 432, —— C. C. A. ——), the trial court will be left free to reconsider the claims of Gibbons and Palmer, and of any other person who may appear in the cause and assert a right prior to the trustee.

The decree is reversed, and the cause is remanded for further proceedings in harmony with this opinion.

THE OLYMPIC.

(Circuit Court of Appeals, Second Circuit. May 12, 1915.)

No. 289.

TOWAGE ⊂=18—TUG ENGAGED IN DOCKING STEAMSHIP—INJURY BY PROPELLER.

A tug engaged with others in docking a large steamship, which took a position alongside near her stern, and when she started her starboard propeller was drawn by suction within reach of the blades and injured, *held* not entitled to recover from the steamship, which, as customary, was to be expected to use her propellers whenever necessary to aid the work of the tugs, but to have assumed the risk of the position it took.

[Ed. Note.—For other cases, see Towage, Cent. Dig. § 40; Dec. Dig. ⊂=18.]

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

This cause comes here upon appeal from a decree dismissing the libel of the owner of the steam tug O. L. Hallenbeck against the steamship Olympic, for damages sustained by the Hallenbeck's coming into collision with the starboard propeller of the Olympic. The opinion of Judge Hazel will be found in 221 Fed. 296.

Samuel Park and Carpenter & Park, all of New York City, for appellant.

Charles C. Burlingham and Burlingham, Montgomery & Beecher, all of New York City, for appellee.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

LACOMBE, Circuit Judge. The Olympic was berthing on the north side of Pier 59, North River. The Hallenbeck was one of a flotilla of tugs engaged in assisting her to do so. The steamer's bow was brought to the upper corner of Pier 59, her stern angling out into the river; the tide was ebb and the wind northeast. Some of the tugs took off-shore lines from her port quarter and hauled up river; when she had canted off sufficiently other tugs went under her starboard quarter to push her stern up river. The steamer assisted the operation in the usual way by going ahead with her port propeller and backing with her starboard propeller. At the time when the Hallenbeck, which was to push on the starboard quarter, came into position, the starboard propeller was temporarily motionless. She came up on the starboard side, a little behind the steamer's after smokestack, and called to the steamer to throw her a heaving line; the steamer's deck was too high to throw her own line to it. A heaving line was thrown, and a man on the tug began to make it fast to her bitt. The stern was then up against the side of the steamer and the tug's engines were stopped; her bow was about 100 feet forward of the steamer's propeller, the tug angling about 45 degrees. At this time the starboard propeller began to revolve, and the suction produced thereby brought

the stern of the tug into collision with the propeller. The tug's captain admitted that he knew it was to be expected that the steamer would use her own power in berthing, also that he did not expect to have flags shown him in order to tell him what he should do with his boat.

Libelant relies upon the opinion of this court in The City of New York, 54 Fed. 181, 4 C. C. A. 268. We do not see how this helps him. We said:

"The measure of care to be exercised by a steamship in the use of her propellers differs under different circumstances; and the same rule of law which would exonerate an employer from the consequences of an injury to a servant caused by a risk inherent in the service which the latter was hired to perform will exonerate a steamship from responsibility for an injury caused by a similar risk received by a tug while in its employ. It is the duty of the employer to use due care to avoid exposing the servant to extraordinary risks which the latter cannot reasonably anticipate; but he is not bound to provide against the risks which are necessarily incident to the service to be rendered. These are implied conditions of the contract of hiring, and there is no reason why they are not as applicable to the relation of steamship and tug as to that of ordinary master and servant."

The Olympic, under the law, undertook not to expose the tug to any extraordinary risk while engaged in the service. The tug held herself out as experienced and competent to facilitate the operations of the steamship, without embarrassing her unnecessarily, and as competent to exercise due care for her own safety. We do not see in what respect the Olympic was in fault. She was conducting the usual process of berthing in the usual way. Presumably with a large steamer it always involves some risk, which is assumed by the tugs which engage in it. Every one who is familiar with the process knows that the steamer uses her own power, and, in doing so, must use her propellers one way or the other, sometimes acting very promptly; it would hardly seem practicable for her to give notice to the attendant flotilla every time she started or stopped them, and there is no testimony indicating any such practice. The Olympic did not order or invite the tug to put herself in position to push at any particular place. The tug master selected what he thought would suit, and hailed some one at that part of the steamer to throw him a line. We agree with Judge Hazel that, in the absence of any specific instructions from the steamer to bring the tug to any particular place on her quarter, the latter should have kept herself under control or taken a position farther from the stern.

Decree affirmed, with costs.

CARNEGIE STEEL CO. v. YUHASZ.

(Circuit Court of Appeals, Second Circuit. June 8, 1915.)

No. 271.

1. MASTER AND SERVANT ⟸278, 281—INJURIES TO SERVANT—SUFFICIENCY OF EVIDENCE—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE.

In an action for injuries to a servant, evidence *held* to justify the jury in finding that the master's foreman was negligent in ordering a craneman to drop a piece of iron, when it was not safe to do so, and that the employé was not contributorily negligent.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 954, 956–958, 960–969, 971, 972, 977, 987–996; Dec. Dig. ⟸278, 281.]

2. MASTER AND SERVANT ⟸182, 190—INJURIES TO SERVANT—LIABILITY OF MASTER—NEGLIGENCE OF FOREMAN.

A corporation is liable, both at common law and under the express provisions of the Pennsylvania statute, for the negligence of its foreman in giving an improper order, which results in injuries to an employé.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 371, 372, 449–474; Dec. Dig. ⟸182, 190.]

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

On writ of error to review a judgment of the District Court for the Southern District of New York entered upon the verdict of a jury for $5,000 in favor of the plaintiff, as damages for an injury to the plaintiff's left eye while working for the defendant in its stockyards at Homestead, Pa.

Raynal C. Bolling, of New York City (Kenneth B. Halstead, of New York City, of counsel), for plaintiff in error.

L. B. Treadwell, Roger Foster, and R. W. Darling, all of New York City, for defendant in error.

Before COXE, WARD, and ROGERS, Circuit Judges.

COXE, Circuit Judge. [1] The jury found that the plaintiff was injured by a particle of iron which flew into his left eye by reason of the negligence of the defendant, acting through its foreman McDonald, in ordering the craneman, Feeny, "to drop" a piece of pig iron, which had adhered to the crane, at a time and place likely to injure the plaintiff. In its fall of about 20 feet it struck a "buggy," causing a chip to fly off which injured the plaintiff's eye.

The question of the defendant's negligence and the contributory negligence of the plaintiff were questions of fact for the jury and were properly submitted to them. There can be no doubt that if the foreman gave an improper order, which order resulted in the injury to the plaintiff, the defendant is responsible. There can be little question that the foreman's order meant that the craneman Feeny was to drop the piece of iron which had adhered to the crane, by reversing the current and demagnetizing the magnet so that the piece of iron would fall. The evidence is that when this adhering iron was in a dangerous position in relation to the plaintiff, the foreman gave the order to the craneman in the following words, "Mike, drop it."

It is urged by the defendant that this order meant "Drop it in the proper way," but that is not what the foreman said. His order was mandatory to "drop it" then and there and it was obeyed. The craneman was not in a position to see the entire situation. He says:

"I can see the bottom of the magnet from my cab. Not right on the bottom but just right on the side, the same as a glass. I cannot see the bottom, it has a flat bottom. I can see when I raise it up."

He had a right to rely on his superior and when the foreman said "drop it," he very naturally obeyed. He had no other alternative. It was his duty to obey and to obey promptly. The defendant seeks to have this peremptory order interpreted as if the foreman had said, "Drop it when you think it safe to do so" or "Drop it when it is clear of the buggies." The order was certainly susceptible of the first interpretation, namely, "Drop it immediately," and the jury were justified in so finding. It is manifest that it cannot be held as matter of law that the order meant that Feeny was to drop the iron when he thought he could do so with safety.

So also the question of contributory negligence was for the jury. The court could not have said as matter of law that the plaintiff was negligent in standing where he did and in not turning his back to the crane. The plaintiff had no reason to suspect that the iron would be dropped in so dangerous a place and in a manner so careless. Both questions were for the jury and not for the court.

[2] Judge Rudkin charged the jury correctly upon the questions of assumption of the risk and contributory negligence. There can be no doubt as to the liability of the defendant for the negligence of the foreman. This would be so at common law, but the Pennsylvania statute removes any possible doubt on the subject. It says the employer shall be liable for:

"Neglect of any person engaged as * * * foreman, or any other person in charge or control of the works, plant or machinery; the negligence of any person in charge of or directing the particular work in which the employé was engaged at the time of the injury; * * * the act of any fellow servant, done in obedience to the rules, instructions or orders given by * * * any other person who has authority to direct the doing of said act."

The case was fairly tried throughout and the verdict was a reasonable one considering the gravity of the injury, and we see no reason why it should be disturbed.

The judgment is affirmed with costs.

BAKER & BENNETT CO. v. N. D. CASS CO. et al.

(Circuit Court of Appeals, Second Circuit. May 12, 1915.)

No. 284.

INJUNCTION ⊂=241—LIABILITY ON BOND—MANNER OF DETERMINING.

On dissolution of a preliminary injunction, for which a bond was given, the court has the discretion to itself determine the liability thereon, or to leave the defendant to his remedy by an action at law.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 544–552; Dec. Dig. ⊂=241.]

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

See, also, 220 Fed. 918, 136 C. C. A. 484.

Hillary C. Messimer, of New York City, for appellants.

T. H. Anderson, of New York City, for appellee.

Before COXE, WARD, and ROGERS, Circuit Judges.

WARD, Circuit Judge. The complainant as exclusive licensee, brought suit in equity against the defendant for infringement of United States letters patent No. 45,249 for a design for sets of character blocks. The District Court granted a preliminary injunction, subject to the filing of a bond by the complainant in the sum of $5,000 to secure the defendants. The condition of the bond reads:

"Now, therefore, the condition of the foregoing obligation is such that if the plaintiff shall pay to the defendants so enjoined such damages, not exceeding the above-named sum, as they may sustain by reason of the injunction, if the court finally decides that the plaintiff is not entitled thereto, then this obligation shall be void; otherwise, it shall remain in full force and effect."

March 12, 1914, the injunction issued and remained in force until September 22d, when the District Court entered a decree on final hearing awarding a perpetual injunction with the statutory damages in the sum of $500. This court upon appeal reversed the decree with costs. The mandate dated January 26, 1915, commanded the District Court to take such further proceedings in accordance with the decision of this court as according to right and justice and the laws of the United States ought to be had. March 8, 1915, the defendants petitioned the District Court for the appointment of a special master in an ancillary proceeding to assess under the injunction bond the damages sustained by them between March 12 and September 22, 1914. March 11th the petition was denied, from which order the defendants have taken this appeal.

Though the fact does not appear in the record, it is admitted that the judgment of the District Court upon the mandate of this court dismissing the bill was entered March 16, 1915, and that it has since been paid by the complainants. We do not understand that Judge Lacombe, in denying the petition for the appointment of a special master, intended to hold that the defendants were not entitled to recover at all, but only to exercise the discretion that lay in him to say whether the liability upon the bond should be determined in an ancillary proceeding in this cause or in an independent action at law.

In Russell v. Farley, 105 U. S. 433, 445, 26 L. Ed. 1060, Mr. Justice Bradley said:

"Other cases are referred to by the counsel of the appellants to sustain their position; but upon a careful examination we are not satisfied that they furnish any good authority for disaffirming the power of the court having possession of the case, in the absence of any statute to the contrary, to have the damages assessed under its own direction. This is the ordinary course in the Court of Chancery in England, by whose practice the courts of the United States are governed, and seems to be in accordance with sound principle. The imposition of terms and conditions upon the parties before the court is an

incident to its jurisdiction over the case; and having possession of the principal case, it is fitting that it should have power to dispose of the incidents arising therein, and thus do complete justice and put an end to further litigation. We are inclined to think that the court has this power, and that it is an inherent power, which does not depend on any provision in the bond that the party shall abide by such order as the court may make as to damages (which is the usual formula in England); nor on the existence of an express law or rule of court (as adopted in some of the states) that the damages may be ascertained by reference or otherwise, as the court may direct—this being a mere appendage to the principal provision requiring a bond to be taken, and not conferring the power to take one, or to deal with it after it has been taken. But whilst the court may have (we do not now undertake to decide that it has) the power to assess the damages, yet if it has that power, it is in its discretion to exercise it, or to leave the parties to an action at law. No doubt in many cases the latter course would be the more suitable and convenient one. In the present case, however, the court did not attempt to assess any damages which the defendants may have sustained in consequence of the injunction and proceedings in the cause, but decreed that it was not a case for damages; in other words, that the bond ought not to be prosecuted. That damages were sustained is very probable. Such a litigation as this was could hardly fail to result in damage to all the parties engaged in it. But it is generally damnum absque injuria. The question before the court, or at least that which it undertook to determine, was whether, under the circumstances of the case, any damages at all ought to be recovered. Its decision was that none ought to be recovered; or, in effect that the bond ought not to be prosecuted. In view of what has already been said, we think that the court had power to decide this question."

Although the foregoing observations, so far as they apply to the power of the court to dispose of the question of damages under the injunction bond as an incident to the principal case, were obiter, they are entitled to great weight. They were so treated by the Circuit Court of Appeals of the Sixth Circuit in Leslie v. Brown, 90 Fed. 171, 174, 32 C. C. A. 556, and of the Seventh Circuit in Mississippi Co. v. Watson Co., 202 Fed. 122, 124, 120 C. C. A. 276. Both courts adopted the law as indicated by Mr. Justice Bradley, and so do we.

There being nothing whatever to show any abuse of discretion, the order is affirmed without prejudice.

THE PERSIAN.

(Circuit Court of Appeals, Second Circuit. May 12, 1915.)

No. 144.

1. COLLISION ⊂⊃19—FAULTS—CONTRIBUTORY FAULT.
   Where the faults of one vessel were so gross as to fully account for a collision, any doubts as to the proper management of the other should be resolved in her favor.
   [Ed. Note.—For other cases, see Collision, Cent. Dig. § 17; Dec. Dig. ⊂⊃19.]

2. COLLISION ⊂⊃82—STEAMSHIPS CROSSING IN FOG—EXCESSIVE SPEED.
   One of two crossing steamships *held* solely in fault for a collision at sea in a dense fog; it being shown that she was going at full speed across the bows of the other, which was proceeding slowly and carefully,

and had stopped and reversed on hearing the signal of the approaching vessel.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 170–174; Dec. Dig. ⊂=82.

Collision rules, speed of steamers in fog, see note to The Niagara, 28 C. C. A. 532.]

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

On appeal by the Great Northern Paper Company, owner of a cargo of paper which was being carried by the steamer Millinocket from Stockton Springs, Me., to New York via Boston, from a decree dismissing its libel against the steamer Persian. At about midnight on July 24, 1913, the Millinocket collided with the Persian, a large, iron passenger steamer which was on her regular voyage from Philadelphia to Boston. The place of the collision is about two miles N N E of Pollock Shoals Lightship. The stem of the Persian struck the Millinocket a glancing blow on the starboard quarter, causing her to leak so badly that she put into Vineyard Haven in a sinking condition. The negligence of the Millinocket is not disputed but the libelant appellant insists that, being an innocent party, it is entitled to recover against the Persian if the latter is wholly or partly in fault for the collision, leaving the owners of the Persian to recoup half the damages from the Millinocket.

Edward E. Blodgett and Blodgett, Jones, Burnham & Bingham, all of Boston, Mass., for appellant.

Van Iderstine, Duncan & Barker, O. D. Duncan, and Daniel H. Hayne, all of New York City, for appellee.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

COXE, Circuit Judge (after stating the facts as above). [1, 2] The negligence of the Millinocket, if not actually admitted, is proved by such an overwhelming weight of testimony that it need not be considered on this appeal. The only question here is, Did any fault on the part of the Persian contribute to the collision? The faults of the Millinocket were so glaring, so numerous and so fully do they account for the disaster that the court should not be particularly astute in the endeavor to discover some contributing fault on the part of the Persian committed at a time when inerrable judgment is not to be expected. A master seeing a steamer emerge from a dense fog at full speed headed directly across his course can hardly be expected to use the same discernment and caution as if he had been aware of the approaching vessel's course and speed. The language of the Supreme Court in The Umbria, 166 U. S. 404, page 409, 17 Sup. Ct. 610, page 612 (41 L. Ed. 1053), is directly applicable. The court says:

"Indeed, so gross was the fault of the Umbria in this connection, that we should unhesitatingly apply the rule laid down in The City of New York, 147 U. S. 72, 85 [13 Sup. Ct. 211, 37 L. Ed. 84], and The Ludvig Holberg, 157 U. S. 60, 71 [15 Sup. Ct. 477, 39 L. Ed. 620], that any doubts regarding the management of the other vessel, or the contribution of her faults, if any, to the collision, should be resolved in her favor."

See, also, The Victory & Plymothian, 168 U. S. 410, 18 Sup. Ct. 149, 42 L. Ed. 519; The Mexico, 84 Fed. 504, 28 C. C. A. 472.

The argument advanced to demonstrate the Persian's fault is based largely on conjecture and is contrary to the facts conceded or established by a clear preponderance of proof. The Persian carried passengers as well as cargo. Her log shows that she was proceeding with care and caution. The collision occurred at 12:15. During the preceding 22 minutes her log shows that she was proceeding slowly and that she stopped at 11:55, at 12:01, at 12:12 and that at 12:14 she was backing full speed astern. The engine log during this period shows that she stopped 10 minutes and was proceeding slowly 11 minutes. It is not easy to see what more a prudent navigator could have done. He did not know of the presence of the Millinocket, but he knew he was in dangerous waters and had heard whistles ahead. His duty to his ship and to the lives intrusted to his care required that he should proceed with the utmost caution and we think the evidence proves that he did so. The argument to the contrary is based largely upon guesswork and presumption. The testimony is clear that when the Persian first heard the two whistles from the Millinocket it was 12:12. The Persian then signaled to stop and two minutes later she was backing full speed astern. Her master testifies that immediately after he had answered the Millinocket's two whistles he saw her "masthead range lights and green side lights come out of the fog a little on my port bow. I should judge about the length of a ship away, probably a little more, possibly 400 feet. When I saw him I reversed, backed engine in an emergency, full speed."

The testimony amply justifies the finding of the trial judge that when the collision occurred the Persian was "nearly stationary." It is unnecessary to discuss the evidence further in detail; taken in its entirety it fully justifies the finding of Judge Smith, who is an admiralty lawyer of wide experience, who had the advantage, which an appellate tribunal can never have, of seeing and hearing the witnesses. Of course there are contradictions and disagreements upon minor and collateral issues. This is generally so where questions of fact are being considered and especially so where a collision in a fog is being investigated. Naturally, and almost unconsciously, the witnesses, even though passengers, are biased in favor of the vessel which carries them and their testimony must be weighed in the light of this well-known tendency. We are, however, fully convinced, as before stated, that the faults of the Millinocket fully account for the conduct of the Persian when almost in the jaws of collision and that the decree of the District Judge in finding her solely in fault is amply sustained by the proof.

The decree is affirmed.

In re METROPOLITAN DAIRY CO.

In re LEVY et al.

(Circuit Court of Appeals, Second Circuit. June 22, 1915.)

No. 319.

BANKRUPTCY ⊂=165—PREFERENCES TO CREDITORS—PRESENT LOAN.

Neither Bankr. Act July 1, 1898, c. 541, 30 Stat. 544, nor Stock Corporation Law N. Y. (Consol. Laws, c. 59) § 66, prohibiting transfers giving preferences to creditors when a corporation is insolvent, invalidates, after the bankruptcy of a corporation, a chattel mortgage given by the corporation, while in financial straits, to a director and officer, to secure a loan at that time made by him to the corporation, where the cash was then actually turned over to the corporation by him; and the fact that the execution of the mortgage was delayed a few days after the money was paid to the corporation does not make it a security for a past debt, where its execution was agreed on before the loan was made.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 259, 260, 266; Dec. Dig. ⊂=165.]

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

This cause comes here upon appeal from an order of the District Court which awarded a fund of $7,500, in the possession of the trustee, to the estate as against the appellants, and declared that a mortgage dated June 23, 1913, made by the bankrupt to one Isabelle P. Doyle, and thereafter assigned to the appellants, Levy Bros., was invalid and inoperative as security for the indebtedness therein stated as against the general creditors of the Metropolitan Dairy Company.

Henry A. Rubino, of New York City, for appellants Doyle and others.

Mitchell May, of New York City, for appellants Levy Bros.

Samuel C. Duberstein and Herman G. Rabinowitz, both of New York City, for appellee Garvin.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge. William F. Doyle was an officer, stockholder, and director of the Metropolitan Dairy Company, which was adjudicated a bankrupt February 12, 1914, on a petition filed in January of that year. In June, 1913, the corporation was in straitened circumstances, needing cash to meet obligations presently due. Whether at the time it was insolvent, or insolvency was imminent, it is not necessary now to decide. The special master found, on uncontradicted evidence, that on June 16, 1913, Doyle tried to borrow $7,500 from Levy Bros. for the corporation, stating that the corporation would give a chattel mortgage for it on property which the event shows was worth that sum. Levy declined to make the loan on such security, but did make a personal loan to Doyle on his note secured by a policy of life insurance, and gave him the money.

This money was loaned by Doyle to the corporation through his wife, who indorsed Levy's check and took the bank's note and the mortgage

to herself. Subsequently Mrs. Doyle assigned note and mortgage to Levy Bros., who make the claim. The wife's intermediation may be discarded, and the transaction be treated as a loan of $7,500 by Doyle of money which was his own, borrowed from his friend (Levy) on his personal security. This loan he made on June 17th, the day after he got the money, to the corporation. The chattel mortgage, a lengthy document with a comprehensive inventory, was executed on June 23d, and filed three days later.

If the mortgage had been given at the same time as the loan was made, there could be no question. It is a wholly novel proposition to us that the officer and director of a corporation, which is losing money, is in financial straits, and facing imminent failure, may not lend it money of his own on its mortgage of its personal property, to secure only the cash turned over, without, by any subterfuge, including any existing indebtedness to him. No authority to such a proposition is cited; certainly neither the Bankrupt Act nor section 66 of the New York Stock Corporation Law supports it. It is not giving a preference to give security on free assets to the extent of new hard cash paid into the treasury by any one.

The cash was paid to the corporation on June 17th, and the mortgage given June 23d. If these were separate transactions, the mortgage would be given to secure an existing debt, and the trustee's contention would have merit. But it is contended that the resolution under which the mortgage was executed (it took some time to make the inventory) was passed June 14th, three days before the loan was made. If this be so, we do not see why there was not a single transaction—why the execution and filing of the mortgage does not, under the resolution, date back to the moment of receiving the loan for which it was given. There is no suggestion of any rights accruing to any one during the interim.

The record as to this vital point in the case is unsatisfactory. Counsel who represented the bankrupt before the special master—he is not the counsel who argued this appeal—was present at the argument and stated that he gave the minute book of the board of directors to the special master. The special master, in response to a call by this court, certifies that no books of the company are in his possession. Whether the trustee has the books of the bankrupt does not appear. The special master, however, sends to us two documents—one purporting to be minutes of board of directors of June 14, 1913, the other purporting to be a consent of stockholders dated June 17, 1913. Both of them purport to authorize this chattel mortgage. He states that they were left with him by counsel for the bankrupts, but were not "offered in evidence." We think it would have tended to a more satisfactory determination of the questions before him if he had called for the production of the minute book. Apparently, for some reason which is not clear, neither the special master nor the District Judge thought that it was a matter of any importance that *before* the money was actually loaned the corporation agreed that in consideration for such loan it would execute the chattel mortgage.

We are averse to disposing of the case finally until all the facts are before us, and therefore reverse the order and remand the cause to the

District Court, with instructions to take such testimony as may be obtainable to determine whether or not, prior to the loan of the money, the corporation agreed to execute the mortgage to Levy Bros., or to Doyle, or to Mrs. Doyle, or to whomever else would loan the $7,500. When it is ascertained whether or not such is the fact, the cause may be disposed of in the District Court in conformity with the views expressed in this opinion.

UNITED STATES v. LAU CHU.

(Circuit Court of Appeals, Second Circuit. June 8, 1915.)

No. 247.

ALIENS ⊂=25—CHINESE EXCLUSION ACTS—"STUDENT."

Where a Chinese person came to the United States properly as a student, was admitted and lived in the United States as a student, and was actually a student when sought to be deported, the fact that he temporarily supported himself by working while his father was unable to send him money for his support did not permanently take him out of the class of "students," expressly excepted by treaty from the operation of the Exclusion Act.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 79–82; Dec. Dig. ⊂=25.

For other definitions, see Words and Phrases, Second Series, Student.

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 an order of the District Court, Eastern District of New York, reversing an order of deportation of a Chinese person made by a United States commissioner.

Melville J. France, U. S. Atty., of Brooklyn, N. Y.

James A. Donegan, of New York City, for appellee.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

LACOMBE, Circuit Judge. This case is peculiar. Defendant came to this country in 1911, being about 16 or 17 years old. Before leaving Hong Kong he secured a certificate, issued to him by Ching Ming Chi, Viceroy, Acting Tartar General, and Superintendent of Imperial Chinese Customs, at Canton, China, which was viséed by the American Consul General, certifying that defendant was a student, about to leave China, for the purpose of studying in the United States; to the certificate was affixed the picture of defendant and his signature, and it is admitted that the defendant is the person mentioned and described in said certificate.

His father was a merchant, or a man of means, living in China, who sent him money for his support in this country until as the result of a revolution in China he lost his property and was unable further to support his son. The young man studied here, but did not engage in any other employment until his father and his grandfather (who lived

here) ceased to supply him with money. We find nothing to cast doubt on the truthfulness of this narrative—nothing to indicate that there was any fraud or misrepresentation about his entry. After his supply of money ceased, he went to work himself and earned money, of which he sent part to his father and saved some. Later on, and while this proceeding was pending, his father resumed sending him money. Defendant received $50 from him before the hearing in the District Court. The superintendent of the Sunday school stated that his organization had taken an interest in the young man and would see he was sent to school, even if his father did not himself furnish the money, that efforts were being made to have him admitted to the New York public schools, and that it had been promised that he would be so admitted.

Several questions have been raised here, as to the interpretation of the article in the treaty touching students and teachers, as to change of status, and as to rule 8 of the regulations, which need not be considered. The case is a peculiar one. We are satisfied from the proofs that Lau Chu came here properly as a student, was admitted as such, lived here as such, and is now actually a student. It is sufficient to say that in our opinion the circumstance that he supported himself temporarily until his father was able to resume sending remittances did not operate to take him permanently out of the class "student" which the treaty expressly excepts from the operation of the Exclusion Act.

The order is affirmed.

UNITED STATES v. LEE CHEE.

(Circuit Court of Appeals, Second Circuit. June 8, 1915.)

No. 248.

1. ALIENS ⊜25—CHINESE EXCLUSION ACTS—PERSONS LAWFULLY IN UNITED STATES.

The adopted son of a Chinese merchant, brought to this country when 5 years old, had the status of the person who adopted him, and was not subject to be deported.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 79–82; Dec. Dig. ⊜25.

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

2. ALIENS ⊜25—CHINESE EXCLUSION ACTS—PERSONS LAWFULLY IN THE UNITED STATES.

Defendant's "godfather," whose obligations as such under Chinese law and custom did not appear, took entire control of defendant after the death of his father, when defendant was 5 years old, brought him to this country, supported him, and sent him to a Chinese school, and when he was about 16 years old sent him to the godfather's nephew, who had opened a store in another city. The godfather was a merchant. *Held* that, though no formal adoption was shown, the godfather practically adopted defendant, and, though defendant later became a laborer, he was not subject to deportation.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 79–82; Dec. Dig. ⊜25.]

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 reversing an order of deportation, under the Chinese Exclusion Acts, made by a United States commissioner.

M. J. France, U. S. Atty., of Brooklyn.

W. A. Moore, of Brooklyn, N. Y., for appellee.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

LACOMBE, Circuit Judge. Defendant was found by the inspector working in a laundry at 231 Sumner avenue, Brooklyn. He is about 30 years of age, was born in China, and came to this country when he was about 5 years old; naturally it is to be expected that his memory is not very full and distinct as to the circumstances attending his entry into this country. On all three occasions when he was interrogated, before the inspector, the commissioner, and the court, he stated that his father died in China before he left. It is reasonable to suppose that at 5 years of age he was sufficiently intelligent to appreciate that fact. When first interrogated, he failed to give the name of the person who brought him here; afterwards he said it was one Chin Hing.

[1] Chin Wee, a Chinese person who came to this country about 1869 and was living in San Francisco at the time, testified that Chin Hing, who was an uncle of the witness, was the proprietor of a restaurant in that city, the witness working for him in the restaurant. Chin Hing therefore belonged to the merchant class, and any minor son whom he might bring to San Francisco with him would—by attribution of status—come within the same class. Defendant testified that Chin Hing was his "godfather," in which statement he is corroborated by Chin Wee. When the inspector asked him the question, "Have you ever been adopted by any body, either according to American or Chinese custom?" he replied, "No." It is doubtful whether he understood this question, and certainly at 5 years of age he would not be likely to appreciate, if he knew, the ceremonies of a formal adoption. Later he said that Chin Hing adopted him. If he were an adopted son, we think that at 5 years of age he would have the status of the person who adopted him.

[2] What are the obligations under Chinese law and custom of a "godfather," or its equivalent in the Chinese language, we are not informed. But the evidence is uncontradicted that after the death of defendant's father Chin Hing took entire control of him, brought him to this country, supported him, sent him to a Chinese school in San Francisco, and when he was about 16 years sent him to Chin Wee, who had then gone to New York and opened a small Chinese dry goods store. We are of the opinion that practically Chin Hing, after the father's death, adopted defendant as a son; that he came to this country in the merchant class, entitled to entry; that at the period of registration he was not required to take out a certificate (Tom Hong et al. v. U. S., 193 U. S. 517, 24 Sup. Ct. 517, 48 L. Ed. 772), and that the circumstance that later on he became a laborer is no ground for his deportation.

The order of the District Court is affirmed.

RUBINSKY et al. v. BANNER RUBBER CO.

(Circuit Court of Appeals, Second Circuit. June 8, 1915.)

No. 302.

APPEAL AND ERROR ⊂=1050—HARMLESS ERROR—EVIDENCE.

Where, in an action for balance due for goods sold and delivered, the court submitted to the jury the statement of the accounts according to the figures of both parties, and on a sheet containing the figures of plaintiff showing a balance the court inadvertently wrote opposite the balance the words "Due on account according to defendant," instead of "according to plaintiff," the defendant was not prejudiced by the mistake plainly appearing on the face of the paper.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153–4157, 4166; Dec. Dig. ⊂=1050.]

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

On writ of error by the defendants to review a judgment in favor of the plaintiff for $4,415.99 entered upon the verdict of a jury in the District Court for the Southern District of New York. Affirmed.

Ruskay & Ruskay, of New York City (Abraham S. Gilbert, of New York City, of counsel), for plaintiffs in error.

Joseph A. Arnold, of New York City, for defendant in error.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

COXE, Circuit Judge. This action was brought by the Banner Rubber Company to recover of the defendants the balance of $5,974.17 due on the sale of rubber boots, etc., made by the plaintiff to the defendants between December, 1907, and December, 1910.

The defense is that the goods were not equal to the quality agreed upon. For this reason a large part of the goods so purchased was returned to the plaintiff by mutual consent. The defendants allege that in March, 1910, the parties entered into another agreement for further sale of rubber goods by sample, known as "standard Goodyear" and equal to the "Sunset grade" manufactured by the plaintiff. The defendants assert that there was a breach of these warranties and that the goods were worthless. Some of the statements in the charge as to the burden of proof were incorrect but no exceptions were taken and we do not think the jury were misled thereby. Many exceptions were taken but present no question for this court, for instance, the exception to the refusal of the court to grant the motion for a new trial. Upon the whole record, we think the questions of fact were fairly presented to the jury and a correct conclusion reached. It is not surprising that in a trial involving so many details and lasting four days some errors should have been committed, but we think in view of the comprehensive charge and the explanations and corrections made by the trial judge, that these errors were harmless and that the verdict of the jury was fully supported by the facts.

The record shows that the court charged the six propositions of law asked for by the counsel for the defendants and that they took no

exception to the charge. The fourteenth assignment of error is as follows:

"The court erred in submitting to the jury certain tabulations made up by the court upon which the court wrote opposite the balance the words 'Due on account according to defendant' instead of according to plaintiff."

We deem it only necessary in disposing of this assignment to quote what the trial judge says regarding it in his opinion denying the motion to set aside the verdict:

"Certain tabulations were submitted to the jury, with the approval of counsel, showing the state of the account according to plaintiff's figures and defendants' figures. One sheet was headed, 'Plaintiff's Figures Showing Balance on This Account with Regard to Claim for Breach of Warrant,' but by an inadvertence, I wrote opposite the balance on that sheet the words 'Due on account according to defendant,' instead of 'according to plaintiff.' Inasmuch, however, as this use of the word 'defendant' was a plain mistake on the face of the paper, and the sheet was accompanied by another one giving the balance as contended by defendant, I cannot see that there was any prejudice to the defendant in submitting it."

The judgment is affirmed with costs.

In re SHIDLOVSKY.

(Circuit Court of Appeals, Second Circuit. June 22, 1915.)

No. 315.

BANKRUPTCY ⇐440—ORDER REQUIRING BANKRUPT TO TURN OVER PROPERTY —MODE OF REVIEW.

An order of court in bankruptcy requiring a bankrupt to turn over property to his trustee, entered on exceptions to a special master to take testimony and report under order requiring the bankrupt to show cause why he should not be compelled to turn over a specified sum to his trustee, is reviewable only by petition to revise, under Bankr. Act July 1, 1898, c. 541, § 24b, 30 Stat. 553 (Comp. St. 1913, § 9608), and is not appealable under sections 24a, 25a (section 9609).

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 915; Dec. Dig. ⇐440.

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

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

Samuel Dickstein, of New York City, for plaintiff in error.

Stern, Barr & Tyler, of New York City (Henry C. Moses, of New York City, of counsel), for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

WARD, Circuit Judge. December 14, 1913, Sussman Shidlovsky, a manufacturer of dresses, carrying on business under the name of S. Shidlovsky & Co., having collected accounts to the amount of $2,262.24, disappeared, and did not return to the city for about a month.

December 15th an involuntary petition in bankruptcy was filed against him and a receiver appointed.

February 6, 1914, the receiver obtained an order requiring Shidlovsky to show cause why he should not be compelled to turn over $1,773.59 to him.

February 9, 1914, the matter was referred to a special master to take testimony and report.

October 8th the special master reported that the bankrupt had collected $2,262.24 and had not accounted for the disposition of such moneys in the sum of $810, and that he should be ordered to turn that amount over as moneys in his possession to the trustee.

November 13th Judge Learned Hand, upon exceptions filed by the trustee to the report, entered an order requiring the bankrupt to pay over $1,470 to the trustee.

November 21st the bankrupt took this appeal.

We think this was a step in the bankruptcy proceedings from which no appeal lies under section 24a, and as the claim does not fall within any one of the three categories in which appeals in bankruptcy proceedings are permitted by section 25a, the only remedy was by petition to revise, under section 24b. In re Mertens, 142 Fed. 445, 73 C. C. A. 561; Kirsner v. Taliaferro, 202 Fed. 51, 120 C. C. A. 305.

Appeal dismissed.

PORTER v. F. M. DAVIES & CO.

(Circuit Court of Appeals, Eighth Circuit. July 9, 1915.)

No. 4314.

In Error to the District Court of the United States for the District of South Dakota; James D. Elliott, Judge.

On motion for rehearing. Motion denied.

For former opinion, see 223 Fed. 465, — C. C. A. —.

Howard Babcock, of Sisseton, S. D., and Frank McNulty, of Aberdeen, S. D., for plaintiff in error.

H. V. Mercer and Mercer, Swan & Stinchfield, all of Minneapolis, Minn., for defendant in error.

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

CARLAND, Circuit Judge. The motion for a rehearing in this action has been considered, and our attention has been drawn thereby to the following language occurring in our opinion in the statement of the case:

"It also had appeared without dispute that this money was paid to Davies & Co. to settle losses resulting from speculations on the future price of wheat, which was not delivered or intended to be by either party."

It was not our intention to in any wise pass upon the merits of the controversy. The language above quoted was unnecessary to the opinion rendered; and in view of the possible embarrassment that it may cause the defendant on a new trial the same may be omitted from the opinion. We do not see any other merit in the petition for a rehearing, and the same will be denied.

And it is so ordered.

NEW YORK SCAFFOLDING CO. v. WHITNEY.†

(Circuit Court of Appeals, Eighth Circuit. May 12, 1915.)

No. 4215.

(Syllabus by the Court.)

1. PATENTS ⟸26—RIGHT TO SECURE—COMBINATION OF OLD ELEMENTS.
A new combination of old mechanical elements, whereby a new and useful result is secured, or an old result is attained in a more facile, economical, and efficient way, may be protected by a patent as securely as a new machine or composition of matter.
[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 27–30; Dec. Dig. ⟸26.]

2. PATENTS ⟸17, 18—RIGHT—SIMPLICITY.
The simplicity of a combination or machine is no bar to its patentability. If those skilled in the mechanical arts have failed after repeated efforts to discover a certain new and useful combination or improvement, it may be safely inferred that he who makes the discovery is entitled to protection as an inventor.
[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 16–18; Dec. Dig. ⟸17, 18.]

3. PATENTS ⟸26—RIGHT TO SECURE—GRADUAL ADVANCE—INDEPENDENT INVENTION.
Where the advance toward the thing sought is gradual, and several inventors independently form several combinations, which accomplish the general result with varying degrees of operative success, each is entitled to his own combination, as long as it differs from those of his competitors and does not include theirs.
[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 27–30; Dec. Dig. ⟸26.]

4. PATENTS ⟸26—RIGHT TO SECURE—COMBINATION OF OLD ELEMENTS.
It is not necessary, in order to escape the defense of an aggregation of elements and to insure the patentability of a combination of old elements, that each element should, in addition to performing its own function, modify the function performed by one or more of the others.
It is sufficient, if there is a new combination of old mechanical elements, and if the elements thus combined are capable of producing a novel and useful result, or an old result in a more facile, economical, or efficient way.
[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 27–30; Dec. Dig. ⟸26.]

5. PATENTS ⟸26—PATENTABLE COMBINATION—CHANGE OF LOCATION OF ELEMENTS.
A new combination of old mechanical elements, wherein, by a different location of one or more of the elements, a new and useful result is attained, or an old result is produced in a better way, is patentable.
[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 27–30; Dec. Dig. ⟸26.
Patentability of combinations of old elements as dependent on results attained, see note to National Tube Co. v. Aiken, 91 C. C. A. 123.]

6. PATENTS ⟸259—"CONTRIBUTORY INFRINGEMENT"—PRESUMPTION.
Contributory infringement is the intentional aiding of one person by another in the unlawful making, selling, or using of a third person's patented invention.
One who makes or sells one or more elements of a patented combination, with the intention or for the purpose of bringing about its or their use

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

† Rehearing denied August 23, 1915.

in an infringing combination, is guilty of contributory infringement, and is equally liable with him who in fact organizes and uses the complete combination.

One who makes and sells articles which are only adapted to be used in a patented combination will be presumed to intend the natural consequences of his act. He will be presumed to intend that they shall be used in the combination patented.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 400–402; Dec. Dig. ⊂⊃259.

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

7. PATENTS ⊂⊃328—VALIDITY.

Claims 1 and 3 of letters patent No. 959,008, for an improved scaffold supporting means, issued on May 24, 1910, to Henderson, secure useful and patentable combinations.

8. PATENTS ⊂⊃259—INFRINGEMENT.

One who makes and sells such hoisting devices and frames therefor as are portrayed in figure 1 in the patent to Whitney, No. 998,270, issued July 18, 1911, with the knowledge that they have been used, and the intention that they shall be used, in combinations with cross pieces and floor pieces of scaffolds, such as are described in claims 1 and 3 in patent No. 959,008, issued May 24, 1910, to Henderson, is guilty of contributory infringement of those claims.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 400–402; Dec. Dig. ⊂⊃259.]

9. PATENTS ⊂⊃168—ABANDONMENT OF CLAIM—ACQUIESCENCE IN REJECTION—ESTOPPEL.

While a patentee, who acquiesces in the rejection of his claim, and abandons it on references cited in the Patent Office, and accepts a patent on an amended claim, is thereby estopped from maintaining that the latter claim covers the combination shown in the references, and that it has the breadth of the abandoned claim that was rejected, that is the limit of the estoppel. One who does not abandon, but insists upon and sustains, his claim, is not estopped; and one who acquiesces in the rejection of his claim because it is said to be anticipated by other patents or references is not thereby estopped from claiming and securing by an amended claim every novel and useful improvement that is not described in those references.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 243½, 244; Dec. Dig. ⊂⊃168.]

Smith, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the District of Nebraska; Page Morris, Judge.

Suit by the New York Scaffolding Company against Egbert Whitney. From a decree for defendant, the Scaffolding Company appeals. Reversed, with directions.

Paul Bakewell, of St. Louis, Mo., and C. P. Goepel, of New York City, for appellant.

James A. Carr, of St. Louis, Mo. (T. Percy Carr, of St. Louis, Mo., on the brief), for appellee.

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

SANBORN, Circuit Judge. The New York Scaffolding Company, the owner of letters patent No. 959,008, for an improved scaffolding

supporting means, issued May 24, 1910, to E. H. Henderson, on an application filed June 19, 1909, brought a suit against Egbert Whitney for contributory infringement of claims 1 and 3 of its patent by the manufacture and sale of the hoisting device and the frame thereof described in the patent to Whitney issued July 18, 1911, on an application filed January 28, 1911. There was a decree for the defendant in the court below, which this appeal challenges. The defenses were, first, invalidity of Henderson's patent on account of (a) anticipation; (b) lack of invention; (c) aggregation, rather than patentable combination; and, second, noninfringement.

Several patents were introduced in evidence to prove anticipation, but it is unnecessary to consider more than two, the patent No. 382,252, to Bowyer and Casperson, for an improvement in painter's stages, issued May 1, 1888, and the patent to William J. Murray, for an improvement in adjustable scaffolds, issued May 28, 1907, for, if neither of these anticipates, there is none that does. The desideratum sought by Henderson was a simple, economical, and efficient hoisting device and the frame therefor to enable workmen constructing large buildings to raise and lower the scaffolds on which they were working from their stations thereon, so constructed and combined with the cross pieces and floor pieces of the scaffold that the hoisting device and frame would not obstruct any portion of the platform of the scaffold, and that the combination of the hoisting device and its frame with the cross pieces and the floor pieces should be detachable without removing rivets or fastenings of cross pieces to the frame, or of the floor pieces to the cross pieces, to the end that the combination could be easily and quickly knocked down, removed, and set up again in another place. The principle and the method of combining the mechanical elements by which he reached the result he sought was to locate a hoisting frame, carrying a drum and a shaft gearing therewith operated by a detachable crank, broadside to the wall of the building at the end of each cross piece, so that neither the frame nor its hoisting device, nor the crank, would obstruct any portion of the scaffold when the crank was not in use, to support the cross pieces bearing the floor pieces on the lower ends of the frames, without fastening them thereto, so that they could be removed and replaced without removing or replacing rivets or fastenings.

The means he devised to effectuate the principle of his combination were these: To a drum, borne by the sides of the frame of each hoisting device, a cable, depending from the overhanging portion of an outrigger fastened on the top, or on some other high portion of the building, was attached. The frame of the hoisting device was preferably formed by bending a piece of bar iron into the form of the letter U, the lower end of which passed around and supported one end of a cross piece without being fastened thereto. Supported in and extending between the upwardly extended ends of the frame he placed a round bar, which formed the support of the drum to which the cable was fastened. On one end of the drum was a gear wheel, which meshed with a pinion revolubly supported in and between the upwardly extended arms of the frame. This shaft was squared at its ends, so

that the crank could be placed on either end without fastening it there, and could be used to drive the pinion and the drum and to raise or lower the scaffold, and then could be removed, without removing any fastening, in order to avoid any obstruction thereby of the platform of the scaffold. The upper ends of the frame were securely held in place by means of a bolt which extended through and between them. One of these frames, with its hoisting device, was placed at each end of each cross piece, and thus at least four of them were necessary to support and operate a scaffold, and as many more could be used as the size of the building and the extent of the work demanded. The claims in suit are:

"1. A scaffold consisting in the combination of cross beams, floor pieces extending between such beams, and a hoisting device associated with each end of each beam, each hoisting device consisting of a continuous U-shaped metal bar extending around the under side of and upward from the associated beam, and a hoisting drum rotatably supported by the side members of such bar."

"3. A scaffold consisting of a plurality of U-shaped bars arranged in pairs, a cross beam laid in and extending between each pair of such U-shaped bars, a floor laid upon said cross-beam, a drum rotatably supported between the upwardly extending side members of each of said U-shaped bars, and means for controlling the rotation of said drum."

The device patented to Bowyer and Casperson is a painter's stage, consisting of the combination of a plank, each end of which is supported by a bar secured to the lower ends of the vertical sides of a frame which carries a drum and a shaft operated by a crank and bearing a pinion meshing with gearing on the drum, to which a cable or rope, depending through pulleys and other familiar devices from a hook on the top of the cornice of a building, is attached. By the use of two of these frames and the hoisting devices, painters, by turning the cranks, could operate the drums and raise or lower their staging and themselves.

The patent to Murray discloses an inverted U-shaped frame bearing in and between its vertical sides a drum, to which a depending cable is attached, and a gear wheel on the drum, with which a pinion on a shaft, operated by a crank and supported in and between the vertical sides of the frame, meshes. By turning the crank the frame and hoisting device may be raised and lowered. This patent portrays a pair of these frames and hoisting devices, one at each end of each cross piece, which supports the floor pieces of the scaffold. These frames, however, are not placed with their broad sides, but with their narrow edges, to the wall of the building, so that the cross pieces used with these devices must necessarily be as much longer than those required for the use with Henderson's combination as twice the breadth of the frames is greater than twice their thickness, or the frames must be placed over and will obstruct the platform of the scaffold. In the combination of Murray the ends of the cross pieces do not rest unfastened upon the lower bends or bars of the hoisting frames, but they are rigidly secured by rivets or like fastenings to the lower ends of the vertical sides of the frame which supports them, so that, in order to move the scaffold and to use it in another locality, it is necessary to remove the rivets or fastenings and then rivet or fasten

the cross pieces and frames together again, or to remove a cross beam with the two hoisting devices and their frames fastened thereto in one cumbersome mass.

[1] Do the combinations of Bowyer and Casperson, and of Murray, anticipate and annul the patent of the combinations of claims 1 and 3 of Henderson's patent? His patent is for a combination. It is not for a new machine, or for new mechanical elements, but for a new way of combining old mechanical elements. And a new combination of old mechanical elements, whereby an old result is attained in a more facile, economical, and efficient way, or whereby a new and useful result is secured, may be protected by a patent as securely as a new machine or composition of matter. Gould v. Rees, 15 Wall. 187, 189, 21 L. Ed. 39; Diamond Rubber Co. v. Consolidated Tire Co., 220 U. S. 428, 443, 31 Sup. Ct. 444, 55 L. Ed. 527; Leeds & Catlin Co. v. Victor Talking Mach. Co., 213 U. S. 301, 318, 29 Sup. Ct. 495, 53 L. Ed. 805; Thomson v. Citizens' Nat. Bank, 53 Fed. 250, 3 C. C. A. 518; National Hollow Brake Beam Co. v. Interchangeable Brake Beam Co., 106 Fed. 693, 707, 45 C. C. A. 544, 558; Ide v. Trorlicht, Duncker & Renard Carpet Co., 115 Fed. 137, 141, 53 C. C. A. 341, 345; Kinloch Telephone Co. v. Western Electric Co., 113 Fed. 659, 665, 51 C. C. A. 369, 375; Anderson v. Collins, 122 Fed. 451, 459, 58 C. C. A. 669, 677. Henderson's method of combination made the use of scaffolds in the construction of large buildings easier, more economical, and more efficient than those of prior methods, in that it avoided obstruction of the scaffolds by the hoisting devices, their frames, or their cranks, shortened the cross pieces necessary to support the floor pieces of the scaffolds by the difference between twice the breadth and twice the thickness of the hoisting devices and their frames, and in that it enabled the workmen to knock down, move, and again set up the scaffolds, hoisting devices, and frames without unfastening and again riveting together cross pieces and hoisting frames, or handling in one cumbersome whole a cross piece riveted to two frames bearing their hoisting devices. It is frequently necessary in the construction of buildings to take down and move the scaffolds of the workmen from place to place, and Henderson's new combinations, now that they have been made, present distinct and obvious advantages over those of Bowyer and Casperson, and Murray, in simplicity, economy, and efficiency. They were neither disclosed nor suggested by Bowyer and Casperson, or by Murray, and neither their patents nor any other patents in the prior art anticipated them.

Did the new combinations of Henderson have such novelty and utility as to make them patentable? Their utility is established by the testimony of witnesses, and by the fact that Whitney himself, after the patent to Henderson, had been allowed, made an application for a patent upon them which was rejected upon Henderson's patent, and Whitney has since, by the construction of his hoisting device and his frame, attempted to appropriate to himself the principle and mode of operation and their advantages, which were secured to Henderson by his patent of the combinations. Diamond Rubber Co. v. Consolidated Tire Co., 220 U. S. 428, 440, 31 Sup. Ct. 444, 55 L. Ed. 527.

[2, 3] Did the combinations of Henderson have the attribute of patentable novelty? They disclose simple and useful improvements. Their simplicity, however, is no bar to their patentability. "The fact that the invention seems simple after it is made," says the Supreme Court, "does not determine the question; if this were the rule, many of the most beneficial patents would be stricken down. It may be safely said that if those skilled in the mechanical arts are working in a given field, and have failed after repeated efforts to discover a certain new and useful improvement, that he who makes the discovery has done more than make the obvious improvement which would suggest itself to a mechanic skilled in the art, and is entitled to protection as an inventor." Expanded Metal Co. v. Bradford, 214 U. S. 366, 381, 29 Sup. Ct. 652, 53 L. Ed. 1034; Diamond Rubber Co. v. Consolidated Tire Co., 220 U. S. 428, 434, 435, 31 Sup. Ct. 444, 55 L. Ed. 527. The quotation states the case which the history of the prior art disclosed by the record in hand presents. Moreover, the combination of Henderson "possesses such an amount of change from the prior art as to have received the approval of the Patent Office and is entitled to the presumption of invention which attaches to a patent." Diamond Rubber Co. v. Consolidated Tire Co., 220 U. S. 428, 434, 441, 31 Sup. Ct. 444, 55 L. Ed. 527. The attempt of the defendant below to patent to himself the combinations of Henderson after the latter had secured them, and the defendant's imitation of them in the devices he now makes and sells, substantially adds his testimony to the other proof of their patentability. The remarks of the Supreme Court in Diamond Rubber Co. v. Consolidated Tire Co., 220 U. S. 440, 31 Sup. Ct. 444, 55 L. Ed. 527, are not inapplicable here. "It is conceded," said that court, "as we have said, that his invention is a narrow one—a step beyond the prior art—built upon it, it may be, and only an improvement upon it. Its legal evasion may be the easier (Railway Company v. Sayles [97 U. S. 554, 24 L. Ed. 1053]), and hence we see the strength of the concession to its advance beyond the prior art, and of its novelty and utility by the Rubber Company's imitation of it."

The devices of Bowyer and Casperson, of Murray, and of the prior art were and are open to the defendant below. If there was no improvement in the combinations of Henderson, if the combination of Murray, or of any other patentee, was in effect the same as and equally useful with Henderson's, why did not the defendant claim and use it? The record discloses the fact that during many years mechanics and inventors had been using their skill and their genius to discover and to construct the most simple, inexpensive, and efficient combinations of hoisting devices, frames therefor, cross pieces, and floor pieces for the scaffolds of workmen, that the advance in the art had been made step by step, and that many inventors and mechanics had contributed different combinations whereby scaffolds could be made, raised, lowered, and used with different degrees of success. This case, therefore, ranges itself under the familiar rule that where the advance toward the thing desired is gradual, and several inventors form different combinations, which accomplish the result sought with varying degrees

of operative success, each is entitled to his own combination, as long as it differs from those of his competitors and does not include theirs. Ottumwa Box Car Loader Co. v. Christy Box Car Loader Co., 215 Fed. 362, 369, 131 C. C. A. 504; Railway Co. v. Sayles, 97 U. S. 554, 556, 24 L. Ed. 1053; McCormick v. Talcott et al., 20 How. 402, 405, 15 L. Ed. 930; Stirrat v. Excelsior Mfg. Co., 61 Fed. 980, 981, 10 C. C. A. 216, 217; Griswold v. Harker, 62 Fed. 389, 391, 10 C. C. A. 435, 437; Adams Electric Ry. Co. v. Lindell Ry. Co., 77 Fed. 432, 440, 23 C. C. A. 223, 231; National Hollow Brake Beam Co. v. Interchangeable Brake Beam Co., 106 Fed. 693, 712, 45 C. C. A. 544, 563.

The facts, considerations, and rules of law to which reference has now been made have forced our minds to the conclusions that the combinations of claims 1 and 3 of Henderson's patent were novel and useful, that their conception and application to the actual use of raising, lowering, and moving workmen's scaffolds rose to the dignity of invention, and endowed them with the attribute of patentability.

[4] Before reaching this conclusion the argument of counsel for the defendant that these combinations were not patentable, because they were mere aggregations of old elements, and the leading authorities upon that subject, received attention and meditation. The rule is now well established, by sound reasons and the great weight of modern authority, that it is not requisite to the patentability of a combination of old mechanical elements that each element should, in addition to performing its own function, modify the function performed by one or more of the other elements of the combination. It is sufficient if the combination of the old elements is new, and if the combined elements are capable of producing a novel and useful result, or an old result in a more facile, economical, or efficient way. National Cash Register Co. v. American Cash Register Co., 53 Fed. 367, 371, 3 C. C. A. 559, 563; Pelton Water Wheel Co. v. Doble, 190 Fed. 760, 766, 111 C. C. A. 488, 494; International Mausoleum Co. v. Sievert, 213 Fed. 225, 229, 129 C. C. A. 569; Ottumwa Box Car Loader Co. v. Christy Box Car Loader Co., 215 Fed. 263, 274, 131 C. C. A. 504; Sanders v. Hancock, 128 Fed. 424, 434, 63 C. C. A. 166, 176; Dayton Malleable Iron Co. v. Forster Waterbury & Co. (C. C.) 153 Fed. 201, 204; W. W. Sly Mfg. Co. v. Russell & Co., 189 Fed. 61, 66, 110 C. C. A. 625, 630; Burdett-Rountree Mfg. Co. v. Standard Plunger Elevator Co. (C. C.) 196 Fed. 43, 46.

[5] A new combination of old elements, in which, by a different location of one or more of the elements, a new and useful result is attained, or an old result is produced in a better way, is patentable. Sanders v. Hancock, 128 Fed. 424, 434, 63 C. C. A. 166, 176; Star Brass Works v. General Electric Co., 111 Fed. 398, 49 C. C. A. 409; Dowagiac Mfg. Co. v. Superior Drill Co., 115 Fed. 886, 53 C. C. A. 36; Stillwell-Bierce & Smith-Vaile Co. v. Eufaula Cotton Oil Co., 117 Fed. 410, 54 C. C. A. 584. The combinations of Henderson's first and third claims were new. No one had made them before he disclosed them. They were not described or suggested in the prior art. They placed the old elements, hoisting device, and frame therefor in a new

location broadside to the wall, a location wherein the connections between the lower parts of the frame were fitted to receive, and so that they did receive, and safely support, without fastening the ends of the cross pieces sustaining the floor pieces of the scaffold, and by the new relation and the coaction of the old elements in these new combinations a more facile, economical, and efficient way to make, operate, and move scaffolds for workmen, a way in which hoisting devices and frames could be used without obstructing the platforms of the scaffolds while work on them was in progress, a way in which hoisting devices, frames therefor, and cross pieces could be combined to support, raise, and lower a scaffold without riveting or securing cross pieces to frames, and so that the hoisting and supporting apparatus could be knocked down, removed, and set up, without unfastening or refastening cross pieces to hoisting frames. These new and beneficial results were the effects, not of the separate performance by each of the old elements of its own function, but of the new relation and the new method of combination of the old mechanical elements, and of their co-operation in that relation in the combinations of Henderson. Those combinations, therefore, fall well within the line of patentability established by reason and authority.

[6] Did the defendant infringe these combinations of Henderson? It is not claimed that he made, sold, or used the entire combination of either of the claims in suit, but that by the manufacture and sale of his hoisting devices and his frames therefor he is guilty of contributory infringement. Contributory infringement is the intentional aiding of one person by another in the unlawful making, or selling, or using of a third person's patented invention. Henry v. Dick, 224 U. S. 1, 32, 33, 34, 32 Sup. Ct. 364 (56 L. Ed. 645, Ann. Cas. 1913D, 880). "He who makes and sells one or more elements of a patented combination, with the intention and for the purpose of bringing about its or their use in an infringing combination, is guilty of contributory infringement, and is equally liable with him who in fact organizes and uses the complete combination." James Heekin Co. v. Baker, 138 Fed. 63, 66, 70 C. C. A. 559, 562. One who makes and sells articles which are only adapted to be used in a patented combination will be presumed to intend the natural consequences of his acts; he will be presumed to intend that they shall be used in the combination of the patent. It is the duty of one who is offering for sale one or more articles, which he intends shall be used in combinations which, if unlicensed, will infringe a patent, to see to it that such combinations which he thus promotes and induces are lawfully organized. Thomson-Houston Electric Co. v. Ohio Brass Co., 80 Fed. 712, 721, 26 C. C. A. 107, 116. The foregoing rules of law are indisputable. They are supported by a multitude of authorities, among others by American Graphophone Co. v. Hawthorne (C. C.) 92 Fed. 516, 517; Thomson-Houston Electric Co. v. Kelsey Electric Ry., etc., Co., 75 Fed. 1005, 1007, 1008, 22 C. C. A. 1, 3, 4; Heaton-Peninsular Button Fastener Co. v. Eureka Specialty Co., 77 Fed. 288, 297, 25 C. C. A. 267, 276, 35 L. R. A. 728; Johnson v. Foos Mfg. Co., 141 Fed. 73, 88, 72 C. C. A. 105, 120; Leeds & Catlin Co. v. Victor Talking Machine Co., 154 Fed. 58, 59, 83 C. C. A. 170, 171, 23 L. R. A. (N. S.) 1027.

[7, 8] The distinguishing characteristic of Henderson's combination, the new location and method of combining the elements which secured the advantages of these combinations, was the location of the hoisting device and its frame broadside to the wall, and the provision of substantial connections between the lower ends of the vertical side pieces of his hoisting frames upon which the ends of the cross pieces could rest without fastenings. This was the principle of his new combinations of hoisting devices and their frames with the cross pieces and floor pieces of the scaffolds. The defendant, Whitney, has embodied this principle in hoisting devices and their frames which are adapted to be used in Henderson's combination, and these he is manufacturing and selling. His counsel argue that a combination of these hoisting devices and their frames with the cross pieces and floor pieces of scaffolds would not infringe the combinations of Henderson, because Henderson's drum is supported by a shaft whose ends extend through perforations in the vertical side pieces of his frames, while Whitney's drum is mounted on brackets secured to the vertical side pieces of his frames, because Henderson's frames for his hoisting devices are metal bars bent in the form of the letter U, while Whitney uses metal bars bent in the form of inverted letters U, and because Henderson uses a shaft operated by a crank to drive his drum, while Whitney uses a lever. But a crank on a shaft is a lever. Whitney has headed and thereby fastened into loops in the lower ends of the vertical sides of each of his inverted U hoisting frames a supporting rod of metal connecting the vertical sides of his frames, and with these rods he supports the cross pieces of the scaffold without fastening the latter to the frames, just as the lower parts of Henderson's frames in the form of upright letters U support such cross pieces. A drum mounted on brackets fastened to the vertical sides of one of these hoisting frames is in mechanical effect the same thing as a drum mounted on a shaft whose ends extend through perforations in such vertical sides.

These changes from the combinations of Henderson which Whitney has made are but the substitution of plain mechanical equivalents, and they have no tendency to relieve the combination of his hoisting devices and frames with the cross pieces and floor pieces of a scaffold of infringement of Henderson's patented combinations. Whitney's hoisting devices and frames still remain the mechanical equivalents of those of Henderson. In combination with the cross pieces and floor pieces of a scaffold they embody the new principle and method of Henderson. By their necessary location in their use by workmen constructing large buildings with their broadsides to the wall (and they could not be used for such scaffolds with their edges to the wall, because thus placed they would furnish no support for the cross pieces), they prevent obstruction of the platforms while the employés are at work and furnish secure supports for the cross pieces without fastening the latter to the frames, so that the scaffolds can be knocked down, removed, and set up again without removing or replacing such fastenings. By the use of the new principle and way of combining the old elements which Henderson disclosed they accomplish, in combination with the cross pieces and floor pieces of a scaffold, by the same mechanical means, the same bene-

ficial results which the hoisting devices and frames of Henderson attained in his patented combinations, and they fail to escape infringement thereof.

The combinations of Henderson are unique in this: That the principle of his invention is embodied in the hoisting devices and their frames and their appropriate location in the combinations to such an extent that any contractor or other person provided with them and taught their proper location can readily supply the cross pieces and floor pieces and make and use the patented combinations. It is the hoisting devices and their frames that the defendant Whitney makes and sells. The expert introduced on his behalf testified that the Whitney machine was the same as that disclosed in the Whitney patent in all essential respects. Whitney himself testified that he had disseminated a circular which contained a cut of his hoisting device and frame during the year 1912, that he had seen his hoisting devices and frames in use and shown contractors the manner of their installation and operation, and that he was ready to supply them. At least two pairs of hoisting devices and their frames, all placed broadside to the wall of the building, each pair supporting a cross piece, are indispensable to the combinations of Henderson to construct scaffolds for workmen on large buildings. Figure 1 of the patent to Whitney discloses four of his hoisting devices and their frames so located, combined with cross pieces and floor pieces in the new way disclosed by the patented combinations of Henderson. Whitney testified that his hoisting devices and their frames were adapted to be used in that manner, and that they were equally adapted to be used by laying a plank across from one machine to another. But their use by laying a plank from one machine to another would be futile and impractical in the construction of large buildings, because the platform would be too narrow, and the hoisting units would necessarily hang across the plank with their edges to the wall, and would obstruct the passage of the workmen beyond the plank. The facts that in his later patent Whitney portrayed in his Figure 1 his hoisting devices and their frames in use in the combinations of claims 1 and 3 of Henderson's patent, that they were adapted to use in those combinations, that he had advertised them, had explained to contractors the manner of their installation and operation, had seen them in operation, and that he is here opposing an injunction against his manufacture and sale of them for use in those combinations, where it is his duty to see to it that they are not used, Thomson-Houston Electric Co. v. Ohio Brass Co., 80 Fed. 712, 721, 26 C. C. A. 107, 116, leaves no doubt that he is making and selling his hoisting devices and frames with the knowledge that they are being used, and the intention that they shall be used, unlawfully in the combinations of claims 1 and 3 of Henderson's patent, and that he is guilty of contributory infringement.

The application of Henderson for his patent was twice rejected by the examiner before the patent was issued, and counsel for Mr. Whitney have earnestly contended that by these rejections and Henderson's amendments of his claims he was estopped from insisting that any combination of the mechanical elements he describes, in which the

lower end of the frame of the hoisting device is not integral with the sides of the frame, constitutes an infringement of his claims, and that, because the lower end of Whitney's frame consists of a rod which is not integral with its sides, although its ends are fitted and headed into metal loops formed by bending up and fastening the lower ends of the side pieces of his frames, he escapes infringement. This argument has been attentively considered, but it has failed to convince. The specification of Henderson's patent, aside from the claims therein, is identical with that specification as it was first presented with his application. He first presented eight claims. They were all rejected by the examiner, who cited Murray, No. 854,959, May 28, 1907, and several other patents not now material, and wrote:

"None of the claims are seen to present invention over Murray. To arrange his U-shaped frame with the closed end down, so as to extend around the crossbar, would be obvious, if desired."

Henderson amended his claim 1 by inserting the words "the under side of" where they now appear in claim 1 of the patent, and added what is now claim 3 of the patent. The examiner again rejected all the claims, with the remark that the claims presented no invention over Murray, in view of Bowyer et al., No. 382,252, May 1, 1888. Henderson did not acquiesce in this rejection, but inserted the word "continuous," where it now appears in claim 1 of his patent, and again pressed his application. His solicitors argued, among other things, that:

"None of the structures of the prior art are adapted to support the scaffold without either positively securing the windlass frame to the scaffold or using a complicated structure for the windlass frame."

Their argument prevailed. The examiner held that the combinations Henderson claimed were not anticipated by Murray, or by Bowyer and Casperson, or by anything in the prior art, that they were novel and useful, and that they exhibited invention, and he caused the patent to issue.

[9] The rule of law which governs the question here at issue is this: While a patentee who acquiesces in the rejection of his claim, and abandons it on references cited in the Patent Office, and accepts a patent on an amended claim, is thereby estopped from maintaining that the latter claim covers the combination shown in the references, and that it has the breadth of the abandoned claim that was rejected, that is the limit of the estoppel. One who does not abandon, but insists upon and sustains, his first claim, is not estopped, and one who acquiesces in the rejection of his claim because it is said to be anticipated by other patents or references is not thereby estopped from claiming and securing by an amended claim every novel and useful improvement that is not described in those references. National Hollow Brake Beam Co. v. Interchangeable Brake Beam Co., 106 Fed. 693, 714, 45 C. C. A. 544, 565; J. L. Owens Co. v. Twin City Separator Co., 168 Fed. 259, 268, 93 C. C. A. 561, 570; O'Brien-Worthen Co. v. Stempel, 209 Fed. 847, 851, 128 C. C. A. 53; Ottumwa Box Car Loader Co. v. Christy Box Car Loader Co., 215 Fed. 362, 373, 131 C. C. A. 504.

Henderson is not estopped by the record which has been recited from claiming that combinations which embody the principle of those claim-

ed in 1 and 3 of his patent, that is to say, the location of the hoisting devices and their frames broadsides to the wall, and the support of the cross pieces without fastenings on the bar which connects the lower ends of the side pieces of the frames, because he never abandoned his claims of those combinations. Claims 1 and 3 are in the same words in which they were when they were first presented to the examiner, except that the words "the under side of" and "continuous" were subsequently inserted in claim 1. But the insertion of these words did not change the meaning or effect of the original claims. The subsequent presentation and allowance of these claims was an insistence upon, and not an abandonment of, them by Henderson, and their allowance by the examiner was the reversal of his earlier decision rejecting them. Even if it were conceded that the insertion of the word "continuous" indicated that Henderson's U-shaped frame was to be integral, nevertheless the claim of its integral character could have had no legal effect.

One may not escape anticipation or infringement by making an article in one piece, which then performs the same function in the same way that an earlier article of the same kind in two pieces performed, and the examiner could not have decided, and clearly did not decide, that the combinations of Henderson were patentable because the U-shaped frame was integral. He held that they were patentable, because they disclosed Henderson's new method of combining hoisting devices and the frames therefor broadsides to the wall with the cross pieces and floor pieces of the scaffold, so that the hoisting units should not obstruct the platform of the scaffold and the cross pieces should be supported on the rod which connected the lower ends of the vertical side pieces of the frames. This principle and the combinations which embody it were not disclosed or suggested in the prior art, nor in the references on which the examiner at first rejected Henderson's claim. His claims to the combinations of 1 and 3 of his patent Henderson never abandoned, never acquiesced in the rejection of, but pressed and reiterated until they were patented, and neither he nor his grantees are estopped from insisting upon their protection against infringement.

Let the decree below be reversed, and let a decree for an accounting and for an injunction against the manufacture and sale by the defendant, Whitney, or his agents, of his hoisting device and hoisting frame for use or sale in the combination of claim 1 or of claim 3 of Henderson's patent, or for any other purpose than use in a scaffold made by laying a plank or planks on the lower bars of two of his hoisting frames placed with their edges to the wall of the building, be granted.

SMITH, Circuit Judge (dissenting). Believing that the alleged patent of the appellant covers nothing but ordinary mechanical skill applied to the prior art, I think the patent is void, and this case should be affirmed. I therefore respectfully dissent from the foregoing opinion.

GENERAL ELECTRIC CO. v. HOSKINS MFG. CO.

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

No. 2152.

1. PATENTS ⟸328—VALIDITY AND INFRINGEMENT—ELECTRIC RESISTANCE ELEMENT.

The Marsh patent, No. 811,859, for an electric resistance element composed of an alloy of one of the metals of the chromium group with nickel, the latter comprising more than 50 per cent. of the alloy, was not anticipated, and discloses patentable invention; nor is it rendered invalid nor materially narrowed by the proceedings in the Patent Office. Also *held* infringed.

2. PATENTS ⟸65—ANTICIPATION—PRIOR DESCRIPTION.

In order to anticipate a later invention, the prior description must be such as to show that the article described in the patent can be certainly arrived at by following the prior description, without the assistance of local knowledge or local prior use in the locality where the description is published, and without experimentation.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 80; Dec. Dig. ⟸65.]

3. PATENTS ⟸21—INVENTION—SUBSTITUTION OF MATERIALS.

The discovery that a described metal alloy in stated proportions when used as an electric resistance element is far superior to any previously known except platinum, the cost of which precluded its commercial use, with the result of greatly advancing the art, constitutes patentable invention, although the alloy itself was known.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 23; Dec. Dig. ⟸21.]

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois; Arthur L. Sanborn, Judge.

Suit in equity by the Hoskins Manufacturing Company against the General Electric Company. Decree for complainant, and defendant appeals. Affirmed.

For opinion below, see 212 Fed. 422.

This patent was sustained and found to be infringed by the District Court. It was granted to A. L. Marsh for an electric resistance element on February 4, 1906, as patent No. 811,859. Claim 1 calls for an electric resistance element composed of an alloy consisting of one of the metals of the chromium group and of metal having the property of nickel and cobalt, combined in the proportion of more than 50 per cent. of the latter and less than 50 per cent. of the former. Claim 2 calls for a like element, comprising a strip, strand, or filament formed of an alloy of nickel and one of the metals of the chromium group, Claim 3 covers the last-named strip, etc., annealed. Claim 4 calls for a like resistance element formed of a metal alloy consisting of nickel and chromium. Claim 5 calls for a like resistance element formed of a metal alloy consisting of less than 50 per cent. of chromium and more than 50 per cent. of nickel.

"My object," says the patentee, "is to provide as an improved electric resistance material, a metal which has the property of being particularly low in electrical conductivity, has a melting point exceeding that of pure copper, and may be drawn or otherwise shaped to form particularly durable, efficient, and desirable strips, strands or filaments suitable for use in various connections where electric resistances are desirable."

What the patentee claims is a new use of an old material. The annealed strips or filaments drawn from an alloy consisting of 90 per cent. nickel and 10

per cent. pure chromium have a melting point exceeding that of pure copper, and a resistance nearly 50 times that of copper. Its temperature co-efficient is low. It does not become crystalline and brittle under heating and cooling, and resists oxidation to a remarkable degree under very high temperature, even when subjected to atmospheric conditions and corrosive fumes. It has a durability more than 150 times that of anything known in the prior art. Any member of the chromium group, such as chromium, molybdenum, tungsten, and uranium, when mixed with nickel or cobalt, form an alloy very low in electric conductivity, very infusible, nonoxidizable to a high degree, tough and sufficiently ductile to permit drawing or shaping into wire, etc., to render it convenient for use as an electric resistance element. Nickel and chromium are preferred. It is adapted to use where very high temperatures are used, 800° to 1000° C. or more. Variations in the related proportions of the metals affect more or less the variation in strength, durability, and resistivity of this alloy. An alloy consisting of 15 per cent. chromium and 85 per cent. nickel drawn into a wire 16/1000 of an inch in diameter has a resistance of about 2.3 ohms per foot. "Iron * * * is readily oxidizable," says Marsh, "and will not answer my purpose when alloyed," etc.

While the patent was in the Patent Office, Marsh made certain changes to meet the objections of the examiner, amounting, in the opinion of appellant, to an abandonment of the alloy now used by him. These matters, together with the effect of the proceedings as shown by the file wrapper, will be discussed in the opinion.

The strongest reference against the validity of the patent is that of the English patent to Emile Placet, No. 202—1896, November 21st. This patent was not before the examiner, nor was it known to Marsh at the time of his invention so far as the record shows. It relates to a method of introducing pure chromium into metals and alloys in a state of fusion. Speaking of pure chromium, Placet says: "This chromium is absolutely pure. It improves all metals and alloys with which it is mixed by imparting to them the qualities peculiar to itself. It renders them harder, more resistant to shock, tension, and friction, and also renders them more proof against the destructive action of the air, moisture, acids, and high temperatures." "Chromium," he says again, "renders metals and alloys more resistant than heretofore to high temperatures, which renders them highly suitable for the manufacture of tuyeres, hearths, firearms," etc. Again he says, "Chromium increases the electrical resistance of manganese, ferro-manganese, ferro-nickel, and other metals employed in the manufacture of conductors of high electrical resistance."

In an article published at page 89 of the Chemiker Zeitung in 1897, Henri Moisson, speaking with reference to Placet's production of commercially pure chromium, says it may be added to metals or alloys like copper, nickel, etc., and that "it renders the alloy harder, nonmagnetic and increases the electric resistance. * * * Alloys produced in that manner are especially suitable for several purposes," mentioning electric resistances. W. F. Barrett and other scientists, contributing to the Journal of the Institution of Chemical Engineers in 1902, speaking of researches with reference to a large number of alloys, among which are shown alloys containing chromium, recommended alloys consisting of: (a) 70 per cent. iron and 30 per cent. nickel, and (b) 80 per cent. iron, nickel 15 per cent., and manganese 5 per cent.—alloys having a life of about 1/200 of the Marsh alloy as a resistance material. This was after a publication of Placet's discoveries.

Kellner patent, No. 661,610, for improvements in incandescent bodies for incandescent lamps, and in the process of making the same, speaks of chromium and its alloys, in order to produce light filaments run at 1700° to about 2200°, at which temperatures chromium and its alloys would melt.

Osterman and La Croix patent, No. 404,220, granted May 28, 1889, covers a method for making nickel and nickel alloys nonmagnetic, properties necessary in watch springs, wheels, etc., and recommend an alloy of chromium 10 per cent. and nickel 90 per cent., which is the alloy of the patent in suit, but this patent makes no suggestion of the alloy as a resistance element. Patentees propose to alloy nickel and other metals with chromium. Such alloys, they say, "possess a very high elasticity and hardness." Nickel, the patent says, becomes completely unmagnetizable by an admixture of 10 per cent.

chromium. It is possible to alloy up to 30 per cent. chromium with nickel. By the addition of certain other metals patentees obtain malleability for watch springs, etc. Whether the alloy is commercially available does not appear, certainly not as a resistance element. Pure chromium is said by Placet to have been discovered by him some 7 years later than this patent.

Parnacott patent, No. 578,465, dated March 9, 1897, covers practically an alloy resembling German silver, which has a short life at 1000° temperature. The Webster patent, No. 377,918, for metallic alloy, is for practically the same alloy as that last stated.

The alloy of the Fleismann patent, No. 225,977, dated March 30, 1880, consists of zinc and nickel—about 95 per cent. nickel. Zinc boils at a temperature under 1000° C.

O'Neill patent, No. 485,424, granted November 1, 1892, for "Electrical Heater," discloses an alloy which is also practically German silver combined with silicon and tin. It makes no reference to the use of chromium in its alloy.

The foregoing suffice to show the state of the art at the date of the patent.

Marsh testified that his discovery came, not through disclosures made by Placet, but by accident when he was working in another field. The resistance of a conductor can be increased or diminished by increasing or decreasing its length and by enlarging or lessening the diameter or cross-section, and by the employment of a material of a high specific resistance. The problem is simply one of convenience. It is not so with durability. It remains constant and inherent in the resistance element.

Appellee contends that Placet did not contemplate a complete operative resistance element, but meant merely to make a statement concerning the physical property of resistivity; that a disclosure of resistance is not a disclosure of a resistance element. Alloys do not necessarily partake proportionately of the properties of their ingredients.

Appellant sought to purchase the patent in suit, and, failing, took appellee's said alloy of nickel and chromium and added a small quantity of manganese and 15 per cent. of iron, admittedly for the purpose of coming within the alleged disclosures of the Placet patent. These additions, appellee contends, served merely as diluents, and in no appreciable degree affected the characteristics of the alloy. This element is termed calorite, and contains nickel 65 per cent., iron 15 per cent., chromium 12 per cent., and manganese 8 per cent. For appellee it is insisted that, for purposes of durability as an electrical resistance element, it is practically identical with its own element.

Appellant contends that the claims in suit are narrow and must be strictly construed; that its own resistance element does not infringe the claims as they read; that, construed in the light of the prior art and the file wrapper, the claims cannot cover appellant's element, which comes within the Placet patent and Marsh's abandoned claim 4, although Placet shows no alloy, used as a high resistance element, having less than 56 per cent. of iron. The patent drawing is that of a rheostat, the resistance element of which is the alloy of the patent. The patentee claims a resistance element as distinguished from a material possessed of high resistivity.

The decree of the District Court granting the injunction and accounting is assigned for error. Other facts appear in the opinion.

Charles Neave, of New York City, and Edward Rector, of Chicago, Ill., for appellant.

Russell Wiles, of Chicago, Ill., for appellee.

Before BAKER, KOHLSAAT, and MACK, Circuit Judges.

KOHLSAAT, Circuit Judge (after stating the facts as above). [1] At the threshold we are confronted with appellant's attack upon the patent growing out of the proceedings in the Patent Office, which, it is contended, show that appellee abandoned the subject-matter covered by the patent, or at least so narrowed it that it may not now be construed to cover appellant's resistance element. These matters are fully and satisfactorily covered by the opinion of the trial court ([D.

C.] 212 Fed. 422), and we are content to accept the conclusions there arrived at, and to hold that the claims are good for whatever of invention they disclose.

At first blush, appellee seems to have led a daylight assault upon the Placet patent fortifications and to have carried off Placet's somewhat unappreciated offspring from under the very cannon's mouth, for purposes of more ardent, if not disinterested, coddling. Placet, who discovered how to and did make pure chromium at a cost and in quantities suitable for commercial purposes, by the process of electrolysis, claims for his product that:

"It improves all metals and alloys with which it is mixed, by imparting to them the qualities peculiar to itself. It renders them harder, more resistant to shocks, tension and friction, and also renders them more proof against the destructive action of the air, moisture, acids and high temperatures,"

—and says that, by reason of their resistance to high temperatures they are highly suitable for the manufacture of tuyeres, hearths, and fire irons, and that it "increases the electrical resistance of manganese, ferro-manganese, ferro-nickel and other metals employed in the manufacture of conductors of high electrical resistance."

[2] The invention of toasters, heaters, electrical ironers, and the like had begun, and it was apparent that in these, as well as in the art generally, the need of conductors having great durability when subjected to heat was at hand. This involved also substances which possessed the property of ductility to a degree sufficient to permit the drawing of filaments, strands, wire, etc., for use as electrical conductors. Platinum alone was then recognized as an enduring material suitable for conductors which were required to be subjected to great heat. Its cost prohibited its commercial use. Consequently the Marsh discovery was hailed as an available substitute. It was and is a most valuable resistance material. It lasts when subjected to heat from 800° to 1000° C. 150 times as long as anything in the prior art, except platinum, unless Placet may be construed to have disclosed the concept; for unless Placet anticipates Marsh's material as an electrical resistance element, it is not anticipated. It will be seen from Placet's English patent that the patentee leaves it to others to ascertain by experiment products of chromium and metals in alloy suitable for high resistance and those disclosing the element of resistance to high temperatures. Placet's discoveries were before the public about 11 years before Marsh's patent was granted, from which fact it may be at least conjectured that the valuable resistance and duration properties as resistance elements, which appellant finds disclosed therein, were not ostentatiously in evidence. Now, the law is well settled that in order to anticipate a later invention, the prior description must be such as to show that the article described in the patent can be certainly arrived at by following the prior description without the assistance of local knowledge or local prior use in the locality where the description is published, and without experimentation.

In Atlantic Giant Gunpowder Co. v. Parker, No. 625 Fed. Cas., cited and approved by Judge Lacombe in Badische Anilin & Soda Fabrik v. Kalle, 104 Fed. 802, 44 C. C. A. 201, Judge Blatchford says:

"It is not enough to show that, by the lucky accident of taking gunpowder of the proper quality, a compound may be obtained which is unlike that indicated by such description. By the light of what Nobel has taught in the patent sued on, much can now be asserted to be seen in what was published before, which no one ever, in fact, saw in it before the original of the patent sued on was taken out."

In Hogan v. Westmoreland Specialty Co. et al. (C. C.) 163 Fed. 289, Judge McPherson held that the scientific announcement that as the OH group in cellulose molecules "are suppressed by combination (with negative radicals to form the cellulose esters), the products exhibit decreasing attractions for atmospheric moisture," while perhaps sufficient to advise a chemist, was not sufficient to constitute a matter of common knowledge, chargeable to makers of saltcellar tops or dredges, that a celluloid cap would keep the salt dry when a glass or metal cap would not.

To anticipate, a prior patent, says Hopkins on Patents, vol. 1, p. 261, must disclose a substantial representation of the device of the later patent, "in such full and clear terms as would enable one skilled in the art to practice his invention without the necessity of experimenting"—citing several authorities.

In Westinghouse Air Brake Co. v. Great Northern Ry. Co., 88 Fed. 258, 31 C. C. A. 525, the Court of Appeals for the Second Circuit, speaking of an alleged anticipating English patent, says:

"The prophetical suggestions in English patents of what can be done, when no one has ever tested, by actual and hard experience and under the stress of competition, the truth of these suggestions, or the practical difficulties in the way of their accomplishment, or even whether the suggestions are feasible, do not carry conviction of the truth of these frequent and vague statements."

In Schmertz Wire-Glass Co. v. Western Glass Co. (C. C.) 178 Fed. 977–989, affirmed by this court 185 Fed. 788, 109 C. C. A. 1, it was said the alleged prior description cited as an anticipation "must be an account of a complete and operative invention, 'capable of being put into practical operation' "—citing Seymour v. Osborne, 11 Wall. 516, 20 L. Ed. 33, and other cases.

As before stated, Placet's statements, if taken at their face value, turn out to be untrue in many cases when subjected to experiment. It is not true that when alloyed with metal, chromium always brings to the alloy its own distinctive specific properties. Some reference to the results of experiments had with chromium and some of the metals may serve to show how little Placet understood or imparted to the public on the subject of chromium alloys as resistance elements, viz.:

Resistivity Not Increased in All Cases by Chromium.

It appears from defendant's Exhibit No. 10, Hansen's Diagram, that an alloy of iron 70 per cent. and nickel 30 per cent. gives a resistivity of 80.5 microhms, while an alloy of chromium 20 per cent., iron 56 per cent., and nickel 24 per cent. gives a resistivity of 79.6 microhms. From the same exhibit it appears that an alloy of iron 67 per cent. and nickel 33 per cent. gives a resistivity of 87.0 microhms. If 5 per cent. of chromium be added, there is a decrease of from 2

to 3 microhms, and an alloy of iron 40.2 per cent., nickel 19.8, and chromium 40 per cent. gives a resistivity of about 85.0 microhms, and that an alloy of iron 63.65 per cent., nickel 31.35 per cent., and chromium 5 per cent. gives a resistivity of about 84.0 or 85.0 microhms. An alloy of copper-nickel, redrawn, treated to 20 per cent. of chromium, reduces from 49.2 to 45.2 microhms. Thus it appears that certain alloys of iron, nickel, and chromium have a less resistivity than the plain ferro-nickel alloy.

Melting Point Not Increased in All Cases by Chromium.

From the evidence it appears that 10.68 per cent. of chromium, added to 89.32 per cent. of nickel, reduces the melting point 15° C.; 20 per cent. reduces it 30° C.; 35 per cent. reduces it 70° C.

Durability Not Measured by Resistivity.

Pure nickel has a lower resistivity than iron. When subjected to high heat, from 800° C. to 1000° C., iron has a durability of about 9 minutes as against 32 hours for nickel. Platinum, with a very low resistivity, has a durability, when exposed to heat, beyond that of any other resistance element.

These illustrations might be multiplied many times. They serve to demonstrate that practically the whole matter was by Placet left to experimentation. The various references of Placet to the effect of chromium upon metals and alloys with reference to the effect of high temperatures was not understood by him in any other sense than as substances having a high melting point. The mention of hearths, fire irons, tuyeres, etc., can mean nothing more than that chromium renders metals harder or more suitable for exposure to outside applications of heat. And when he speaks of durability in connection with the manufacture of bells, gongs, etc., he has in mind hardness or toughness. His conductors of high electrical resistance can fairly be said to refer to conductors of high resistivity. When he speaks of chromium as more proof against the destructive action of the air, moisture, acids, and high temperatures, he fails to give any clear idea calculated to lead the public, or one skilled in the art to the device of the patent in suit, unless it be by means of experiments.

There are many elements which affect the efficiency of a resistance element in an electrical circuit. The melting point, while a limit to a material's electrical resistance properties as an element, is not determinative thereof. Resistance to oxidation is an important feature. These are probably the chief factors. There must also be taken into account the temperature co-efficient, the condition of the oxide scale on the resistance material as to density, electrical conductivity, volatility, uniformity of composition of resistance material, and a number of other things. The durability of the Marsh alloy at a heat of 800° C. to 1000° C., Marsh fixes at from 200 to 2,000 times that of any resistance material in the prior art. Can it be supposed that Placet, had he known of its availability as an electrical resistance element, would have overlooked it? or that all those who utilized it afterwards for the manufacture of watch springs and wheels, steel, pig iron and

precision apparatus and light filaments would have passed by, as of no consequence, this great substitute for platinum, had Placet suggested its value to them, or made them understand what it was? Placet could no more claim this resistance element, as disclosed by Marsh, than could Ostermann and La Croix with their watch spring material.

For 11 years this device of Marsh lay hidden as a gem in its Placet matrix. There it might yet be lying had not Marsh found it and made it public. Certainly it never occurred to Placet that this chromium-nickel alloy would produce a rival to platinum as a resistance element at a cost and under conditions which made it an available article of commerce.

The principal advantage to be derived by the use of a material of high specific resistivity, as bearing upon the question of durability, is that the conductor may be increased or diminished in cross-section or length, and thereby made more or less liable to injury or destruction from oxidation or otherwise, and more conveniently housed. High resistance is not serviceable in the absence of high durability. The application of great heat to a resistance element often increases its resistivity, while great heat is the enemy of durability.

In the case of the Chemiker Zeitung extract on the Placet patent, we have the statement that Placet claims that chromium invests its coingredient metals with its own properties, and that he assumes an alloy with one metal to be just as good as another for the purposes set out. It asserts that these alloys make admirable resistance elements. As shown hereinbefore with reference to Placet, these statements as to all metals are often found to be untrue and the statements do not strengthen Placet as a reference. They fail to disclose the resistance elements covered by Marsh. Reference is made to disclosures made by Barrett, Brown and Hadfield prior to Marsh. It will be seen that these disclosures pertain to the measurement of electrical resistance and not to an electrical resistance element, which must cover durability as well.

From the foregoing statements it is evident that Placet and the other prior art and prior publication references fell far short of disclosing, even to those skilled in the art, the subject-matter of the patent in suit.

In his argument before the examiner, shown in the file wrapper and contents, Marsh by his attorneys says he—

"does not claim to have been the first to make the alloy itself, but to have discovered that such alloys possess certain properties adapting them for a new field of usefulness."

Again appellee says:

"Some of the most important inventions have consisted in the practical application of the discovery of a new property of matter and this invention is of that class."

And, again:

"The novelty of the patent in suit consists in discovering a new use for the chromium-nickel alloy in which is produced most extraordinary and unexpected results."

And again:

"The basis of the patent is the discovery that a resistance element of the composition specified is suitable for all round use in the various situations in which such elements are desirable."

Thus, the main feature of the patent relied upon as new is the fact that Marsh found by experiment that the alloy of the patent combined with great resistivity, marvelous durability, second only to platinum, under conditions which made its production commercially practicable. Placet merely says chromium renders certain metals more resistant to high temperatures, that is, it increases the melting point in some cases—a very different thing from durability. At most, he is speaking of externally applied heat, which is no criterion for durability under internally developed heat.

[3] It appears from the record that Marsh made his discovery by accident, not as a deduction from Placet, whose patent he does not seem to have known about, and perhaps did not fully appreciate it. Nevertheless he is entitled to all it covers, even though not specified. Grant Tire Case, 220 U. S. 428, 31 Sup. Ct. 444, 55 L. Ed. 527. It was an inventive act on Marsh's part to extricate this most valuable material from the vague generalities and speculative statements of Placet, and place it among the instrumentalities of science as an electrical resistance element. Treibacher Chemische Werke, etc., v. Roessler & Hasslacher Chemical Co., 219 Fed. 210. Here is an element which has made commercially practicable the manufacture of a large line of electrical power using devices, greatly contributing to the comfort of mankind as well as to the rewards of business enterprise. That Marsh was entitled to a patent for the service he rendered in rescuing the alloy from obscurity and placing it in the forefront of electrical resistance elements seems clear under the authorities. He first disclosed the properties and great advantages of the chromium-nickel alloy as a resistance element. So far as the record shows these had never been suggested in any manner calculated to lead to their application to the uses set out in the patent. Marsh substituted the alloy for the ineffective and practically discarded resistance elements of the prior art. The result was such a remarkable advance upon that prior art as to turn failure into unquestioned success. The degree of that success was quite as surprising as that achieved in the celluloid salt shaker case (Hogan v. Specialty Co., supra). It is said by Walker on Patents, § 29, that:

"Where the excellence of the material substituted could not be known beforehand and where practice shows its superiority to consist not only in greater cheapness and greater durability, but also in more efficient action, the substitution of a superior for an inferior material amounts to invention."

To the same effect is Robinson on Patents, vol. 1, pp. 329, 334. The patentable novelty of such an act was upheld in Frost v. Samstag, 180 Fed. 739, 105 C. C. A. 37, as to the substitution of rubber for metal in garters; in Smith v. Vulcanite Co., 93 U. S. 486, 23 L. Ed. 952, as to the substitution of vulcanite for materials theretofore in use in the manufacture of dental plates; in Fairbanks Wood Rim Co. v. Moore (C. C.) 78 Fed. 490, in the substitution of wood

bicycle wheel rims for metal; in Badische Anilin & Soda Fabrik v. Kalle, supra, where the essence of the invention consisted in the discovery that by prolonged washing sapanineazo-napthol became soluble in water and adaptable to a new use. The same principle is upheld in Potts v. Creager, 155 U. S. 597–606, 15 Sup. Ct. 194, 39 L. Ed. 275; Wickelmann v. Dick Co., 88 Fed. 264, 31 C. C. A. 530; Edison Electric Light Co. v. United States Electric Lighting Co., 52 Fed. 300, 3 C. C. A. 83; Celluloid Co. v. Zylonite Co. (C. C.) 35 Fed. 301; King v. Anderson (C. C.) 90 Fed. 500.

If this discovery is to be judged by its contribution to the electrical art, it is entitled to be held to be measurably broad within certain lines, and as such entitled to a reasonable degree of equivalents—not necessarily equivalency as found in chemical structures but, as was said in Treibacher Chemische & Werke, etc., v. Roessler & Hasslacher Chemical Co., supra, equivalency in "functional efficiency."

Appellant's calorite consists in substance of appellee's alloy plus 15 per cent. of iron and 8 per cent. of manganese. It will be remembered that the patent specification says:

"Iron, on the other hand, is readily oxidizable and will not answer my purpose when alloyed with a metal of the chromium group."

Placet speaks of the beneficial effect of an alloy consisting of chromium and ferro-nickel. Appellant claims to have brought itself within this alloy and within appellee's alleged abandoned claim 4. But Placet's alloy contained not less than 56 per cent. of iron. It is evident that appellee was advised of the tendency of iron to oxidation. While possessed of high resistivity and high melting point, its duration at 1000° C. is only nine minutes. Manifestly, in looking for an element possessing high specific resistance, he was awake to the necessity of such an element as had also the property of high durability. Very naturally he did not want a metal which endured at 1000° C. for only nine minutes. We deem it a fair deduction from the evidence that Marsh was not thinking of a diluent of iron, but of iron as a substitute for nickel, as a body for his alloy. From the record it appears that for the purposes of an all round element of great specific resistivity, including the essential companion property of endurance or resistance to the encroachment of high temperature, etc., 15 per cent. of iron has no appreciable effect on a chromium and nickel alloy. Iron was supposed to increase the quality of ductility. Manganese was supposed to aid in deoxidation and refining. These elements were added to appellant's alloy, after it had analyzed two specimens of appellee's material and seem to have been added in the attempt to bring calorite within the Placet description and to avoid infringement of Marsh; but as above stated, Placet's ferro-nickel alloy contained 56 per cent. iron. For all practical purposes for use in electric heating and cooking appliances and other devices employing high temperatures, the two resistance elements are equivalent. The object in increasing ductility was for the purpose of facilitating the process of drawing the alloy into strips, filaments, etc. As a matter of fact, appellant's resistance material is to all intents and purposes identical with that of appellee's. Its resistivity, durability, melting point, temperature co-efficient, re-

sistance to oxidation, ductility, and appearance, practically coincide with that of Marsh. Appellee's element is sufficiently ductile for the uses to which it is put, as shown by the Hansen diagram above alluded to. The 15 per cent. of iron is apparently lost, while the manganese makes no impression. Thus it is apparent that iron and manganese serve no purpose other than as diluents and as fictitious bases upon which to construct a claim for nonmeritorious distinctions between the composition of the two alloys. Neither composition is new. When applied as electrical resistance elements, the results are identical, as is the appearance of the two. There is no other dissimilarity than the presence of small and inconsequential ingredients of iron and manganese in appellant's alloy. The new use is the same.

It is charged by appellant's counsel that Marsh's claim of more than 50 per cent. nickel and less than 50 per cent. chromium leaves the situation more obscure than Placet did. The latter's second claim reads, "The products which result from the mixture of pure chromium with metals and alloys." Inasmuch as Marsh is not claiming novelty for his alloy as such, we need not give the objection further attention, except to note that Marsh's specification gives the more detailed proportion desirable in forming the alloy, to such as desire it. These come within the claims. In his evidence Marsh recommends two alloys, one consisting of 80 per cent. nickel and 20 per cent. chromium, the other 80 per cent. nickel approximately, and 20 per cent. chromium, to which he adds 2 per cent. aluminum for particular manufactures. These appellee terms its standards.

Some question is raised by appellant as to the relative merits of binary and ternary alloys. It appears in the record that the highest resistivity of ternary alloys as tested was 120 microhms, while the resistivity of a binary alloy reached 128 microhms, so that it is evident that there is no merit in the point that ternary or quarterney alloys exceed in efficiency for the purposes of this hearing a binary alloy.

We are clearly of the opinion that appellant's use of the alloy is an infringement of the Marsh patent and should be restrained.

The decree of the District Court is affirmed.

AUTOSALES GUM & CHOCOLATE CO. et al. v. CAILLE BROS. CO.

(Circuit Court of Appeals, Sixth Circuit. June 8, 1915.)

No. 2589.

PATENTS ⇐328—INVENTION—WEIGHING MACHINE.

The Baldwin patent, No. 659,910, for an improvement in weighing machines especially designed for automatic coin-operated machines for weighing persons, and which consists in placing either upon or adjacent to the dial a table of the normal weight of persons of different heights, is void for lack of invention, in that the machine and the table, both of which were old, do not co-operate to form a true combination.

Appeal from the District Court of the United States for the Eastern District of Michigan; Arthur J. Tuttle, Judge.

Suit in equity by the Autosales Gum & Chocolate Company and the Empire Trust Company against the Caille Bros. Company. Decree for defendant, and complainants appeal. Affirmed.

A. A. Thomas, of New York City, for appellants.

E. N. Pagelsen, of Detroit, Mich., for appellee.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

WARRINGTON, Circuit Judge: This is an appeal from a decree dismissing the bill of complaint in a suit brought to enjoin alleged infringement of a patent. The decree does not state the ground of dismissal, nor does any written opinion appear to have been rendered; but counsel in effect agree that the court stated orally that the device in suit lacks patentable invention. The patent, numbered 659,910, was issued to Leroy W. Baldwin, October 16, 1900, and in terms for "an alleged new and useful improvement in dial faces for weighing machines"; and appellant, the Autosales Gum & Chocolate Company, through mesne assignments, claims to be the owner of the letters patent and the invention therein described, subject to an instrument held by the other appellant, as trustee, to secure a loan. The bill contains averments and seeks relief of the ordinary character. The answer denies title in appellants, denies infringement, and, in view of the prior art, denies invention. The alleged invention is described by specification and drawings. The specification in part states:

"My invention relates generally to weighing machines; and it more specifically consists of a weighing machine having printed on its exterior a table showing the normal weights of persons of different stature," and "finds its most useful application to coin-operated weighing machines—that is to say, to machines which are automatically operated upon the introduction of a coin to either indicate or register the weight of a person or object at that time on the scales."

It is to be noted that the invention is here said to relate to weighing machines generally and to automatic weighing machines particularly, though the feature of a table showing normal weights would naturally limit both classes of machines to devices designed for weighing persons; and, apart from this table, the drawings are distinctly confined to the well-known automatic (or slot) weighing machines. This is sufficiently shown by the specification:

"Fig. 1 represents a standard table of the normal weights of men, women, and children of various heights and ages. Fig. 2 represents the upper portion of a coin-operated weighing machine of standard type, showing the dial thereof with the table shown in Fig. 1 printed thereon. Fig. 3 is a similar view of a weighing machine, showing in dotted lines the principal portion of the internal apparatus thereof."

There are two claims, and both are said to be infringed:

"1. A weighing machine provided with a weight indicator and with a table of the normal weights of persons of different stature exposed on its exterior, adjacent to the weight indicator, whereby both the indicator and the table can be seen at substantially the same time.

"2. A coin-operated weighing machine having an index hand and dial with the numbers for indicating the weight on the platform printed thereon, and also a table showing the normal weights of persons of different stature."

The language of the first claim is consistent with the beginning of our first quotation from the specification, in that it might fairly be said that the claim was not intended to be restricted to automatic machines for weighing persons; yet other portions of the specification, as well as the drawings, show this to have been the main purpose; and the course of trial and the arguments have proceeded upon this theory, and the infringing devices in issue are types only of the automatic machine. Our consideration should therefore be confined to the issue so presented. The patented device in suit consists in placing on the dial of the familiar automatic weighing machine, or on the machine adjacent to the dial, in addition to the usual figures and scale of the dial showing actual weights, a table of normal weights of persons of differing heights; so that a person, knowing his height, may compare the actual with the normal weight. It is to be observed that mechanism, set in motion by the dropping of a predetermined coin in the slot, is employed both to ascertain and show actual weight, while the printed chart is used to show normal weight, and that the actual height of the person weighing himself must be known or sought independently of the machine.

Concededly, at the time the patent was issued, automatic weighing machines and tables of normal weights were old. The language of the first claim would on first impression indicate that the table of normal weights is to be exposed on the exterior of the weighing machine and "adjacent" to (though not upon) its indicator of actual weights, and so that both the indicator and the table "can be seen at substantially the same time." The "weight indicator" mentioned in the first claim, and the "index hand and dial with the numbers for indicating" actual weight, named in the second, are the same; but, under the second claim, the table of normal weights is seemingly required to be printed on the dial, and Figs. 2 and 3 of the drawings show the table to be within the central horizontal chord and upper arc of the circle described by the weight-indicating figures on the dial. However, assuming, as we must, that these claims were intended to be consistent, and so to apply to tables which might be differently located with respect to the weight figures of the dial, under the first claim the table must be exposed on the exterior of the machine and either "adjacent" to the dial, or on its face, and, under the second, upon the face of the dial; still it is perfectly clear that neither involves any integral addition to or connection with the mechanism of the machine, since that was complete before. The most, then, that can be said of the so-called invention, is that the information furnished by the table was thus made available to the person being weighed; yet it hardly need to be suggested that this might have been done in other obvious ways that would have rendered the information equally available, without placing the table on the dial or any other part of the machine.

We cannot believe that such a combination as this involves patentable novelty; in our judgment, it is a mere aggregation of separate elements. Each element operates only in the old way. The machine does not coact with the table, nor the table with the machine, to

produce a unitary result. Further, while it is true that each element furnishes its own particular result to the person being weighed, yet these results remain distinct; they are dependent upon something else—the person's height—which admittedly is not ascertainable by any element of the combination. This is not to say that it is essential to the patentability of a combination that the elements shall severally contribute in like degree to the union and the consequent result required; it is that there must be some tendency of the elements combined in themselves to co-operate to bring about a novel and useful result, and that here the elements are not so related as to enter into any sort of a union that can rightfully be said to produce such a result. As Judge Dallas said, in National Cash Register Co. v. American Cash Register Co., 53 Fed. 367, 371, 3 C. C. A. 559 (C. C. A. 3d Cir.), when interpreting the opinion in Pickering v. McCullough, 104 U. S. 310, 26 L. Ed. 749:

"* * * A combination, to be patentable, must produce a new and useful result, as the product of the combination, and not a mere aggregate of several results, each the complete result of one of the combined elements. There must be a new result produced by their union."

The principle thus declared was recognized by this court in an opinion of Judge Knappen (International Mausoleum Co. v. Sievert, 213 Fed. 225, 229, 129 C. C. A. 569); again, in an opinion of Judge Denison (Dunn v. Standard Computing Scale Co., 204 Fed. 617, 623, 123 C. C. A. 111). And in Reckendorfer v. Faber, 92 U. S. 347, 357, 23 L. Ed. 719, Mr. Justice Hunt said:

"The combination, to be patentable, must produce a different force or effect, or result in the combined forces or processes, from that given by their separate parts. There must be a new result produced by their union; if not so, it is only an aggregation of separate elements."

See Brinkerhoff v. Aloe (C. C.) 37 Fed. 92, 96, opinion by the late Judge Thayer, which was distinctly approved and affirmed by the Supreme Court, 146 U. S. 516, 517, 13 Sup. Ct. 221, 36 L. Ed. 1068.

It is stated in the specification that "the invention greatly increases the earning power of the coin-operated weighing machine by exciting the interest of passers-by. * * *" Some testimony to this effect was also offered; and earning capacity is seriously urged as evidence of patentable invention. In cases of doubtful validity, the fact that the patented device has met with favor among those having occasion to use it is frequently helpful; but it is unimportant in a case of clear lack of the inventive quality. When denying the petition for rehearing in Richards v. Chase Elevator Co., 159 U. S. 477, 487, 16 Sup. Ct. 53, 40 L. Ed. 225, which involved a patent for a grain-transferring apparatus, Mr. Justice Brown said:

"To make a combination of old elements patentable, there must be some new result accomplished, and as the result in this case is a mere aggregation of the several functions of the different elements of the combination, each performing its old function in the old way, we see nothing upon which a claim to invention can be based. The device is undoubtedly a convenient one, and appears to have proven profitable to the patentee; but we are unanimously of opinion that it lacks the necessary quality of invention."

Careful examination of the record and the briefs satisfies us that further discussion of the assignments is unnecessary; and the decree is accordingly affirmed, with costs.

UNDERWOOD TYPEWRITER CO. v. ROYAL TYPEWRITER CO.

(Circuit Court of Appeals, Second Circuit. May 12, 1915.)

No. 261.

1. PATENTS ⊂⊃328—VALIDITY AND INFRINGEMENT—TYPEWRITERS.
The Manning patent, No. 609,036, the Wagner patent, No. 624,135, and the Kunath patent, No. 845,240, each for a typewriter, do not cover any broad generic invention, but minor improvements only, and their claims, if valid, must be narrowly construed. As so construed, *held* not infringed.

2. PATENTS ⊂⊃246—INFRINGEMENT—OMISSION OF ELEMENT OF COMBINATION.
In an overcrowded art, where a broad generic invention is not possible, a defendant who omits altogether one element of a patented combination cannot be held an infringer, even though he makes another element do the double work.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 387; Dec. Dig. ⊂⊃246.]

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

This action was brought upon claims 1 and 3 of a patent issued to E. J. Manning, No. 609,036, dated August 16, 1898; claims 16 and 18 of a patent to F. X. Wagner, No. 624,135, May 2, 1899, and all the claims, five in number, of a patent to E. G. Kunath, No. 845,240, of February 26, 1907. After the hearing, a motion was made by the complainant to add to the record letters patent No. 1,100,301 issued to the defendant as assignee of Hess, June 16, 1914. This motion was granted. The decree below dismissed the bill.

Arthur v. Briesen, of New York City (Fred A. Klein, of New York City, of counsel), for appellant.

Edward C. Davidson and J. J. Kennedy, both of New York City, for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

COXE, Circuit Judge. [1] The record shows that the typewriting art has been developing for at least 40 years, during which period, although the general principle of operation remained unchanged, innumerable changes have been made and minor improvements added. At the dates of the Manning, Wagner and Kunath patents there was no opportunity for a broad generic invention in typewriters and it cannot be successfully contended that the claims in issue cover such an invention. They must be strictly construed and limited to the precise improvements claimed. There is no room for the doctrine of equivalents.

The main questions involved are whether the claims in suit are valid and if so whether they are infringed. The court below found the

claims invalid and those of the Wagner and Kunath patents not infringed.

We are clearly of the opinion that the prior art as shown in the record renders it impossible to predicate invention of the minor improvements covered by the claims in issue and, if held valid at all, they must be so limited as not to cover the defendant's machine.

It is wholly unnecessary to enter upon a minute description of the many parts forming the combinations which are the subject of this controversy. Judge Hough, so far as the issues in this action are concerned, has done this so clearly and succinctly that extended description is unnecessary. Speaking of Manning's contribution to the art as embodied in the claims in controversy (Nos. 1 and 3) he says:

"What Manning did was to affix in an extremely simple manner to a platen carriage, a piece of metal marked as a scale. His appliance necessitated no change in the structure of the typewriter or any substantial part thereof. Every part of the machine operated in the same way for the same reason and with the same results after Manning's addition was put on as it did before."

As to the Wagner and Kunath patents Judge Hough says:

"If there is anything in the Wagner patent at all, since the Manning patent was prior art for Wagner, there was nothing left for the latter to invent but the details of mechanism, and he does not claim that. The same may be said of Kunath. As combination patents I think they are worthless in view of the prior art even if they are not aggregations. But if one is to turn from the mere language of the claims to a study of the thing exhibited in court as the perfect fruit of Wagner and Kunath, then the two last named patentees invented nothing but certain details of mechanism which must be very narrowly viewed and are not infringed by defendant."

The main features of the typewriters here in issue were present in all the machines of the prior art but these features were embodied in different mechanisms, operating upon substantially the same principal, each showing, perhaps, some minor improvement over its predecessors but all attempting to accomplish the same result. The typewriter depends for its efficiency upon the careful construction of its various parts and the accuracy of their interdependent action precisely as does a clock or a watch. We can take judicial notice of the fact that the art of clock and watch making is centuries old and yet, in essential features, horology is the same to-day as it was 500 years ago. The modern watch contains many improvements over the watch in use 50 years ago and yet both possessed the same essential features—the mainspring, the balance spring, the train of wheels, etc. No one would seriously contend that by changing the size or location of these parts or by adding new ones he could secure a patent which would prevent others from making improvements on similar lines.

This is what the patentees attempted to do in the present case. Manning's object was to determine where a character or a line of characters "will appear upon the paper before the same are written so that the paper may be shifted to the exact position to receive the impact of the type on the line or point indicated." In other words, his object was so to locate the paper that it would be printed upon

at the desired point—not a very difficult problem, in view of what the prior art disclosed. Wagner's problem was equally simple. In the prior structures the feed-rollers were separately mounted marginal rollers separately moved and maintained out of action when it was desired to straighten the paper on the platen. Wagner's object was to provide a simple mechanism for simultaneously throwing the feed-rolls which co-operate with the paper platen out of operation by a single movement of a hand actuated lever.

Kunath's problem also was not difficult, his object being to provide an easy means for moving the platen scale to and away from the writing line. It seems to us that all of these improvements would suggest themselves to an ordinarily intelligent workman in a typewriter factory the moment the operator of the machine complained that it was inconvenient for him to do the work by hand.

Manning's first claim, which is sufficient for our present purpose is as follows:

"1. In a typewriter, the combination of a reciprocating paper carriage, a platen carriage which is vertically movable to bring the printing point into the path of the upper or lower case characters, an indicating bar carried by said platen carriage and means for moving the indicating bar to and away from the printing point when the platen is in either the lowered or elevated position."

It will be observed that the first member of this combination is "a paper carriage" and the second is "a platen carriage." The defendant does not use such a platen carriage or an indicating bar carried by a platen carriage. The complainant seeks to avoid this omission of one element of the combination by the contention that the paper carriage rises and falls. Such a construction seems inadmissible and especially so in an art where a broad construction of the claim is out of the question.

[2] In an overcrowded art, where a broad generic invention is not possible, a defendant who omits altogether one element of a combination cannot be held as an infringer, even though he makes another element do the double work.

The patent to White and the patent to Barron disclose, substantially, all that is shown in the Manning patent as exemplified by the claims in controversy. In the Manning patent the platen carriage moves vertically while in the prior patents it moves horizontally. In other words, the claims of the Manning patent, if construed broadly, are invalid in view of the prior art and if construed narrowly the defendant does not infringe them.

Wagner's claims Nos. 16 and 18 are as follows:

"16. In a typewriter, the combination of a reciprocating carriage, a platen carriage which is vertically movable to bring the printing point into the path of the upper or lower case characters, an indicating bar carried by said platen carriage, feed rollers co-operating with said platen and means for moving the indicating bar to and away from the printing point when the platen is in either the lowered or elevated position and for simultaneously conveying the feed rollers into and out of contact with the platen."

"18. In a typewriter, the combination of a reciprocating paper carriage, a platen, feed rollers co-operating therewith, a platen carriage which is vertically movable to bring the printing point into the path of the upper or lower

case characters, an indicating bar carried by said platen carriage and being adapted to be moved to and away from the printing point in a perpendicular plane when the platen is in either the lowered or elevated position and means for moving said scale and simultaneously conveying said feed rollers into and out of contact with the platen."

Here are two combination claims containing five and six elements respectively and said to be identical with the first and third claims of the Manning patent, except as to "the feed-rollers" and means for simultaneously conveying the feed-rollers into and out of contact with the platen. As we have held that the defendant does not use a platen carriage which is vertically movable, it is clear that it does not infringe any combination claim of which such a carriage is one of the elements and as the defendant does not employ a reciprocating carriage it is manifest that it does not infringe a claim for a combination of which these carriages are elements.

Kunath's first claim is as follows:

"1. In a typewriting machine, the combination with a platen, of a set of pressure rolls, a pressure roll releasing mechanism including a rock shaft extending along the platen and having arms at its ends, a scale in front of the platen and pivoted at its ends upon said arms, and a spring for pressing said scale toward the platen."

The alleged novel feature of this patent and of its claims is the addition to an Underwood typewriter, as shown in the drawings, of an indicating scale pivotally mounted and a spring to press the scale towards the platen. He says:

"The object of the invention is to provide a simple, readily applied, inexpensive, and efficacious means for moving the platen scale to and away from the writing line."

The defendant's construction is entirely unlike the structure of the Kunath patent. It does not have the rock shaft of the patent, but two rock shafts operating independently. The patent shows one rock shaft by which the scale and feed rolls are moved simultaneously. The defendant does not use such a structure and a construction broad enough to include its structure would render the claim invalid in view of the prior art. This is without doubt a narrow construction of the claims, but no other construction is possible in such a crowded art.

The Hess patent was added to the record after the argument and has, it seems to us, little relevancy to the matters here in issue. We prefer to leave it as we find it without further comment. Should it ever become necessary to construe its claims it should be in an action where it has been tested and examined as other patents are and where the court can, if it so desires, avail itself of the opinions of experts.

The decree is affirmed with costs.

CHADELOID CHEMICAL CO. v. WILSON REMOVER CO. et al.

(Circuit Court of Appeals, Second Circuit. May 12, 1915.)

No. 232.

PATENTS ⇐328—VALIDITY AND INFRINGEMENT—COMPOSITION FOR REMOVING PAINT AND VARNISH.

The Ellis patent, No. 714,880, claims 6, 7, and 8, for a composition for removing paint and varnish, *held* not anticipated, valid, and 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 for the Southern District of New York holding valid and infringed claims 6, 7, and 8 of letters patent No. 714,880 granted December 2, 1902, to Carleton Ellis for a composition for removing paint and varnish.

The patent has been the subject of protracted litigation but it has been uniformly sustained not only by Judge Lacombe and Judge Learned Hand in the present suit ([D. C.] 220 Fed. 681), but also by Judge Hazel in the Southern District of New York in an action against the De Ronde Company ([C. C.] 146 Fed. 988). It was sustained by Judges Chatfield and Veeder in the Eastern District of New York in an action against the Daxe Varnish Company, by Judge Dodge in the District of Massachusetts in an action against the Billings Company, and by Judge Sanborn in the Northern District of Illinois in an action against the Thurston Company (220 Fed. 685). The decision by Judge Hand was rendered January 6, 1915.

Frederick P. Fish, T. D. Merwin, W. H. Swenarton, and J. Lewis Stackpole, all of New York City, for appellants.

Frederick S. Duncan, of New York City, and Victor Elting, of Chicago, Ill., for appellees.

Before COXE, WARD, and ROGERS, Circuit Judges.

COXE, Circuit Judge. Few patents have been subjected to so protracted, determined and ingenious attacks as the patent here in issue. Every argument that the able and resourceful lawyers who have represented the defendants could discover in opposition to the patent has been advanced, considered and overruled by an unbroken line of decisions sustaining the patent and holding its claims infringed. Judging from the prior opinions no argument against the validity of the patent has been overlooked or neglected. Every effort has been made to secure a construction of the claims which would permit an ingenious infringer to escape, but without success. We have, then, a case in which the patent has been held valid and infringed by seven judges, some of them particularly learned in patent law, and we should be very sure of our position before going counter to such a uniform array of authority. It is most improbable that these judges have been misled or that any meritorious defense has been overlooked or erroneously decided by them.

The Ellis patent is for a process and the product of that process. It contains nine claims. The first five are for the process, the remaining four claims being for the product. The claims here involved are

the sixth, seventh and eighth—all for the product. The sixth claim sufficiently describes the paint remover. It is as follows:

"A composition for removing paint and varnish consisting of a wax, a solvent for the wax and an alcohol combined substantially as described."

This composition is produced by dissolving a wax or waxy body in a hydro-carbon oil and the subsequent precipitation of this wax, in a gelatinous state, by adding an alcoholic body capable of being mixed with the solvent which is preferably benzol or its homologues. Other bodies which are good solvents for waxes and miscible with alcoholic bodies are included in the process. The waxy body must dissolve readily in the solvent and must gelatinize on the addition of alcohol. The waxes employed are such as beeswax, carnauba wax and their equivalents.

There can be no question on this record that Ellis produced a new and highly efficient paint remover which rapidly grew in favor and superseded the prior crude and unsatisfactory methods. These methods were expensive, inefficient, slow and dangerous. When it became necessary to remove paint or varnish from buildings, furniture and the like, the process in vogue was to scrape the paint with a sharp tool, or glass, or sandpaper or burn it off with a torch. When several coats of paint had been applied and had hardened for years its removal was expensive and resulted in damage to the object being scraped or burned. Especially was this true of furniture, doors and mantels which had been elaborately carved, the use of glass or sharp tools frequently resulting in injury to the carving. Under the Ellis method his composition is applied and permitted to remain until the paint is softened, when it may be removed by rubbing it with a cloth.

The dangers of the torch method are avoided by Ellis and the use of his remover saves time and money and is superior in operation and result to anything which preceded it. These qualities were immediately recognized by the trade and it is stated in the complainant's brief that "at the present time there are upwards of 60 licensees including the most important manufacturers of painter's supplies in the country." Those who have persisted in infringement have been stopped by the courts and at the present time the recognition is general and practically unanimous. We deem it unnecessary to review the testimony and arguments relating to the removers of the prior art for the reason that they have been so thoroughly discussed in the former decisions that anything we might say would be a repetition of what has been so well said by the judges of the District Court.

The danger, expense and loss of time incident to the use of the torch and metal scrapers had for years been known and the necessity for a chemical remover had been recognized long prior to 1902. Many efforts had been made to produce a safe and efficient remover along these lines, but without success. One of the first of these attempts is found in the patent to Ball, No. 488,416, which is referred to in the opinion below and in several other opinions in the prior suits and yet no copy is found in the record, so far as we can discover, and we are unable to find that the patent was introduced in evidence. In the De Ronde suit Judge Hazel says:

"In the patent to Ball for a paint and varnish remover, the specification shows that four parts of benzol, three of fusel oil and one of alcohol (the kind of alcohol not being mentioned), are compounded. This composition probably to a slight extent retarded evaporation but the ingredients used were highly volatile and subject to the objection and difficulty of running off vertical surfaces and evaporating before the composition could efficiently soften the paint. That the Ellis remover when applied to the wood acts more efficiently and requires a less quantity to achieve the result than the remover of Ball is frankly admitted by the expert witnesses of the defendant. And it is fairly established by the evidence that the Ball compound because of the difficulties stated together with the noxious fumes arising from the fusel oil was unsuccessful and unpractical. Accordingly it cannot be held to anticipate the patent in suit." (C. C.) 146 Fed. 988, 990.

In the case at bar Judge Learned Hand said:

"Ball's remover contained no phenol, and relied for its solvent upon benzol; but it had no wax, and the solvent evaporated too quickly to be serviceable. * * * Ball's remover went upon the theory that benzol and fusel oil should act as the solvent; but he had no wax to hold them from evaporation." 220 Fed. 681.

Assuming that the Ball patent is properly in evidence and that it has been correctly interpreted by the District Courts, it is manifest that it offers no defense to the suit.

Neither do we think that the testimony of learned experts and chemists, who have made many experiments to prove that the paint remover of the patent which does the work and satisfies the trade is old and inefficient, can be relied on in the face of proof showing its widespread popularity and satisfactory results. Ellis was the first to produce such a remover. It is the hunter who actually brings down the game who is entitled to carry it home. The need of an efficient and harmless paint remover had been felt for many years by the trade. Efforts to supply it were many but unsuccessful. Caustic alkali removers were tried and failed; they got rid of the paint but injured the wood. Carbolic-fusel oil removers were tried, but the carbolic acid proved dangerous to the workmen and injured the new paint when applied to the wood. All of these matters were considered in the litigation in the District Court and they were held not to negative the invention of the non-corrosive harmless removers of the Ellis patent.

The Bennett and Arnstein removers were considered in the original case but were held not to defeat the invention of the Ellis patent and to belong to the same class as the other prior carbolic-fusel oil removers, where wax and similar substances were used as thickeners, and were not intended to retard evaporation. If the old removers were satisfactory and did the desired work why are they not used to-day? How can we account for this persistent effort, during ten years of litigation, to use the Ellis product, upon any other theory than that the prior removers were wholly insufficient? The necessity for a practical remover was felt and many experiments were tried, but no practical result was reached until the Ellis composition was produced.

The testimony in support of this proposition is clear and persuasive; it is not necessary to review it in detail further than to say that it comes from manufacturers and large dealers and is to the effect that the carbolic-acid fusel oil removers were ineffective, dangerous to

health, destructive to the wood, offensive in use and lamentable failures generally.

The Ellis composition solved a problem which, prior to 1902, had baffled the efforts of those who realized the dangers and shortcomings of the existing removers but were unable to remedy them. The solution was not the result of a mere guess but was due to persistent effort by Ellis, who is an educated chemist of standing and reputation, who studied the problem with care and reached a solution which has solved the problem successfully. This is done without injuring the wood operated upon or endangering the health of the workmen. No one before had achieved this result.

We see no ground for criticism of the patent per se. In fact we think the patentee and the officials of the Patent Office are to be commended for having issued a chemical patent where the description and claims cover less than a page. The patent is clear, concise and intelligible to laymen. The criticisms are not well founded. It was not necessary or wise to specify the exact proportion of wax, as this differs according to the work being done. Had the exact percentage been named, anyone could evade the patent by using more or less than the specified amount and thus could have secured all the advantages of the invention without the payment of a dollar.

There can be no doubt regarding infringement. The defendants use a wax varying in quantity from 3½ to 9 per cent., a solvent for the wax, benzol and an alcoholic body, each about 42 per cent.

The decree is affirmed.

UNITED STATES HOFFMAN CO. v. BECKER & WADE CO.

BECKER & WADE CO. v. UNITED STATES HOFFMAN CO.

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

Nos. 1924, 1928.

PATENTS ⊂328—VALIDITY AND INFRINGEMENT—GARMENT-PRESSING MACHINE. The Hoffman patent, No. 928,199, for a garment-pressing machine, *held* not anticipated, valid, and infringed as to all of its 16 claims; Nos. 1 to 7, inclusive, and No. 16, being broad claims, and Nos. 8 to 15, inclusive, specific claims.

Appeals from the District Court of the United States for the Eastern Division of the Northern District of Illinois; Kenesaw M. Landis, Judge.

Suit in equity by the United States Hoffman Company against the Becker & Wade Company. Decree in part for complainant, and both parties appeal. Reversed on complainant's appeal, and affirmed on defendant's appeal.

F. W. Cameron, of Albany, N. Y., and Edward Rector, of Chicago, Ill., for complainant.

Charles C. Bulkley, of Chicago, Ill., for defendant.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

KOHLSAAT, Circuit Judge. Appellant, United States Hoffman Company, brought suit in the District Court against appellee, the Becker & Wade Company, for infringement of the 16 claims of the A. J. Hoffman patent, No. 928,199, granted July 13, 1909, for improvements in clothes-pressing apparatus. Such proceedings were thereafter had in said cause that the District Court found and decreed that claims 1, 2, 3, 4, 5, 6, 7, and 16 were invalid, and that claims 8, 9, 10, 11, 12, 13, 14, and 15 were valid and infringed. Appellant brings to this court so much of said decree as holds claims 1 to 7 and 16 to be invalid, while appellee brings up by cross-appeal the part of said decree which declares said claims 8 to 15, inclusive, to be valid and infringed; thus all the claims are before us.

Claims 1 to 7 and 16 will be herein termed the broad claims, and claims 8 to 15 will be designated the narrow claims. The broad claims are in substance stated in claim 4 which reads as follows, viz.:

"In a garment-pressing machine, a supporting bed for the garment, a superposed presser head permanently associated with and movable toward and from the upper face of the bed and fixed from endwise movement relatively thereto, said presser head having a steam chamber and a perforated metal plate extending across the bottom of the steam chamber, a foraminous press cloth covering the bottom of the perforated plate, means for moving the head toward and from the bed, and means for introducing steam into the steam chamber and through the perforated plate and press cloth while the head is in its pressing position."

The narrow claims have to do mainly with superheating mechanism. The device of the patent is designed for pressing clothes, and especially used by tailors as a substitute for the immemorial sadiron or goose. The Hoffman presser consists of a presser block, otherwise termed a "buck," which supports the garment to be pressed. Hinged above this is a presser head movably mounted with respect to the presser block, which is stationary. The lower face of this presser head is provided with a perforated plate coextensive therewith. This head is hollow, and contains means for letting steam into the head, also superheating burners and a deflector, dividing the hollow presser head into an upper and lower chamber. As it enters the lower chamber, the steam is superheated by the burners until the contained steam has become heated and the moisture reduced to the desired degree. By means of the deflector and the upper and lower chambers, the steam is applied indirectly and diffused under varying pressure through the perforated, cloth-covered lower face plate of the head to the cloth to be pressed. The mechanical pressure of the head upon the presser block is effected by means of a foot lever. It is claimed, that in passing from the lower chamber, what remains of the moisture is extracted from the steam by the cloth covering of the perforated plate, and is communicated from that cloth to the top surface of the thing to be pressed.

From the evidence it appears that the Hoffman presser has gone into very general use. While differing in some respects from the detail of construction of the presser in suit, appellee's device in substance appropriates the essential features of Hoffman's broad claims, and is the same in general arrangement and operation. It has the stationary

presser platform, the superimposed movable heated presser head, means for introducing and supplying steam to the cloth to be pressed, and means for the application of the mechanical pressure by the use of a foot lever. Unless the broad claims are found to be invalid, appellee must be held to be an infringer.

The principal alleged anticipation of the prior art in evidence—indeed, the only one that need be here considered—is that of German patent, No. 59,423, granted to A. Bossen May 5, 1891, for a steam pressing apparatus. In this device, the perforated steam supplying plate is located on the upper surface of the under or block member of the presser, so that steam is supplied from beneath. The movable superimposed presser head is steam-heated, but has no foraminous plate, and brings only pressure and heat to the pressing process. It is claimed by appellant that the result attained by it is new, and makes a departure from Bossen, and that its device is not to be dealt with as a mere reversal of parts as compared with Bossen; that by the Bossen device, when steam is applied to the article to be pressed, from below, that article is saturated, and that, if dried out at all, considerable time is taken by the operation; that the heated presser head is applied to the upper side of the article pressed and that the desired result, so far as pressing clothes is concerned, is not attained, whereas by his own device the operation is practically momentary, the moisture and heat being applied at the same time, and that when the face of the presser head is lifted it leaves the garment dry, while the nap of the goods is lifted and restored to normal by the upward lift of the escaping steam.

The patent was before the Circuit Court of Appeals for the Sixth Circuit in Grever v. United States Hoffman Company, 202 Fed. 923, 121 C. C. A. 281, where it was sustained. It was the theory of the primary examiner, in passing upon the Hoffman application, that there was no patentable novelty in constituting the upper swinging member a steaming member, instead of making the lower or stationary member the steaming member, as in Bossen, and he thereupon rejected all of the so-called broad claims. The examiners in chief, on appeal, reversed the primary examiner and allowed those claims, giving their reasons in the following language:

"We regard the appealed claims as allowable, for the reason that in none of the patents cited by the examiner is there revealed a superposed presser head movable toward and from the bed of a garment-pressing machine and having a steam chamber which is adapted to moisten and soften the nap of a fabric without penetrating the body of the fabric. The patent to Bossen discloses a machine for pressing garments in which the steam emerges from the bed of the machine, and, as pointed out by appellant, must pass entirely through the body of the fabric before the nap can be moistened. Appellant's object could not be attained by the use of this machine. The patents to Bainka and Wassertheurer disclose ironing machines in which the steam delivering and pressing elements are movable, not toward and from the bed of the machine, but to and fro across the surface of a garment resting upon the bed. These devices are in no sense presses, and, as indicated by the appellant in his brief, will produce a rubbing contact which would seriously affect the condition of the nap."

It is well settled that, unless some new and patentable result is attained by the reversal of the members of a patented device, the change

does not amount to invention. The device of Bossen was intended, as stated in the specification, for "pressing ladies' plain and pleated garments, skirts, coats, etc., without being ripped apart, for the purpose of removing creases due to dyeing or cleaning in dye houses or chemical cleaning establishments." The steam is allowed to flow upward through the perforations of the upper face plate of the lower member of the presser into the garment to be pressed for about a minute. Then the heated presser head is lowered onto the saturated garment and allowed to remain thereon for three or four minutes. As a result, the garment is not freed from moisture by the process, but is hung up to dry.

From the evidence, it appears that in the use of the device in suit the steam and the pressure of the heated presser head are simultaneously applied to the upper surface of the garment, and then only for a fraction of a second; the object in Hoffman's device being to press the upper surface of the goods as the same is dampened by the steam, which latter, he insists, is, by the time of the fall of the presser head, gathered substantially in the cloth covering of the lower foraminous plate of the head, as above stated. The testimony fails to show that in Bossen's case the upper surface becomes sufficiently or only so moist as to make the pressure effective. One of the advantages which seems to be established by the evidence, and which was asserted by the patentee in his argument in the Patent Office, is that the natural tendency of the steam to escape upward raises the softened nap of the goods after the head is lifted, "the rapidity of evaporation serving to instantly dry such nap, leaving the pressed garment in a dry condition immediately after the raising of the press head, so that such garment may be put on and worn with perfect safety directly from the press." (File wrapper, p. 107.)

The device of the broad claims of the patent in suit produces such a coaction of the several parts of the presser as, independently of the special matter of the so-called narrow claims, brings about a new and meritorious result, and gives to the conception by Hoffman of the transference of the perforated steam applying plate from the upper face of the lower or presser block, as in Bossen, to the under face of the superimposed movable presser head, the dignity of invention, especially when considered in connection with the marked success which has attended the commercial promotion thereof and the patentee's long and victorious struggle in the Patent Office. This being so, we find, as above stated, that appellee's device infringes the broad claims.

The so-called specific claims, Nos. 8 to 15, inclusive, cover a device in which the superheating of the steam is accomplished by the use of a deflector so arranged as to embrace the dome with burners which direct their flames against the base of the dome opposite the contracted steam passage formed between the deflector and dome, through which the steam passes in a thin sheet to be most effectively subjected to the heat of the burners. Concerning these claims, appellee's expert, Mr. Carter, says that they, "limited, as they are, to substantially this particular construction, are not disclosed in any of the patents of the prior art to which my attention has been called."

We are of the opinion from the record that these narrow claims disclose invention of a degree which entitles the patent to a fair range of equivalents, such as are hereinafter set out. Claim 8, which may be taken as fairly representative of the so-called narrow claims, reads as follows, viz.:

"In combination with an elongated press block, a hollow elongated press head, an elongated dome on said head spaced from the edges thereof, a perforated face plate carried by said head, a deflector in the head dividing the same into a pair of chambers, said deflector being spaced from the side walls of the dome to form a passage connecting said chambers, burners carried by the head and embracing said dome, said burners being disposed so as to direct the flame against said head, and means for supplying steam to the head."

This claim calls for (1) an elongated press block; (2) a hollow elongated press head; (3) an elongated dome on said head; (4) a perforated space plate; (5) a deflector, dividing the head into an upper and lower chamber, and which is spaced from the side of the dome to form a connecting passage between the chambers; (6) burners embracing the dome, so arranged as to direct the flame against the base of the dome, and especially the narrow space leading from the upper to the lower chamber; (7) means for supplying steam to the head. The claim is limited to a device in which, to quote the testimony of appellee's expert, "the press head has its interior divided by a deflector into upper and lower chambers, which communicate with each other through the narrow passage left around the margin of the deflector by making it slightly smaller than the interior of the dome, with burners embracing the dome so as to direct their flames against the base of the dome throughout its circumference and directly opposite the narrow steam passage formed between the walls of the dome and the edges of the deflector; the purpose of these co-operating elements being to divide the steam into a thin sheet and subject it to the intensity of the flame at the point where it is so divided, so as to superheat it most effectively." Substantially all the elements above noted, except Nos. 5 and 6, are conceded to be present in appellee's device.

As to the deflector, appellee insists the alleged infringing device has none. It does have, however, a very considerable enlargement of the steam supply pipe—so large, indeed, as to constitute practically an upper expanding chamber into which the steam flows, and, of course, expands. Its impetus toward the foraminous plate is checked by the walls of the chamber. It then rises to the upper part of the dome and escapes through narrow passages to the lower chamber, where it again expands and passes through the foraminous plate as required to assist in the pressing process. While passing through the narrow conducting space between the two chambers, it is subjected to the heat of burners and becomes superheated, as is provided in the patent in suit. Appellee asserts that the steam, after leaving the upper chamber, is driven in a practically controlled stream upon the foraminous plate, and thereby fails entirely to perform the diffusing function assigned to the Hoffman opening between the two chambers. There is no satisfactory evidence to show that the steam, in the alleged infringing device, is projected with any force into the lower chamber or against the perforated plate. As the steam of the upper chamber is expanded and super-

heated, it would, naturally, and does, enter the lower chamber in a condition suitable to cause it to again expand and fill the latter, thereby causing it to be projected with uniform pressure upon the whole foraminous face of the presser. The enlarged section of the supply pipe, appellee contends, acts simply to gather the water caused by condensation of the steam, so that it may by action of the superheating means, as well as the steam, be reconverted into steam. This contention does not appeal to us. We regard the chamber caused by enlarging the supply pipe as the equivalent of the upper chamber of Hoffman, and that part of the wall of the enlarged portion of the pipe which directly opposes the steam intake as the equivalent of Hoffman's deflector. The same thought prevails in both devices. Appellee's burners are applied, just as Hoffman's, to the stream of steam when it is most attenuated and most easily superheated. We are impressed with the idea that appellee has employed all the essential principles and features of both the broad and the narrow claims of Hoffman, in practically the same arrangement thereof, ingeniously disguised, but detectable, and is therefore guilty of infringement as charged in the bill.

The decree of the District Court as to the so-called broad claims is reversed, with direction to grant the injunctional and other relief asked. As to the so-called narrow claims, the decree of the District Court is affirmed.

FOX TYPEWRITER CO. v. UNDERWOOD TYPEWRITER CO.

(Circuit Court of Appeals, Sixth Circuit. June 8, 1915.)

No. 2586.

PATENTS ⊂=328—VALIDITY AND INFRINGEMENT—TYPEWRITING MACHINE.

The Stickney patent, No. 811,183, for a type-bar cushion for typewriters, upon which the type bars rest when in normal position, and consisting of a casing filled with sand or other yielding and nonresilient material, was not anticipated and discloses patentable novelty and invention; also the invention *held* not abandoned, and the patent infringed as to claims 1, 2, 3, 6, 7, and 8, and not infringed as to claims 9 and 10.

Appeal from the District Court of the United States for the Western District of Michigan; Clarence W. Sessions, Judge.

Suit in equity by the Underwood Typewriter Company against the Fox Typewriter Company for infringement of letters patent No. 811,183, for a typewriting machine, granted to B. C. Stickney January 30, 1906. Decree for complainant, and defendant appeals. Affirmed.

F. L. Chappell, of Kalamazoo, Mich., for appellant.

Arthur V. Briesen, of New York City, for appellee.

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

PER CURIAM. This was a suit for alleged infringement of a patent. The patent was sustained, infringement found, and the usual

reference made. The nature of the invention and the facts involved sufficiently appear in the opinion of the District Court; and the opinion, for the reasons there stated, is approved and adopted. The opinion appears below.

The decree is accordingly affirmed with costs.

NOTE.—The following is the opinion of Sessions, District Judge, in the trial court:

SESSIONS, District Judge: Complainant's bill is the usual one in patent suits, alleging infringement and asking an injunction and accounting. The asserted defenses are: First, invalidity of the patent for lack of invention, or because of the anticipation of the invention if any exists; second, noninfringement; and, third, abandonment of the invention by the inventor. A correct understanding of the questions presented requires at least a brief examination of the letters patent. In the specifications the patentee says:

"This invention relates, primarily, to typewriting machines in which radially disposed type bars are arranged about a common printing point, and move one at a time to the printing position. These type bars, especially in 'front-strike' machines, are often closely arranged, so that in rapid operation there is liability of clashing, due largely to the fact that the type bars are apt to rebound from the basket or cushion upon returning to normal position, thus getting into the path of a subsequently operated type bar. The principal object of my invention, therefore, is to minimize the liability of the type bars to rebound in this manner. * * * The type bars normally rest in contact at their type ends with a flexible ring or segment, consisting of a casing of some flexibility and preferably tough and inelastic, filled with sand or other force-absorbing material, although in some cases the casing need not be entirely filled by the material.

"The device may be supported in any suitable way, preferably upon inturned fingers, formed at the lower edge of a thin stiff sheet metal ring or band, the latter being hung upon rods, attached to the top plate or otherwise supported. In front-strike machines the member (metal ring or band) may be in the form of a segment and in some cases may be omitted. The device being flexible, yields more or less at the impacts of the type bars, and owing to this yielding movement some of the adjacent and opposite type bars are jarred, thereby taking up much of the force of the blow and minimizing the reaction of the parts, so that it does not tend to throw the type bar back with force, the tendency of the same to rebound being lessened, while owing to the inelastic character of the filling the force of the original blow of the type bar is still further absorbed, particularly because the filling is incased in soft, inelastic material, so that the bar upon striking the basket may possibly drive slightly past its normal position, but will not rebound to the extent of causing it to clash with a subsequently operated type bar. This enables the operation of the machine at high speed without danger from this source.

"The curved frame or ring is substantial and protects the cushion from injury. It also prevents undue displacement of the cushion. Preferably a narrow space is left between the ring or segment and the inner member, so as to allow slight freedom of movement of the latter. During such movement there may be more or less friction between the cushion and the fingers or shelves whereon it is supported, thereby further tending to absorb the force of the type bar blows. The filled or partly filled casing is flexible and inelastic, rendering it desirable for a type basket, either with or without the stiff ring or segment."

The ten somewhat redundant claims here in issue are as follows:

"1. In a typewriting machine, the combination with a series of type bars of a rest therefor consisting of inelastic material confined within a casing of inelastic pliant material."

"2. In a typewriting machine, a type bar rest consisting of a casing and sand contained therein."

"3. In a typewriting machine, a curved type bar rest consisting of a casing of pliant material and a filling of granular material."

"6. In a typewriter, a cushion constructed of a yielding sheath and a yielding and nonresilient filling, producing a pad that is absorbent of the energy of the blow struck by the type bar, and nonresilient under said blow."

"7. In a typewriter, a yielding, inelastic cushion to support the type bars in their normal position, consisting of a sheath and a filling made of finely divided material."

"8. A type-bar cushion comprising a yielding striking surface and an inherently nonresilient shock-absorbing medium beneath the striking surface."

"9. A type-bar cushion, comprising a yielding striking surface and an inherently nonresilient shock-absorbing medium beneath the striking surface and movably supporting the same."

"10. A type-bar cushion, comprising a striking surface or facing of yielding material, said material being sufficiently yielding to prevent sudden arrest and consequent rebound or springing of the type bars, and a nonresilient shock-absorbing backing for said facing, said backing being sufficiently nonresilient to absorb the energy of the returning type bars, and being also movable, so that both the facing and the backing may be displaced by the impacts of the type bars; said cushion being sufficiently yielding and nonresilient to prevent injurious rebounding of the type bars therefrom."

"11. A type-bar cushion, comprising a yielding facing of tough material, said facing being inelastic and pliant, and a yielding, inelastic, shock-absorbing backing; said cushion being sufficiently yielding, inelastic, and shock-absorbing to prevent injurious rebounding of the type bars." * * *

Invention.

"In the light of accomplished results" an inelastic casing or sheath filled with sand, shot, or other granular material seems like a simple and obvious device to prevent the rebounding of the type bars of a typewriter; but the inventor of this device did not have the benefit of present-day knowledge to guide him in his search for the thing desired. This record shows that, prior to Stickney's discovery, many men had vainly sought in many different ways to accomplish what he actually accomplished in and by his apparently simple contrivance. Cushions or pads of various forms and shapes, and made of felt, leather, lead, rubber, and other materials, had been tried, and all had proved more or less unsatisfactory. The defendant itself has made many experiments extending over a long period of time in its attempt to supply a recognized want. Of those working in this field, Stickney and Baxter alone, so far as appears, conceived the idea which is embodied and put into practice in this invention, and, in the Patent Office proceedings, Baxter conceded priority of invention to Stickney. These facts, among others, coupled with the presumptions arising from the allowance of the patent, preclude a finding that the patented device is devoid of novelty and that the patent does not involve invention.

Infringement.

The decision upon the question of infringement hinges upon the construction to be given to the several claims of the patent. This does not mean whether a liberal or a narrow construction shall be given to the claims, but rather whether the complainant's or the defendant's interpretation shall be adopted. Complainant contends that each of the claims contains two and only two elements: (1) A pliant and non-elastic casing; and (2) a filling of granular shock-absorbing material. While the defendant insists that to these two a third element must be added, viz.: A mounting for the cushion which will permit it to move or yield bodily and as a whole under the impact of the returning type bars. If complainant's contention be sustained, it is conceded that infringement exists. On the other hand, if defendant's construction be adopted, it is manifest that there is no infringement, because defendant's cushion is solidly cemented to its support, and therefore is incapable of bodily movement as a whole.

A most cursory examination of the claims in issue will make it apparent that the third element, upon which defendant insists, cannot be found in any of the first three claims and cannot be read into any of the others, except the ninth and tenth, without doing violence to the plain and unambiguous

language employed. Nor does the specification of the patent give any aid to defendant's theory. It is true that, in the description of his structure, the inventor had expressed a preference for a support or mounting for the cushion that will permit the latter to yield or move bodily and as a whole; but he has also stated that "the device may be supported in any suitable way," thereby expressly refusing to place any such limitation thereon as is contended for by defendant. It is certain that claim 4, which is not in issue, was framed with reference to and was based upon the preferred structure described in the specification, and it is more than probable that claims 9 and 10, which are in issue, were intended to cover the preferred device. The term "yielding," in some of the other claims, clearly refers either to the casing or to the filling, and not to the type-bar rest as a whole. It follows that claims 9 and 10 are not infringed, and that the other claims in suit are infringed.

Abandonment.

Mr. Stickney, the patentee, was a witness for complainant. He testified that in the years 1897 and 1898 (more than two years prior to his application for the present patent), and while he was in the employ of one Auerbach, he made three model typewriters, each of which contained a sand cushion type-bar rest. He further testified that the first model "was put on the shelf," that the second was left with his employer, and that he did not know what became of the third, and that all three "were models containing many experimental things, and were not perfected to a state to be put on the market." Mr. Stickney does not explain very satisfactorily his long delay in making application for this patent, but, under the authorities, his testimony falls far short of establishing an abandonment of his invention.

A decree will be entered in favor of complainant except as to claims 9 and 10; an injunction will be granted and the accounting will be referred to John S. Lawrence, master in chancery. Complainant will recover its costs of suit to be taxed.

In re TEAR-OFF BOTTLE SEAL CO.

In re MONTGOMERY.

(Circuit Court of Appeals, Second Circuit. May 12, 1915.)

No. 229.

1. PATENTS ⟸209—LICENSE—FRAUDULENT REPRESENTATIONS—MATTERS OF OPINION.

Statements made by persons interested in certain patents and in a prospectus subsequently issued by them to induce the formation of a company to exploit the patents under licenses *held* not to constitute such fraudulent representations as to invalidate the license contract subsequently made by the corporation, but to consist mainly of predictions and opinions.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 300, 303; Dec. Dig. ⟸209.]

2. PATENTS ⟸209—LICENSE—RESCISSION—TIME FOR RESCISSION.

A licensee under patents, which proceeded for four years to manufacture under the license and in perfecting its machinery therefor, cannot then rescind the license contract on the ground that it was induced by fraud, nor can it, after affirmance by such continued use, recover damages resulting from the alleged fraudulent representations.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 300, 303; Dec. Dig. ⟸209.]

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

Saul S. Meyers, of New York City (Selden Bacon, of New York City, of counsel), for appellant.

Lind & Pfeiffer, of New York City (Alfred D. Lind and Alexander Pfeiffer, both of New York City, of counsel), for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

WARD, Circuit Judge. One Kaufman was the inventor of a bottle seal made of aluminum, and patentee therefor under letters patent of the United States, followed by patents in about 15 foreign countries. He assigned one undivided half of these patents to B. L. and Berthold Weil. Messrs. Stark and Turner were the inventors of the capping machine for applying the seals or caps to bottles, and owners of patents therefor in this and various foreign countries. All these patents were ultimately assigned to the Bottlers' Seal Company, of which the brothers Weil were the chief officers and holders of its entire capital stock.

December 23, 1909, the Bottlers' Seal Company executed an exclusive license under all the foregoing patents to the 4th day of January, 1924, to one Horner, and sold to him all its machines for making and applying the seals for the sum of $25,000. December 28, 1909, Horner assigned the license and sold the machines to the Tear-Off Bottle Seal Company. September 11, 1913, the Bottlers' Seal Company filed its proof of debt in bankruptcy proceedings against the Tear-Off Bottle Seal Company for unpaid royalties under the said license agreement of $45,000, with interest.

November 20, 1913, the trustee filed objections on the ground that the bankrupt had been induced to enter into the agreement by fraudulent representations and had rescinded the same, and the proof of debt was referred to a special master for re-examination. The claimant took no testimony. The record shows that the Weils and some of the persons who subsequently organized the Tear-Off Bottle Seal Company prepared a prospectus, drafted principally on the strength of statements of the Weils, to be issued to the public to secure capital for the corporation to be organized under the name of Tear-Off Bottle Seal Company to exploit the patents under the license. This prospectus was shown to other persons, who joined the company, and it is some statements made by the Weils before that time, together with those contained in the prospectus, said to be false and fraudulent, which induced the bankrupt to enter into the license agreement. The special master so found, and entered an order disallowing the proof of debt, which order, upon petition to revise, was reversed by Judge Mayer, and the claim allowed, without costs. From this judgment the trustee appeals.

[1] The principal statements of the Weils, made before the prospectus was issued, which are complained of, were that the patents were basic and that aluminum could be had for 25 cents per pound. This word "basic" is vague, and may mean either that the United States patents were the basis of the foreign patents or that they were pioneer patents. At all events, it is a matter of opinion whether a patent is basic, and so what the price of aluminum would be in the future was a pure matter of opinion. In addition there was testimony

of one of the Bottlers' Seal Company's employés that Stark, its foreman, told him, when running the assembling machine in the presence of persons invited to see it, not to stop, even though he knew imperfect caps were being made. The testimony is not entirely satisfactory, but there is nothing to show that it was within Stark's authority to give such an instruction. There is no proof whatever that either of the Weil Bros. did such a thing, or ordered such a thing to be done. Examination of the prospectus shows that it was, as might be expected, almost entirely a matter of prediction and of opinion. The Bottlers' Seal Company had no commercial plant, but only an experimental one, in which it did stamp out by a standard machine metal which was assembled by a specially devised, but unpatented, machine into the patented seal, and then capped on the bottles by another machine covered by the patent to Stark and Turner. A great many caps had been made and bottles capped, some of which had been used by the Ebling Brewing Company, which expressed its high appreciation of the same in a letter in evidence. All persons interested were given free access to the plant. Every one knew that the new company was to be organized to build machines which would make and apply the patented seal commercially, and the object of the prospectus was to forecast what such machines, when made, would do, and the probable profits of the operation so as to interest investors.

After the bankrupt began to use the assembling machine, some time in the spring or early summer of 1910, it was found to be very unsatisfactory. It also found the price of aluminum to be so high as to make profits impossible. Still, it was so convinced of the value of the license that it spent $100,000 in money and nearly four years in time in devising a better assembling machine, capable of manufacturing commercially tin, instead of aluminum, caps. Just as this machine was about completed, the company went into bankruptcy. Down to that time, however, it had received and invited subscriptions to its capital stock, showing exactly the same kind of confidence in the bottle seal that it was quite natural the Weil Bros. had at the time the prospectus was prepared. We think the District Judge was right in finding that the bankrupt was not induced to make the license agreement by fraudulent representations.

[2] Were this otherwise, the result would be the same. The bankrupt could not go on availing itself of the benefit of the license for nearly four years after it had discovered the fraud and then rescind. It was bound upon discovery to stop, if it wished to rescind. By going on it plainly affirmed the contract. Nor, having affirmed it, could the bankrupt recover, either by direct suit or by set-off or counterclaim, any damages resulting to it from such representations, even if they were false. That would be to let it at the same time affirm and disaffirm the contract. Kingman v. Stoddard, 85 Fed. 740, 29 C. C. A. 413; Simon v. Goodyear Co., 105 Fed. 573, 44 C. C. A. 612, 52 L. R. A. 745. The bankrupt, of course, could avail itself of any breach of the license agreement, but none is shown.

Strictly speaking, the trustee's objection to the proof of debt should have been overruled, because, as both the special master and the Dis-

trict Judge found, the bankrupt never rescinded the contract. As, however, the claimant took a large amount of testimony upon the subject of fraudulent representations, which was considered by both the special master and the District Judge, the objection may be regarded as amended to conform to the proof, and include the trustee's claim for damages against the Bottlers' Seal Company by way of set-off or counterclaim.

The judgment is affirmed, with costs of this court.

McCASKEY REGISTER CO. v. MANTZ

(Circuit Court of Appeals, Second Circuit. May 12, 1915.)

No. 264.

1. PATENTS ⊂=328—VALIDITY AND INFRINGEMENT—CREDIT ACCOUNTING APPLIANCE.
   The McCaskey patent, No. 783,126, for a credit accounting appliance, is a narrow one, and must be strictly construed. Claims 12, 13, and 22, as so construed, *held* not infringed, and claim 23 void for anticipation.
2. PATENTS ⊂=246—INFRINGEMENT—OMISSION OF ELEMENT OF COMBINATION.
   Where there is nothing of a pioneer character in a patentee's device, a claim which calls for two elements cannot be infringed by a device which employs one only.
   [Ed. Note.—For other cases, see Patents, Cent. Dig. § 387; Dec. Dig. ⊂=246.]
3. PATENTS ⊂=240—SCOPE OF IMPROVEMENT PATENT—PRIOR ART.
   While an inventor may improve on the disclosure of his earlier patent, and patent his improvements, he cannot give such improvements greater scope than they would have had, if he had improved another man's patented disclosure.
   [Ed. Note.—For other cases, see Patents, Cent. Dig. § 379; Dec. Dig. ⊂=240.]

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

This cause comes here on appeal from a decree dismissing the bill in a suit for alleged infringement of patent. The patent is No. 783,126, granted February 21, 1905, upon application filed April 27, 1904, for "credit accounting appliance." The opinion of Judge Ray, who held the patent valid, but not infringed, is found in 217 Fed. 415. The same patent was before Judge Orr in the Western district of Pennsylvania; he held the patent void. McCaskey v. Divens (C. C.) 181 Fed. 171. Upon appeal the Court of Appeals, Third Circuit, held that the patent was a very narrow one, and that, if it were sustained, it must be narrowly construed, with no broad range of equivalents. McCaskey v. Divens, 194 Fed. 967, 114 C. C. A. 603.

Charles B. Mason, of Utica, N. Y. (Harry Frease, of Canton, Ohio, of counsel), for appellant.

Miner G. Norton, of Cleveland, Ohio, for appellee.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

LACOMBE, Circuit Judge. [1] In prior patents, No. 560,523, May 16, 1896, and No. 717,247, December 30, 1902, McCaskey had described a method of keeping the accounts of small tradesmen with their customers by means of duplicate memorandum sheets of sales and appliances for conveniently preserving the same. The patent in suit relates to that system for keeping records of credit sales of merchandise and cash payments thereon and "has reference particularly to the apparatus and appliances for carrying out the system." The claims in issue are:

"12. Account-recording appliances, including a bill-holder frame, bill-holders mounted on the frame, and having pairs of apertures therein, bill-clamps mounted oppositely on both sides of the bill-holders and having members extending through the apertures to opposite sides thereof, the bill-clamps, on both sides of the bill-holders, extending from the apertures in the same direction.

"13. Account-recording appliances, including pivoted bill-holders, bill-clamps mounted on the bill-holders, tab-holders attached to the bill-clamps near the free ends thereof, and index-tabs mounted on the tab-holders."

"15. Account-recording appliances, including a bill-holder frame, bill-holders mounted on the frame and having pairs of apertures therein, bill-clamps mounted oppositely on both sides of the bill-holders and having members extending through the apertures to opposite sides thereof, and rubbing-strips, on the bill-holders in pairs on opposing holders, and co-operating one with another."

"22. In account-recording appliances, the combination, with a plurality of pivoted bill-holders, of a plurality of bill-clamps mounted on the holders, tab-holders attached to the bill-clamps, and index-tabs attached to the tab-holders."

We concur with the Court of Appeals of the Third Circuit that the patent is in no sense a pioneer; that there can be no broad range of equivalents. All that can be covered by it are such new devices as are shown and *claimed*. In defendant's device the index number, letter, or name is affixed directly to the bill-clamp. Manifestly this does not infringe claims 13 and 22. It makes no difference what combination of elements the specifications disclose, these two claims enumerate several separate elements of which one is a "tab-holder" attached to the bill-clamp and another is an "index-tab" mounted on the tab-holder. To place an indexing letter or number directly on the clamp may be just as good, or better, or worse than putting it on a tab, which may be slipped in or out of a holder, but in the one case there are two elements, in the other only one.

[2] Since the claim calls for the two elements, it cannot be infringed by a device which employs one only, where there is nothing of a pioneer character in the patentee's device. There is no claim declared on, and indeed none in the patent, which states as a single element "an indexing mark attached to the bill-holder."

The other claims, 12 and 15, do not deal with the general system of duplicate slips made out at the time of sale and deposit thereof; i. e., of the seller's duplicate, in a case. All that was prior art, developed largely by McCaskey himself. These claims are mechanical; they deal only with appliances for carrying out the system.

[3] The nearest approach to the patent in suit is McCaskey's patent 717,247. To the proposition advanced by appellant that this patent is not prior art—it was issued 18 months before his application for the patent in suit—we cannot assent. When the first patent issued, all

that it disclosed became "known by others in this country." The words of section 4886, U. S. Rev. Stat. (Comp. St. 1913, § 9430), "before his invention or discovery thereof," mean before his invention or discovery of what is shown in the particular patent then being applied for. An applicant can of course *improve* on the disclosure of his earlier patent and can patent his improvements, but he cannot give such improvements greater scope than they would have had, if he had improved another man's patented disclosure, merely because the first disclosure to the full extent of its relevation was his own. The interpretation contended for would enable a patentee to extend the term of his original patent, by patenting his subsequent improvements and having the claims which covered them construed as themselves pioneers in scope, on the ground that he was the first to disclose a pioneer invention to which the improvement claims are added. Appellant relies upon rule 75 of the Patent Office. It need not be quoted or discussed, because no administrative rule of the Patent Office can change the statute, which precludes a patentee from claiming what was "known to others" before he filed his application, even though *he* was the one who, in an earlier patent, imparted that knowledge to others. It may be noted that we have here no application which the Patent Office required to be broken up into divisions, nor any substituted or amended or supplemental application. The question is presented without any complications.

In view of the restricted character of the claims, we concur with Judge Ray that in claim 12 the "bill-holder frame" is an element and that defendant's device does not have it. As to claim 15 we concur with the Court of Appeals in the Third Circuit that "rubbing-strips" on one side of the bill-holder were shown in McCaskey's earlier patent and that placing them on the other side also does not involve invention.

The decree is affirmed, with costs.

MacCLEMMY v. GILBERT CORSET CO

(Circuit Court of Appeals, Second Circuit. June 22, 1915.)

No. 294.

PATENTS ⊂=328—VALIDITY AND INFRINGEMENT—BODY BRACES.

The MacClemmy patents, Nos. 948,233 and 948,234, for body braces, are valid, but in view of the prior art must be narrowly construed, and are not entitled to a large range of equivalents, nor can any of the elements enumerated be disregarded as unimportant. As so construed, *held* not infringed.

Appeal from the District Court of the United States for the District of Connecticut; Edwin S. Thomas, Judge.

This cause comes here upon appeal from a decree holding validity and infringement of two patents for body braces, issued to Robert F. MacClemmy, viz., Nos. 948,233 and 948,234, both issued February 1, 1910. The opinion of Judge Thomas will be found in 221 Fed. 73.

Samuel H. Fisher and Henry E. Rockwell, both of New Haven, Conn., for appellant.

Clair W. Fairbank, of New York City, for appellee.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

LACOMBE, Circuit Judge. The type of body braces to which the patents relate are those having two back sections or pieces with armholes therein adapted to fit over the shoulders of the wearer. These sections are joined in the back by lacings or cords, the free ends of which are secured to parts of a belt which fits around the waist of the wearer, and buckles in front. The tightening of the belt tends to draw the shoulders backward and thereby cause the person wearing the brace to assume a more erect carriage.

There were a number of braces of similar type in the prior art, of which the one which most closely resembles the complainant's is the Munter brace. The improvement over the latter's is thus indicated by complainant's expert:

"The novelty is the construction wherein the armhole encircling portion is formed of two pieces, one projecting from and substantially integral with the upper part of the back, and passing upward over the shoulder. (It would be more correct to say to the top of the shoulder.) The other portion projecting from and substantially integral with the back section below the arm and extending upward in front."

These two portions unite in a seam on the top of the shoulder. "Munter formed his armhole of a piece of the back section which was carried up over the shoulder and thence down in front and united at the bottom," to the back section. Speaking of the old style, with single strap-forming projection, brought from the back over the shoulder and down to body portion below the arm, the specification states that:

"Fabric cannot be cut so that the front portion of the shoulder strap will fit the body equally well at both ends thereof, and the shoulder strap will tend to cut into the flesh and become very uncomfortable, whereas by forming the shoulder strap of two sections, each integral with the body of the back section and connecting these sections together along the top of the shoulder, the completed shoulder strap fits the body and there is no tendency for either edge of the strap to cut into the flesh."

This method of forming the shoulder strap by uniting two prolongations from the back piece with a seam on the top of the shoulder, although not a great invention, seems to be novel and useful, and we are inclined to agree with the District Court in the conclusion that it is patentable, without having recourse to any theory of estoppel to question patentability arising from past relations between the parties. Defendant's brace has the same general method of forming the shoulder strap with seam at the top. He seeks to differentiate, substantially by cutting off his front extension and sewing it to the place it is cut off from. In practice, of course, he cuts a front extension as a separate piece and sews it on to the back piece below the arm, then bringing the free end up to the top of the shoulder and sewing it to the back extension. When this third piece is sewn on, it becomes integral with the back section to which it is sewn; the method of completing the shoulder strap is essentially the patentee's. The extra

seam below the arm is not a drawback to the use of the brace, because a seam in that locality apparently does not distort or irritate.

Whether or not defendant's brace infringes the patent is a question to be determined by the language of the claims. All of the claims are set forth in the opinion of the District Judge, and their full text need not be here repeated. The invention is of a character which will not support any broad range of equivalents, nor warrant discarding any enumerated element of a claim as unimportant. In order to insure against any wrinkling of the shoulder strap, the specifications of the first patent set forth features additional to the location of the seam These consist of interior padding in the front strip—defendant has this also—narrow strips of stiffening and reinforcing material sewn into the shoulder-top seam, and a plurality of transverse seams, as the patent calls them; they are really lines of stitching extending across the front strip. No claim declared on is confined to the single improvement of bringing front and back strips together on the top of the shoulder. In patent 948,233 claim 1 enumerates as an element:

"Separate reinforcing strips extending along each of said (shoulder) seams and serving to hold the fabric smooth along the tops of the shoulders and to prevent it from buckling or wrinkling."

Defendant's brace has no such "separate and reinforcing strips extending along each of the shoulder seams." Claim 2 makes no mention of these separate reinforcing shoulder seam strips, but it enumerates as an element—

"a plurality of transverse seams extending across said reinforcing layers and the padding (i. e., the reinforcing layers in the front portion) and serving to retain the portions in front of the shoulders substantially stiff."

Defendant has a plurality of rows of stitches (seams, as the patent calls them) in the front portion of the shoulder strip, but they are longitudinal, as they were in the earlier art, not transverse as the claim requires. Claim 3 also includes, as an element, "a plurality of transverse seams extending across said reinforcing layers and padding."

Infringement of these three claims is not found in defendant's brace.

Patent 948, 234 shows a back portion of inelastic material, consisting of the two separated back sections of the earlier patent connected by a central connecting portion under the lacings. This is really a lining, and protects the wearer from direct contact with the lacings. The specifications show an arrangement for keeping the central portion from bunching up, and for folding it always in a definite and predetermined position. The patentee also states that difficulty is often experienced due to the tangling of the lacing and the twisting of the belt portions. To remedy this he provides loops for guiding the belt portion. These guiding loops are made an element of claim 4. Considered by themselves, they would not constitute invention; the Patent Office held, quite correctly, that:

"Loops attached to a garment in order to form a guide for straps and belts and similar devices are old and common and it would not require invention to make use of this old expedient in connection with any garment."

The claim was therefore so restricted that this element of it was enumerated as "strips of tape secured to said back sections along their

lower edges." Since defendant locates his guiding tapes, or loops, not along the lower edge of the back sections, but perpendicular thereto, he cannot be held to infringe this claim. Claim 7 relates to the inelastic back portion, which is secured to the two back sections. Defendant has no such back portion between his lacings and body of the wearer. Therefore he does not infringe this claim.

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

COMPUTING SCALE CO. et al. v. TOLEDO COMPUTING SCALE CO.

(Circuit Court of Appeals, Second Circuit. May 12, 1915.)

No. 255.

PATENTS ⊂328—INVENTION—IMPROVEMENT IN COMPUTING SCALES.

The Bane & Crane patent, No. 937,573, for an improvement in computing scales, whereby an electric lamp is automatically lighted when the weighing operation begins and is put out on its completion, *held* void for lack of invention.

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

This cause comes here on appeal from a decree entered on July 13, 1914, in the United States District Court of the Southern District of New York, dismissing the bill of complaint in a suit brought by the plaintiffs against the defendant for the infringement of letters patent No. 937,573.

Drury W. Cooper and J. B. Hayward, both of New York City, for appellants.

Frank Parker Davis, of Chicago, Ill. (Charles Neave, of New York City, of counsel), for appellee.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge. The invention which is the subject-matter of the patent has to do with an improvement in computing scales, whereby an electric lamp is lighted at the moment the weighing operation begins, and is put out upon its completion. The specification of the patent indicates the possibility of applying it to other scales of ordinary type, such as floor and platform scales, but the only use that has been made of the invention by either of the parties is in computing scales. Indeed, it seems to be admitted that the invention is, in fact, inapplicable to other types of scales. The computing feature of the machine is not, however, directly concerned. In other words, the presence or absence of a table or chart of computed values does not affect the mechanical or electrical action. There is simply greater occasion for illuminating a scale which has such a table or chart than for illuminating one which merely shows weight, as the table of computations is necessarily made up of numerous figures and graduations in a circumscribed area. The patent is for the simple expedient

of arranging an electric circuit closer on a scale, so as to automatically close a light circuit and illuminate the weighing scale while it performs its operation.

The patent was issued to Harry H. Bane and Samuel G. Crane on October 19, 1909, which patent passed by subsequent assignments to the plaintiffs. The court below conceded that Bane & Crane first made a scale in which, at the critical point of weighing, the circuit was closed and the beam was free from the disturbing weight of the contact beam, while at the normal position it had engaged the contact beam and broken the circuit. The District Judge well expressed the situation when he said:

"I must therefore hold that the invention here consisted only of the mere conception of lighting a computing scale automatically when in use, and then only. Once you had that idea, you had only to look to the nearest possible art—i. e., that of electrical contacts upon scales—and the whole mechanism was at hand, at least any mechanism which the defendant has ever used. Should it, therefore, be held to be invention to see that it would be a good thing to illumine the chart of such a scale with an automatic light? Cash registers were not very remote, and automatic lights had been put on them, Gibbs, 509,685. But surely no invention was necessary to discover the need of a light when the scale was set in a dark place, and, once you thought of a light, it hardly required invention to consider that it would be well to have it automatic. If, therefore, I am right in supposing that the scale art had already completely developed the necessary mechanism of electrical contacts, which, when applied to a computing scale, would fill the need so conceived, I confess that I cannot quite see what room is left for invention."

The bill was dismissed on the ground that what the patentees did amounted to "useful ingenuity, but that there was absolutely nothing to suggest that it was beyond the scope of the mechanical abilities of thousands of active, fertile minds which are constantly at work in this art putting it forward by gradual accretion." And upon a careful consideration of all the facts we have reached a like conclusion, and are obliged to hold that what was done did not rise to the dignity of invention, and that patent No. 937,573 must, in accordance with the opinion of the court below and for reasons therein stated, which we adopt, be held invalid.

Decree affirmed.

AMERICAN SULPHITE PULP CO. v. CARTHAGE SULPHITE PULP CO. (five cases).

(Circuit Court of Appeals, Second Circuit. May 27, 1915.)

PATENTS ⊂=324—SUIT FOR INFRINGEMENT—APPEALABLE ORDERS.

An appeal will not lie from an interlocutory decree granting an accounting only for infringement of an expired patent.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 600-606; Dec. Dig. ⊂=324.]

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

Samuel R. Betts and Livingston Gifford, both of New York City, for appellant.

Howard P. Denison, of Syracuse, N. Y., and Frank T. Benner and Alex. P. Browne, both of Boston, Mass., for appellee.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

COXE, Circuit Judge. It would undoubtedly save the parties trouble and expense if the question as to the validity of the patent and the infringement by the defendants could be determined before the parties are put to the expense of an accounting. But such considerations should not be considered if in fact there is no authority for such a review. It is idle to say that this is an appeal from an order denying an injunction, in view of the fact that it is conceded on all hands that the patent has expired. We have then an interlocutory decree granting an accounting and nothing else. We cannot find any authority for an appeal from such a decree. The defendant is not injured if no profits or damages are awarded and therefore appeals from such decrees should await the accounting which may result in a finding for the defendant. To hold otherwise will establish a precedent which will involve the court in difficulties in the future.

The motion to dismiss the appeal is granted.

ELLIOTT MACH. CO. v. ROTHSCHILD & CO. et al.

(District Court, N. D. Illinois, E. D. May 31, 1915.)

No. 101.

PATENTS ⇐328—NOVELTY—SHOE BUTTON FASTENING MACHINE.

The Elliott patent, No. 765,616, for improvement in shoe button fastening machines, in view of the proceedings in the Patent Office, must be limited to the making of the button feeding tube detachable and supplying the machine with a plurality of such tubes for use with buttons of different sizes, and, as so construed, is void for want of novelty.

In Equity. Suit by the Elliott Machine Company against Rothschild & Co. and the Independent Button Fastener Machine Company. On final hearing. Decree for defendants.

Wilson & Johnson and Luther V. Moulton, all of Grand Rapids, Mich., and Edward Rector and Marquis Eaton, both of Chicago, Ill., for complainant.

Judah, Willard, Wolf & Reichmann, of Chicago, Ill., for defendants Rothschild & Co.

Linthicum, Belt & Fuller, of Chicago, Ill., and Ellis Spear, Jr., of Boston, Mass., for defendant Independent Button Fastener Mach. Co.

SANBORN, District Judge. Infringement suit on patent No. 765,616, issued July 19, 1904, on application filed September 19, 1896, by Minnie S. Elliott.

Defendants filed separate answers. The Independent Company, in addition to the usual defenses, pleaded a counterclaim that complain-

ant had established a monopoly of the business of shoe button fastening by machinery, and continued the same after its patents expired, by continuing to give licenses under expired patents, and bringing infringement suits thereon, and threatening such suits, on patents part of which had expired. The proofs did not sustain the counterclaim, and it should be dismissed.

The case involves attachments to machines used in shoe sale stores for fastening buttons on shoes. The buttons of a particular size and color to suit the work in hand are placed in a hopper and fed into a button tube or chute, where they slide by their own weight down to the bottom of the tube. By ingenious and complicated levers, bars, hooks, drivers, benders, fingers, and arms, and a clinching anvil or die, they are automatically strung on wire, the wire cut to the proper length and bent, the threaded button placed in position on the shoe, and the ends of the wire forced through the leather and bent up to secure the button. The operation is all done by one stamp of the foot.

If this suit were brought upon the patent covering the Elliott machine the question presented would be quite different from what it is, but that patent is not sued on. On the contrary, the very unusual situation is presented of a suit on a patent involving only part of a machine, taken out under peculiar circumstances, which makes it difficult to ascertain just how far Mrs. Elliott is the inventor of the combination covered by the first five claims in suit. This arises from the fact that William E. Elliott and his wife, Minnie S. Elliott, each applied for a patent on the same day, September 19, 1896, one for a machine and the other for part of the same machine, and each application contained the same drawings and substantially the same specifications. Each disclosed a button fastener machine. It is claimed by defendants, but not conceded by complainant, that Mr. Elliott invented the complete button fastening machine, with one tube for setting buttons of three or four slightly varying sizes, and that Mrs. Elliott discovered the idea of having several detachable button tubes, so as to accommodate buttons of widely varying sizes. The point was raised at the trial on the cross-examination of Mr. Browne, expert witness for complainant. He was asked whether it was his understanding that Mr. Elliott invented the machine, with a single tube to accommodate three sizes of buttons, and Mrs. Elliott the adjustable tubes, or the use of more than one tube, and he answered in the affirmative. In the same connection counsel for complainant took the position that the whole question was entirely immaterial, and that Mr. Browne's idea was pure speculation. The matter is not referred to in complainant's brief. The claims finally allowed cover rather more than adjustability of button chutes, so it seems necessary to compare the two file wrappers in order to find out the real situation.

In her original application Mrs. Elliott claimed a good deal more than the adjustable chutes, her original first claim being the combination in a button setting machine of a button hopper, a detachable button chute, and mechanism for setting the staple and button. She thus claimed practically the whole machine under the word "mechanism." On the other hand, her husband's claims were much narrower, the first one being for the combination, in a staple driving machine, of a

staple driver, a staple bender, and a lock bar, the latter containing a hook engaging the bender after the staple is formed; and all his other original claims are equally narrow, though they seem to cover, when taken as a whole, all the specific devices necessary to set a button. It will be thus seen that the two parallel applications started out with the idea that Mrs. Elliott was the inventor of the broader idea.

As the applications progressed, however, it appeared that Mrs. Elliott's invention was to adapt a button machine to the use of different sizes and kinds of buttons. This was stated by her attorney in response to the first office action. After the second rejection, her attorney repeated the same idea, saying that the invention intended was that the user of the machine might be provided with different button tubes provided with buttons of varying sizes and shapes, and might instantly remove one tube and insert another. This was claimed to be novel, and of great value; and the Denton prior patent was distinguished, because it contemplated only one chute, permanently fixed to the machine, and the same idea is reiterated all through the proceedings.

Some six years after application the original specification was canceled, and the final one substituted, in which it is stated that "the objects of the invention are to provide a novel construction of chute," readily attached and detached, to render the machine capable of receiving, and operating in conjunction with, chutes of different sizes containing different sized buttons. The new specification then continues:

"I have described in the specification and illustrated in the drawings so much of a machine only as will suffice to render clear the application of my invention. The features of this machine, except so far as expressly claimed herein, are the invention of William E. Elliott and form the subjects-matter of patents issued to him or of pending applications filed by him."

New claims were also submitted counting on mechanism for setting the staple and the button, *in combination* with automatically adjustable button feed mechanism to accommodate different sized buttons, and detachable tubes. These claims were still much broader than any finally allowed in the W. E. Elliott application. Two claims were also submitted for the portable chute as a new article of manufacture, which were disallowed and finally abandoned. The drawings were also entirely changed, and show only the different chutes and one view of the machine with one of the chutes in place.

In response to the first office action taken after the new specification, the position of Mrs. Elliott is somewhat changed:

"Nothing is claimed as to the novelty of the mechanism for the setting of the staple and button, and it is merely intended to make the sense of the claim complete and show the intended operation of the button feed mechanism. *The novel element is the adjustable feed finger* and the detachably connected tube or chute."

It is also explained that the adjustability of the feed finger signifies that the feed mechanism will yield so as to adapt itself to different sizes of buttons:

"One button might be, say, one-eighth of an inch thick and a quarter of an inch in diameter, and it would be fed by the feed finger *20*. The tube con-

taining such size of buttons could be removed, and a tube applied to the machine containing buttons which might be a quarter of an inch in thickness and a half an inch in diameter, which would probably be the extreme range of operation of the machine, and the feed finger *20*, without any alteration in the machine, would also feed the latter buttons by reason of the fact that the feed finger *20* will yield or accommodate itself automatically to the increased size of the button."

The examiner still objected because of the words "in combination," without describing the mechanism for setting the staple, and suggested they should be made to read thus: "In a button machine having," or "provided with, button feed mechanism." This suggestion was adopted by the applicant.

Further proceedings in the Patent Office required the applicant to claim only one chute, because only one could be used at a time. This was conceded, and the patent finally issued, after eight years from application.

During the same period the W. E. Elliott proceedings were dragging along, the patent issuing nine years after application. It appears from the file wrapper contents that the feed mechanism and feed finger action are fully explained, as they are in the patent finally issued. Claim 1 of the Minnie S. Elliott patent and claim 4 of the W. E. Elliott patent are here reproduced to show the relation of the two inventions:

"1. In a button setting machine of the class described, spring-controlled button feed mechanism automatically adjustable to accommodate buttons of varying sizes and operating to deliver buttons to the machine, and a button tube or chute detachably connected to the machine, and mounted in direct operative relation to said button feed mechanism."

"4. In a button attaching machine, the combination of a button feed finger, a feed arm pivotally connected therewith, a feed lever, and a spring connection between said feed lever and finger adapted to allow the feed lever to complete its normal stroke after the feed finger is arrested by the stoppage of the button."

The W. E. Elliott patent thus fully describes the feed finger operation in connection with the chute, and also claims it. Indeed, he could not have an operative machine without doing so. The result is, in view of the disclaimer by Mrs. Elliott and the position taken by her attorney in the Patent Office, that the only thing left for her was to devise a novel improvement to her husband's machine. Obviously she might do this by making a combination including as an element something he had discovered, provided such combination was a novel and useful one. This she attempted by describing and claiming a detachable button tube, and describing a plurality of such tubes, for use with a greater variety of buttons than is contemplated by the other patent.

Thus the question is whether there is any novelty in providing for a number of button chutes in combination with the button setting mechanism. The operation of each is not only identical, but the operation in the original machine of W. E. Elliott is precisely the same. Undoubtedly there is an improved result, just as there was in most of the patents involved in the decisions which have held such a combination invalid. In the jail lock case there was an important moral

advantage, but no different mechanical result. Fond du Lac County v. May, 137 U. S. 395, 11 Sup. Ct. 98, 34 L. Ed. 714. In Osgood Dredging Co. v. Metropolitan Dredging Co., 75 Fed. 670, 21 C. C. A. 491, the patent covered a dredge adapted to operate either a scoop for hard soils or a clam shell for soft soils. Here was an obvious practical advantage, but no improved mechanical result. To the same effect are Ball v. Coker, 210 Fed. 283, 127 C. C. A. 126; Beecher Mfg. Co. v. Atwater Mfg. Co., 114 U. S. 523, 5 Sup. Ct. 1007, 29 L. Ed. 232; Kidd v. Horry (C. C.) 33 Fed. 712; Victor Talking Machine Co. v. Hawthorne Mfg. Co. (C. C.) 168 Fed. 554; Hendy v. Golden State, etc., Works, 127 U. S. 370, 8 Sup. Ct. 1275, 32 L. Ed. 207.

The bill and counterclaim should be dismissed, without costs for or against any of the parties.

AUTOMATIC RECORDING SAFE CO. v. BANKERS' REGISTERING SAFE CO. et al.

(District Court, N. D. Illinois, E. D. June 7, 1915.)

No. 172.

1. PATENTS ⊜328—VALIDITY AND INFRINGEMENT—RECORDING COIN SAFE.
   The Fisher patent, No. 793,779, for a recording safe for holding coins, discloses invention and is valid; claim 8 also *held* infringed.
2. PATENTS ⊜165—CONSTRUCTION OF CLAIMS—LIMITATION BY AMENDMENT.
   When an applicant for a patent, having devised a new mode of operation, in order to meet a reference amends a claim by inserting a limitation which modifies the operation, such limitation is a material one, even though the amendment was unnecessary because the combination as a whole was new.
   [Ed. Note.—For other cases, see Patents, Cent. Dig. § 241; Dec. Dig. ⊜165.]
3. PATENTS ⊜328—VALIDITY AND INFRINGEMENT—RECORDING COIN SAFE.
   The Fisher patents, No. 990,534, claim 7, No. 990,535, and No. 1,073,847, all relating to recording safes for holding coins, *held* valid, but not infringed.
4. PATENTS ⊜328—VALIDITY AND INFRINGEMENT—RECORDING COIN SAFE.
   The Thompson patent, No. 758,340, claim 4, for a recording safe for holding coins, *held* valid, but not infringed.
5. TRADE-MARKS AND TRADE-NAMES ⊜3—VALIDITY—TELLER AS NAME OF COIN SAFE.
   The word "Teller" *held* a valid trade-mark for a recording safe for holding coin, and also infringed.
   [Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 4–7; Dec. Dig. ⊜3.]
6. TRADE-MARKS AND TRADE-NAMES ⊜70—UNFAIR COMPETITION—IMITATING FORM OF ARTICLE.
   The manufacture and sale by defendant of a coin safe so nearly resembling complainant's patented safe, previously in the market, that it could be distinguished only by careful examination, and that purchasers were in fact deceived, *held* to constitute unfair competition.
   [Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 81; Dec. Dig. ⊜70.]

In Equity. Suit by the Automatic Recording Safe Company against the Bankers' Registering Safe Company, the White Brass Castings Company, Forrest B. Page, Gerald G. Barry, John C. Farwell, and W. A. Winterburn. On final hearing. Decree for complainant.

Dyrenforth, Lee, Chritton & Wiles, of Chicago, Ill., for complainant.

Gerald G. Barry and John C. Farwell, both of Chicago, Ill., for defendants.

SANBORN, District Judge. Injunction suit to restrain unfair competition, infringement of trade-mark "Teller," and infringement of patents relating to recording safes used by depositors in savings banks for the temporary collection of coins. The main patent relied on was issued to Charles Fisher July 4, 1905 (application March 24, 1904), No. 793,779, all the claims being involved; also claim of patent to Robert J. Thompson, No. 758,340, April 26, 1904, claim 7, Fisher patent, No. 990,534, April 25, 1911, claim 6, Fisher patent, No. 990,535, April 25, 1911, and claims 1, 2, and 5, Fisher patent, No. 1,073,847, September 23, 1913.

Three other suits involving the same patents were heard about the same time and are decided herewith. One of them is in the Southern District of New York, Automatic Recording Safe Co. v. Burns Co., 224 Fed. 513, another is Automatic Recording Safe Co. v. W. F. Burns Co., 224 Fed. 512, in this district, and the third in the Western district of Wisconsin, Automatic Recording Safe Co. v. Savings Loan & Trust Co., 224 Fed. 513.

The safes in question are made of nickel steel, about the size of a small flatiron, oval in shape, and comprising a coin stack with six cylinders, open at the top and slotted at the outer side. This is known as the core. Over this fits tightly the other part of the device, called the casing (like a skullcap), with a small lock under the top, engaging with the top of the core, by which the two parts are detachably secured together while the coins are being gradually deposited. Opposite the top of each coin compartment of the core there is a coin admission slot in the casing, with a spring slot guard to prevent withdrawal. The recording feature is secured by small holes through the casing opposite each coin stack, through which the height of the stack of collected coins may be seen and the amount estimated.

Aside from the trade-mark and unfair business questions, the main inquiry is whether the first five claims of the first Fisher patent so narrow the invention as to render it practically valueless. The gist of the invention was a new mode of operation thus described by the patentee:

"The primary object of my invention is to provide a portable savings bank in which the various denominations of coins when the bank is opened may be kept separate and at the same time be accessible to the teller, so that he may readily count the coins without first having to assort them according to their denominations."

This feature was novel, and there was nothing in the prosecution of the application which in any way affects it. For instance, claim 1

was twice amended before allowance, but this novel idea of separation and accessibility is present in all the three forms. The amendments are shown in parentheses:

"1. In a portable savings bank, a core comprising a plurality of (rigid) vertical flanges spaced apart to form compartments to receive coins (the distance between the flanges of each compartment being greater than the diameter of the coins to be received by such compartment), the adjacent flanges being united at corresponding ends by walls adapted to partially surround the coins."

Both these amendments were made on prior patents not containing the mode of operation referred to, where the coins were separated and counted before deposit, and remain so when the safe is unlocked by the receiving teller of the bank. Complainant argues that the doctrine of Winans v. Denmead, 15 How. 330, 14 L. Ed. 717, should be applied, where a hopper was applied to an ore car; but the form of the hopper was by the claim limited to the frustrum of a cone. The patent was held to cover an octagonal form. It is said that the rigid, flaring flanges form no part of the real invention, which was the new mode of operation, and that defendants' banks, with rigid flanges slightly converging, should be held to infringe, because the true invention does not reside in a mere change of form, but in a new principle. As the change in the Patent Office from converging to diverging flanges only slightly affects the mode of operation may they be held equivalent? In order to fully understand this question further explanation is given.

The recording safes in question sold by complainant have had quite a remarkable history. Starting on a capital of $4,000 the business has stood a total expense of about $500,000, all paid out of earnings, while the sales have exceeded 1,000,000 in number. A considerable part of the business also depends upon the placing of the safes among prospective depositors in banks through the work of salesmen or solicitors who represent the banks, and who sometimes guarantee the latter that the account of the purchaser of a safe will continue for a certain time. In addition to this method of sale it appears that more than half of the demand for the recording safe comes directly from savings banks and trust companies, mainly through advertising or the solicitation of traveling salesmen.

The history and development of complainant's business are described by its counsel, and shown by the proofs, substantially as follows:

In the year 1902, Robert J. Thompson and Alexander H. Revell, realizing the desirability of a plural-compartment recording safe for use by banking institutions and trust companies, entered into an arrangement whereby a recording safe, suitable for the purpose, should be produced by Mr. Thompson and placed upon the market by Messrs. Thompson and Revell. Thompson devised the construction shown in patent No. 758,340, and during the period 1902–1904 the device was placed on the market by Messrs. Thompson and Revell, doing business in the name of the Automatic Recording Bank Company. The Thompson recording safe proved to be expensive in manufacture, mechanically deficient in some particulars, and lacking in the mode of operation which was afterwards introduced into the recording safe art by Mr. Fisher. Only a very few thousand (perhaps about 3,000) of the Thompson recording safes were sold, and it was afterwards necessary to replace these safes with the Fisher recording safe. The recording safe shown in Fisher

patent, No. 793,779, was devised to overcome the defects of the Thompson recording safe. Fisher conceived the idea of a recording safe comprising two main telescopically related complemental parts or elements, viz.: (a) A core comprising a base and open-sided or accessible coin receptacles rising from the base, the core being provided with a locking member; (b) a coin-slotted, guard-equipped, and lock-provided casing within which the core snugly fits and is detachably locked. The coin-receptacles of the core were grouped about a common center; and the vertical wall of the casing was provided near its upper end with a series of coin slots corresponding with the several coin compartments, while the slot guards were arranged in an annular series beneath the top wall of the casing. When the parts were assembled, the vertical wall of the casing served to cover the outer vertical openings of the coin receptacles. It was important that, in filling the safe with coins, they should be permitted to drop freely and be stacked flatwise in the coin receptacles.

The new mode of operation introduced in the savings bank art by Fisher will be clearly understood from Figure 3 of the drawing of the Fisher patent. The new mode of operation introduced was that by removing the cover the receiving teller at the bank was able to leave the core standing on the counter with the coins assorted according to denomination and arranged in stacks, these stacks being capable of being removed one by one from their respective compartments, thus saving the slow, laborious work of assorting the coins and economizing the time of the busy and hard-worked employé of the banking institution. The approval of the bank officers was an important factor in the success of the device, and one of the chief objects was to produce a bank so convenient as to be entirely satisfactory to the receiving teller. From the viewpoint of the customer it was made of convenient size, simple in structure, mechanically desirable, sanitary, and cheap. But the most important feature was the mode of operation described.

The idea of unlocking and removing a casing having coin-admission means from a core having open-sided coin receptacles, thus leaving the coins accessible to removal in stacks, and avoiding the necessity of assorting the coins (which was necessary with the Thompson patent, where the contents of the bank were dumped by the teller), is employed in all complainant's recording safe product and by all of the defendants in the suits referred to.

About May, 1904, the National Recording Safe Company was incorporated, Revell, Thompson, and Fisher being the directors, and the Fisher recording safe was placed upon the market in the cylindrical form shown in the first Fisher patent. Between 300,000 and 400,000 in this particular embodiment were marketed. In the latter part of the year 1909, the National Recording Safe Company made arrangements for marketing its recording safe in the oval form, and with the outer, lateral openings of the coin compartments contracted somewhat. This form was placed upon the market in April, 1910, and between 500,000 and 700,000 of the oval form of safes have been sold by complainant. Late in the year 1909, complainant arranged with the White Company to manufacture complainant's product; and in April of 1910 complainant began the marketing of its oval form recording safes under the trade-mark "Teller," associated with various auxiliary words, such as "Savings," "Traveling," etc. For three or four years complainant's product was practically all manufactured by the White Company, and shipped directly by that company to complainant's customers. A large number of details of improvement were perfected and developed by Mr. Fisher at complainant's expense, and numerous patents were taken for such features of improvement as were of a patentable order. All of the refinements in construction and appearance, whether of a patentable order or not, were developed at complainant's expense, and the arbitrary markings and all the details of size, exact curvature, appearance, color, and finish, were worked out by it; and during this period of development, all the secrets of manufacture and invention were made known to and learned by the White Company, while enjoying complainant's patronage during a period when between $100,000 and $150,000 was paid to it by complainant. The expense for all of the dies and special tools, the expense of procuring the patents, and the expense of introducing and making known the recording safe throughout the United States, was borne by complainant.

During the year 1913 complainant began to transfer its business to another

factory, where the stamped core and spider could be made in lieu of the die-molded cast core and spider, which the White Company was accustomed to manufacture for complainant. The White Company continued, however, to manufacture for complainant and to ship goods to complainant's customers. During this period the White Company entered upon the manufacture of a recording safe for itself, known as "Depositor's Teller," in which it copied the latest form of the device, together with the trade-mark "Teller," and copied also the "Savings Teller," so that they can hardly be distinguished. While it is true that these savings banks are sold mainly to bank officers, who would not be easily deceived, yet some confusion in the trade actually resulted.

A preliminary injunction against unfair competition was granted against the White Company, and the latter then arranged with the Burns Company in New York, whereby the latter took up the sale of the White Company product as its own, omitting the word "Teller." Suit was brought in New York against the Burns Company, in which Judge Julius M. Mayer granted a preliminary injunction, based on claim 8 of the first Fisher patent.

[1] The validity of the first Fisher patent must depend wholly on the novelty of the mode of operation described and the utility of the device itself. There was nothing new in the telescoping feature, as the old collar boxes and poker chip holders show. It is also in Wolf, No. 690,544, and Rowley, No. 268,296, for coin holders. But the idea of removing the case and leaving the coins in stacked and counted relation, ready for rapid handling by a bank teller, was a new one, and of much utility, as the success of the Fisher bank has demonstrated. It is true that good business methods have been partly influential in this result, but, as Mr. Revell testified:

"I never found anything that was constant in its movement over a course of years that succeeded by salesmanship. It had to have the merit under the salesmanship or it could not go on."

[2] The first five claims in the first Fisher patent limit the invention to coin compartments whose flanges are so spaced apart as to make the compartment wider than the coins, enabling the latter to be removed in a lateral direction. This is not true of defendants' bank. As this limitation modifies the mode of operation, it is a material one. When a patentee, having devised a new mode of operation, in order to meet a reference, amends a claim by inserting a limitation which modifies the operation, such limitation is a material one, even though such amendment was unnecessary because the combination as a whole was new. If the change does not affect the operation of the device, the limitation may, in a proper case, be disregarded by the rule of Winans v. Denmead, where the limitation did not affect the mode of operation. In the Fisher application the spacing apart of the compartment flanges does slightly affect the new mode of operation discovered by him, and must be respected. I am not prepared, therefore, to hold that claim 1 is infringed. In view of claim 8, it is at present unnecessary to do so. Defendants' construction operates substantially the same as that covered by claims 1, 5, 6, and 7, accomplishing the same result in substantially the same manner; but in view of the limitations as to spacing apart and central compartment in these claims it is at present unnecessary to decide these claims to be infringed.

The sixth and seventh claims of No. 793,779 include a central compartment between the coin chutes, which is absent in defendants' device. The eighth claim does not contain either one of the limitations of the first five, nor of the sixth or seventh, and is infringed. The only difference between the two constructions is the position of the lock slot. This in no way modifies the new mode of operation, and in view of the character of the invention a change in the position or character of the lock is of no consequence. The two forms are mechanically equivalent. The eighth claim should be, therefore, held infringed. Hillard v. Fisher Book Typewriter Co., 159 Fed. 439, 86 C. C. A. 469; J. L. Owens Co. v. Twin City Separator Co., 168 Fed. 259, 93 C. C. A. 561.

[3] The Fisher patent, No. 990,534 (claim 7), should be sustained as a specific one, but is not infringed.

Patents No. 990,535 and 1,073,847, sued on, relate to the spring slot guards. The claims are specific ones, and defendants do not employ the precise form counted on. The patents are valid, and should be so decreed, but are not infringed.

[4] As to the Thompson patent, No. 758,340, claim 4: A combination is shown, consisting of a number of coin receptacles or compartments, coin slots registering with the compartments, and a plate under the top of the casing and above the compartments which holds the latter in place; the plate having projections or depressions into the tops of the compartments, operating like the spring slot guards shown in the Fisher forms. While the new mode of operation introduced by Fisher is not present, yet there is sufficient improvement over the earlier art to sustain the patent. The Thompson banks did not prove very satisfactory, however, and Fisher's improvement was necessary in order to remove the objections and make the device useful and successful. In regard to infringement it is evident that the very different mode of operation in defendants' bank, which was new in Fisher (defendants' being equivalent), entirely distinguished it from Thompson. The Thompson patent should be sustained, but held not infringed.

[5] In respect to the trade-mark "Teller," it seems clearly valid. It is of a suggestive character, but of the right kind, as in the case of "Roof Leak" for paint, as just decided in this court in Elliott Varnish Co. v. Sears, Roebuck & Co. (D. C.) 221 Fed. 797. Loonen v. Dietsch (C. C.) 189 Fed. 487, where plaintiff used a red cross as a trade-mark for a tooth brush, may also be referred to. A long list of terms held descriptive, and so not subject to appropriation as trade-marks, is given in the main opinion in Trinidad Asphalt Co. v. Standard Paint Co., 163 Fed. 977, 90 C. C. A. 195, and a similar list held good trademarks in the dissenting opinion, pages 987, 988.

[6] As to unfair trade, defendants have made and sold a bank which can be distinguished from complainant's form only by careful examination, and the proof shows sufficient proof of actual confusion and deception. It is true that the purchasers of these safes are bankers, and that the articles are not sold to the public generally; however, even bankers may be deceived, as the evidence shows.

Pope Automatic Merchandising Co. v. McCrum-Howell Co., 191 Fed. 979, 112 C. C. A. 391, 40 L. R. A. (N. S.) 463, in this circuit, is cited by defendants, and it is urged that the form adopted by both parties is strictly utilitarian, and therefore may be copied without lawful objection. In that case there was no patent covering the invention, while in this the form of the device will become public property upon the expiration of the Fisher patents.

There should be a decree adjudging the validity of all the claims sued on and of the complainant's trade-mark. All such claims should be held not infringed, except claim 8 of the first Fisher patent. An injunction and accounting, as prayed, should be awarded, including an injunction against unfair trade. Complainant should have costs, although all the claims but one are not infringed, because of the violation of the trade-mark and the unfair competition.

AUTOMATIC RECORDING SAFE CO. v. W. F. BURNS CO.

(District Court, N. D. Illinois, E. D. June 7, 1915.)

No. 121.

PATENTS ⊂=328—INFRINGEMENT—RECORDING COIN SAFE.

The Fisher patent, No. 793,779, for a recording safe for holding coins, claims 6 and 7, *held* infringed.

In Equity. Suit by the Automatic Recording Safe Company against the W. F. Burns Company. On final hearing. Decree for complainant.

Dyrenforth, Lee, Chritton & Wiles, of Chicago, Ill., for complainant.
Cheever & Cox, of Chicago, Ill., for defendant.

SANBORN, District Judge. Infringement suit on claim 4 of the Thompson patent, No. 758,340, claims 1, 5, 6 and 7, Fisher patent, No. 793,779, and claim 5, Fisher patent, No. 990,534; also for unfair trade and competition by reason of the sale of safes in the same form as complainant's, and in simulating certain cuts, circulars, etc. The decision in this suit follows that in Automatic Recording Safe Company v. Bankers' Registering Safe Company et al., 224 Fed. 506, in this court, heard and decided herewith. The only question remaining is infringement.

Defendant's safe is in oval form, but is sufficiently distinguished from the Fisher safe by having a handle and a slightly different shape. No trade-mark or trade-name is employed, and there is no unfair trade. The only practical difference between defendant's and the Fisher form is that in the former the core and base are made in two parts. When the safe is unlocked the base falls off, leaving the stacks of coins unsupported, unless by hand. This is either a mutilated or improved form of the Fisher device. It may be regarded as an improvement, so that the bank may be inverted, unlocked, the bottom removed, and the stacks of coins retained by the hand while the bank is turned back to upright position, and then lifted to leave the coins in stacked

relation on the table. This is substantially the same mode of operation, even if an improved one.

Claims 6 and 7 of the first Fisher patent are infringed, but neither of the others in suit, nor is there any unfair competition or infringement of trade-mark.

Decree for complainant as indicated, without costs for or against either party.

AUTOMATIC RECORDING SAFE CO. v. BURNS CO.

(District Court, S. D. New York. June 7, 1915.)

No. 11-187.

PATENTS ⊜328—INFRINGEMENT—RECORDING COIN SAFE.

The Fisher patent, No. 793,779, for a recording safe for holding coins, claim 8, *held* infringed.

In Equity. Suit by the Automatic Recording Safe Company against the Burns Company. On final hearing. Decree for complainant.

Dyrenforth, Lee, Chritton & Wiles, of Chicago, Ill., for complainant.

Gerald G. Barry, of Chicago, Ill., for defendant.

SANBORN, District Judge. This case is almost identical with Automatic Recording Safe Company v. Bankers' Registering Safe Company and White Brass Castings Company, 224 Fed. 506, in the Northern District of Illinois, Eastern Division; the only difference being that defendant has not used complainant's trade-mark "Teller." A copy of the opinion in that case is attached hereto.

For the reasons stated therein, there should be a decree adjudging validity of all the claims sued on, but all held not infringed, except claim 8 of the Fisher patent, No. 793,779; also decreeing defendant liable for unfair competition, and for an account and injunction, with costs.

AUTOMATIC RECORDING SAFE CO. v. SAVINGS LOAN & TRUST CO.

(District Court, W. D. Wisconsin. June 7, 1915.)

No. 3.

PATENTS ⊜328—INFRINGEMENT—RECORDING COIN SAFE.

The Fisher patent, No. 793,779, for a recording safe for holding coins, claims 6 and 7, *held* infringed.

In Equity. Suit by the Automatic Recording Safe Company against the Savings Loan & Trust Company. On final hearing. Decree for complainant.

Dyrenforth, Lee, Chritton & Wiles, of Chicago, Ill., for complainant.

Richmond, Jackman & Swansen, of Madison, Wis., and Thomas F. Sheridan, of Chicago, Ill., for defendant.

SANBORN, District Judge. Infringement suit on claim 4, Thompson patent, No. 758,340, claims 1, 5, 6, and 7, Fisher patent No. 793,779, claims 2 and 6, Fisher, No. 990,534, and claims 1, 2, 3, and 5, Fisher, No. 1,072,709.

This case is quite similar to the Chicago case of Automatic Recording Safe Co. v. Bankers' Registering Safe Co., 224 Fed. 506, decided herewith; the claims of the first Fisher patent involved in that suit including those sued on in this. Claim 8, held infringed in that suit, is not included by reason of differences in details of construction. There is no question of trade-mark or unfair trade.

For the reasons given in the Chicago case in respect to the spacing apart of the walls of the coin compartments it is not necessary to decide on claims 1 and 5. Claims 6 and 7 follow: In a savings bank: (1) The combination with a *circular base,* of (2) a plurality of vertical flanges supported above the base. (3) And spaced apart to form compartments for the coins. (4) Walls uniting the inner edges of adjacent flanges. (5) Said walls forming a central compartment. (6) A cover comprising a surrounding side wall, and top united thereto, and adapted to inclose the base and flanges thereon. (7) Means for detachably securing said cover to the base. (8) Said cover having slots therethrough communicating with the compartments between the flanges and said central compartment, (9) and inwardly yielding plungers carried by the cover, and normally obstructing the slots leading to said compartments. The ninth element is not contained in claim 6.

Defendant's bank is made under the Stone patent of December 12, 1911. Instead of being of circular or elliptical form, like the Fisher bank, it is an oblong cube. It has the same mode of operation as Fisher, and answers all the elements of the two claims quoted, except the circular base, and the central compartment extends to one side of the rectangular base. The shape of the two devices in no way affects the new mode of operation invented by Fisher, so that defendant's square base may be considered the equivalent of the circular base of Fisher, and the partly central compartment the equivalent of his central compartment. These points are mere details, not affecting the real invention. The other patents sued on are not infringed.

There should be a decree sustaining all the patents in suit, that the first Fisher patent, claims 6 and 7, are infringed, and the others not, and ordering an injunction and accounting as prayed, without costs for or against either party.

KLAUDER-WELDON DYEING MACH. CO. v. GILES et al.

(District Court, N. D. New York. May 28, 1915.)

PATENTS ⇐328—VALIDITY AND INFRINGEMENT—DYEING AND MERCERIZING MACHINES.

The Weldon patent, No. 659,906, for a rotary dyeing machine, and the Weldon patent, No. 645,698, for apparatus for mercerizing, *held* valid and infringed, on motion for preliminary injunction.

In Equity. Suit by the Klauder-Weldon Dyeing Machine Company against John H. Giles and the John H. Giles Dyeing Machine Company for infringement of claim 1 of letters patent No. 659,906, for a rotary dyeing machine, granted September 18, 1899, to Leonard Weldon, and claims 1 and 2 of letters patent No. 645,698, for apparatus for mercerizing, granted September 18, 1899, to the same patentee. On motion for preliminary injunction. Granted.

See, also, 212 Fed. 452.

Duell, Warfield & Duell, of New York City, for complainant.

Alfred Wilkinson, of New York City (Christopher J. Heffernan, of Amsterdam, N. Y., of counsel), for defendants.

RAY, District Judge. Letters patent No. 659,906, relates to rotary dyeing machines wherein a reel is mounted upon a tub or dye liquor vat having a curved bottom and ends and carries the skeins or articles to be dyed, dipping them intermittently and successively into the dye liquor. The alleged invention consists in the combination, with the tub having a curved bottom and containing the dye liquor and the revolving reel journaled to one side of the center of the tub, of a curved partition in the tub near the side farthest from the reel, said partition extending in proximity to the bottom and near the upper edge of the tub, and a steam pipe extending transversely across the tub near the bottom and in the space between partition and the side of the tub, said pipe having perforations on the side turned toward the space between the lower edge of the partition and the bottom of the tub, and the invention alleged consists also in other combinations described in the patent.

Patent No. 645,698, relates to alleged improvements in apparatus for mercerizing, and the patent states that the invention consists in the combination with the dye tub of a reel constituted by a pair of large wheels fixed on a revoluble shaft, revoluble removable sticks between the outer rims of the wheels, a pair of smaller wheels loosely mounted on the said shaft between the large wheels, revoluble removable sticks between the outer rims of the small wheels, means to rotate the said reel, gearing mounted on the large wheels and adapted to rotate the small wheels relatively to the large wheels when the large wheels are rotated, and suitable means to regulate or control said relative movement of the parts, and that the invention consists also in other combinations of parts described in the patent and set forth in the claims.

It would serve no good purpose for this court to enter on a description of the mechanism and construction shown in these patents or that of the alleged infringing devices. The patent is old, but there has been a lengthy contest and litigation in the Supreme Court of the state of New York as to the title of the patents, which finally has been settled in favor of the complainant here. The papers are somewhat voluminous on both sides. Lengthy argument was had, and the court has carefully examined the papers, exhibits, and briefs, and is of the opinion that the patents are valid and that infringement is clearly made out.

Should an appeal be taken from my decision, I think the papers of such a character that the merits of the entire controversy would be before the Circuit Court of Appeals and that its decision would settle the controversy without the necessity of a trial or hearing in open court. It seems to me that all the facts that can be shown are now before the court.

I think the preliminary injunction prayed for should be granted; and it is so ordered.

WALKER BIN CO. v. LEIBE.

(District Court, E. D. Louisiana.)

No. 13852.

PATENTS ⊜328—VALIDITY AND INFRINGEMENT—TILTING BIN.

The Walker patent, No. 614,279, for a pivoted or tilting bin especially designed for use in stores, *held* not anticipated, valid, and infringed.

In Equity. Suit by the Walker Bin Company against Magdaline Leibe, Jr., trading as the William Leibe Refrigerator Manufactory, for infringement of letters patent No. 614,279, for a tilting bin, issued to Edwin J. Walker November 15, 1898. On final hearing. Decree for complainant.

Decree affirmed in 225 Fed. 45, —— C. C. A. ——.

E. Howard Hunter, of Philadelphia, for complainant.

Charles A. Munn and T. Hart Anderson, both of New York City, for defendant.

FOSTER, District Judge. In this matter it appears that the complainant has invented a counterbalancing bin with the axis of oscillation at the front edge. It may be that the inventor obtained his idea of a swell-front bin that would counterbalance by the weight of its contents from articles already on the market, such as showcases; but it does not appear that any effected a combination of counterbalancing and pivoting, so as to anticipate complainant. In my opinion, he has invented a useful article, and the defendant's device is a clear infringement. The method of suspension adopted by the defendant is of little practical utility, aside from furnishing an axis of oscillation, and the fact that in operation the bin is pulled out of the casing an inch or two does not prevent its infringing.

There will be a decree as prayed for, perpetually enjoining the defendant, and the matter will be referred to a master to state an account and fix the measure of damages.

In re GEORGIA STEEL CO.

GEORGIA IRON & COAL CO. et al. v. TATUM, Sheriff.

(District Court, N. D. Georgia, N. W. D. May 5, 1915. On Rehearing, May 27, 1915.)

1. COURTS ⊂=366—DECISION OF STATE COURTS—CONCLUSIVENESS.
A decision of the Supreme Court of Georgia that the adoption of a resolution by a county board of education that the territory embraced in each militia district in the county shall constitute a separate school district is not alone sufficient to create school districts, and the collection of a tax levied in pursuance of an election within an alleged district will be enjoined on application, is conclusive on the United States District Court sitting in Georgia; and it, in the absence of laches, will enjoin the collection of a school tax, where the school commissioners simply declared the militia districts to be school districts and a map, not made until later simply carried out the action of the school commissioners.
[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 954–957, 960–968; Dec. Dig. ⊂=366.]

2. SCHOOLS AND SCHOOL DISTRICTS ⊂=107—TAXES—LACHES.
Laches of a trustee in bankruptcy as to school taxes not enforceable cannot estop the bankrupt resuming possession of the property and proposing to pay all legal taxes.
[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 253–256; Dec. Dig. ⊂=107.]

In Bankruptcy. In the matter of the Georgia Steel Company, bankrupt. Injunction restraining collection of school taxes issued.

Anderson & Rountree, of Atlanta, Ga., for complainant.

Martin G. Smith, of Trenton, Ga., and Maddox, McCamy & Shumate, of Dalton, Ga., for defendant.

NEWMAN, District Judge. [1] I think the case of Brown v. Hawkins, 139 Ga. 697, 77 S. E. 1123, is absolutely controlling in this case. The second headnote in that case says this:

"The adoption of a resolution by a county board of education that the territory embraced in each militia district in the county shall constitute a separate school district is not, without more, a substantial compliance with the positive requirements of the statute in relation to the laying off and marking out of the county into school districts by the county board of education; and a school district sought to be established merely by such a resolution is not a lawful district, and an election within such territory for the determination of the question of imposing a local tax therein for the support of public schools is illegal. The collection of a tax levied in pursuance of the election should be enjoined upon due and proper application by citizens and taxpayers of the territory."

In the present case the evidence shows that the school commissioners simply declared the militia districts to be school districts, and nothing

further, and it seems from the evidence that no map was made until 1914, and that was simply carrying out the action of the school commissioners, as I understand it.

[2] Clearly these taxes cannot be collected under the decisions of the Supreme Court of the state, which must be controlling here, unless there has been such laches on the part of the trustee in bankruptcy, or the Georgia Steel Company, as to bring the case within the decision in Dobbs v. Hardin, 137 Ga. 191, 73 S. E. 582. There was no such laches here as would justify applying that decision in this case. What laches there was was that of the trustee in bankruptcy, and I do not think the Georgia Steel Company, which has resumed possession of the property and proposes now to pay all legal taxes, should be estopped by his action. The trustee in bankruptcy had on his hands a lot of unproductive property and no money. He had to borrow money to pay the taxes for former years, and altogether it does not make such a case as was shown in Dobbs v. Hardin, supra.

I think the injunction should remain in force as to the school tax, but the other taxes should be paid at once, if they have not already been paid. The court dislikes to prevent a county from collecting its taxes, but the case is controlled by the decision of the Supreme Court of the state as to the taxes claimed to be due it for school purposes.

On Rehearing.

This case was decided by me on May 5, 1915; but, counsel stating that they desired to file other briefs and the brief of counsel associated with them, I agreed to hold up the opinion filed by me on the date named until I could hear them further. Their briefs, and also reply brief of counsel representing the Georgia Steel Company, are now in, and I have considered the question again.

A re-examination of the matter satisfies me thoroughly that the decision heretofore made by me in this case is correct. Since that decision was rendered the Supreme Court of the state, on May 12, 1915, made a decision in the case of Grier et al. v. Loyless, Tax Collector, 85 S. E. 323 (not yet officially reported). I have, however, a copy of the opinion by Judge Beck, and it simply reiterates the doctrine laid down in former cases by that court. The question presented was somewhat different from that here, but it finds as a fact that it is necessary that the county should be laid off into school districts. I am still clear, therefore, that under the evidence in this case the case on trial is controlled absolutely by the case of Brown v. Hawkins, 139 Ga. 697, 77 S. E. 1123, and that the injunction must issue restraining the collection of this tax.

I regret very much to interfere with the collection of taxes, but I am compelled, in a case like this, to follow the decisions of the Supreme Court of the state, and I think they are all such that, under the facts in the present case, the tax cannot be collected. The injunction will issue as prayed.

UNITED STATES v. LEM YOU.

(District Court, S. D. New York. May 6, 1915.)

No. 1-315.

1. ALIENS ⟸32—DEPORTATION OF CHINESE—EVIDENCE.
In a proceeding to deport a Chinese person, who, when arrested, was taken directly before a commissioner and examined, such examination was not inadmissible as evidence on the ground that such an examination carried on without counsel and was unlawful, as such proceedings are summary, and not to be compared with the trial of a civil or criminal suit, or hearings before a committing magistrate.
[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 84, 92-95; Dec. Dig. ⟸32.]

2. ALIENS ⟸32—DEPORTATION OF CHINESE—EVIDENCE.
In a proceeding to deport a Chinese person, evidence *held* to show that he was born in this country.
[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 84, 92-95; Dec. Dig. ⟸32.]

3. ALIENS ⟸32—DEPORTATION OF CHINESE—HEARSAY—EVIDENCE OF PEDIGREE.
In a proceeding to deport a Chinese person, his testimony that his father told him he was born in San Francisco, though hearsay, was admissible and competent; the matter being one of pedigree or descent.
[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 84, 92-95; Dec. Dig. ⟸32.]

Proceeding to deport Lem You. From an order of Commissioner Houghton directing his deportation under the Chinese Exclusion Act, defendant appeals. Order of deportation reversed.

Max J. Kohler, of New York City, for appellant.
Edwin M. Stanton, Asst. U. S. Atty., of New York City, for the United States.

HOUGH, District Judge. [1] A point of law is raised by this appeal which to me is novel. When Lem You was arrested, instead of being taken for examination before an inspector or immigration officer, he was haled directly before Commissioner Houghton and there asked certain questions and made certain answers. This examination was offered in evidence by the government, and objected to on the ground, substantially, that such an examination carried on without counsel was unlawful.

In my opinion, proceedings in the matter of Chinese exclusion are summary; they are not to be compared with the trial of either a civil or criminal suit, nor do they resemble hearings before a committing magistrate. The statute contains no prohibition upon asking a Chinaman questions regarding his right to remain in this country at any time or place, or by any officer or official, and what the statute does not forbid it is not in the interests of justice to read into the act, because (as I have said in other Chinese cases) it is highly conducive to ascertaining the truth to find out what the Chinaman will say when suddenly asked as to his right to remain.

[2] Holding that this examination was a proper piece of evidence, I fail to see how it injures appellant's case. He immediately claimed American birth, said he had been in New York since he was about four years old, and gave the name of a man who had known him and looked after him since his father returned to China, while the appellant was still very young. The result of all the evidence is that it is true that this young man has known no other home than New York City for 21 of the 25 years of his life, and that fact is weighty matter in his favor, as was held in United States v. Leu Jin (D. C.) 192 Fed. 580.

[3] For the rest he testifies, and testifies alone, that according to his father's statements to him he was born in San Francisco, and his evidence, though hearsay, is admissible and competent, because the matter is one of pedigree or descent. It is undoubtedly true that the only direct testimony as to this appellant's place of birth is his statement, based upon his father's assertions. But it has often been pointed out in cases of this nature that the truth is singularly difficult to ascertain, and I think that little can ever be arrived at with absolute accuracy. If the appellant's story is not true, he is indeed a man without a country, for it is overwhelmingly proven that he has spent all his life, except infancy, in the United States.

I think I am entitled to weigh the probabilities, and to incline perhaps in favor of the appellant, from previous experience with the habits of Chinamen living in this country as revealed by evidence in other cases. If Lem You was not born in San Francisco, then his father must have left China with a wife and an infant child and brought them both to San Francisco. Consequently he could have been in the United States but a very short time before he found his way across the continent in order to try fortune as a peddler of groceries in this city. I think this is extremely unlikely. A peddler of groceries is engaged in a very humble vocation, and I do not think it at all probable that Lem You's father drifted so far from San Francisco in so short a time as to render it possible that Lem You himself was born in China. It is not the quantity but the quality of evidence which carries conviction, and so far as I am concerned there is such an absence of contradiction, such a sobriety in the story as told, that I am persuaded that this appellant is native-born.

The order of deportation is reversed.

UNITED STATES v. MOY TOOM.

(District Court, S. D. New York. June 2, 1915.)

ALIENS ⇐32—DEPORTATION OF CHINESE—PROCEDURE.

Where a Chinese person sought to be deported was afterwards given an opportunity to appear with counsel, to be examined, to call witnesses, and to cross-examine the government's witnesses, it was immaterial that he was first examined in the absence of counsel, or whether such preliminary inquisition was before an inspector or commissioner.

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

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. As to the technical point raised that on his first examination defendant was instructed to answer questions as truthfully as he could, although he had stated that he did not want to answer any question till he saw a lawyer, I fully concur with Judge Hough's ruling in United States v. Lem You, 224 Fed. 519. It would seem to make little difference whether this preliminary inquisition is had before inspector or commissioner, so long as thereafter the Chinese person is given opportunity to appear with counsel, to be examined (this defendant did not take the stand on the formal examination), to call witnesses, and to have counsel, if he chooses, to cross-examine witnesses called by the government. All these privileges he had. An offer to hear further testimony in this court was declined. Examination of very many records in these cases has induced the conviction that it tends greatly to elucidate the truth to hear what the Chinese person has to say about such simple facts as his age, parentage, relationships, occupation, and localities where he has lived, and the circumstances attending his latest entry into this country, *before* his lawyer appears.

The discrepancies between defendant's story and that of his witness are so great that my conclusion is the same as the commissioner's.

Order affirmed.

In re TRION MFG. CO.

(District Court, N. D. Georgia. March 8, 1915.)

No. 389.

BANKRUPTCY ⊜328—CLAIMS—TIME FOR FILING.

Under the express provisions of Bankr. Act (July 1, 1898, c. 541, § 57n, 30 Stat. 560 (Comp. St. 1913, § 9641), that claims, with certain exceptions, shall not be proved against a bankrupt estate subsequent to one year after the adjudication, a claim not coming within any of the exceptions, and filed more than two years after adjudication, is too late.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 518; Dec. Dig. ⊜328.]

In Bankruptcy. Proceedings against the Trion Manufacturing Company. Decision of the referee, rejecting the claim of A. S. Hamilton, as guardian, affirmed.

See, also, 214 Fed. 161.

Maddox & Doyal, of Rome, Ga., for bankrupt.

M. B. Eubanks, of Rome, Ga., for claimant.

NEWMAN, District Judge. A. S. Hamilton, as guardian for his children, seeks to prove a claim against the bankrupt estate of the Trion Manufacturing Company. He first sought to prove it as a

secured debt, but afterward amended by seeking to prove it as an unsecured debt. The view of the referee on the subject is as follows:

"On the 23d of December, 1914, A. S. Hamilton, as guardian of A. S. Hamilton, Jr., Deforest A. Hamilton, and Margaret K. Hamilton, filed a petition before the referee, claiming priority in the sum of $2,606.16, which said sum petitioner claims was on deposit with the Trion Manufacturing Company at the time petition in bankruptcy was filed against it. Shortly after the filing of the petition by A. S. Hamilton, guardian, an amendment was filed by his attorneys, proving the claim as an unsecured debt. On the 12th of December, 1914, a final dividend of .029 per cent. was declared by the referee, and at the time of the filing of said petition all the checks to pay said dividend had been drawn and signed by the trustee, and countersigned by the referee, and were ready for mailing.

"The referee is of opinion that the filing of the amendment, proving said claim as an unsecured debt, is equal to a renunciation of a claim of priority. Certain it is that petitioner could not proceed both ways. The unsecured claim was filed about 2 years and 10 months after the adjudication in bankruptcy. The law provides that all unsecured claims shall be filed within 12 months subsequent to the adjudication; and this claim does not come within any of the exceptions to that rule. Consequently the referee is of the opinion that the claim is barred. Furthermore, under the evidence in this case, the claim of A. S. Hamilton, guardian, is not entitled to priority. It appears that the claim resulted from dividends on stock of the Trion Manufacturing Company, on which the purchase money has not been paid, and that the balance due to the Trion Manufacturing Company on said purchase money was in excess of the amount of the claim. Consequently the trustee would have the right to set off the amount due for said stock against the claim of A. S. Hamilton, guardian.

"In addition to this, the claim was filed after the declaration of a final dividend in the case, and the claimant has therefore lost whatever rights he had, for that reason. I do not think, in any view of the case, that the claim is entitled to priority, and I am certain that the unsecured claim is barred by the statute of limitations. Consequently the prayer of the petition is denied."

Bankr. Act 1898, § 57n, is as follows:

"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: Provided, that the right of infants and insane persons without guardians, without notice of the proceedings, may continue six months longer."

There is no question under this statute that this claim was brought to the attention of the referee and sought to be proven too late. I do not see how it is possible for the referee to have decided the matter otherwise than he did. It seems that, even if A. S. Hamilton, as guardian, had been allowed to prove the claim, there would have been certain offsets set up on behalf of the trustee in bankruptcy; but I do not think that is very material here. The whole of the matter is that the claim came too late.

The decision of the referee is approved and confirmed.

SOUTHERN PHOTO MATERIAL CO. v. EASTMAN KODAK CO. OF NEW YORK.

(District Court, N. D. Georgia. June 26, 1915.)

No. 166.

1. COURTS ⟸338—FEDERAL COURTS—JURISDICTION OF STATE COURTS—CONCLUSIVENESS.

Notwithstanding the conformity statute (Rev. St. § 914 [Comp. St. 1913, § 1537]), state decisions and statutes are not conclusive on federal courts on questions of jurisdiction.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 901; Dec. Dig. ⟸338.]

2. JURY ⟸16—SERVICE OF PROCESS—SUFFICIENCY—QUESTION FOR COURT.

The issue of sufficiency of service of process on a foreign corporation, specially appearing to challenge the service and denying that it has either an office or place of business or agent or agency in the state, must be determined by the court without a jury.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 84–94; Dec. Dig. ⟸16.]

At Law. Action by the Southern Photo Material Company against the Eastman Kodak Company of New York. On challenge as to sufficiency of service of process. Question for court alone.

J. A. Fowler and King & Spalding, all of Atlanta, Ga., for plaintiff.
Smith, Hammond & Smith, of Atlanta, Ga., for defendant.

NEWMAN, District Judge. In this case (which is a common-law case) there is a traverse to the return of service by the marshal; the defendant being a New York corporation, and the service being made on Frank Luckiesh at what is stated to be "the office and place of doing business of this corporation in Atlanta, Fulton county, Georgia." The defendant, by counsel, makes a special appearance for the purpose of challenging the service, and denies that it has either an office or place of business, or any agent or agency, in the state of Georgia, etc.

[1] The question presented now for determination is whether or not this question as to whether the defendant was properly served should be heard by the court or must be tried by a jury. It is contended by the plaintiff that under the law of the state a jury trial is required. This question of following the state law is controlled absolutely, in my opinion, by the case of Mechanical Appliance Company v. Castleman, 215 U. S. 437, 30 Sup. Ct. 125, 54 L. Ed. 272. The language of two headnotes of that case will show what was determined on this question. They are as follows:

"Notwithstanding the conformity act (section 914, Rev. St.), decisions and statutes of states are not conclusive upon the federal courts in determining questions of jurisdiction.

"Even if by the law of the state the sheriff's return is conclusive, and cannot be attacked, after removal into the federal court, that court can determine whether a defendant was properly served; and if, as in this case, it appears that the corporation was not doing business in the state the court should dismiss the bill, for want of jurisdiction by proper service."

[2] Upon the general question of whether, in the federal courts, the court should hear and determine such question or submit it to a jury, the cases of Goldey v. Morning News, 156 U. S. 518, 15 Sup. Ct. 559, 39 L. Ed. 517, Green v. Chicago, etc., Railway Co., 205 U. S. 530, 27 Sup. Ct. 595, 51 L. Ed. 916, and Mechanical Appliance Co. v. Castleman, supra, are, in my opinion, controlling. True, the question is not distinctly and directly raised in these cases; but in each of them an issue like this was heard by the court, without a jury, and nowhere was the question even raised that such action by the court was illegal or improper in any way. It seems to me to be the settled practice so far as I can understand it. A recent case has just been handed me of Kirby v. Louismann-Capen Co., 221 Fed. 267, in which a similar question seems to have been heard by Judge Evans, in the Western district of Kentucky, without the aid of a jury, and heard on affidavits.

It is clear to me that it is the duty of the court to pass upon the sufficiency of this service without the aid of a jury.

AMERICAN HOIST & DERRICK CO. v. NANCY HANKS HAY PRESS & FOUNDRY CO. et al.

(District Court, N. D. Georgia. March 23, 1915.)

No. 12.

EQUITY ⊂=392—REHEARING—NEW EVIDENCE—LACHES.

A rehearing in an equity case will not be granted to allow the introduction of new evidence, where such evidence was known at the time the briefs were filed, but no motion was made to suspend or delay the case for the purpose of introducing such evidence.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 834–851; Dec. Dig. ⊂=392.]

On motion for rehearing. Denied.

For original opinion, see 216 Fed. 785.

Timothy D. Merwin, of New York City, for plaintiff.

James P. Field, of Atlanta, Ga., for defendant.

NEWMAN, District Judge. This is a motion for rehearing in an equity case which was heard January 21 to 23, 1914. Decision was reserved, and counsel given opportunity to file briefs. The briefs were not filed for several months, and a decision was made in the case and an opinion filed July 28, 1914. The motion for a rehearing was filed on the 16th day of November, 1914.

When the defendants filed their brief in this case, they knew of the facts which they now propose to offer as ground for granting a rehearing; but, instead of asking the court to suspend the case or delay it for the purpose of putting in the new evidence, they waited until after the decision of the court had been rendered and the opinion filed. If the application for a rehearing should be granted, it would be neces-

sary for the court to go further into the case, and largely into the merits of the matter, and determine whether or not the Mallon patent, which it is claimed anticipates the Crosby patent, which is set up here by the plaintiff, and whether or not the checking or binding device in the two patents, are equivalents.

Without going further into the matter, the motion for a rehearing must be denied because of the laches of the defendant in bringing this matter into the case and to the attention of the court.

In re SAGE.

(District Court, E. D. Missouri, N. D. June 20, 1915.)

No. 367.

1. BANKRUPTCY ⊜11—COURTS OF BANKRUPTCY—EXCLUSIVE CHARACTER OF JURISDICTION.

Upon a valid adjudication of bankruptcy, the jurisdiction of the court of bankruptcy, which attaches from the time of the filing of the petition, to administer the property of the bankrupt, is exclusive, and no other court, after the filing of such petition, can make any order or decree which will deprive it of such exclusive jurisdiction, nor can the court of bankruptcy itself properly surrender it to another court.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 11; Dec. Dig. ⊜11.]

2. BANKRUPTCY ⊜293—ADMINISTRATION OF ESTATE—REDUCTION TO POSSESSION—ANCILLARY JURISDICTION.

A court of bankruptcy may exercise ancillary jurisdiction for the purpose of enabling a trustee in bankruptcy, who has been appointed and qualified in another jurisdiction, to reduce to his possession property of the bankrupt which is within the territorial jurisdiction of the court whose ancillary jurisdiction is invoked; and where the court of primary jurisdiction can act summarily the court exercising ancillary jurisdiction may also proceed by summary order.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 411, 417; Dec. Dig. ⊜293.]

3. BANKRUPTCY ⊜100—ADJUDICATION—COLLATERAL ATTACK.

Where a petition in involuntary bankruptcy and the answer of the bankrupt show the requisite jurisdictional fact as to domicile, the adjudication made thereon cannot be questioned collaterally.

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

4. BANKRUPTCY ⊜73—PERSONS SUBJECT TO JURISDICTION—PRIVATE BANKER.

That a bankrupt conducted a private bank under state law does not affect the validity of the adjudication.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 17; Dec. Dig. ⊜73.]

5. BANKRUPTCY ⊜100—ADJUDICATION—IRREGULARITIES IN PROCEDURE.

On the filing of a petition in involuntary bankruptcy, no subpœna was issued for the defendant; but six days later he appeared and filed an answer, admitting the allegations of the petition, which showed the requisite jurisdictional facts, consenting to be adjudged a bankrupt, and asking that the matter be at once referred for adjudication. Thereupon the clerk, without waiting for the expiration of the time for filing pleadings

fixed by Bankr. Act July 1, 1898, c. 541, § 18, cls. "a," "b," "c," 30 Stat. 551 (Comp. St. 1913, § 9602), or making any finding of the absence of the judge at that time, referred the petition to a referee who made the adjudication. *Held* that, while such procedure was irregular, the defects were not jurisdictional, and did not render the adjudication subject to collateral attack.

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

6. BANKRUPTCY ⟸73, 138—"PRIVATE BANKER"—PROPERTY VESTING IN TRUSTEE.

By the statutes of Missouri private bankers are defined as "those who carry on the business of banking * * * without being incorporated" (Rev. St. 1909, § 1116), and the owner of such a business, whether a natural person or an unincorporated company, is subject to adjudication as an involuntary bankrupt, under Bankr. Act July 1, 1898, c. 541, § 4b, 30 Stat. 547, as amended by Act June 25, 1910, c. 412, §§ 3, 4, 36 Stat. 839 (Comp. St. 1913, § 9588); and the state statute, further providing that the property of such a bank may be sold on execution after judgment, it is such as "might have been levied upon and sold under judicial process" against the owner, and therefore on an adjudication of bankruptcy vests in the trustee as of the date of the filing of the petition under section 70a (5), being Comp. St. 1913, § 9654.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 17, 193–204, 206–209; Dec. Dig. ⟸73, 138.

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

7. BANKRUPTCY ⟸296—JURISDICTION OF COURTS—SUMMARY PROCEEDINGS BY TRUSTEE TO RECOVER PROPERTY—"ADVERSE CLAIMANT."

A receiver appointed by a state court in a suit instituted, and who took possession of property, after the filing of a petition in bankruptcy against the owner, is not an "adverse claimant" in such sense as to deprive the court of bankruptcy of jurisdiction by a summary order to direct the delivery of such property to the trustee, nor is his right strengthened by the fact that the property was previously in charge of a special agent appointed by the state bank commissioner.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 414; Dec. Dig. ⟸296.

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

8. BANKRUPTCY ⟸296—JURISDICTION OF COURTS—DIRECTING DELIVERY OF PROPERTY TO TRUSTEE.

While a court of bankruptcy may as a matter of comity direct a trustee to apply to a state court for possession of property of the bankrupt held by its receiver, it cannot thereby surrender its own jurisdiction to order delivery of the property.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 414; Dec. Dig. ⟸296.]

In Bankruptcy. In the matter of David H. Sage, bankrupt. On petition by Johnson B. Angle, trustee, for an order against McDermott Turner, state receiver, for the delivery of property. Petition granted.

Boyd & McKinley, of Keokuk, Iowa, for trustee in bankruptcy.

John T. Barker, Atty. Gen., W. T. Rutherford, Asst. Atty. Gen., J. P. Gilmore, of Tulsa, Okl., T. L. Montgomery, of Kahoka, Mo., and W. M. Fitch, of St. Louis, Mo., for the state receiver and creditors.

DYER, District Judge. This is a petition filed in this court by Johnson B. Angle, as trustee in bankruptcy of David H. Sage, bankrupt, praying that the court make an order directing McDermott Turner, a receiver appointed by the circuit court of Clark county, Mo., to turn over to the petitioner certain property in his custody. The facts out of which this controversy arose are these:

For some years prior to October, 1914, the bankrupt, David H. Sage, was engaged in the mercantile business in Clark county, Mo., and elsewhere, and also conducted a bank at Alexandria, Clark county, Mo., under the name of Sage Banking Company. The bankrupt was the sole owner of the bank, and the bank had been regularly established and conducted by him as a private bank under and pursuant to the statutes of Missouri relating to private banks. On October 15, 1914, the bankrupt made a general assignment of all his property, real, personal, and mixed, to Charles Hiller, of Kahoka, Clark county, Mo., for the benefit of all his creditors, but in this assignment "did not name the Sage Banking Company." The assignee refused to qualify under the assignment, and did not take possession of the property assigned. About October 15, 1914, the bankrupt notified the bank commissioner of the state of Missouri that the Sage Banking Company had voluntarily closed its doors and requested the bank commissioner to take charge of its affairs. On the same day the bankrupt caused a notice to be posted on the front door of the bank as follows: "This bank is in the hands of the bank commissioner." On October 16, 1914, one of the state bank examiners, acting under the direction of the bank commissioner, took charge of the bank and began an examination of its affairs. On October 17, 1914, the bank commissioner, finding that the bank was insolvent, appointed the respondent McDermott Turner, of Kahoka, Mo., special agent to take charge of its affairs, and said Turner qualified at once as such special agent by taking and subscribing an oath and executing a bond as required by law. On November 21, 1914, the Attorney General of the state of Missouri, acting upon a report made to him by the bank commissioner that the bank was unable to liquidate its business to the satisfaction of all of its creditors, made application to the circuit court of Clark county, Mo., for the appointment of a receiver for said bank, and said court thereupon appointed McDermott Turner receiver of said bank, and the receiver at once qualified and took possession of the property of the bank and began winding up its affairs.

On November 19, 1914, an involuntary petition in bankruptcy was filed against the bankrupt, David H. Sage, in the District Court of the United States for the Eastern Division of the Southern District of Iowa. This petition was in the prescribed form, and alleged all the jurisdictional and other facts necessary to obtain a valid adjudication of bankruptcy. Among other things this petition averred that the bankrupt "had his principal place of business, or resided, or had his domicile, at Keokuk, Lee county, Iowa, for the greater portion of six months next preceding the date of filing this petition," and charged as an act of bankruptcy that "on the 15th day of October, 1914, the said David H. Sage was insolvent, and on said date made a general as-

signment for the benefit of his creditors." On November 25, 1914, the bankrupt filed in the office of the clerk of the United States District Court aforesaid his answer to the foregoing petition, in which he admitted the act of bankruptcy charged, and further averred in his answer that "his domicile for more than six months last past has been in Keokuk, Lee county, Iowa, but that his actual residence during all of said time, and prior thereto, is still in Alexandria, Clark county, Mo.; that he is a citizen of the state of Missouri." The bankrupt in his answer further "admitted his willingness to be adjudged a bankrupt, and asked that the involuntary petition in bankruptcy * * * might be at once referred to the referee in bankruptcy in the county of Lee and state of Iowa, and that such proceedings might be had as are provided by the Bankrupt Law." Thereafter, on November 25, 1914, the clerk of the United States District Court aforesaid made and entered an order reciting that:

"Whereas, the judge of said court was absent from the Eastern division of the Southern district of Iowa at the time of the filing of said petition; and whereas, an answer has been filed by the alleged bankrupt admitting insolvency: It is ordered that the said matter be referred to W. J. Roberts, one of the referees in bankruptcy of said court, to consider said petition and take such proceedings as are required by the Bankrupt Act."

And the case was thereupon referred to said referee in bankruptcy. Thereafter, on November 27, 1914, the referee in bankruptcy before mentioned made an order adjudicating David H. Sage bankrupt. Afterwards, on January 7, 1915, the petitioner, Johnson B. Angle, was duly appointed trustee of the estate of the bankrupt, and on January 11, 1915, qualified as such trustee.

Afterwards, on February 2, 1915, the trustee filed in this court a petition asking that the court make an order directing McDermott Turner, the receiver appointed by the circuit court of Clark county, to turn over to the petitioner certain property in the possession of said receiver, alleged to belong to the bankrupt estate. On the same day the court granted a rule to show cause, directed to said McDermott Turner, receiver, returnable February 15, 1915. Upon the return day of said rule the said McDermott Turner, receiver, and certain persons who alleged themselves to be "depositors and creditors of the Sage Banking Company," by leave of this court, filed written objections to the granting of the order prayed for. A hearing was thereupon had upon the petition of the trustee, and the objections filed, and it appearing that the trustee had not applied to the circuit court of Clark county for an order directing its receiver to turn over to him the property in controversy, this court on the same day made an order discharging the rule to show cause "without prejudice, and with special leave to the said trustee to renew his application in the premises after having applied to the circuit court of Clark county, Mo., for an order directing the receiver appointed by that court to turn over the property in his possession."

Thereafter, on May 24, 1915, the petitioner, as trustee of the bankrupt estate, filed in this court his petition, alleging, among other things, that he had filed in the circuit court of Clark county, Mo., in the case

of State of Missouri ex rel. v. David H. Sage, Doing Business as the Sage Banking Company, an application reciting the facts as to the bankruptcy of David H. Sage, and asking said court to order its receiver, McDermott Turner, to turn over to him the property of David H. Sage, the bankrupt, doing business as the Sage Banking Company, in his hands as receiver; that the circuit court of Clark county had thereupon made and entered an order directing its said receiver to turn over to the petitioner all of the property in his hands, except the sum of $1,600; that the said receiver had refused and still refuses to turn over the property to the petitioner; and the petitioner prayed this court to make an order directing the receiver to turn over to him all the property of David H. Sage, doing business as the Sage Banking Company, now in his hands. No formal rule to show cause has been asked or granted, but McDermott Turner, receiver, the state of Missouri, by its Attorney General, and Erwin Fox, George W. Cannon, and James Fulton, depositors and creditors of the Sage Banking Company, * * * for themselves and all other depositors and creditors of said Sage Banking Company, have through their respective counsel voluntarily appeared herein, and by leave of court have respectively filed answers to the petition of the trustee in bankruptcy, and have also filed an agreed statement of facts.

In addition to the facts heretofore stated, this agreed statement of facts shows that the state of Missouri, the receiver, McDermott Turner, and Erwin Fox, George W. Cannon, and James Fulton, "creditors and depositors of the Sage Banking Company," have taken an appeal to the Supreme Court of Missouri from the order entered by the circuit court of Clark county, directing the receiver to turn over the property in controversy to the petitioner herein, and that these appellants have given a supersedeas bond, which has been approved by the circuit court of Clark county, and that the case is now pending on appeal in the Supreme Court of Missouri. The matter has been heard by and submitted to this court upon the petition and answers, and upon the agreed statement of facts filed herein by the parties, and previously referred to.

[1] The consideration of the questions presented by this case can perhaps be best approached by first stating some general principles of law which have been established by the judicial construction of the present Bankrupt Act. Where a valid adjudication of bankruptcy has been made by a court of bankruptcy, the jurisdiction of that court to administer the property of the bankrupt is exclusive, and it cannot properly surrender its jurisdiction to any other court. United States Fidelity & Guaranty Co. v. Bray, 225 U. S. 205, 32 Sup. Ct. 620, 56 L. Ed. 1055. The jurisdiction of a court of bankruptcy attaches from the time of the filing of the petition in bankruptcy, and the effect of the filing of the petition is to place all of the property of the bankrupt, not in the possession of adverse claimants, in the legal custody and under the exclusive control of the court of bankruptcy. After the petition has been filed no other court can make any order, or decree, which will deprive the court of bankruptcy of its exclusive control over the administration of the bankrupt's property. Lazarus v.

Prentice, 234 U. S. 263, 34 Sup. Ct. 851, 58 L. Ed. 1305; Acme Harvester Co. v. Beekman, 222 U. S. 300, 32 Sup. Ct. 96, 56 L. Ed. 208; State Bank v. Cox, 143 Fed. 91, 74 C. C. A. 285. It follows, as a corollary to the foregoing doctrine, that after the jurisdiction of the court of bankruptcy has attached no other court can make any order or decree which will operate to vest in any one a claim or title to the bankrupt's property which is adverse to his trustee in bankruptcy. Lazarus v. Prentice, 234 U. S. 263, loc. cit. 266, 34 Sup. Ct. 851, 58 L. Ed. 1305; State Bank v. Cox, 143 Fed. 91, 74 C. C. A. 285.

[2] It is also well settled that a court of bankruptcy can exercise ancillary jurisdiction for the purpose of enabling a trustee in bankruptcy, who has been appointed and qualified in another jurisdiction, to reduce to his possession property of the bankrupt which is within the territorial jurisdiction of the court whose ancillary jurisdiction is invoked, and that, where the court of primary jurisdiction can act summarily, the court exercising ancillary jurisdiction may also proceed by summary order. Bankrupt Act, § 2 (20) being Comp. St. 1913, § 9586; Babbitt v. Dutcher, 216 U. S. 102, 30 Sup. Ct. 372, 54 L. Ed. 402, 17 Ann. Cas. 969; Lazarus v. Prentice, 234 U. S. 263, 34 Sup. Ct. 851, 58 L. Ed. 1305.

Applying the foregoing general principles to the facts of this case, we may say: (1) That if the United States District Court for the Southern District of Iowa had jurisdiction to adjudicate David H. Sage bankrupt; and (2) if the property of David H. Sage, doing business as the Sage Banking Company, is such property as under the provisions of the bankrupt law passed to the trustee by virtue of the adjudication of bankruptcy; and (3) if the respondents are not adverse claimants within the meaning of the law—then the petitioner is clearly entitled to the relief here asked. On the other hand, if, under the facts of this case, we are obliged to negative any one of the foregoing assumptions, then no redress can be given the petitioner in this proceeding. The questions thus presented will be considered in the order in which they have just been stated.

[3] 1. It is contended that the United States District Court for the Southern District of Iowa had no jurisdiction to adjudge David H. Sage bankrupt, for the reason that he did not have his principal place of business, residence, or domicile in Iowa, and also because as a private banker he was not subject to be adjudicated a bankrupt. The court is of opinion that neither of the objections made is tenable. It was averred in the petition that the bankrupt had his principal place of business, residence, and domicile in the Eastern Division of the Southern district of Iowa for the requisite period, and the bankrupt admitted in his answer that he had his domicile within the jurisdiction of that court for more than six months prior to the date of filing his answer. As the pleadings showed the requisite jurisdictional fact as to domicile, the adjudication made thereon cannot be questioned collaterally. Edelstein v. United States, 149 Fed. 636, 79 C. C. A. 328, 9 L. R. A. (N. S.) 236; Gilbertson v. United States, 168 Fed. 672, 94 C. C. A. 158; In Re First National Bank, 152 Fed.

64, 81 C. C. A. 260, 11 Ann. Cas. 355; In Re Hecox, 164 Fed. 823, 90 C. C. A. 627; In Re Dempster, 172 Fed. 353, 97 C. C. A. 51.

[4] The fact that the bankrupt was the proprietor of a private bank can in no way affect the validity of the adjudication. The Bankrupt Law (section 4 [Comp. St. 1913, § 9588]) provides that:

"Any natural person, except a wage-earner or a person engaged chiefly in farming or tillage of the soil, * * * may be adjudged an involuntary bankrupt."

And unquestionably the bankrupt was subject to be adjudicated a bankrupt as a "natural person." Whether upon his adjudication his trustee in bankruptcy is entitled to administer the property appertaining to his private bank is a distinct question, which will be discussed later.

[5] Although the foregoing are the only questions affecting the jurisdiction of the court of bankruptcy to make the adjudication which have been suggested by the respondents, this court has considered another jurisdictional question which arises upon the agreed statement of facts. The adjudication of bankruptcy was not made by the judge, but by the referee in bankruptcy. The Bankrupt Act provides (section 18a) that, upon the filing of an involuntary petition in bankruptcy, process in the form of a writ of subpœna shall be served upon the alleged bankrupt, returnable within 15 days, unless the judge shall fix a longer time, and that the bankrupt or the creditors may appear and plead to the petition within 5 days after the return day, or within such further time as the court may allow. Section 18 of the Bankrupt Act further provides:

"(d) If the bankrupt, or any of his creditors, shall appear, within the time limited, and controvert the facts alleged in the petition, the judge shall determine, as soon as may be, the issues presented by the pleadings, without the intervention of a jury, except in cases where a jury trial is given by this act, and make the adjudication or dismiss the petition.

"(e) If on the last day within which pleadings may be filed none are filed by the bankrupt, or any of his creditors, the judge shall on the next day, if present, or as soon thereafter as practicable, make the adjudication or dismiss the petition.

"(f) If the judge is absent from the district, or the division of the district, in which the petition is pending, on the next day after the last day on which pleadings may be filed, and none have been filed by the bankrupt or any of his creditors, the clerk shall forthwith refer the case to the referee."

The act also provides (section 38 [Comp. St. 1913, § 9622]):

"Referees respectively are hereby invested, subject always to review by the judge, within the limits of their districts as established from time to time, with jurisdiction to (1) consider all petitions referred to them by the clerks and make the adjudications or dismiss the petitions."

It is manifest that the procedure prescribed by the statute was not strictly followed in this case. It does not appear that, upon the filing of the petition, a subpœna fixing a return day was issued. The agreed statement of facts merely shows that, on the sixth day after the petition was filed, a bankrupt appeared and filed an answer, admitting the substantial allegations of the petition, and consenting that he be ad-

judged a bankrupt, and asking that the case be at once referred to the referee. The clerk thereupon made an order reciting that:

"Whereas, the judge of said court was absent from the Eastern division of the said Southern district of Iowa at the time of filing the petition aforesaid; and whereas, an answer having been filed by the alleged bankrupt, admitting insolvency: It is ordered that the said matter be referred to W. J. Roberts, Esq., one of the referees in bankruptcy in this court, to consider said petition and to take such proceedings as are required by the Bankrupt Act."

The course of procedure followed in this case is irregular in several particulars. The clerk did not issue a subpœna fixing the return day. This should have been done, for, while the bankrupt was entitled to appear, waive process, and consent to an adjudication, "any creditor" of the bankrupt was entitled to "appear and plead" to the petition within five days after the return day. In re Humbert, 4 Am. Bankr. Rep. 76, 100 Fed. 439. In involuntary cases the clerk is required to refer the case to the referee—

"if the judge is absent from the district, or the division of the district, in which the petition is pending, on the next day after the last day on which pleadings may be filed, and none have been filed by the bankrupt, or any of his creditors."

If the letter of the statute is to be followed, two facts must exist in order to warrant the clerk in referring the case to the referee, viz.: (1) That no pleadings have been filed within the time provided for pleading; (2) the absence of the judge from the district, or the division, "on the next day after the last day on which pleadings may be filed." In view of the terms of section 18, clause "d," of the act, the requirement that "no pleadings have been filed" should in my opinion be properly construed to mean no pleadings in opposition to the petition, and the fact that an answer confessing the allegations of the petition has been filed ought not to be a legal obstacle to the reference of the case by the clerk to the referee. But in this case, in referring the case to the referee, the clerk did not find or specify that the judge was absent "on the next day after the last day on which pleadings may [might] be filed," but found and recited in his order of reference that the judge was absent "at the time of the filing of the petition."

In view of the nature of the present proceedings, the court has given very careful consideration to the irregularities just referred to, with a view to determining whether they constitute jurisdictional defects which render the adjudication void, or, on the other hand, should be treated as mere errors of procedure, which might have been availed of upon direct review, but are not available collaterally. As the petition in bankruptcy contained all the requisite jurisdictional averments, and as the United States District Court in which it was filed had jurisdiction of the subject-matter, and acquired jurisdiction of the parties by virtue of the filing of the petition and the appearance of the bankrupt, the creditors of the bankrupt not being entitled under the law to any other notice than such as is imparted by the filing of the petition, and as it appears that no party in interest has directly questioned the validity of the order of adjudication, the court has reached the conclusion that this order should be treated as valid and not open to

collateral attack in this proceeding. Gilbertson v. United States, 168 Fed. 672, 94 C. C. A. 158; B. R. Electric Co. v. Ætna Insurance Co., 30 Am. Bankr. Rep. 424, 206 Fed. 885, 124 C. C. A. 545 (C. C. A. 8th); In re First National Bank, 152 Fed. 64, 81 C. C. A. 260, 11 Ann. Cas. 355; In re Dempster, 172 Fed. 353, 97 C. C. A. 51; In re Plymouth Cordage Co., 135 Fed. 1000, 68 C. C. A. 434.

For the reasons stated, the court concludes that the objections made to the jurisdiction of the District Court of the United States for the Southern District of Iowa are untenable, and that the adjudication of bankruptcy made in this case by that court must be treated as valid in the present proceedings.

[6] 2. Let us next consider whether the property of David H. Sage, doing business as the Sage Banking Company, is such property as, under the provisions of the Bankrupt Act, passed to his trustee in bankruptcy by virtue of the adjudication of bankruptcy. The Bankrupt Act provides (section 70):

"(a) The trustee of the estate of a bankrupt, upon his appointment and qualification, and his successor or successors, if he shall have one or more, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt, to all (1) documents relating to his property; (2) interests in patents, patent rights, copyrights, and trade-marks; (3) powers which he might have exercised for his own benefit, but not those which he might have exercised for some other person; (4) property transferred by him in fraud of his creditors; (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him: Provided, that when any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated and continue to hold, own, and carry such policy free from the claims of * * * creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets; and (6) rights of action arising upon contracts or from the unlawful taking or detention of, or injury to, his property."

It has been held that while, under the provisions of section 70a of the Bankrupt Act, the title to the bankrupt's property vests in his trustee at the time he is adjudged a bankrupt, such title vests by relation as of the date of the filing of the petition in bankruptcy. State Bank v. Cox, 143 Fed. 91, 74 C. C. A. 285; Acme Harvester Co. v. Beekman, 222 U. S. 300, 32 Sup. Ct. 96, 56 L. Ed. 208. In the present aspect of the case the question presented for determination is whether the property of David H. Sage, doing business as the Sage Banking Company, is such property as prior to the filing of the petition in bankruptcy the bankrupt "could by any means have transferred or which might have been levied upon and sold under judicial process against him."

The business of banking is in Missouri, as in nearly all the other states, regulated by law. The Missouri statutes provide for two classes of banks, namely, incorporated banks and "private bankers." The bankrupt herein was a private banker. By section 1116, R. S. Mo. 1909:

"Private bankers are declared to be those who carry on the business of banking by receiving money on deposit, with or without interest, by buying and selling bills of exchange, promissory notes, gold or silver coin, bullion, uncurrent money, bonds or stocks, or other securities, and of loaning money, without being incorporated."

The principal provisions of the Missouri statutes regulating private bankers are these: No person, or persons, shall engage in the business of private banker without "a paid-up capital of not less than $10,000, * * * nor until he or they shall have made a statement, subscribed and sworn to as correct and true before a notary public by each person connected with such business as owner or partner, setting forth: (1) The name and places of residence of all persons interested in the business, all of whom shall be residents of this state, and the amount of capital invested; and (2) the name in which the business is to be conducted and the place at which it is to be carried on"; and the person or persons engaging in the business are required to acknowledge and record such statement in the office of the recorder of deeds in the county in which the bank is located, and file a certified copy thereof in the office of the bank commissioner (section 1117). The private banker is required to use the capital invested in his bank in the banking business, and not in general trade (section 1118); not to loan more than a specified percentage of his bank's capital and surplus to any one borrower (sections 1110, 1118); to maintain a specified cash reserve (section 1098); not to borrow himself from his bank more than 10 per cent. of the bank's paid-up capital and surplus (section 1087); not to withdraw the profits earned by the bank without making a prescribed provision for the accumulation and maintenance of a surplus (section 1118); to make certain reports to the bank commissioner (section 1119); to submit to periodical examinations by the bank commissioner, or one of his examiners (sections 1080, 1119); not to make a voluntary general assignment of its business and affairs, but in case he shall find his bank in a failing condition to place its affairs in the hands of the bank commissioner (section 1084).

The statutes of Missouri further provide (section 1084) that no attachment, injunction, or execution shall be issued against an incorporated or private bank before final judgment in any suit, action, or proceeding in any state, county, or municipal court. The statutes further provide (section 1081) that the bank commissioner shall require a private banker to make good any impairment of the capital of his bank, and authorize the bank commissioner to close the bank and take charge of its property when, from an examination, he finds the bank insolvent, or that its continuance in business will seriously jeopardize the safety of its depositors or other creditors. The statute also provides (section 1081) that, when the bank has been closed and taken charge of by the bank commissioner, he shall ascertain its actual financial condition, and if he is satisfied that it cannot resume business, or liquidate its indebtedness to the satisfaction of all its creditors, shall report its insolvency to the Attorney General, who shall institute proper proceedings to have a receiver appointed to wind up its affairs. It is further provided that the bank commissioner may appoint a special agent to

take charge of the affairs of an insolvent bank temporarily, until a receiver is appointed, such special agent not to remain in charge more than 60 days.

The Missouri statutes refer to one who is conducting a private bank as "proprietor or owner" (section 1087), and also as "individual banker" (sections 1095, 1098). The Missouri statutes seem to expressly recognize the right of the proprietor or proprietors of a private bank to dispose of it; section 1117 providing:

"That in order to accomplish a change in the ownership of a private bank, it shall be necessary for all the partners of the new bank to make, record and file in the office of the bank commissioner a statement in form and manner" as required in the case of the establishment of a new private bank.

Attention has already been called to the fact that the provisions of the Bankrupt Law operate to vest in the trustee in bankruptcy title to such property of the bankrupt as, prior to the filing of the petition in bankruptcy, "he could by any means have transferred or which might have been levied upon and sold under judicial process against him." Putting aside for later discussion the legal effect to be given to the act of the bank commissioner in placing a special agent in charge of the bank, it seems clear that David H. Sage, the bankrupt, was the sole owner of the Bank of Alexandria, and of the property held by the bank, and that he could have transferred a valid title to the whole, or any portion, of the property held by the bank. Under the provisions of the Missouri statutes it seems also to be clear that the property held by the bank could have been levied upon and sold under an execution issued upon a final judgment against the bankrupt. The fact that a man is engaged in a business that is regulated by law and supervised by governmental authority does not, in contemplation of law, affect his title to or ownership of the property employed in such business. These considerations constrain the court to conclude that the property of the Sage Banking Company is such property as could have been transferred by the bankrupt and levied upon under an execution against him.

It is contended by respondents that under the provisions of the Missouri statutes the "Sage Banking Company" must be treated as an "entity" distinct from David H. Sage as an individual. In a certain sense the Missouri statutes do undoubtedly treat a private bank owned by an individual as an "entity" to be distinguished, for some purposes, from such individual; but this is very far from saying that these statutes make a private bank a legal entity having the attributes of a corporation, and being a juristic person distinct from the owner. Speaking generally, the person who carries on the business of a private banker is required by the Missouri law to provide a sum of money as capital for his bank, and as long as he continues in the business he is required to maintain this capital fund intact, and to conduct his bank under the restrictions, and subject to the supervision, imposed by law. The statutes require a separation of the property of a private banker used in his banking business from his other property, and while he continues to conduct his bank he is restricted in his right to use the bank's funds or property.

In respect of the required separation of the bank's property and business from the owner's property and business, we may say, if we choose, that the bank is recognized as an "entity" distinct from the owner as an individual; but this assertion will in no way aid us in resolving the legal questions involved in this case. Whether we choose to call a private bank an "entity" or not, it is certain that the Missouri statutes do not warrant us in treating such a bank as a corporation. Private bankers are defined by the statute as "those who carry on the business of banking * * * *without being incorporated.*" The statutes throughout recognize the distinction between incorporated banks and "private bankers," and every provision of the statutes which have any bearing on the question negatives the view that a private bank is to be regarded in any sense as a corporation. Furthermore, the view that a private bank is a corporation, or quasi corporation, has been expressly repudiated in the only Missouri case dealing with the question which has been brought to the court's attention. Gupton v. Carr, 147 Mo. App. 105, 125 S. W. 849.

It is further contended by the respondents that the title to the property of the Bank of Alexandria did not pass to the trustee in bankruptcy of David H. Sage, because under the Bankrupt Act, as it now exists, a private banker cannot be adjudicated bankrupt. As David H. Sage was subject to be adjudicated a bankrupt as a "natural person," this question does not affect the validity of the order of adjudication; but, if we should conclude the private bankers, as such, cannot be adjudicated bankrupt, it would give weight to the contention here made that the property of the bank did not pass to the trustee herein. The contention that private bankers cannot now be adjudicated bankrupt is based upon the language of section 4 of the Bankrupt Act, and especially upon the change made in that section by the amendment of June 25, 1910. As originally enacted in 1898, section 4 of the Bankrupt Act was as follows:

"(a) Any person who owes debts, except a corporation, shall be entitled to the benefits of this act as a voluntary bankrupt.

"(b) 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 corporation engaged principally in manufacturing, trading, printing, publishing, or mercantile pursuits, owing debts to the amount of one thousand dollars or over, may be adjudicated an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this act. Private bankers, but not national banks or banks incorporated under state or territorial laws, may be adjudged involuntary bankrupts."

In 1910 original section 4 was amended so as to read as follows:

"(a) Any person, except a municipal, railroad, insurance, or banking corporation, shall be entitled to the benefits of this act as a voluntary bankrupt.

"(b) 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 upon default or by impartial trial, and shall be subject to the provisions and entitled to the benefits of this act. The bankruptcy of a corporation shall not release its officers, directors, or stockholders, as such, from any liability under the laws of a state or territory or of the United States."

Bearing in mind that the word "person," as used in the Bankrupt Act, includes corporations and partnerships—section 1 (19), being Comp. St. 1913, § 9585—it will be observed that the general effect of the amendment of 1910 was to permit all corporations, with certain specified exceptions, to become voluntary bankrupts, and to greatly enlarge the classes of corporations subject to be adjudged involuntary bankrupts. Under the original act no corporation could become a voluntary bankrupt, but under the act as amended all corporations, except a "municipal, railroad, insurance, or banking corporation," can file voluntary petitions. Under the original act the only corporations subject to be adjudged involuntary bankrupts were those "engaged principally in manufacturing, trading, printing, publishing, or mercantile pursuits, owing debts to the amount of one thousand dollars or over." Under the amended act the classes of corporations liable to be adjudicated involuntary bankrupts are "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." The amendment of 1910 made no change in the law as regards "natural persons" and "unincorporated companies."

At all times since the original enactment of the statutes all natural persons owing debts may become voluntary bankrupts, and all natural persons, except wage-earners and persons engaged chiefly in farming or tillage of the soil, and all unincorporated companies, owing the requisite amount, have been subject to be adjudged involuntary bankrupts. By the amendment of 1910 the last sentence of clause "b" was dropped. The sentence so eliminated read:

"Private bankers, but not national banks, or banks incorporated under state or territorial laws, may be adjudged involuntary bankrupts."

It is contended that the elimination of the sentence and of any specific reference to private bankers has operated to exclude private bankers from liability to be adjudged involuntary bankrupts. A careful analysis of section 4 as originally enacted, and as amended, has led the court to conclude that this contention is erroneous for several reasons: (1) The original act clearly made private bankers liable to be adjudged involuntary bankrupts, independently of the final sentence of clause "b" referring specifically to "private bankers"; (2) in the amendment of 1910 clause "b" is substantially rewritten in such terms as to render the last sentence of clause "b" of the original act inapposite and superfluous; and (3) in the context in which it originally appeared the specific reference to "private bankers" added nothing to the force and meaning of the clause, and the words were evidently employed there ex industria, and were dropped in the amendment because superfluous.

As already pointed out, both under the original act and under the amendment of 1910 all "natural persons, except wage-earners and persons engaged chiefly in farming or tillage of the soil," and all "unincorporated companies," were liable to be adjudged involuntary bankrupts. If, therefore, a private banker is a "natural person" or an "unincorporated company," he has been liable to be adjudged an involuntary bankrupt at all times since the present Bankrupt Act has been in

force. If the private banker is to be regarded as a banking corporation under federal, state, or territorial laws, he is expressly excluded from being adjudicated a bankrupt by the original act, and also by the amended act, and it is, of course, clear from the context in the last sentence of original clause "b" that the "private banker" there referred to is not a bank incorporated under federal, state, or territorial laws.

It is clear that in the amended act "banking corporations" are *expressly excepted* from the voluntary provision of the act (clause "a"), because such banks would otherwise be embraced in the generic term "any person" which is there employed, and which by statutory definition includes corporations, natural persons, and partnerships. It is equally clear that "banking corporations" are *expressly excepted* from the involuntary provisions of the act (clause "b") because such corporations would otherwise be embraced in the generic classes "any moneyed business or commercial corporation" therein specified. In this context the *express exclusion* of *"banking corporations"* seems entirely inconsistent with the view that private or unincorporated banks stand on the same footing as incorporated banks, and that both are without the purview of section 4 of the act. In expressly excepting "banking corporations" from the generic classes of corporations enumerated in clause "b" of the amendment of 1910, and in failing to except private or unincorporated bankers from the generic classes of "natural persons" and "unincorporated companies" there specified it seems reasonably clear that Congress intended that natural persons and unincorporated companies engaged in banking should remain liable to be adjudged bankrupt.

Undoubtedly a general rule of statutory construction, if applicable here, would require us to conclude that the elimination of the term "private banker" by the amendment of 1910 has had the effect of excluding private bankers from the class of debtors now subject to be adjudged bankrupts; but this general canon of construction must be applied rationally, and the propriety of its application in any particular case can only be determined upon careful consideration of the entire context of both the original and amended statutes. If the terms employed in original section 4 are to be given their plain, ordinary, and usual meaning, they certainly embrace natural persons and unincorporated companies doing business as private bankers, independently of the express reference to "private bankers" contained in the last sentence of that section. As the amendment of 1910 made no change in the broad and comprehensive terms used, we are obliged to conclude that natural persons and unincorporated companies engaged in business as private bankers remain liable to be adjudged bankrupt.

It seems impossible to reach any other conclusion without doing violence to the language of the act as amended and overstepping the legitimate boundaries of construction. Rules of construction are designed to aid us in interpreting language of doubtful or ambiguous import, and where the language employed is clear and unequivocal such rules can have no application. These considerations constrain the court to conclude that private bankers can be adjudged involuntary bankrupts under the act as now in force.

[7] 3. It is further contended that the respondent receiver is an "adverse claimant" within the meaning of the Bankrupt Law, and that this court is therefore without jurisdiction to compel him by summary order to deliver the property in his custody to the petitioner. This contention is untenable, because the basis of the respondent receiver's possession of and dominion over the property in controversy is the order of the circuit court of Clark county appointing him receiver and directing him to take possession of the property. As the suit in which the receiver was appointed was not instituted until after the petition in bankruptcy was filed, and after the jurisdiction of the court of bankruptcy had attached, it is clear that no order made by the circuit court of Clark county could operate to render its receiver an adverse claimant. Acme Harvester Co. v. Beekman, supra; State Bank v. Cox, supra.

It is said that, as a special agent appointed by the bank commissioner was in charge of the bank when the petition in bankruptcy was filed, the property of the bank must be treated as then held adversely, and that the subsequent appointment of a receiver only operated to continue such adverse possession. It seems clear that the special agent to the bank commissioner was a mere temporary custodian of the bank's property, having no beneficial title to or claim upon such property, and it is difficult to see how he could be treated as an adverse claimant, or how his previous possession could in any way strengthen the claim of the receiver who was afterwards appointed.

It is also suggested on behalf of respondents that the action taken by the bank commissioner in taking charge of the bank, placing a special agent in charge, and afterwards having a receiver appointed and put in charge, must be treated as having placed the bank's property in custodia legis from the time the bank commissioner first took charge. As neither the bank commissioner nor his special agent was vested with or could exercise any judicial power, it is difficult to see how this view can be successfully maintained.

There is a more fundamental reason why the action taken by the bank commissioner and the appointment of a receiver by the circuit court of Clark county cannot operate to deprive the petitioner of his right to administer the assets of this bank. As the Bankrupt Act confers upon courts of bankruptcy jurisdiction to adjudge private bankers bankrupt and to administer their property, this jurisdiction is not only paramount, but is exclusive, and state laws assuming to confer upon state officers or courts authority to administer the property of such bank are superseded and must give way when the Bankrupt Law is properly invoked. In re Salmon (D. C.) 143 Fed. 395; Sturges v. Crowinshield, 4 Wheat. 122, 4 L. Ed. 529; Ogden v. Saunders, 12 Wheat. 213, 6 L. Ed. 606; Baldwin v. Hale, 1 Wall. 223, 17 L. Ed. 531; Carling v. Lumber Co., 113 Fed. 483, 51 C. C. A. 1; 1 Remington on Bankruptcy, § 1628, and cases.

Under the doctrine just stated the administration under state insolvent laws can be superseded by the institution of bankruptcy proceedings, providing the bankruptcy proceedings are commenced at any time within four months after the commencement of proceedings under

the state insolvency laws. 1 Remington on Bankruptcy, §§ 1625, 1626, and cases; Bankrupt Act, § 3a (4), being Comp. St. 1913, § 9587. That statutes of Missouri governing the administration of insolvent private banks are insolvent laws within the meaning of the doctrine above stated seems to admit of little doubt, and it has been so determined in the case of In re Salmon (D. C.) 143 Fed. 395.

[8] It is finally contended that this court ought not now to act upon the petition presented, but should await the action of the Supreme Court of Missouri upon the appeal now pending in that court. If the Supreme Court of Missouri could render an authoritative judgment in the pending case, and if this court was vested with discretion to delay action upon the present petition until the Supreme Court of Missouri makes its decision, this court would be glad to await the action of the latter court; but this court is of opinion that the Supreme Court of Missouri has no jurisdiction to decide the present controversy, and that this court has jurisdiction, and that it cannot properly refuse to exercise its jurisdiction. United States Fidelity & Guaranty Co. v. Bray, 225 U. S. 205, 32 Sup. Ct. 620, 56 L. Ed. 1055.

This court as a matter of comity required the petitioner to first apply to the circuit court of Clark county for an order directing its receiver to turn the property in controversy over to him. This application was made, and the circuit court of Clark county made an order substantially as asked. But the petitioner has not obtained the property he seeks, and the order of the circuit court of Clark county has been rendered ineffectual by the action of the respondents herein, who took an appeal from such order.

For the reasons already pointed out, the court is of opinion that the petitioner is entitled to the property in controversy, and that the duty of this court to award him the property is not affected by the action of the respondents in taking an appeal from the order of the state court. It is well settled that, where a trustee in bankruptcy is entitled to the possession of property in the possession of a receiver appointed by a state court, the court of bankruptcy will, if necessary, by its own order direct and compel such receiver to deliver such property to the trustee. In re Hecox, 164 Fed. 823, 90 C. C. A. 627; Hooks v. Aldridge, 145 Fed. 865, 76 C. C. A. 409; In re Watts, 190 U. S. 1, 23 Sup. Ct. 718, 47 L. Ed. 933. Such an order can be properly made, notwithstanding that the state court has previously denied an application of the trustee in bankruptcy addressed direct to it. In re Hecox, supra; Hooks v. Aldridge, supra.

In this case this court is of opinion that the circuit court of Clark county made an inadvertent error in directing its receiver to retain the sum of $1,600 to cover fees and costs. As the circuit court of Clark county had no jurisdiction over the property in the possession of its receiver, it had no authority to dispose of any portion of such property or its proceeds. If any expenses have been incurred, or any services rendered in the care and preservation of the property, they will, no doubt, be allowed by the United States District Court for the Southern District of Iowa, which court alone has jurisdiction to impose charges upon this property.

In conclusion, the court desires to say that it has not discussed in this opinion the question of whether or not the property of the Bank of Alexandria must be treated as a trust fund for the benefit of the depositors and other creditors of the bank, as that question is deemed one of substantive law, not directly involved in the present proceedings. This question will be determined by the court of primary jurisdiction, the District Court of the United States for the Southern District of Iowa.

In accordance with the foregoing views, an order will be entered directing the respondent, McDermott Turner, to forthwith turn over to the petitioner herein all the money, property, and effects in his possession of David H. Sage, doing business as the Sage Banking Company

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ROCKEFELLER v. O'BRIEN, County Treasurer.

(District Court, N. D. Ohio, E. D. May 13, 1915.)

No. 274.

1. TAXATION ⊜608—ILLEGALITY OF TAX—INJUNCTION.
Under the law of Ohio a suit in equity may be maintained to enjoin the collection of a tax which is illegal or invalid.
[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1230–1241; Dec. Dig. ⊜608.]

2. STATUTES ⊜205—CONSTRUCTION—GENERAL RULES.
All parts of a statute should be construed together in order to ascertain the legislative purpose in enacting it.
[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 282; Dec. Dig. ⊜205.]

3. STATUTES ⊜245—CONSTRUCTION OF REVENUE STATUTE.
A taxing statute must be construed as part of the legislative taxing system of the state, and if there is any doubt as to its meaning the construction must be strict, and the doubt resolved in favor of the citizen.
[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 326; Dec. Dig. ⊜245.]

4. TAXATION ⊜58—SITUS OF INTANGIBLE PERSONAL PROPERTY—RESIDENCE OF OWNER.
Gen. Code Ohio, §§ 5373, 5374, provide that a person who has had his actual or habitual place of abode in the state for the larger portion of the 12 months next preceding the annual tax listing day shall, for the purposes of taxation, be deemed a resident of the state, unless he shall before said day have changed his place of abode to a place without the state with the bona fide intention of continuing actually to abide permanently without the state; that if a person so removing from the state returns to it to reside within 6 months thereafter, it shall be prima facie evidence that he did not intend to permanently change; that the fact that a person so residing within the state does not exercise the right to vote shall not of itself constitute him a nonresident; and that no provision of the act shall be construed to repeal any statute previously in force as to the taxation of personal property. *Held*, that under such statute, construed with prior statutes, the intention is of great, if not controlling, importance, and that a person who has his actual place of abode in the state for the specified time, and on the tax listing day, may still be a nonresident, and not subject to taxation on his intangible property, where he has a permanent residence in another state, of which he is a citizen,

to which he at all times intended to return, and to which he would have returned before such day, but for illness in his family.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 134, 135; Dec. Dig. ⟸58.]

5. TAXATION ⟸93—SITUS OF TANGIBLE PROPERTY.

Under the statutes of Ohio, as construed by its Supreme Court, tangible personal property situated within the state is there taxable, irrespective of the residence of the owner.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 182–188; Dec. Dig. ⟸93.]

In Equity. Suit by John D. Rockefeller against P. C. O'Brien, County Treasurer of Cuyahoga county, Ohio. Decree for complainant.

Kline, Clevenger, Buss & Holliday and Squire, Sanders & Dempsey, all of Cleveland, Ohio, for plaintiff.

Cyrus Locher and Fred W. Green, both of Cleveland, Ohio, for defendant.

CLARKE, District Judge. The controversy in this case involves a great sum of money, but this does not increase the difficulty of a just decision of it. The federal and state courts of the country have been in singular accord in condemning many of the methods by which Mr. Rockefeller has acquired much of his great fortune, but the character of these methods is not involved in this suit, for the claim of the county assumes that he is the lawful owner of the $311,000,000 and more invested in "bonds, stocks, joint-stock companies, annuities and otherwise," upon which it seeks to collect the tax, the collection of which the bill in the suit prays may be enjoined. The facts of the case which are essential to a decision of it, and which are either admitted or are not seriously disputed, are as follows:

In 1884 the plaintiff, John D. Rockefeller, who theretofore had been a citizen and resident of the city of Cleveland, in the state of Ohio, moved to the city of New York, and established there his permanent home, and has there maintained it ever since. Since that year he has exercised in New York state the rights and privileges of citizenship, including the right to vote at state, county, and municipal elections, and has been regularly taxed by the proper authorities of that city and state upon his personal property, including doubtless the property involved in this suit. The plaintiff for a long time has been the owner of a home in the village of East Cleveland, Cuyahoga county, Ohio, known as Forest Hill.

On or about the 24th day of June, 1913, the plaintiff came from his home in New York to Forest Hill for the purpose of spending the summer season, bringing with him his family, servants, and secretary, as had been his custom, with occasional exceptions, for many years. The uncontradicted evidence clearly shows that it was his intention to return to New York, as had been his usual custom, about the month of October; that plans were made for such return, but that the illness of Miss Spellman, a member of his family, and the illness of his wife, led to the deferring of his return to New York from time to time until after the first Monday, the 3d day, of February, 1914, which, under

the statute of Ohio then in force, was tax listing day for that year. There can be no doubt upon the testimony introduced that Mr. Rockefeller's coming to East Cleveland was for the purpose of a summer visit, without any intention on his part of giving up his residence in New York, but with the fixed purpose to return to his New York home in the autumn. Neither can it be disputed on the evidence introduced that the occasion of his continuing longer than usual in Cleveland was the sickness of members of his family and his desire to be with them. The evidence is conclusive that Mr. Rockefeller made arrangements more than once between October 1, 1913, and February 1, 1914, to return to New York, but that, acting under advice of his family physician and other physicians called in consultation with him, it was concluded that it would not be prudent, owing to her illness, to remove his wife to New York, and his family physician testifies that it was important to her comfort and the proper treatment of the malady with which she was afflicted that her husband should be with her.

Immediately after February 3, 1914, the tax listing day for that year, notice was served upon the plaintiff that he must make return of all of his property, including "moneys invested in bonds, stocks, joint-stock companies, annuities and otherwise" of which he was the owner on the day preceding the first Monday of February, 1914. The plaintiff failed to make a return in form and substance satisfactory to the deputy state tax commissioners, who thereupon, pursuant to authority vested in them by law, made out and filed the return which they were of opinion the plaintiff should have made, which return included the $310,000,000 item of intangible property which is the subject of controversy in this case. The tax assessed upon the amount of this return was certified to the defendant, the county treasurer, for collection, and in this suit the plaintiff seeks to enjoin such collection upon two grounds, viz.:

First. For the reason, as is claimed, that under the facts proved the plaintiff cannot properly be taxed upon his intangible property under the provisions of sections 5373 and 5374 of the General Code of Ohio under authority of which it is conceded the tax commissioners acted in making the return in dispute.

Second. For the reason that, if the plaintiff were subject to taxation under the terms of sections 5373 and 5374 of the General Code of Ohio, nevertheless the collection of the tax should be enjoined, because the sections are in conflict with the Constitution of the United States and void, because to give them effect would be to deprive the plaintiff of his property without due process of law and to deny to him the equal protection of the laws, thus violating the fifth and fourteenth amendments to the Constitution of the United States.

The disputed part of the return by the deputy state tax commissioners is as follows, viz.:

1. Two automobiles, valued at the sum of.....$ 8,000
2. "The amount of all moneys invested in bonds, stocks, joint-stock companies, annuities and otherwise," value at the sum of.. 311,040,337

To be more specific, the claim is that the assessments described are both illegal and void for the reason that at the time they were levied

the plaintiff was a citizen and bona fide resident of the state of New York, and was not a resident or citizen of the state of Ohio; that the personal property described in the second item was never in the state of Ohio, and that its legal situs at the time said assessment was made was in the state of New York; and that therefore there was no jurisdiction in the taxing authorities of Ohio to return the same for purposes of taxation, as was done, and that the collection of the tax would be a taking of the property of the plaintiff without due process of the law, and would be a denial to the plaintiff of the equal protection of the laws, in violation of the fifth and fourteenth amendments to the Constitution of the United States.

The defendant denies, for want of information, the allegation in the petition that the plaintiff intended to return to New York in the fall of 1913, avers that on the 3d day of February, 1914, he was a bona fide resident of the city of East Cleveland, Cuyahoga county, Ohio, and that the deputy state tax commissioners, pursuant to law, made the return of the plaintiff's property for taxation which is complained of in the bill. It is also averred that upon the 3d day of August, 1914, the plaintiff filed with the auditor of Cuyahoga county, Ohio, his complaint to the district board of complaints for said county, in which he averred that the two automobiles and the moneys invested in bonds, etc., which had been listed for taxation as stated in the bill, were not taxable in Ohio, which complaint was rejected. It is further averred that the plaintiff did not appeal from this decision of the board of complaints within 30 days from its decision, nor at any time, and that therefore said finding of the district board of complaints is still in full force.

[1] This last objection made in the answer, that this action does not properly lie, because the plaintiff did not appeal from the decision of the district board of complaints to the tax commission of Ohio, is not seriously urged. That the suit is properly brought, so that the relief prayed for may be granted if the facts of the case justify it, is very clear under authority of the following decisions, all rendered in cases originating under Ohio law: Cummings v. National Bank, 101 U. S. 153, 25 L. Ed. 903; Grether v. Wright, 75 Fed. 742, 23 C. C. A. 498; Lander v. Mercantile Nat. Bank, 118 Fed. 785, 55 C. C. A. 523; McKnight v. Dudley, 148 Fed. 204, 78 C. C. A. 162.

The really essential controversy in the case is whether the assessment upon $311,040,337 of property of the plaintiff invested in bonds, stocks, joint-stock companies, annuities and otherwise (intangible property) is illegal or valid, and the decision of this question depends wholly upon whether or not the plaintiff on February 3, 1914, was subject to the terms of sections 5373 and 5374 of the General Code of Ohio, when the return for taxation was made, and, if he was subject to them, whether or not they were at the time valid constitutional laws. *It is conceded by the defendant that the liability of the plaintiff depends entirely upon his coming within the provisions of these sections and upon their validity, and no claim is made of liability under any other law.*

These sections of the General Code were originally the act of the General Assembly of April 14, 1900 (94 O. L. 162), which was carried

practically unchanged into the General Code, except that it was divided into two parts or sections. It will contribute to clearness and brevity in the discussion of whether or not this act applied to a man so situated as the evidence and the statement of facts in this opinion show Mr. Rockefeller was situated when the return was made to separate the act into four clauses as follows (section 5373):

(1) "Any person who shall have had his actual or habitual place of abode in this state for the larger portion of the twelve months next preceding the day before the second Monday of April in each year, shall, for the purposes of taxation, be deemed a resident of this state, and the personal property which he is required by law to list shall be taxable therein, *unless he shall on or before said day have changed his said place of abode to a place without this state with the bona fide intention of continuing actually to abide permanently without this state.*"

(2) "The fact that a person who has so changed his actual place of abode, within six months from so doing, again abide within this state, *shall be prima facie evidence that he did not intend permanently to have his actual place of abode without this state.* Such person, so changing his actual place of abode and not intending permanently to continue it without this state and not having listed his property for taxation within this state, *shall be deemed to have resided on the day when such property should have been listed, at his last actual or habitual place of abode within this state.*"

(3) "And the fact that a person whose actual or habitual place of abode during the greater portion of said twelve months has been within this state, does not claim or exercise the right to vote at public elections within this state, *shall not of itself constitute him a nonresident of this state within the meaning of this section.*"

(4) "Nothing herein contained shall relieve any person or property, who or which, but for this act, would be subject to taxation within this state; and no provision of this act shall be construed to repeal any statute now in force as to the taxation of personal property."

This last clause—(4)—is section 5374 of the General Code and reads:

"A person or property subject to taxation within this state, shall not be relieved therefrom by the next preceding section, nor shall any provision thereof repeal any statute now in force as to the taxation of personal property."

We shall consider, first, Did Mr. Rockefeller come within the terms of this act on tax listing day, February 3, 1914? If he did not come within its terms, the case will be ended, and the relief prayed for should be granted. If he did come within its terms, then the further question as to the constitutionality of the act must be decided. In the discussion of the statute involved, for the purpose of arriving at the legislative intent, it will be well to keep in mind the following three familiar rules prescribed for the construction of statutes:

[2] First. *The whole statute must be read together in order to ascertain what the expressed purpose of the Legislature was in enacting it.* Peck v. Jenness, 7 How. 612, 12 L. Ed. 841:

In construing a statute, every section, provision, and clause should be expounded by reference to each other; and if possible every clause and provision be given and have the effect contemplated by the Legislature. One portion of the statute should not be construed to annul or destroy what has been clearly granted by another. The most general and absolute terms of one section may be qualified and limited by conditions and exceptions contained in another so that all may stand together. Brown v. Duchesne, 19 How. 183, 15 L. Ed. 595; Gayler v. Wilder, 10 How. 477, 13 L. Ed. 504.

[3] Second. If there is doubt as to the meaning of a statute such as this under consideration, the construction must be strict, and the doubt must be resolved in favor of the citizen upon whom the burden is sought to be imposed.

Treat v. White, 181 U. S. 264, 21 Sup. Ct. 611, 45 L. Ed. 853:

"There must be certainty as to the meaning and scope of language imposing any tax, and doubt in respect to its meaning is to be resolved in favor of the taxpayer."

Insurance Company v. State, 79 Ohio St. 305, 87 N. E. 259:

"The rule is that 'statutes imposing taxes and public burdens of that nature are to be strictly construed; and where there is ambiguity which raises a doubt as to the legislative intent, that doubt must be resolved in favor of the subject or citizen on whom the burden is sought to be imposed.'"

This is recognized as a general rule. Cooley on Taxation, 453.

Third. The statute must be construed as a part of the taxing legislative system of Ohio, and, if it can reasonably be done, a construction must be put upon it which will harmonize it with that system.

Vane v. Newcombe, 132 U. S. 220, 10 Sup. Ct. 60, 33 L. Ed. 310:

"In cases of doubt or uncertainty, acts in pari materia * * * may be referred to in order to discern the intent of the Legislature in the use of particular terms." United States v. Saunders, 22 Wall. 492, 22 L. Ed. 736; Reiche v. Smythe, 13 Wall. 162, 20 L. Ed. 566.

City of Cincinnati v. Connor, 55 Ohio St. 89, 44 N. E. 582:

"It is an * * * established rule that the provisions of a statute are to be construed in connection with all laws in pari materia, and especially with reference to the system of legislation of which they form a part, and so that all the provisions may, if possible, have operation according to their plain import."

[4] Keeping these rules of construction in mind, let us analyze the act of April 14, 1900 (94 O. L. 162; G. C. §§ 5373 and 5374), and ascertain whether it was intended by the General Assembly of Ohio to apply to a person situated as the plaintiff was in February, 1914.

The first clause of the statute, as we have divided it, in express terms divides the years as of the second Monday of April, instead of the 1st day of January, and the first provision of this clause is that any person "who shall have his actual or habitual place of abode" in the state of Ohio for the larger portion of the 12 months (for more than 6 months of the year) next preceding the second Monday of April *"shall for the purposes of taxation be deemed a resident of this state, and the personal property which he is required by law to list shall be taxable therein."* By the act of April 18, 1913 (103 Ohio Laws, p. 788, § 6), tax listing day was changed from the second Monday of April to the first Monday of February of each year; but since all parties seemingly assent to it, the court will treat section 5373 as if it read "the first Monday of February," instead of the "second Monday of April in each year."

Obviously, considering only this provision of the clause of the act, it does not matter whether the more than six months that any person has "his actual and habitual place of abode" in the state is the first or the last, or any other, six months of the year, he must still under this

provision of the clause, considered alone, be deemed a resident of the state for the purposes of taxation.

But this first clause continues with the provision that such a person shall be deemed a resident of this state *"unless he shall on or before said day have changed his place of abode to a place without this state with the bona fide intention of continuing actually to abide permanently without this state."* The implication from this is clear beyond discussion that the Legislature intended that if a person so residing in Ohio for more than 6 months of the 12 months next preceding the second Monday of April (the first Monday of February) shall on or before said day change his place of abode to a place without the state *with the intention in good faith* (bona fide) of continually abiding permanently without the state, he shall not be liable to taxation within the terms of the act. This provision introduced by "unless" constitutes an obvious exception to the general language preceding it.

If, now, we confine the discussion as to the meaning of the act to these two provisions of this first clause, it seems to be the clear intention of the Legislature that any person may come into the state of Ohio and have his actual or habitual place of abode therein for 6 or even for any greater number of months of the year less than 12, but that, if he shall before tax listing day change "his place of abode to a place without the state" with the intention in good faith to "abide" permanently without the state, he shall not be taxed under the terms of this statute.

Mr. Rockefeller came into the state about the 24th day of June, 1913, and it would be a perversion of the testimony in the case to say that he came with any intention to make this state the place of his permanent abode. He, however, remained in the state a little over 7 months and until after tax listing day of 1914. It seems very certain that if he had gone back to his permanent home in New York before tax listing day, even one day before it, the claim would not, it could not, have been seriously made that under the terms of this statute thus far considered he should pay taxes on other than tangible property actually within the state, for the reason that on the evidence before this court there can be no doubt at all that the plaintiff's bona fide intention all the time while he was in this state was to have his permanent abode or home without the state; that the occasion of his not returning to his permanent home in New York state was the sickness of members of his family, and that when he did leave the state of Ohio it was "with the bona fide intention of continuing actually to abide permanently without this state" of Ohio, and to continue his permanent abode in the state of New York, where it had been for 30 years before.

If he had left Ohio the day before tax listing day, he would not have come within the terms of this first clause of the statute, for the reason that his change of abode to his New York permanent home would have been a change of his place of abode to a place without this state with the bona fide intention of continuing actually to abide permanently without the state and this would have brought him within the second provision of this first clause of the statute, so that he could not have been taxed under the clause at all. With this conclusion very clearly

reached, let us ask: Can it be said that the law is different in Mr. Rockefeller's case because he chanced to be in the state on tax return day, instead of leaving it on the day before that day? Must it be concluded that this provision of the statute means that his mere physical presence in the state of Ohio for more than 6 months of the year made him subject to taxation under this clause regardless of his intention, regardless of whether he intended to make Ohio his home, or whether he was simply visiting in the state, intending to return to the state of his citizenship and permanent residence, if that period included tax listing day, but that he would not be liable to taxation if his stay did not include tax listing day, and if he had removed from the state before that day—even one day before it—with the bona fide intention of going to his permanent abode without the state, or must there be, in addition to his physical presence in the state for more than six months, when this includes tax listing day, an intention in addition on his part to make this state his permanent abode? This is the important question to be decided.

The next two clauses (2 and 3) as we have divided the act, while not directly applicable to the facts of this case, are of great importance in deciding what the answer to this question should be.

The first of these clauses provides that if a person who has made his actual abode in the state of Ohio for the required part of any year shall change his abode to a place without the state before tax listing day, but shall return and again "abide" in the state within six months of the time he left it, this return "shall be prima facie evidence" that he did not, in good faith, intend to make his permanent place of abode without the state when he moved to a place without it. Plainly this clause prescribes a rule of evidence by which courts are to be guided in determining whether or not such a change of residence was made in good faith with the intention of permanently abiding without the state. If, giving due effect to the rule of evidence thus prescribed by the statute, a court concludes that the removal was made in good faith, the implication is imperative that the person shall not be taxed in Ohio. This decision is obviously to be determined by what the conclusion of the court shall be as to the intention, the mental state, of the person at the time of and after his removal, and this is to be determined by all of the evidence introduced, and not wholly by the physical presence of the person in, or by his physical absence from, the state.

But if the court, on all the evidence, shall conclude that the removal to another state was not made in good faith with the intention to permanently abide without the state of Ohio, then the remainder of this second clause as we have divided the act becomes effective, and requires that notwithstanding such removal from the state, and notwithstanding the physical absence from the state of the person and his family and household belongings on the tax listing day, nevertheless, since his removal was not made in good faith, his property shall be listed in Ohio for taxation, and he shall "be deemed to have resided" in the state on tax listing day at the place where his actual place of abode was before his removal.

Thus again by the express terms of this law physical absence from the state, alone, does not determine whether the act shall apply to a given person or not; but his intent, his purpose, with respect to making or not making his abode permanently without the state, is the decisive consideration. This clause is obviously a rule of evidence with an effect to be given to it prescribed by the Legislature.

Since, under the express terms of these three clauses of this law, intention, purpose, is such a determining factor that a person's property may be listed for taxation in Ohio, even though he may be physically absent from the state with his family and belongings on tax listing day, if he otherwise comes within their terms, clearly it is not lightly to be held that the intention, purpose, of a person who may have been in the state the required period of time including tax listing day shall not be taken into consideration in determining whether the act applies to him or not, and that the decision of the question shall depend in such case wholly on the physical presence on that day of such person in the state without regard to his intention to make or not to make it his permanent abode.

It is of much significance in this connection that the act does not declare that the more than six months during which a person must have had "his actual or habitual place of abode" in the state shall include tax listing day, but that, on the contrary, it expressly provides, as we have seen, for listing the property of the man who leaves the state before tax listing day, if his change of abode to a place without the state is not made with the intention in good faith to permanently live without the state. If a man's intention to return to the state can render him taxable when he is without the state on tax listing day, surely the intention of another not to abide permanently in the state—the fact that he certainly was simply visiting in the state—should not be without value in determining whether he should be taxed, even if he happens to be in the state on tax listing day.

It is reserved for the fourth clause of the act, as we have divided it, to clear up any doubt there might otherwise have been as to what the intention of the General Assembly was in the respect which we are discussing. This clause provides that if a person, who shall have his place of abode within the state for the period prescribed by the act, "does not claim or exercise the right to vote at public elections, within this states," *this fact "shall not of itself constitute him a nonresident* of this state within the meaning of this section."

This is an extremely significant and important provision, because it expressly recognizes that conditions may exist under which a person may abide in the state the required time and nevertheless continue to be a nonresident within the meaning of the act, and it also clearly implies that whether such a person is or is not a nonresident within the meaning of the act is one to be determined by testimony, and it therefore prescribes that, even though a person may renounce his citizenship in the state by not claiming or exercising the right to vote at elections in the state, yet, notwithstanding this, he may still be a resident of the state, and taxed in it, because his real purpose and intention was to make his permanent home in Ohio.

Thus, this clause prescribes, as we have seen that each of the two next preceding clauses prescribes, a rule of evidence for the guidance of courts in deciding whether a person who has actually had his abode within the state for the required period is, or is not, a nonresident, and if he is a nonresident the implication is imperative that he does not come within the scope of the section and should not be taxed.

This third provision, be it noted, is that the failure of a man to vote in the state *"shall not of itself"*—that is, standing alone, unsupported by other facts and circumstances—*"constitute him a nonresident of this state within the meaning of this section."* The implication from this plainly is that this fact, not standing alone, but supported by others, as that he was certainly visiting in the state without any intention of making his home in it, would "constitute him a nonresident of this state within the meaning of this section."

From this third clause of the act these deductions seem to this court to be obvious and imperative: (a) That a man may have his "actual or habitual place of abode" during the greater part of the prescribed 12 months and *still be a nonresident of the state,* and not within the terms of the act; (b) that whether a given person so residing in the state for the prescribed period is a resident of the state and taxable, or a nonresident and therefore not taxable, under the act, is a question of fact, to be determined from the testimony of each case, and of course such determination must be by the courts when properly applied to; and (c) that in determining this question of residence or nonresidence the fact that a man renounces his right to vote in a state "shall not of itself constitute him a nonresident," which but for such a provision it probably would be accepted as doing, so averse are the courts to believe that to avoid taxation men will forego their right to participate in their own government.

The remaining provision of the section—the fourth clause, section 5374—reads:

"Nothing herein contained shall relieve any person or property, who or which, but for this act, would be subject to taxation within this state; and no provision of this act shall be construed to repeal any statute now in force as to the taxation of personal property."

This, when read with the title of the act we are considering, viz., "An act to supplement section No. 2735 of the Revised Statutes of Ohio relating to the taxation of personal property," makes it clear that the legislative purpose was that this law shall be an integral part of the taxing system of Ohio, and therefore under the third rule of construction prescribed by the Supreme Courts of the United States and of Ohio in the authorities we have cited, such a construction should be given to it, if the language will reasonably permit of it, as will make it harmonize in principle and purpose with that system and body of law of which it is a part.

In Worthington v. Sebastian, Treasurer, 25 Ohio St. 1, the Supreme Court of Ohio declared that the system of Ohio law—

"has uniformly proceeded upon the theory that *tangible property* is to be taxed according to the law of the place where it is situated, irrespective of the residence of its owner; while, with equal uniformity, it has proceeded upon the theory that 'credits,' 'investments in bonds,' 'stocks,' etc. (intangible

property), are taxable according to the laws of the place where the owners or holders reside."

And in Grant v. Jones, 39 Ohio St. 506, it is said that:

"Credits owned by a nonresident of this state are not taxable here, unless they are held within this state by a guardian, trustee, or agent of the owner by whom they must be returned for taxation."

These are but statements of what the policy of the taxation laws of Ohio has been, certainly since the adoption of the Constitution of 1851, and that it was the policy of such laws in 1913 and 1914 is sufficiently clear from the provisions of General Code, §§ 5328, 5321, 5323, and 5371. To declare that the plaintiff is taxable as the defendant contends he is upon his intangible property, property which was never in Ohio, and which was subject to taxation in the state of New York, when he was clearly a nonresident of Ohio within the meaning of that term as it is used generally in the Ohio statutes (Grant v. Jones, 39 Ohio St. 506), would be to put upon the act we are considering a construction which would make it wholly out of harmony with this long-settled policy of the taxation laws of the state.

Under the decisions of the Supreme Court of the United States and of the Supreme Court of Ohio, which we have cited, such a construction should be put upon the act only if made necessary by its express terms, and since the construction at which we have arrived as the proper one of the preceding three clauses of the statute does not require this, we are but following the highest authority in concluding that this act of April 14, 1900 (G. C. §§ 5373 and 5374), did not introduce a new departure into the taxing system of Ohio by attempting to tax nonresidents of the state on their intangible property, but that it simply furnished new rules of evidence which courts must apply in determining who are and who are not residents of the state for purposes of taxation.

This discussion of the provisions of the act of April 14, 1900, reading them all together, and resolving doubts in favor of the citizen, as we must do under the rules and authorities cited, makes it very clear to this court that the legislative purpose in enacting it was not to tax nonresidents of the state who might by chance remain within it more than 6 months, but was to provide certain definite rules of evidence by which the courts are to be guided in deciding whether or not a person is a resident of Ohio for taxing purposes. These rules thus prescribed are:

(1) That if a man shall make his actual place of abode within the state for more than 6 months of any year, as the year is divided by the act for taxing purposes, this fact, unexplained and unrebutted, shall render him a resident of the state, so that he may be taxed as a citizen is taxed; but such residence may be explained and shown by evidence to have been temporary in its character, without any intention on the part of the person to make Ohio his permanent abode or residence, and, when this is proved, he shall not be subject to such taxation.

(2) That if, after such a person shall have resided in the state the required period, he shall remove from the state before tax listing day, with the purpose, in good faith, to establish his permanent home

elsewhere, then he shall not be taxed under its terms. Whether such removal from the state was with the bona fide intention of permanently abiding without it is plainly a question of fact to be determined by a court upon the evidence that may be adduced bearing upon the question.

(3) But if the person so removing from the state shall return to it within 6 months of such removal, this return is made by the statute "prima facie evidence" to be considered by a court that he did not intend when he left the state to permanently have his place of abode without the state, and he shall be taxed as if he had remained in the state until the tax listing day.

(4) The fact that such a person may renounce his right to vote in the state, while evidence of his nonresidence, shall not be conclusive of his really being a nonresident, as it might be if the statute had not been enacted.

Thus plainly the statute contemplates that a man may have his place of abode within Ohio for the required 6 months, and yet be a nonresident of the state all the time within the meaning of the tax laws of Ohio, and so not taxable in the state on his intangible property, and whether he is such a nonresident or not is for the courts to determine upon the evidence introduced in each case. In the case under consideration, it is admitted that Mr. Rockefeller, all of the time he was in Ohio in the years 1913 and 1914, was a citizen of the state of New York; that he was a voter of that state; that he was taxed there, presumably upon this very property; that he had his permanent home there; and it cannot be doubted on the testimony introduced on this trial that he came to Ohio in June, 1913, as he had often done before, simply for a summer visit, which was continued longer than usual because of the illness of members of his family. Neither can it be doubted that when he left the state he left it with the purpose of permanently residing in the state of New York, which had been his home for more than 30 years.

With these facts before us, in the opinion of this court, there can be no doubt at all that, notwithstanding the provisions of the act of April 14, 1900, Mr. Rockefeller was a nonresident of Ohio when the tax return in dispute was made, and that he could not properly be taxed upon his intangible property under the terms of that statute.

[5] With respect to the two automobiles returned, valued at $8,000, the case is entirely different. These were tangible personal property, which were in the state of Ohio for 7 months prior to and upon tax listing day and are clearly to be distinguished from moneys, credits, bonds, and stocks, etc., included in the other item of the return, which were not within the state, and which retained the situs of the nonresident owner in New York. That this tangible personal property was properly taxable as returned seems clear enough, under authority of G. C. §§ 5328 and 5325; Pullman's Car Co. v. Pennsylvania, 141 U. S. 18, 11 Sup. Ct. 876, 35 L. Ed. 613; Coe v. Errol, 116 U. S. 517, 6 Sup. Ct 475, 29 L. Ed. 715; Old Dominion Steamship Co. v. Virginia, 198 U. S. 299, 25 Sup. Ct. 686, 49 L. Ed. 1059, 3 Ann. Cas. 1100; Gromer v. Standard Dredging Co., 224 U. S. 362, 32 Sup. Ct. 499, 56 L. Ed. 801.

In the construction of statutes, the history of the times, "the environment" of the lawmakers, may always be looked to (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), for the purpose of ascertaining the legislative purpose, and such reference is convincingly confirmatory of the conclusions which we have reached from the language of the statute under consideration.

There can be no doubt that it was generally understood among lawyers in full practice at the time the law of April 14, 1900, was enacted that the purpose of it was not to tax nonresidents who might be temporarily within the state, but that its purpose was to prevent the escape from taxation of persons who really lived and did business in the state, but who in order to avoid taxation in Ohio pretended to maintain a residence elsewhere, usually in New York or Washington. These men spent a large part of their time in Ohio, but were careful to be out of the state on tax listing day. Some of them rented rooms in hotels, and others rented apartments which they claimed as their residences; and as constituting, as they hoped, a final proof, so that the courts would not hold them to be citizens of Ohio and subject to taxation, such men usually gave up voting in the state. Some of them voted elsewhere and some did not.

If we keep in mind such cases as these we have described, we shall see that the various provisions of the act of April 14, 1900, "read onto" them perfectly and sensibly.

Such a person, after living in the state of Ohio more than 6 months of each year as prescribed in the act, invariably left the state before tax listing day, but returned again to his business and to what was his real home within a short time after. His business and home being really in the state, such removal was a sham, the effect of which this statute sought to defeat by declaring that such return within 6 months should be "prima facie evidence" that the removal was not made in good faith, with the purpose to reside permanently without the state, and that therefore the "tax dodger" should be taxed as if he had been in the state upon tax listing day.

The greatest emphasis of all was laid by such men, and also by the courts, as proof that they were nonresidents, upon the fact that they had renounced the right to vote in Ohio, and therefore the act declared that such failure to claim the right to vote in the state should not of itself constitute or prove the man a nonresident, but it plainly left the door open for other proof of nonresidence. Thus it will be seen that the act applied perfectly to the conduct of such men, and served to make it necessary for them to choose between having a bona fide residence outside of Ohio and paying taxes within it.

We have seen that the terms of the statute do not apply to Mr. Rockefeller's case, and obviously this is because it was not intended by the lawmakers to cover such a case of genuine bona fide nonresidence as his certainly is, but because it was intended to circumvent the frequently practiced, fraudulent devices of men living and doing business in Ohio to escape paying their just share of the expenses of the government which protected their lives and property.

The conclusion thus arrived at renders unnecessary the consideration of the question as to the constitutionality of the law under discussion, which was elaborately and learnedly argued.

This court is quite aware that such a decision as is here rendered will be the subject of criticism, but a judiciary which has not independence sufficient to protect the rights of rich men, when they are believed to be unjustly assailed cannot be trusted to justly protect either the personal or property rights of the well-to-do or poor.

A decree will be entered allowing an injunction against the collection of the tax assessed upon the intangible personal property of the plaintiff as returned by the deputy state tax commissioners, in conformity with the conclusions of this opinion.

UNITED STATES v. MURPHY et al.

(District Court, N. D. New York. July 12, 1915.)

1. JURY ⊂⊃66—JURY LIST—SELECTION OF NAMES—STATUTORY PROVISIONS.

Judicial Code (Act March 3, 1911, c. 231) § 276, 36 Stat. 1164 (Comp. St. 1913, § 1253), provides that jurors shall be drawn from a box the names in which shall have been placed therein by the clerk of the court and a commissioner appointed by the judge, who shall be a citizen of good standing and a well-known member of the principal political party opposing that to which the clerk may belong, and that the clerk and commissioner shall each place one name in the box alternately without reference to party affiliations until the whole number required shall be placed therein. An assistant United States attorney, at the request of the jury commissioner, obtained the petit jury list of a county for use in the state courts, but, not feeling at liberty to send such list out of the city, copied a part, but not all, of the names on the list, and added 108 names not on the list. The jury commissioner made inquiries concerning such names of such attorney and other reputable persons, and made some additions, and the clerk of the court also added other names; but the names placed in the jury box were very largely taken from the list prepared by the attorney, and included some of the 108 names not taken from the jury list. *Held*, that a challenge to the panel would be sustained, as the statute requires the selection of names to be made by the commissioner and the clerk, and, though other persons may answer proper inquiries, and give information as to the character and fitness of persons whose names are under consideration, they may not select nor suggest names, and, though the defendants might not be prejudiced by the manner in which the names were selected, it could not be known that they would not be prejudiced.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 283–290, 306; Dec. Dig. ⊂⊃66.]

2. JURY ⊂⊃66—JURY LIST—SELECTION OF NAMES—STATUTORY PROVISIONS.

In selecting lists of names of jurors for service in the courts of the United States, there is no law or rule of court requiring an apportionment of the names selected in accordance with the population of the various towns and wards in a county, or in proportion to the persons liable to jury duty residing therein.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 283–290, 306; Dec. Dig. ⊂⊃66.]

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3. JURY ⟸66—JURY LIST—SELECTION OF NAMES—STATUTORY PROVISIONS.
In selecting names to be placed in the jury box, the clerk of the court and the jury commissioner each has a right to select his names, absolutely independent of the other.
[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 283-290, 306; Dec. Dig. ⟸66.]

Richard Murphy and others were indicted for offenses. On challenge to the panel of jurors. Panel discharged.

When the United States attorney moved this indictment for trial the defendants challenged the entire panel, on the ground that the names of jurors contained in the jury box, and from which the panel of jurors serving at this June, 1915, term of this court was drawn, were not selected and placed in such jury box in the mode and manner prescribed by law or the statutes of the United States providing therefor, but in violation thereof, and that the greater number of the names placed and contained in such box—in fact, nearly all —were in fact selected and designated (although adopted by the commissioner of jurors and clerk) by one of the assistant United States attorneys for the Northern district of New York and residing in the county from which such names of jurors were to be selected, and that such box contained and contains, and that the panel of jurors drawn from such box for service at this term of court, contains, the names of many of the friends, neighbors, and clients of said assistant United States attorney, and that such panel is composed of an illegal and prejudiced, or liable to be prejudiced, body of men, whereby the rights of the defendants are jeopardized or imperiled. On the other hand, while it is not denied that the assistant United States attorney copied off from the petit jury list of Onondaga county, N. Y., a list of names of residents and citizens of the county of Onondaga liable to jury duty and competent and fit to serve as jurors, to which was added about 108 names not on such list, and that a large number of such names, including the 108, went into the jury box from which panels for service at the several terms of court to be held in such county are to be drawn from time to time, it is contended that such list was a mere suggestion of fit and proper names to go in such box; that it was submitted to the commissioner of jurors and examined by him as a guide and suggestion merely, he making inquiries of other and disinterested persons well informed and competent to judge in the matter, and that he then accepted such names, with some changes or additions, as a fair and proper and representative list of names to go in such box; that, in point of fact, the box and panel contains the names of persons who are qualified and competent to serve as jurors, and who are unbiased and without prejudice, and that the selection of names was a proper one in fact, and that of the commissioner of jurors and of the clerk of the court, acting jointly as they should; and that in all respects there was a substantial compliance with the statute. The challenge having been duly interposed, this court appointed George W. O'Brien and Leroy B. Williams, of the city of Syracuse, in said county, to act as counsel and aid in properly developing the facts and the truth relevant to the challenge made, to the end that a correct conclusion may be reached. The material and relevant facts appear in the opinion.

John H. Gleason, U. S. Atty., of Albany, N. Y., and Frank J. Cregg, Asst. U. S. Atty., of Syracuse, N. Y.

Elon R. Brown, of Watertown, N. Y., and Chas. N. Bulger, of Oswego, N. Y., for defendants.

Geo. W. O'Brien and Leroy B. Williams, both of Syracuse, N. Y., appointed by the court.

RAY, District Judge (after stating the facts as above). [1] Prior to March 23, 1915, the United States District Judge of the Northern District of New York, at the suggestion of the United States at-

torney for said district, and deeming it advisable and proper, directed that a new jury list or list of names be selected from the county of Onondaga to be placed in the jury box to be used for the drawing of jurors to serve at terms of the United States court to be held in said county. This was to be done under and pursuant to the statute and in accordance therewith by Alexander H. Crounse, commissioner of jurors, and the clerk of this court. Mr. Crounse resided in the county of Albany, N. Y., at a distance of about 150 miles from the county of Onondaga, while the clerk of the court resided and resides in the county of Oneida, in the neighborhood of 50 miles from the city of Syracuse, Onondaga county. The compensation allowed to the clerk of the court and to the commissioner of jurors for their services in making up jury lists, including the selection of names, preparing slips, and placing same in the box, and later drawing and attending to drawing panels of grand and petit jurors, is $75 per year each. In the Northern district of New York, the city of Albany, Albany county, the city of Binghamton, Broome county, the city of Auburn, Cayuga county, the city of Utica, Oneida county, and the city of Syracuse, Onondaga county, are designated by statute as the places for holding regular terms of court. It is evident, and has been several times decided in similar cases, that it was not contemplated that the clerk and commissioner of jurors should visit and abide in the several counties from which jurors are to be selected for a sufficient length of time to familiarize themselves or become acquainted with the citizens subject to jury duty and competent to act as jurors, but that it was anticipated these officers, in performing their duties, would obtain information from various legitimate sources, including, undoubtedly, personal inquiry. It has always been the custom, whether warranted by law or not, for these officers, in making up lists and selecting names of persons to act as jurors, to make inquiry of various well-informed persons, obtain lists from various sources, usually the grand and petit jury lists of the several counties, and then make a selection of names based on the information thus derived, and not on personal acquaintance or actual knowledge as to the qualifications and fitness of the persons whose names have thus been finally selected to go in the box.

In February and March, 1915, one of the assistant United States attorneys for said district was frequently in the city of Albany, where the United States attorney resides, and where during those months a term of the United States District Court was being held. He was, of course, frequently in the office of the United States attorney, as it was his duty to be when not in court, and here and at the government building, where court was held, he met the jury commissioner on several occasions. The jury commissioner is not provided with a clerk or stenographer, or funds with which to employ one. The assistant United States attorney has no such assistant, or funds allowed with which to employ one. The United States attorney is allowed a stenographer. Mr. Crounse, the United States commissioner of jurors at that time, residing in the county of Albany as stated, was appointed such on the recommendation of the United States attorney, with the approval of the Department of Justice. He was not supposed to be, and there is

no evidence that he was, under the influence of the United States attorney, with whom he had been acquainted for some years, unless it be that personal acquaintance and friendship created such a condition. The commissioner of jurors was not acquainted with the assistant United States attorney until about that time. There is no relationship by blood or marriage or in business matters between the United States attorney and Mr. Crounse, or between Mr. Crounse and the assistant United States attorney. The commissioner of jurors had no acquaintance in the city of Syracuse or county of Onondaga, and the clerk of the court had but very limited acquaintance there.

The evidence shows that in selecting the names of jurors to go in the box for Onondaga county, from which panels were to be drawn for service at subsequent terms of court held therein, the following course was pursued and the following things done, viz.: Mr. Crounse applied to the commissioner of jurors for the county of Onondaga, a state officer, for the grand and petit jury lists used by the state courts in that county, and which lists are in fact made up by the commissioner of jurors for that county, who is appointed by the judges. The grand jury list contains about 500 names, while the petit jury list contains about 6,000 or 7,000 names. Mr. Crounse was furnished the grand jury list for the county of Onondaga, but was informed that the petit jury list was not available. The commissioner then saw the assistant United States attorney in Albany, and requested him to secure, if possible, the petit jury list for the county of Onondaga. He did secure that list, but did not feel at liberty to deliver same to Mr. Crounse or remove same from the city of Syracuse, and proceeded to have a list copied off, containing at least 500 names or more. This list may have contained three or four times that number, but it was not a copy of the entire list. This list caused to be made by him from the jury list of Onondaga county, and copied by the stenographer in the law office of the firm of which he is a member, and to which was added about 108 names not on any list, was then delivered by mail or personally to Mr. Crounse, who made up a list for proposed jury service therefrom, and who later visited the city of Syracuse and saw the assistant United States attorney in reference to the list, and was referred by him to other reputable persons to make inquiry as to the persons on such list and other persons fit and suitable for jury duty. Mr. Crounse saw highly reputable attorneys and business men, including one judge, and showed the list, and it was approved by them, with some additions and changes. He went to the places of business of some of the persons to whom he was referred, but did not find them all. This list, as changed by additions and erasure of names, was submitted to the clerk of the court as containing the names of men selected by Mr. Crounse, as proper and suitable to go into the jury box. The clerk of the court had secured the grand jury list of the county of Onondaga, and from this he had selected about 72 names, and he also went over the list submitted by Mr. Crounse with a person residing in the county of Onondaga in whom he had confidence, and erased a few names—some because he did not approve of them and others for the reason they had served as

jurors in the United States court within a year, and hence were disqualified to go in such box.

Mr. Crounse had caused to be made copies of the list as so made up from the list submitted to him by the assistant United States attorney. In copying lists he had previously availed himself of the services of the clerk or stenographer in the office of the United States attorney in Albany. This list for Onondaga county was not copied in that office. The list of names taken by the assistant United States attorney from the petit jury list of the county of Onondaga, with some 108 names added, but not containing all of the names on that jury list, and to which had been added the 108 names not on the lists as prepared by the jury commissioner of said county, as before stated, and made up in the manner and under the circumstances stated, went into the hands of the clerk of the court from Mr. Crounse as a list approved by Mr. Crounse, and was submitted by him to the clerk as a proper list of names in his judgment to go in the jury box. The clerk of the court added names to the number of 72 or 73 taken by him from the grand jury list of the county of Onondaga, as before stated, and after going over the list submitted by Mr. Crounse he selected therefrom, as he had the right to do, in the neighborhood of 200 names which he expressly approved. He did not disapprove the others, except in a few instances, and those names, as stated, were erased. There is no proof to sustain a finding, or facts proved to justify the inference, that the assistant United States attorney, in copying off names from the petit jury list of Onondaga county, selected the names of clients or friends. It is but fair to assume and find that the list was complete as to certain towns and wards and so far as it went.

A day was fixed for filling the box, and for certain good reasons and at the suggestion of the judge it was deemed advisable to place in the box about 600 names. The law provides that the box shall contain at least 300 names. The rule of the court provides that such box shall contain at least 400 names. The maximum number of names to go in the box is not limited by law or any rule of the court. On the day fixed for filling the box at the clerk's office in Utica, the clerk of the court and the United States jury commissioner were both present. The clerk had caused slips to be made by a typewriter in the clerk's office, each of which contained the name of one of the persons on the list finally submitted by Mr. Crounse, and to which list had been added the names from the grand jury list suggested by the clerk and the other names as above stated. These slips were in two packages, each package containing an equal number. In the package of slips containing names selected and adopted by the clerk as the names he desired to put in the box as above stated was included the names from the grand jury list and such of the names from the list submitted by Mr. Crounse as the clerk had so expressly selected and approved. The balance of the names on the list submitted by Mr. Crounse were in the other package, and this was handed to him. The clerk informed the commissioner of jurors what he had done and what the packages contained. The United States jury com-

missioner knew of the additions made by the clerk, and of the erasures from the list, and made no objection.

In legal effect this list of names was the joint list adopted by both the commissioner and the clerk. Both knew what names it contained, and neither objected. Both were content. It does not appear that either of them knew how the list that came from the assistant United States attorney was made up. The clerk had no information tending to show it came from that officer. The clerk and commissioner of jurors thereupon filled the jury box, placing all of said slips, some 618 in number, therein; the clerk putting in one from his package and Mr. Crounse one from his package alternately, until all the slips were in the box. The box was then locked and sealed, and the key was sealed up by Mr. Crounse under his own seal and deposited in the vault. Just before the day fixed for the drawing of the jury, grand and petit, for this term of court, and on May 18, 1915, Mr. Crounse resigned, and Mr. Weston, of the city of Syracuse, was appointed in his place, and he qualified and attended the drawing of jurors from said box to serve at this term of this court. This term of this court had been in session three weeks before this case was taken up for trial. It is conceded that the drawing of the grand jury panel and petit jury panel to serve at this term of this court from the box in question was in all respects regular, fair, honest, and in accordance with law. There is no evidence that the box referred to had been tampered with in any manner or by any person. The proof shows it had not been.

[2] It does appear that the names of jurors selected and placed in the box from which such panels were drawn are not apportioned to the several towns in the county of Onondaga or to the several wards in the city of Syracuse in said county in proportion to the persons residing in such towns and wards, respectively, subject to jury duty. In copying off names for the list so submitted by the assistant United States attorney in the first instance, or in making additions, no attention was paid to that. The clerk of the court, in making and approving his selection from such list and from the grand jury list, paid no attention to an apportionment of the names selected in accordance with the population of the various towns and wards, or in proportion to the persons liable to jury duty residing therein. The law does not require such an apportionment. The list furnished to the clerk of this court by Mr. Crounse, the commissioner of jurors, was also made up without any such reference, and in point of fact more names of qualified jurors in proportion were on such list from the town in which the assistant United States attorney had formerly lived, and from the ward of the city of Syracuse in which he now resides, and from one or two of the neighboring towns and wards, than from some of the other towns and wards of the county and city. Such a result in selecting names may come from the fact that the person or persons making the selection is quite liable to put the names of persons he knows on such list, rather than the names of those with whom he has no acquaintance whatever, unless he has in mind an apportionment of the list in accordance with either population or qualified jurors from

the various towns and wards. This, as stated, is not required by any law or rule of court in selecting lists of names of jurors for service in the courts of the United States.

[3] The clerk of the court was ignorant of the source from which Mr. Crounse obtained his list of names and the manner of their selection. He was not under any duty to inquire. In fact, I am of the opinion the clerk and jury commissioner each has the right of selection of his names absolutely independent of the other. There is no evidence that the assistant United States attorney had any desire or purpose to select, or copy off, or submit a list of partial or biased jurors—any other than good men. Nevertheless it does appear that approximately five-sixths of the names in the box from which panels of jurors were drawn for service at this term of court were copied off from the county petit jury list by those in or connected with the office of the assistant United States attorney. To these he had added nearly all the 108 names not on that list.

The assistant United States attorney is a gentleman of high character and standing at the bar and in the county of Onondaga, where he was born and reared, as well as in the city of Syracuse, where he now resides and practices his profession. His integrity is unimpeached. He has had charge of many criminal cases, and has tried every case which has come to trial since his appointment to the office he now holds. He has not resorted to any measure or artifice which would justify a suspicion that he is other than high and just-minded, honest, conscientious, sincere, and devoted to duty. His leanings and tendencies are all to the side of mercy. An honest, intelligent, and fair-minded jury is all he desires in any case. This evidence shows nothing to the contrary. The fact that the list contains the names of many of his friends, some clients, and many people who know him, establishes nothing to the contrary. It shows he has friends, and that his law firm has clients, nothing further.

The lawyer charged with the duty of looking after and protecting the interests of his clients, as well as the clients themselves, instinctively shy at the idea of having their cases, civil or criminal, tried before and decided by a jury of 12 men taken from a larger body of men selected or named, even indirectly, by the attorney for the opposing party from the great body of citizens competent and qualified to perform jury duty, even if the men so selected are known to be of high, unquestioned, and approved character and conceded ability. This is true, even if such a selection is first submitted to and approved and confirmed by the commissioner of jurors and clerk, or those officials charged with the duty of selection and making up of jury lists for county or municipality. Such a mode of selecting jurors has never been sanctioned by legislative enactment or judicial decisions. It has frequently been condemned. Jury lists should, so far as possible, be free from suspicion or criticism. Confidence in our courts and the honest administration of the law cannot otherwise be maintained.

The Judicial Code (chapter 12, §§ 275, 276, and 277, Act of March 3, 1911, c. 231, §§ 275, 276, 277, 36 Stat. 1164 [Comp. St.

1913, §§ 1252, 1253, 1254]) provides, first, that jurors to serve in the courts of the United States, in each state, respectively, shall have the same qualifications, subject to certain provisions of the statute, and be entitled to the same exemptions, as jurors of the highest court of law in such state may have and be entitled to at the time when such jurors for service in the courts of the United States are summoned, and, second:

"Jurors, How Drawn.—All such jurors, grand and petit, including those summoned during the session of the court, shall be publicly drawn from a box containing, at the time of each drawing, the names of not less than three hundred persons, possessing the qualifications prescribed in the section last preceding, which names shall have been placed therein by the clerk of such court and a commissioner, to be appointed by the judge thereof, or by the judge senior in commission in districts having more than one judge, which commissioner shall be a citizen of good standing, residing in the district in which such court is held, and a well-known member of the principal political party in the district in which the court is held opposing that to which the clerk may belong, the clerk and said commissioner each to place one name in said box alternately, without reference to party affiliations until the whole number required shall be placed therein."

Then, third:

"Jurors, How to be Apportioned in the District.—Jurors shall be returned from such parts of the district, from time to time, as the court shall direct, so as to be most favorable to an impartial trial, and so as not to incur an unnecessary expense, or unduly burden the citizens of any part of the district with such service."

It is further provided that petit jurors shall serve but one term of court each year, and that in cases of felony, other than treason or a capital offense, the defendant shall be entitled to ten peremptory challenges and the United States to six, and that:

"In all cases where there are several defendants or several plaintiffs the parties on each side shall be deemed a single party for the purpose of all challenges under this section."

It is further provided that all challenges, whether to the array, or panel, or to the individual juror for cause or favor, shall be tried by the court. The restriction on the number of challenges allowed the defendants, especially where more than one defendant is on trial, emphasizes the idea that the names of jurors selected to be put in the box from which the panels of grand and petit jurors are to be drawn later for service at a term of court, and which panels are limited in number, should represent and call for men well qualified to serve who are fair and impartial, and who were fairly and impartially selected by the officers charged with the performance of that duty. Mere irregularities, which cannot be prejudicial to either party, have been quite generally held not to sustain a challenge to the array. The section of the statute fully quoted makes it plain that Congress sought to eliminate political considerations, or at least minimize that consideration, for the commissioner is to be of the principal political party opposed to that to which the clerk belongs and "a well-known member" of that party. However, when it comes to the selection of names to place in the jury box, such names are to be placed therein by such officers alternately and "without reference to party affiliations"; that

is, without reference to the political affiliations of the persons so selected for jury duty, if called upon to serve. There is no evidence tending even to indicate that the assistant United States attorney was actuated or influenced by any political feeling or motive. So far as evidence was adduced, it tended to show a fair and just political equilibrium in the make-up of the list of names.

It is evident from the reading of the statute that the *selection* of names to go in the jury box is to be made *by the commissioner of jurors and by the clerk of the court,* who are supposed to be indifferent and impartial as between the parties to any controversy coming or which may come before the court, whether civil or criminal. No other person or official has the right to participate in such selection. Others may, of course, answer proper inquiries properly made to them, or either of them, and give information to these officials as to the character and fitness of men, but may not select, and no person interested should be permitted to suggest, names.

The fairness, impartiality, and freedom from prejudice or bias of every juryman should be above well-grounded suspicion. There should be no question that the selection was made by those in whom the power is vested. To this end statutory directions as to the selection of jurymen should be followed in all essentials, unless they relate to mere form of procedure, and even in such cases a departure therefrom has in some of the cases been held fatal to the entire panel.

In the trial of causes, civil or criminal, it is not sufficient that you have in court, as here, a fine body of men, from whom, so far as appears, an honest, intelligent, impartial jury may be selected. In criminal cases, especially, it is all-important that all legal safeguards provided by the Legislature of the state, if we are in the state courts, or by acts of Congress, if we are in the United States courts, be observed. The jury system has the approval of all just-minded men, and will continue to have if it is properly administered. The Constitution provides that:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed."

In 24 Cyc. 212, it is said, citing authority:

"The jury commissioners appointed to make the selection cannot delegate that duty to any other person, but must themselves make the selection, and they cannot, by subsequently ratifying a selection made by some other person, render the selection valid." State v. Newhouse, 29 La. Ann. 824; Klemmer v. Mt. Penn Gravity R. Co., 163 Pa. 521, 30 Atl. 274.

In Klemmer v. Mount Penn Gravity R. R. Co., 163 Pa. 521, 530, 30 Atl. 274, in which state the mode of preparing jury lists and drawing and selecting jurors and panels of jurors is quite similar to that prescribed by the United States statutes quoted and referred to, the court held:

"The jury commissioners and the judge, in alternately selecting names from the whole qualified electors of the county, may use lists made up by themselves of persons whom they deem sober, intelligent, and judicious, although the information upon which their judgment is based is obtained from others."

The court in its opinion, after stating generally the duty of the jury commissioner and the difficulty of selecting names, said:

"There is not probably, in the county, a single person qualified from his own knowledge to do this. His ability to select must, in large degree, come from information derived from others. That the members of the board made private lists, prepared by themselves beforehand, of 'sober, intelligent and judicious persons,' proves nothing more than that they sought, by inquiry, to qualify themselves for a proper performance of their duty. If they had taken up the lists of the voters in the different districts, and at once made selections from nearly 30,000 names thereon, unless they were men thoroughly acquainted with the voters of every precinct, and of phenomenal memory, they would have been wholly incapable of performing the duty as the law enjoined. If they filled the wheel from lists prepared by others, no matter by whom, it was a gross violation of duty. But if they made up lists of sober, intelligent, and judicious persons themselves, on their own judgment, although on information obtained from others, this was the only way, in very many cases, that they could intelligently perform their duty. * * * If the fact were clear that this jury wheel had been filled by selections made by political and personal friends of the board, we would not hesitate a minute in sustaining the motion to quash, and in reversing the judgment. We would do this, even though as to irregularities of less gravity appellant might be treated as having waived them. One of this character no consent or waiver of parties could cure; it effectually undermines the foundation of the administration of justice. That sworn officers, intrusted with the performance of the highest duty, one on which hinges the life, liberty, and property of the citizen, should, to any extent, surrender their functions to personal and political friends, as stated by Judge Endlich, could not be tolerated for a moment in any court, even though the parties affected by it were willing to condone the wrong."

In Hewitt v. Gage, 71 Mich. 287, 39 N. W. 56, the court held:

"The selection of the jury, secured to litigants by our Constitution, is of first importance to parties, and they have a right to have such jury constituted in substantial conformity with the law as established; and where a departure has occurred, and the positive provisions enacted to * * * guard the right of trial by jury have been violated or disregarded, there is no warrant in our jurisprudence for treating the deviations as harmless irregularities."

In 12 Cyc. of Pl. & Prac. 291, it is said:

"The usual mode of procuring the names of persons eligible to jury duty is through various municipal officers and boards, whose duties, in that respect, are defined by statutes with which there should be at least a substantial compliance, though, as previously stated, slight irregularities or informalities in their conduct or proceedings, as failure to make return of the list of names from a particular locality, or to comply strictly with the requirement respecting the preparation of the list, will not necessarily invalidate it."

In U. S. v. Collins, 1 Woods (U. S.) 499, Fed. Cas. No. 14,837, it was held:

"A rule of court requiring the names of jurymen to be selected by a board of officers is substantially complied with by partially listing the names of persons furnished by a reputable citizen of a distant county within the district, on an application by one of the officers for a list of the names of proper persons residing in his vicinity."

In 24 Cyc. of Law and Procedure, 217, it is stated, citing numerous authorities:

"The statutory provisions with regard to making up the jury list are ordinarily held to be merely directory, and errors and irregularities in failing to comply strictly with their provisions, which are not prejudicial to the parties,

do not invalidate the list, or furnish any ground for challenging the array; but a substantial compliance with the law is necessary, and a disregard of the material provisions which make up the essential features of the system, and are designed to secure and preserve a fair and impartial trial, is not a mere irregularity, and is ground for challenging the array, even though it does not affirmatively appear that any injury has resulted therefrom."

From the authorities it is clear that the question here is whether it is plain that these defendants can suffer no injury or prejudice through the irregularity pointed out in the selection of the names to go in the jury box, and which were placed therein and from which this panel challenged was drawn, in case such defendants are compelled to go to trial before a jury of 12 men drawn and made up from such panel. It is not enough that the defendants may not be prejudiced thereby, but it must appear that they cannot be. Each juror called will be subjected to a rigorous examination as to his qualifications, opinions, bias, if any, etc.; but, after all this is done, even if no legal objection is found which disqualifies the juror, and after 12 such men are found, there remains to the defendants the right to peremptorily challenge 10 of the jurors drawn from the panel and found legally qualified to serve. For such challenges the defendants are not required to give any reason whatever. Would not the panel have been more equally distributed throughout the towns of Onondaga county and the wards of the city of Syracuse, and would not the liability, if any, to have men affected by passion, prejudice, tendencies to favor the prosecution, bias, etc., men not free from objection, on the jury as finally selected, be lessened, or minimized, had the copying from the petit jury list and the addition of the 108 names, which involved, in effect, a selection, been done at some place other than the office of the assistant United States attorney and free from any participation by him? Who can say with any certainty?

But behind and underlying all is the general principle, universally recognized, that the courts cannot justly or safely permit or sanction any participation by unauthorized persons, or by parties litigant, or their representatives, in the selection of names of persons to go on the jury lists, or in the jury boxes, from which panels for service are to be drawn, no matter how high-minded and conscientious the purpose of the party so participating, and no matter that his motive is purely to promote fair trials and just verdicts and the due administration of the law. The law has specified who is to make the selection of jurors, and it is unsafe and unwise to permit a departure from its provisions. Courts cannot stop to inquire in each case whether such participation, however indirect, has been harmful in a given case. The only safe rule is to prohibit and condemn it absolutely. And the government itself, as a party and representing all the people and their interests in prosecuting offenders and alleged offenders, is no exception to the rule. Only the clerk and commissioner of jurors are permitted by law to participate in the actual selection of names. When a panel is summoned, the jury for a particular case is drawn and selected by both parties under the eye of the court, and talesmen are selected by the marshal when necessary.

In State v. Newhouse, 29 La. Ann. 824, it appears that the statute of Louisiana provides for two jury commissioners, who are to receive a salary of $500 each per annum, and:

"They shall select impartially from the citizens of the parish of Orleans having the qualifications requisite to register as voters the names of not less than five hundred good and competent men, a list of whose names shall be made out and returned certified under their hands to the clerk of the superior criminal court, to be filed by him in his office; said list shall be kept complete and supplemented from time to time. Each of the names on said list, and all supplemental lists shall be written out by said clerk on a separate slip of paper, together with the place of residence of each person, and the slips of paper on which shall be written the names and places of residence of persons on the said list, shall be placed in a box or wheel to be kept for that purpose by the sheriff of the court."

The statute then provides for the drawing of panels to serve at terms of the court from such wheel. It appeared and was found that:

"One Lionel Adams at the request of the commissioners of jurors forwarded them a list of 200 or 300 names, which such commissioners looked over and approved, and the names of such persons then went in the box or wheel."

The court says:

"The district judge was of opinion that this was a substantial compliance with the statute, and that the commissioners, *by approving*, made the list their own selection. We do not think so. To so hold would be equivalent to affirming that the commissioners could act by proxy or deputy in the performance of their very important and grave duties. Nothing in the statute justifies such an inference. Much less could their functions be performed by a person like Mr. Adams, who was, as it were, a mere bystander, under none of the obligations of an officer, or even of an agent or proxy. It is manifest that there would and could be no security for the accused against packed juries, if they be selected in this loose way. The intent of the law was that two responsible and competent men should, under the appointment of the Governor and under the sanction of an oath, select from all the voters of the parish a list of persons to serve as jurors; that they should inspect and select from the names of all the voters, and not simply inspect and approve what might be a 'cut and dried' list of 200 or 300 names. Such a system is too liable to abuse to be tolerated or sanctioned by courts charged with the lives and liberties of the citizens."

It has been suggested that under the evidence the list supplied to Mr. Crounse by the assistant United States attorney may have contained several thousand names copied from the petit jury list of the county of Onondaga as prepared by the commissioner of that county for use in the state courts. But, if it did, it was still incomplete, and in effect a list made by the assistant United States attorney, to which 108 names were added, and if Mr. Crounse then selected a list from that list it was still (except for the very few additions made by the clerk and one or two other persons) a list prepared by the assistant United States attorney. And when the clerk selected and approved 200 (or about that number) names from such smaller list so selected by Mr. Crounse, that 200 remained a part of the list copied and added to in the first instance by the assistant United States attorney. In any event some five-sixths of the names in the box from which the panel was drawn were a list taken by the assistant United States attorney from the greater body of qualified jurors of the county of Onondaga, and from which body he had in fact, but without any bad intent, ex-

cluded at least 2,000 names. No exclusion or partial or biased list was intended, and it is the duty of the court to say that the evidence fails to disclose that the name of a single improper person to serve as a juror (aside from one, possibly two, not taxpayers by self or wife) is found on the list. The jurors whose names are in the box are intelligent and sober men of high character and standing, an exceptionally fine body of jurors. This fact is not challenged or questioned.

It is not intended to hold or intimate, and is not held, that the clerk and commissioner of jurors may not prepare proposed lists of names, and then make careful investigation and inquiry as to the character and fitness of the persons whose names are in mind. This is a question of law, the facts stated having been proved, and not having been disputed, and this court has no discretion in the matter.

The challenge as originally made and as subsequently amended cannot be sustained, except in the one particular, that the list in the box was taken mainly from a list copied by the assistant United States attorney from the petit jury list of the county of Onondaga, and which it may be assumed contained a large part of such names, but still a part only, and to which the assistant United States attorney had added about 100 names not previously on any jury list. These facts, for the reasons stated as a legal proposition and matter of law, require that the panel in attendance here be discharged, the slips and names in the jury box removed and destroyed, a new list made up, selected by the clerk and commissioner of jurors and placed therein, from which a new panel may be drawn on due notice for service at this term of court, which will be in recess until Tuesday, August 31, 1915, at 10 o'clock a. m., when the trial of this case will proceed.

It is so ordered.

GREAT ATLANTIC & PACIFIC TEA CO. v. CREAM OF WHEAT CO.

(District Court, S. D. New York. July 20, 1915.)

No. 12-224.

1. MONOPOLIES ⊜17—"RESTRAINT OF TRADE"—INJUNCTION.

The refusal of the manufacturer of an unpatented food product, which is not a necessity of life or even a staple article of trade, who has a monopoly only because of the trade-name under which it is sold, it being open to any one else to make and sell the same article under any other name which does not infringe such trade-name, to sell to a dealer who resells at retail at less than the regular price charged by other retailers, and a price which gives to the retailer no profit, while to an extent it lessens competition, is not an unreasonable "restraint of trade," nor is it unlawful under the Clayton Act (Act Oct. 15, 1914, c. 323, § 2, 38 Stat. 730) as a price discrimination, the effect of which "may be to substantially lessen competition or tend to create a monopoly, "so as to entitle the would-be purchaser to relief by injunction under section 16 of the act; but, on the contrary, the effect of such an injunction would be to restrain trade by making it impossible for competitors to handle the article, except at a loss, and to give such purchaser a monopoly.

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

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

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2. MONOPOLIES ⊂⊃17—INTERSTATE COMMERCE LAW—CONSTRUCTION OF CLAYTON ACT.
Construing together the provisions of section 2 of the Clayton Act the last proviso in effect authorizes persons engaged in selling goods in interstate commerce to select their own bona fide customers, provided the effect of such selection is not to substantially and unreasonably restrain trade; and the refusal of a manufacturer to sell its product to a dealer, who avowedly uses it in a manner which injures and lessens the trade of the maker, cannot be said to be an unreasonable restraint of trade, nor a violation of the statute.
[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 13; Dec. Dig. ⊂⊃17.]

3. MONOPOLIES ⊂⊃24—INTERSTATE COMMERCE—STATUTORY REGULATION.
Congress is without constitutional power to authorize the courts by injunction to compel a person, selling goods in interstate commerce, and affected by no public duty, to sell his goods to a particular customer.
[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 17; Dec. Dig. ⊂⊃24.]

4. MONOPOLIES ⊂⊃17—INTERFERENCE WITH COMMERCE—INJUNCTION.
The sending out by a manufacturer of circulars to wholesale dealers, who are its customers, requesting them not to sell its product to a particular dealer, on the ground that he is cutting retail prices, is within its legal rights, and cannot be enjoined.
[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 13; Dec. Dig. ⊂⊃17.]

5. WORDS AND PHRASES—"MANUFACTURING."
"Manufacturing" is a word of such wide and loose meaning as to include the preparation by art of any finished product from raw material.

6. WORDS AND PHRASES—"MIDDLINGS."
"Middlings" are the coarse flour and fine bran separated by bolting from fine flour and coarse bran.
[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Middlings.]

In Equity. Suit by the Great Atlantic & Pacific Tea Company against the Cream of Wheat Company. On motion for preliminary injunction. Denied.

Martin Conboy, of New York City, for the motion.
Jos. J. Baker, of New York City, and Rome G. Brown, of Minneapolis, Minn., opposed.

HOUGH, District Judge. Although the application is for relief pendente lite only, all the essential facts are set forth with clearness and without contradiction upon any material point. The novelty of the litigation is such that a careful statement of what these facts are is more than excusable, for upon them will depend conclusions of law toward whose final settlement the action of this court is but a preliminary.

Plaintiff is a corporation of New Jersey, defendant of North Dakota, and has appeared herein protesting against the jurisdiction. This point has been resolved against defendant in other proceedings and by another judge. Following that decision, and without expressing any opinion thereupon, it is held, for the sake of the record, that jurisdic-

tion exists, and that defendant was lawfully obliged to respond to process.

[5] The business of defendant is what is commonly called the "manufacture" and sale of the food product known as "Cream of Wheat." "Manufacturing" is a word of such wide and loose meaning as to include the preparation by art of any finished product from raw material; but more accurately descriptive words for defendant's business are selection and cleansing of the by-product of a true manufacture, viz., flour making.

[6] "Middlings" are the coarse flour and fine bran separated by bolting from fine flour and coarse bran. These middlings defendant "selects," selection depending upon the grade and kind of wheat used by the miller, and then purifies or cleanses such selection. The result is Cream of Wheat, which is no more than purified middlings. It is not patented, any one can make it who can get middlings, and the amount of that material annually required by the business of defendant is less than 1 per cent. of the amount thereof produced in the same period by the millers of the United States.

Obviously defendant does not and cannot control, nor indeed does it seek to control or monopolize, the production of, or market for, middlings. It naturally wishes to buy its raw material wherever it can procure the same easiest, best, and cheapest. Yet it has a monopoly—a perfectly lawful monopoly—in the trade-name "Cream of Wheat." By the law of trade-mark and unfair competition, no one but defendant can sell, under the name chosen by defendant, what any one can make and sell under another and noninfringing label. The style and dress, name, and package of defendant have been extensively and successfully advertised for 18 years, until the public has grown accustomed to ask for and get something good to eat under the name "Cream of Wheat"; and an identical substance under another name would have to travel the same long, hazardous, and expensive path in order to get or create a market.

It is possible to assert that the (say) 1 per cent. of middlings, which, when selected and purified, is called Cream of Wheat, is for legal purposes, at all events, a different commodity, a separate thing or entity, from all other middlings. The point is mere dialectic, for all that makes the difference or separates the things is a name, and the substantial truth remains that defendant's business consists in lawfully monopolizing a trade-name, and impressing the public with the purity, reliability, and uniformity of the very common substance it sells under that cleverly chosen name. The selection of the name was quite as important as the selection of the middlings, when business began, and, after so much advertising, the name or brand is by long odds the most important element in the business.

Plaintiff is the founder and proprietor of an unusually large number of stores widely scattered through the Middle and some of the Eastern states. If not grocery stores in the common acceptance of that phrase, they sell many, if not most, "groceries." Out of more than 1,000 establishments owned by plaintiff, a large proportion are known as "Economy Stores," which are places having but a single attendant and

no telephone, giving no credit, making no deliveries, and closed whenever the manager leaves for meals or sleep. The maintenance charge, or overhead expense, of such stores is plainly smaller than that of groceries managed in the usual way; and at them plaintiff seeks to compensate for lack of conveniences by cheapness of price. Such a storekeeper as plaintiff obviously has under his own hand as many outlets or places for reaching the consumer as some jobbers or wholesalers have customers. He can buy for his own convenience, and in order to sell over his own counters, in quantities as large as does many a jobber who would refuse retail trade. In short, the plaintiff is in buying a wholesaler (on perhaps no great scale), and in selling is a very large retailer.

For purposes of this discussion, relations between plaintiff and defendant begin in 1913. In January of that year defendant published a new scheme of sales, revoking all existing plans, methods, or agreements. The action was timely, if not caused by legal advice based on the price regulation cases, of which the dissent in Henry v. Dick Co., 224 U. S. 1, 32 Sup. Ct. 364, 56 L. Ed. 645, Ann. Cas. 1913D, 880, was the premonitory rumble, and Victor Talking Machine Co. v. Straus (D. C.) 222 Fed. 524, is the last echo.[1]

By the printed scheme just mentioned the Cream of Wheat Company held itself out as refusing to sell to "consumers, retailers, or chain or department stores." It reserved the right to refuse to sell to anybody who failed to comply with any request made, and deemed by defendant beneficial to itself, the "trade at large," or the "interests of the consumer," and announced as its policy that it would "confine our sales exclusively to wholesalers." Sales, however, once made, were absolute, and the transaction closed. Sale was to imply no agreement to maintain or fix any price on a resale; nevertheless defendant *requested* that retail prices be kept at the level recommended by it.

This request, taken in conjunction with the reserved right to cease selling to any one who did not comply with requests from the same source, was in effect saying plainly enough: Keep up the retail price, or we will stop supplying you, if we think such stoppage profitable. I do not suppose that this sales scheme was a contract, or anything enforceable against defendant; but it serves to show a professed state of mind.

Notwithstanding, however, this published sales plan, defendant, well knowing that plaintiff sold directly to the consumer, sold Cream of Wheat to plaintiff at wholesale rates and in large quantities, upon condition that, in making sales over the counter, no smaller price should be charged than the small retailer had to ask in order to get a fair profit, viz., not less than 14 cents the package.[2] In or about January, 1915,

[1] These cases resting on sales of patented articles are cited, merely to emphasize my opinion that restrictions in use and limitations on sale are essentially the same thing, if title passes to the *thing* limited or restricted. The dissent in the Henry Case loudly prophesied to the profession what has since become history.

[2] The effect of defendant's price list was and is this: The Cream of Wheat Company sold to wholesalers at $4.10 per case of 36 packages, and in car load lots at $3.95 per case. The wholesaler was "requested" to sell to the retailer

plaintiff refused to observe this agreement or request, and openly sold Cream of Wheat at its "Economy Stores" for 12 cents per package.

It is fairly inferable from this history that the published sale plan of 1913 was incomplete or inaccurate. It should have added:

"We reserve the right to sell at wholesale rates and in car load lots to *anybody* who will not cut the consumer's price below 14 cents."

Defendant's selection, acceptance, or rejection of a customer did not depend upon the wholesale or retail character of his business, but largely, if not wholly, upon whether he could be depended on to maintain "requested" rates. After some talk and writing, plaintiff remained contumacious, and refused to maintain prices, whereupon defendant refused and still refuses to sell Cream of Wheat to plaintiff at any price or in any quantity whatever. The defendant also sent out circulars to the jobbing trade pointing out the "cut rate" practices of plaintiff, and asking the recipients to see to it "that no quantity [of Cream of Wheat] at any price shall reach directly or indirectly the [plaintiffs] to enable them to continue their present menace to the legitimate trade."

In result, the situation when suit was brought was that plaintiff could not make any money on Cream of Wheat sold at 12 cents, because it could not get car-load rates; but no great success attended defendant's efforts to prevent jobbers selling to plaintiff. There were and are too many men quite willing to let the Atlantic & Pacific Company lose some money, as long as they made a little. This condition of affairs still continues, and the main object of this action and of the present application is to compel defendant to fill plaintiff's orders for Cream of Wheat in car load lots at $3.95 per case. Of course the bill does not put the matter so baldly,[3] but if the law does not warrant an order productive of the result stated this action is of little worth.

It is not worth while to consider whether the facts above shown produce a case under the Sherman Act (Act July 2, 1890, c. 647, 26 Stat. 209). If they do, the matter is not much advanced, because under that statute the plaintiff could not bring this action in equity; and, if

at $4.50 per case, a figure which enables the ordinary groceryman to get a moderate profit on selling at 14 cents the package. At 12 cents per package, loss is almost certain, unless the goods are obtained at $3.95 the case.

[3] The prayers of the bill are as follows:

"1. That it be adjudged that the said plan or system of sales and said system of embargo are illegal, and that the defendant herein has violated sections 1 and 2 of the act of Congress of July 2, 1890, entitled 'An act to protect trade and commerce against unlawful restraints and monopolies' [Comp. St. 1913, §§ 8820, 8821], and section 2 of the act of Congress of October 15, 1914, entitled 'An act to supplement existing laws against unlawful restraints and monopolies, and for other purposes.'

"2. That defendant be enjoined and prohibited from enforcing and carrying *out said plan or system of sales*, or from enforcing or attempting to enforce said embargo by means of said boycotting, blacklisting, or otherwise, *and from thereby* in any manner or to any extent *cutting off the plaintiff's supply of said article 'Cream of Wheat'* within the jurisdiction of the United States until such time as your honors shall appoint and direct and order herein, and that upon such hearing the writ herein prayed for be made and confirmed until the final determination of this suit, and that thereupon said injunction may be made perpetual."

they do not, plaintiff just as firmly asserts its right to relief under the Clayton Act (Act Oct. 15, 1914, c. 323, 38 Stat. 730). I shall therefore follow counsel (none of whom has discussed the applicability of the Sherman Act) and say no more about it.

[1] It is urged that defendant's professed and published scheme of sales, plus its practice thereunder, create an actual monopoly of, and do lessen competition in, Cream of Wheat; that this result is in itself unlawful, and is produced by means which are specifically prohibited by section 2 of the Clayton Act, viz., price discriminations not justified by any of the exceptions of that section. As the next and final step in justification of its procedure, plaintiff asserts itself to be threatened with loss or damage through the above-stated violations of section 2, and therefore seeks an injunction under section 16. The text of these sections is given in a footnote,[4] and I shall hereafter assume (but not find) that, if defendant has violated section 2, plaintiff has good right to use section 16.

It will show my interpretation of section 2, and emphasize any errors of construction, to pick out, sometimes paraphrase, and arrange in order the words of that section deemed applicable to the case in hand, thus: It is unlawful for a person engaged in commerce,[5] and in the course of commerce, to discriminate in price between purchasers of

[4] Section 2. "It shall be *unlawful for any person engaged in commerce, in the course of such commerce*, either directly or indirectly to *discriminate* in price *between different purchasers of commodities*, which commodities are sold for use, consumption, or resale within the United States or any territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, *where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce:* Provided, that *nothing* herein contained *shall prevent discrimination* in price between purchasers of commodities on account of differences *in* the grade, quality or *quantity* of the commodity sold, or that makes only due allowance for difference in the cost of selling or transportation, or discrimination in price in the same or different communities made in good faith to meet competition: And provided further, that *nothing* herein contained *shall prevent persons engaged in selling goods*, wares, or merchandise in commerce from *selecting their own customers in bona fide transactions and not in restraint of trade.*"

Section 16. "Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the anti-trust laws, including sections two, three, seven and eight of this act, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: Provided, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission."

[5] Commerce can only mean (as the context shows) interstate or foreign commerce.

commodities,[6] whenever discrimination may substantially lessen competition, or tend to create a monopoly in any line of commerce;[7] but there may be price discrimination on account of quantity of commodity sold, and persons selling goods may still select their own customers in bona fide transactions,[8] and not in restraint of trade.

Plaintiff's syllogisms in support of the demand for relief are simple, thus: (1) Defendant has a monopoly in Cream of Wheat; (2) through such monopoly it fixes the resale price of that article: Therefore (3) it prevents competition in Cream of Wheat and violates the body of section 2. Again: (1) Preventing competition is restraint of trade; (2) defendant does prevent competition: Therefore (3) it restrains trade and is not within the exception of section 2. If the premises of the above logical formulæ are admitted in the sense and to the extent plaintiff asserts or assumes as proper, the conclusions flow as matter of course. A successful answer must deny or avoid the premises, or ascribe to words a scope and meaning at variance with plaintiff's usage.

Taking up seriatim the parts of the above propositions: It is true that defendant has a monopoly in Cream of Wheat; but, as heretofore stated, it is a lawful monopoly, ultimately resting on the plain truth that there can be nothing anywhere in the United States lawfully called Cream of Wheat without defendant's consent and approbation. In that substance (if legally it is a distinct substance) defendant has the monopoly of a creator, something which is not and never has been within the prohibition of any law, anti-trust or otherwise. On the contrary, that monopoly is encouraged by patent, trade-mark, and copyright statutes, and the rules of unfair competition. Therefore the implication of plaintiff's premise, that there is something inherently wrong in defendant's monopoly, is false and misleading.

The minor premise, that defendant *fixes* the resale price, is not, in my opinion, true in point of fact. It would like to fix that price, so far as its minimum is concerned; but *fixing* connotes enforcement. That it cannot accomplish, and since 1913 at all events the attempt has been abandoned. Let it be assumed that defendant declines business with all who refuse to maintain prices. If such refusal affected a necessity of life, or even a staple article of trade, the matter might be serious, and history might be appealed to for instances of statutory punishment —e. g., the engrossing acts. But mere abstention from dealing cannot per se be price fixing, because the price is not made to depend upon any contract or agreement even thought by the parties to be enforceable. To call defendant's acts price fixing is inaccurate, and evades obvious legal questions, viz., whether defendant has the right to decline business, and whether it is anybody's business why the business is declined.

[6] That is, "commodities" sold by the "person" first named.

[7] "Line of commerce." This vulgarism is not a term of art, but it must mean trading or dealing in the commodities (or some of them) first above spoken of.

[8] It would have been simpler to say that vendors may select their own bona fide customers. I think the intent is to exclude from the exception pretended sales, e. g., consignments to undisclosed agents, and perhaps sales coupled with an attempted condition subsequent.

Therefore, because I cannot accept the meaning imputed to the words used by plaintiff, it is not found necessary to reach the conclusion of the first proposition.

Concerning the second syllogism: It must be admitted that there is abundant authority for the general proposition that preventing competition is restraint of trade; but it does not follow that it is unlawful either to prevent any and every species of competition or to restrain trade in any and every degree. The only competition prevented or sought to be prevented by defendant's acts is that of Cream of Wheat against itself; the only trade restrained is the commercial warfare of a large buyer against small ones, or that of a merchant who for advertising purposes may sell an article at a loss, in order to get customers at his shop, and then persuade them to buy other things at a compensating profit. That competition, as encouraged by statutes and decisions, does not include such practices, has been sufficiently shown (with ample citations) in Fisher Flouring Mills Co. v. Swanson, 76 Wash. 649, 137 Pac. 144, 51 L. R. A. (N. S.) 522.

It is further obvious that, when plaintiff premises that preventing competition is restraining trade, it is assumed that the resultant restraint is *unreasonable;* for there is nothing in the Clayton Act to compel or induce courts to hold that the trade restraint referred to by this statute differs in kind, quality, or degree from that now held to be meant by the Sherman Act.

Because, therefore, I am not persuaded that the acts of defendant have produced, or tend to produce, diminution of any competition favored by reason or law, or have restrained trade unreasonably (if at all) I do not find it necessary to accede to the second syllogism.

Mere doubt of the propositions of plaintiff would require refusal of preliminary injunction; but I may more distinctly state my reasons for thinking that even definite, positive, and admitted price regulation is not unreasonable restraint of trade in the present instance.[9]

Cream of Wheat is not a necessity; it is not even a staple article of commerce. If it be a commodity at all, the commodity and the name are synonymous. Its continued existence depends upon defendant's ability to control the marketing of its own product. The doing of what plaintiff wishes would take from every groceryman near an "Economy Store" the last incentive to buy any Cream of Wheat, and collectively such grocery keepers are more important to the public and the defendant than is the plaintiff. If injunction were granted,

[9] There is surely a very obvious difference between enforcing by legal process an agreement to regulate prices and regulating prices by legal process. The agreement may be, and usually is, unenforceable. Bauer v. O'Donnell, 229 U. S. 1, 33 Sup. Ct. 616, 57 L. Ed. 1041, 50 L. R. A. (N. S.) 1185, Ann. Cas. 1915A, 150, gives the reasons. But it is not necessarily unlawful for a man to do voluntarily what he cannot be compelled to do. It follows, therefore, that even under the Clayton Act price regulation accomplished without undue or unreasonable trade restraint, and by a judicious selection of customers, may be lawful. It *seems* to be argued for plaintiff that, because defendant could not enforce a price agreement, it cannot by any method accomplish, even partially, the same result. It is an amusing commentary on this doctrine that the main object of this suit is to have this court *compel* delivery of Cream of Wheat at $3.95 per case, which is pro tanto price fixing.

defendant and many retailers would be injured, and the microscopic benefit to a small portion of the public would last only until plaintiff was relieved from the competition of the 14 cent grocers, when it, too, would charge what the business would normally and naturally bear. In short, it is plaintiff, and not defendant, that pursues methods whose hardship and injustice have often been judicially commented upon. U. S. v. Freight Assocn., 166 U. S. 321, 17 Sup. Ct. 540, 41 L. Ed. 1007.

In my judgment the prevention or limitation of practices such as plaintiff's (so far as consistent with statute law) is the reverse of unreasonable.

There remain two legal inquiries (previously suggested) to which this motion justifies answers, which answers go to the root of plaintiff's case. The questions are: (1) Does section 2 of the Clayton Act apply to the defendant at all? and (2) Is it within the power of Congress to compel defendant to do what plaintiff demands?

[2] Section 2 plainly identifies the lessening of competition with restrain of trade. (Cf. the body of the section with the last exception.) But price discrimination is only forbidden when it "substantially" lessens competition. Construing the whole section together, the last exception reads in effect that a "vendor may select his own bona fide customers providing the effect of such selection is not to *substantially* and *unreasonably* restrain trade." How it can be called substantial and unreasonable restraint of trade to refuse to deal with a man who avowedly is to use his dealing to injure the vendor, when said vendor makes and sells only such an advertisement begotten article as Cream of Wheat, whose fancy name needs the nursing of carefully handled sales to maintain an output of trifling moment in the food market, is beyond my comprehension.

[3] Turning to the second question: If it be granted that section 2 does apply, and that defendant's selection of customers results in unlawful restraint of trade, can it be possible that such person's evil ways are to be amended, not by stopping his business, but by adding to his list of customers one or many persons chosen by Congress? Numerous individuals and corporations have been enjoined from restraining the trade of other people, no matter how flourishing the offenders' trade might be, nor how greatly the general volume of trade had increased during the period of restraint. But never before has it been urged that, if J. S. made enough of anything to supply both Doe and Roe, and sold it all to Doe, refusing even to bargain with Roe, for any reason or no reason, such conduct gave Roe a cause of action.[10] If Congress has sought to give him one, the gift is invalid, because the statute takes from one person for the private use of another the first person's private property.

[10] The following decisions recognize the inherent right of refusing business, but bear no relation to the facts herein: In re Grice (C. C.) 79 Fed. 627; Greater New York, etc., Co. v. Biograph Co., 203 Fed. 39, 121 C. C. A. 375; Adair v. United States, 208 U. S. 161, 28 Sup. Ct. 277, 52 L. Ed. 436, 13 Ann Cas. 764; Standard Oil Co. v. United States, 221 U. S. 56, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734.

Using the word "sell" or "sale" conceals the issue. If a man prefers to keep what he has, an offer of money to salve the taking thereof does not prevent such taking from being confiscation. The Cream of Wheat Company is a purely private concern, except as regulated by its creating law. It is an ordinary merchant, whose business is affected by no public use whatever. The statute as construed by plaintiff descends upon that private merchant, and commands him to make a contract by which he transfers his property for a price, but against his will. The contract and the price are legally mere surplusage; the constitutional violation lies in the compulsion, whereby he is deprived of his property for a private purpose. If defendant's actual scheme of interstate business is unlawful, the United States certainly, and now perhaps an individual plaintiff, can put it out of business; but neither the nation nor any individual can take away its property, with or without compensation, for the private use of any one.[11]

[4] There remains one pendant to the main case. Plaintiff complains of defendant's circulars to the trade as an embargo or boycott. There is no proof that defendant refused or threatened to refuse to sell to any one who sold to plaintiff; it did request its chosen customers not to deal with plaintiff.

If it had good right to refuse dealings itself with plaintiff, and without malice asked other people to do the same thing, so far only as Cream of Wheat was concerned, defendant was within its rights. "Embargo" is a word without meaning in private law; as to "boycott" I have stated my views at some length in Gill Engraving Co. v. Doerr (D. C.) 214 Fed. 111. Limiting the discussion to goods of defendant's own making, the opinion in U. S. v. Keystone Watch Co. (D. C.) 218 Fed. 502, does not bear out plaintiff's contention. See, also, Montgomery Ward & Co. v. South Dakota, etc., Co. (C. C.) 150 Fed. 413.

The motion is denied in all its parts.

NOTE.—Aided by counsel, I have examined all the public documents I could find relative to the Clayton Act, hoping to find something of assistance in interpreting the statute. The point raised by this motion was not, so far as I know, discussed or considered.

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11 It is an interesting speculation whether national price regulation, embracing compulsory sales, could not be reached by a system of federal licenses as a prerequisite for interstate business. Semble that submission to such prospective regulatory orders might be exacted as the price of license.

PRICE v. WALLACE.

(District Court, D. Oregon. July 6, 1915.)

No. 6511.

1. SPECIFIC PERFORMANCE ⟸86, 121—PAROL CONTRACT TO MAKE WILLS—ENFORCEMENT—EVIDENCE.

A parol agreement to make a will, if legally enforceable, will not be enforced, unless the evidence shows a reasonably definite and certain contract, established by clear, full, and irrefragable evidence, and performed to such an extent and in such manner that the beneficiary cannot be properly compensated in damages.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 223, 224, 387–395; Dec. Dig. ⟸86, 121.]

2. WILLS ⟸58—CONTRACT TO MAKE WILLS—EVIDENCE—SUFFICIENCY.

Evidence *held* not to establish a contract to make a will by one in favor of his stepdaughter and her children.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 164, 165; Dec. Dig. ⟸58.]

3. TRUSTS ⟸44—PAROL TRUSTS—EVIDENCE—SUFFICIENCY.

Evidence *held* not to establish a trust, binding the widow of testator to hold a part of testator's property in trust for testator's stepdaughter and her children.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 66–68; Dec. Dig. ⟸44.]

In Equity. Suit by Elizabeth M. Price against Marie Dewey Wallace. Decree of dismissal.

Peter B. Smith was, on July 12, 1893, married to Mrs. Lillie D. Ailes; she having been divorced from a former husband. The plaintiff is the daughter of Mrs. Ailes, and was at the time about the age of 14 years. Plaintiff lived with her mother and stepfather until her marriage with Donald MacLean, February 20, 1899. This marriage took place in London, England; the plaintiff having gone abroad on a trip with her own father, Lyman Ailes, and at his expense. MacLean was a surgeon in the United States Army. The issue of the marriage was two sons. Mrs. Smith died June 12, 1900. At that time the plaintiff and her husband, MacLean, came to live with Smith. MacLean continued the relations for a short time only, when he left, and plaintiff and her sons continued to live with Smith until he was married to the defendant, and for a time thereafter. This marriage was consummated May 14, 1902, at Fargo, N. D. On the day of his marriage to defendant, Smith made and published his last will and testament, whereby he made provision for plaintiff in the sum of $5,000, referring to her as his adopted daughter, and for her children in the further sum of $5,000, constituting plaintiff and his wife trustees to dispense the fund for their use and benefit. The wife was handed a copy of this will on the day of the marriage and shortly thereafter.

The plaintiff was divorced from MacLean January 9, 1902, the suit therefor having been instituted in the fall of 1901. In August, 1905, at San Jose, Cal., plaintiff was married to Edwin J. Price, who died March 3, 1914. Soon after the marriage Price legally adopted the two sons of plaintiff. From the time of the marriage plaintiff continued to make her home in California with her children, until after the death of Peter B. Smith, which occurred August 16, 1907, when she moved again to Minneapolis, and was a resident of Minnesota at the time of the commencement of this suit. Prior to Smith's decease, to wit, on January 10, 1906, he made and published a second will, revoking all former wills, wherein and whereby he made no mention of plaintiff and her two sons, and gave his entire estate to his wife, the defendant herein, naming her as his sole executrix. This will was caused to be probated by the defend-

ant about August 27, 1907, and the estate was subsequently in due course settled, and the executrix discharged; the plaintiff making no claim in probate against the estate for any share thereof.

On August 14, 1908, the plaintiff instituted a suit against the defendant, in the district court within and for the county of Hennepin, state of Minnesota; the cause being stated in all material respects the same as in the present suit, and demanding like relief. To the bill of complaint the defendant interposed a demurrer, assigning the following reasons: "(1) That this court has no jurisdiction of the subject of the action. (2) That the plaintiff has not legal capacity to sue. (3) That there is a defect of parties plaintiff, in that Donald MacLean should be made a party plaintiff therein. (4) That the facts stated in said complaint do not constitute a cause of action." After full argument and hearing upon the demurrer, and due consideration, it was ordered by the court "that the said demurrer be and the same is hereby in all things sustained." Later, and in due course, it was further adjudged that the defendant recover from the plaintiff the sum of $7.50 costs and disbursements as taxed and allowed.

Now, as cause of suit, briefly stated, the plaintiff alleges that about the month of October, 1900, both before and after the departure of MacLean, Smith offered and proposed to complainant, and upon her assent agreed with her, that if she would make her home with him, and live there as his daughter, and treat and regard him as her own father, and care for him during his declining years, and assume the cares, duties, and responsibilities of the management of his household, and be the housekeeper thereof in the same manner and to the same extent as though she were his own daughter, he, the said Peter B. Smith, would care for and support the complainant and her children in the same manner as if she were his own daughter and the said children his grandchildren, and would at his death leave and will to complainant, for herself and her children, all the property that he might then own, and that complainant assented to and accepted said proposal and agreed thereto. It is further alleged that plaintiff entered upon and discharged the obligations on her part in every respect until about the month of February, 1902, when the agreement was modified. It is then further alleged that, about the month of February, 1902, Peter B. Smith, being about to contract marriage with the defendant, requested the complainant to consent that said promise and obligation, as by the terms of said agreement undertaken upon his part, be modified so as to require him (Smith) to leave and bequeath to complainant, for herself and her two children, two-thirds of the property that he might own at the time of his death—one-third for her own separate use and benefit and one-third for the use and benefit of her children—and to permit him to bequeath one-third of his estate to the defendant, to all of which the plaintiff assented, and thus by mutual consent of the parties the agreement was accordingly modified. Plaintiff thereupon asserts that she performed upon her part all the conditions of the agreement as so modified, so far as she was permitted so to perform by the said Peter B. Smith. It is then further alleged that, shortly after the probate of Smith's will, the plaintiff advised the defendant of the agreement and modified agreement existing between plaintiff and Smith at the time of his death, and that defendant then informed plaintiff that it had been understood and agreed between defendant and Smith that Smith should leave by will all of his property to the defendant, but that defendant should take and hold two-thirds of the same in trust for the use and benefit of the complainant and her two children, and that defendant should account to complainant for two-thirds of said property, and that defendant then and there promised and agreed with plaintiff that she would respect, recognize, and protect complainant's said rights and interests, and would take all the property of said estate in her own name as sole legatee and distributor thereof, but that she would so take and hold two-thirds of said property in trust, and charged and impressed with a trust in favor of complainant and her children, and would faithfully render account accordingly. The estate is a large one, and it is charged that defendant has refused to observe the obligations of the trust, although due demand has been made upon her in that behalf. The prayer demands that defendant be charged as trustee of two-thirds of the

estate for the use of plaintiff and her sons, and that she render an account, and such other and further relief as may seem equitable.

Wm. H. Hallam, of Portland, Or., for complainant.

H. V. Mercer, of Minneapolis, Minn., and Wood, Montague & Hunt, of Portland, Or., for defendant.

WOLVERTON, District Judge (after stating the facts as above). It is first urged that the suit and decree following upon the demurrer in the state court in Minnesota is a bar to the present suit. While I am strongly persuaded that the contention is sound (Lindsley v. Union Silver Star Min. Co., 115 Fed. 46, 52 C. C. A. 640), I am disposed to waive the question and determine the cause solely upon the merits of the controversy. It should be further premised that this is not a suit to disclose an adoption on the part of Peter B. Smith of the plaintiff as his child, and thus to establish her right to a child's portion of his estate as an heir by inheritance, but its theory and purpose is to specifically enforce an agreement to make a will in favor of plaintiff, as subsequently modified, and to declare a trust, with defendant, as trustee, obligated to account to the plaintiff for her use and the use of her two sons to the extent of two-thirds of the estate of decedent. To the issues thus cast in the record we must be confined, and we can determine none other.

[1] Another factor in the inquiry is that the alleged agreement to make a will, and the modification thereof, sought to be enforced, are in parol, and their sufficiency on this account is questioned. I need not stop to inquire as to this. It may be conceded, without inquiring, but without deciding, that such and kindred agreements in parol are legally sufficient to justify their enforcement, but with the qualifications, first, that they must be reasonably definite and certain; second, they must be established by clear, full, and irrefragable evidence; and, third, they must have been performed to such an extent and in such a manner that the beneficiary cannot be properly compensated in damages. Stellmacher v. Bruder et al., 89 Minn. 507, 95 N. W. 324, 99 Am. St. Rep. 609; Richardson v. Richardson, 114 Minn. 12, 130 N. W. 4; Haubrich v. Haubrich, 118 Minn. 394, 136 N. W. 1025; Robertson v. Corcoran, 125 Minn. 118, 145 N. W. 812. As to whether the trust agreement is also required to be in writing, I waive that as well.

[2] When Peter B. Smith married Mrs. Ailes, the plaintiff, being her daughter, became a member of his household, as she naturally would. Smith regarded her as a member of his family. He was fond of her, treated her with parental regard, and cared for her very much, I assume, as he would have cared for his own child. He called her "Bess," as her mother and associates did, and allowed her to take his name, that of Smith, by which she seems generally to have been known. But when she went abroad with her father she resumed the name of Ailes, and traveled with him under that name. It was on this trip that she was married to Donald MacLean, in London. She was then about the age of 20 years, and says she obtained the consent of her mother and stepfather to the marriage. She returned with her husband soon to the United States and accompanied him as he was transferred from

post to post, but later returned with him to the home of Smith in Minneapolis. The plaintiff affirms that Smith had previously urged her husband to resign from the army, and that he came to Minneapolis, so that he might engage in private practice at that place. The immediate cause, however, for their coming to Minneapolis was the illness of plaintiff's mother, and before coming MacLean resigned from the army. After the death of her mother, which occurred on June 12, 1900, the day of her arrival in Minneapolis, it was arranged that plaintiff and her husband should live with Smith, that plaintiff should keep house for him, and that her husband should engage in the practice of medicine. This arrangement continued until October of that year, when trouble arose, which resulted in Dr. MacLean leaving, not only the home of Smith, but the city of Minneapolis, and thence continuing absent therefrom. Plaintiff asserts that her stepfather would not allow her, with her child, to go with her husband. From that time on the plaintiff remained, with her child and one subsequently born, with her stepfather until after his marriage with the present defendant. After Dr. MacLean had left, plaintiff relates that her stepfather insisted on her remaining with him as his daughter and keeping house for him, and that he said to her that she ought to be glad that she was "rid of a man like that," and that he would never be able to take care of the baby and herself as he should do, and that "the sooner I would consent to leave the doctor"—using the language of plaintiff as a witness in her own behalf—"divorce him, make up my mind to give him up entirely, the better it would be for all of us; * * * and he said that if I would give him up entirely, everything he had would be mine when he had gone." To this she relates she did not then assent. She further relates that she frequently had conversations with her stepfather along the same line, and, specifying more particularly, she says:

"Well, my dad was disappointed that I still had any thought whatever of going back to the doctor, and in the mornings almost the first thing he would say, he would come in the dining room to the table, and he would say, 'Well, Bess, are you going to give up this man?' I would say, 'No.' And that would perhaps drop then. Or he would say another time. 'Have you come to your senses yet?' He was just continually banging away at me all the time, and saying continually that when I would give up this man, who had proven himself no good, and in no position to take care of the baby and me, everything that he had would be ours. He repeated that over and over and over all during this time. * * * That continued until that fall. I would not consent to give up all thought of the doctor. * * * I meant to say that it continued all that winter, until the following spring. And finally—my health was very, very poor, and finally—I think it was in the last of April or the first part of May (this is 1901), I couldn't stand it any longer; I was very miserable and unhealthy; and I said to Dad, 'All right, go ahead and get the divorce.' He did. And then I accepted. Then is when I accepted that I would stay, gave up all thought of going to the doctor, decided that I would stay and make my home the rest of my life, as I thought, there in my home."

Until the time she consented to procure a divorce, she contemplated, when opportunity presented itself, renewing her marriage relations with her husband. On cross-examination touching the same subject, the plaintiff continues:

"Q. You say in your complaint, in effect, that Mr. Smith told you that if you went with Dr. MacLean he would not contribute anything to your sup-

port; that is, Mr. Smith would not contribute anything to your support. Is that right? A. Yes. Q. If I understood you correctly awhile ago, in your testimony, you said in effect that Mr. Smith told you that, if you stayed there, he would do something by you in a property way? A. Yes; if I would divorce the doctor. Q. Did he only say that in connection with his statement that if you would divorce the doctor he would do it? A. I wouldn't say that he used those very words invariably. He would change his way of speaking by saying, 'Well, have you come to your senses, and will give up this man—make up your mind to give him up?' He didn't always use the word 'divorce.' Q. Well, was all of this talk, which you say took place between you and Mr. Smith about what he would do if you did give him up, had before the time when you filed your divorce complaint? A. Not all the talk before. There was talk before I consented to divorce the doctor. Q. Well, was there any talk, about the property arrangement which you have mentioned, after the time when you filed your divorce action, and before the time when you say he announced his engagement to you? A. Well, that was a thing that was more taken for granted; that he had changed very much since I consented to divorce the doctor. He asked if there was anything that he could do. He did everything in his power for me. And when I accepted the conditions, I understood that meant that when I gave up the doctor I should have everything. Q. Well, now, the time when you say you accepted was before you filed the divorce action? A. Yes; at the same time. Q. And if you made any acceptance, then, of what you say was his proposition, it was before you started the divorce action? A. Well, I think that when I started the divorce action was the same time that I accepted this proposition. Q. You don't think it was after that that you accepted it? A. I should think that the matter of accepting, of divorcing the doctor would be accepted, I should think it would be the same time. * * * Q. Now, how did he put that proposition? I would like to have the exact words, if you can give them. A. I will give the exact words, just as nearly as I can: 'If you will give up this man, I will leave everything I have to you when I am gone.' I think those are very close to the exact words."

Further on she continues:

"Q. Now, the matter of divorcing the doctor was the matter that you and Mr. Smith had talked about at various times, wasn't it? A. Various times. Q. And that came about in the inception because the doctor was not able to support you at that time, didn't it? A. As a general thing. * * * Q. And Mr. Smith advised you that, until the doctor could earn something to support you, you had better stay there and live with him, didn't he? A. No; he didn't put it that way. He forbade me to go, Mr. Mercer. Q. But, as a matter of fact, Mr. Smith told you then, didn't he, that if the doctor got himself established some place you could go to him? A. Why, yes; he told me that, I presume, in a way to quiet me. Q. And he told you that a good many times, didn't he, afterwards? A. Yes; but he said, also, that he never expected that he would. Q. Yes; but that if he did, you could go? A. Yes. Q. And he kept that up as long as you didn't apply for the divorce, didn't he? A. Oh, no; he insisted upon my getting a divorce. Almost continuously he was grinding that—that I must divorce the doctor."

And again:

"Now, you never told Mr. Smith at any time until you decided to get a divorce that you would accept any suggestion that he had made, did you, about this matter? A. I don't think so—speaking always of the idea that I would divorce the doctor. * * * Q. Do you remember the conversation that took place when you told Mr. Smith that you had decided to get the divorce? Now, I want exactly the language, if you can give it. A. I told you I couldn't, Mr. Mercer. Q. Then I want the substance of it, as to what you said and what he said, if you please. A. Well, the substance of it, and the most important part to my mind, is my saying—I just gave up and said, 'All right, Dad, go ahead and get the divorce.' Q. That is all you said? A. I don't say that is all I said. I said that was the important thing.

* * * Q. Up to that time, Mr. Smith had never mentioned the word 'will' to you, had he? A. Well, he may have mentioned the word 'will.' Q. Not in relation to his affairs and yours, did he, the word 'will'? A. I don't think he ever—I don't know, but I don't recollect the word 'will' exactly. Q. Now, you hadn't mentioned the matter of his will to him, had you, in the terms of 'will'? A. I don't think so. Q. As a matter of fact, you never had discussed with Mr. Smith the question of how he would leave his property, had you, in so many words? A. Only what he had said, that he would leave it all to me. Q. Did he say when he would leave it to you? A. When he was gone. Q. Did he say he would leave it by will? A. He didn't say 'will' that I remember. * * * Q. As a matter of fact, the question of his making a will, where the term 'will' was used, was never mentioned between you and Mr. Smith at any time, was it? A. Well, it seems to me that on one occasion, * * * when Dad was making the remark, and insisting that I consent to divorcing the doctor, he made the remark—I can't swear just how this was—that he made the remark that he wished I would make up my mind, so that he could—I don't know whether he used the word 'will' or not—I can't answer that. Q. Now, he never said anything to you, after he was married to the defendant, about leaving you any property? A. No; I don't think the question ever came up."

It will be remembered that divorce proceedings were commenced in the fall of 1901, and a divorce was obtained January 9, 1902.

As to the second alleged agreement, in modification of the first, the testimony is very brief. The next morning after Smith and the defendant had become engaged to marry, plaintiff relates that her stepfather advised her of what had happened, and after saying to her that he did not want her to think that any one could ever take her mother's place, and indicating that the new relations would make some difference to her, he said:

"Instead of you having everything I have when I am gone, you will have one-third, and the boys will have one-third, and Dewey (meaning the defendant) will have one-third; but," he said (quoting the further language of witness), "I think we will have enough for all." "That," she says, "was practically all that was said, because it was rather a tense situation." "And I said, 'All right.'"

As it pertains to the alleged trust relations on the part of the defendant, the plaintiff testifies that, shortly after her stepfather's death, she, with her husband, Price, went to Minneapolis, and while there had a conversation with defendant about Smith's disposition of his property. She says:

"I told her that I had seen the will, and that I was very much surprised that there had been no provision made for me and the children, and further went on to say that I could not understand it—that I couldn't understand why there was no provision made for myself and the children. And Dewey said, 'Yes,' she was surprised also, and that she knew nothing about it; * * * that she was also surprised; that she knew nothing whatever about the will. But she said she supposed that it had been made that way—it was very short and very brief—for business reasons; and she said she knew I was anxious to get back to the children in California, or else she said she supposed I was anxious—anyhow, that remark came up—and that she knew the agreement, and that I could go back to California and not wait for the will to be probated.

"The Court: What agreement? A. Well, I presumed that she meant the agreement between my dad and I that I was to have one-third and the boys were to have one-third. I took it to mean that, because I was speaking about the will, and said I was surprised that no mention had been made of us, or

me. And that I could go back to California, back to Mill Valley, and she would send our share to us. That was all the conversation."

The cross-examination does not shed further light upon the subject.

In corroboration of plaintiff's cause, W. J. Hartzell testifies that he had a conversation at one time with Smith, probably six months before the marriage of Smith with the present defendant, in which Smith said in effect that he felt toward the children as though they were his own babies, and that he proposed to care for them, and another time after the marriage, in which he said, quoting the testimony:

"'Bess, of course, is trying to make her own way now, but I have to help her all the time,' and he says, 'I think I will have to arrange a home for them somewhere. But,' he says, 'I expect to take care of them, feel toward them as though they were my own boys, and shall always provide for them.' About that time there were two or three times he consulted with me about the possibility of finding a home more suitable for them, so that he could relieve Mrs. Smith of the care of them. * * * He always repeated his extreme affection for the boys."

Mrs. Hartzell testifies that Smith said, after the divorce was granted, that he would not have insisted on her getting a divorce from the doctor if he had not intended to provide for her and the boys; that subsequent to the marriage of the present defendant Smith said that Bessie and Mrs. Smith were friends, and everything would be all right, and that Bessie and the boys were to be provided for just the same. And still later:

"He said he thought he would have to find another home for the boys, because children worried Mrs. Smith; that he intended to care for them all the same, whether their home was with him or somewhere else; that he intended to take care of them as though they were his own."

On cross-examination she further testifies that Mrs. Smith—

"said that she understood what P. B. had wished, and she intended to carry out his wishes regarding the boys. * * * It was very soon after his death."

Further than this, W. T. Price relates a conversation which he had with Smith after his marriage to the defendant, and while plaintiff was living with Price, her second husband, in which Smith said:

"Bess and the children are well provided for. * * * I want to see that the boys have a good education and means to go into any business that seems best for them to when the time comes. If I live, I shall see that it is done, and, if not, they are well provided for."

In refutation of plaintiff's proofs, the defendant denies utterly that she had any such conversation with plaintiff as she relates, while plaintiff and her husband, Price, were on their visit to Minneapolis after the death of Smith, or that she at any time agreed to carry into effect in any respect the alleged modified agreement which plaintiff claims she had with Smith; and she denies making any remark to Mrs. Hartzell to the effect that she understood Smith's wishes were such that she had any care or responsibility, either financially or morally, of the plaintiff or the children, and denies any recollection of ever having had any such conversation with Mrs. Hartzell as she relates. The defendant states, however, that at the time of plaintiff's visit she gave her

(plaintiff) money with which to bear her and her husband's expenses back to California.

It developed soon after Smith's marriage with defendant that plaintiff had not been managing the household to the satisfaction of Smith, that she had been extravagant, and that she had, prior to her divorce from MacLean, sent him money unknown to Smith, which annoyed and worried Smith greatly. Subsequent to the marriage, there was an effort to find a place where plaintiff and her children could stay; it being understood that Smith would bear their expenses. Such an arrangement was not consummated, and plaintiff went on the stage, very much against Smith's wishes, and her children were in the meantime maintained at his home. Plaintiff remained on the stage for some time, when again the separate maintenance of herself and the children came up, which finally resulted in Smith sending for plaintiff's own father, and it was arranged that plaintiff and her children should go to the Pacific Coast, that her father would contribute to their maintenance the sum of $50 per month, and that Smith would contribute a like amount. Her father failed in his promise, and Smith contributed the entire amount up to the time of plaintiff's marriage to Price, when he reduced his advancements to $50 per month for the use of the children. Later he advanced to plaintiff and her husband $2,000 with which to construct a residence, and at that time he discontinued all allowances for the support of plaintiff and the children.

As evidence of his solicitude for plaintiff and the children, and as indicative of his feeling towards her and of the manner in which she had treated him, is his letter to E. A. Wright, an uncle of plaintiff by marriage, in an endeavor to secure a home for plaintiff and her children, written February 16, 1903, less than a year after his marriage to defendant. He says:

"Herewith please find a letter from Bess, which indicates that she is cured of her stage folly, and it now becomes a question what to do with and for her and her children. The way she has treated me I can hardly be expected to take her back into my home again, and yet I want to do all I can to enable her to live properly and bring up the children as they should be brought up. Bess has absolutely no idea of the value of money; neither has she any sense of obligation, or even honesty, so far as money is concerned; but she has many good impulses, and she dearly loves the children, and wants to have them, and she has certainly shown good judgment in discipline of the children."

The letter culminates in an offer of $85 per month to Wright to take plaintiff and children and give them a home. Wright was not able to comply with the request, and then came the arrangement with plaintiff's father as above noticed.

In conformity with the tone of this letter is the conversation Smith had with Mr. and Mrs. Lauderdale, which took place some time after his marriage to defendant. He said to them:

"I think you know the family well enough, and know me well enough, to know that I have done everything that I possibly could for Bess, and for the children, and it has got to the point where I must draw a halt. * * * She has told different parties in regard to what I was doing and what I was not doing, and it certainly is not fair to me that she should circulate those stories, and I have no defense at all. The whole gist of the matter is that I am going to stop; I am not going to do anything more for them. As long as the chil-

dren are in my house, I will take care of them; but further than that I must absolutely stop."

Smith was very much wrought up over the situation.

As it relates to the alleged agreement and modified agreement with Smith to leave his property to plaintiff, the testimony of Mrs. Jessie Carey Smith is pertinent. She relates, in effect, that she had a conversation with plaintiff after the will was probated, in which plaintiff told her that she was very much disappointed at the way things had been left, to which witness replied, "I don't suppose you expected P. B. to leave you anything," and she answered that she thought he might have remembered the boys in his will, but at no time did she say anything about claiming any contract for a will. Witness further says:

"I had a talk with her about why P. B. didn't adopt her. * * * She said that her mother hadn't wanted P. B. to adopt her, because her own father had mining interests which they hoped might develop into something worth while, and they thought he would be more favorably inclined to remember her generously if she were not the adopted child of another man."

Thus the relations of these parties are quite fairly indicated, and their feelings, motives, and disposition one towards the other. And now come the solemn acts of Peter B. Smith in the disposition of his property. It is everywhere agreed, and by all parties to the record, that Smith possessed a high sense of honor and integrity, was unusually careful and exact in all his business dealings, and fulfilled his obligations, whatsoever their character, punctiliously and to the very letter. On the very day of his marriage to defendant he made his first will. This was some seven or eight months only after it is alleged that he entered into the agreement to leave everything to the plaintiff. This circumstance is in strong refutation of the plaintiff's testimony respecting the alleged first agreement. Considering Smith's sense of honor, and his faithfulness in observing his obligations, it seems hardly probable that he would have made such a will in disregard of such an agreement.

When he made the second will, circumstances had greatly changed. Plaintiff had remarried, and had a home of her own, and her husband, Price, had duly adopted her two children, and in the meantime Smith had expended a large amount of money in the support of plaintiff and her children away from his domicile, so that he evidently felt under no further obligation to provide for them out of his estate. Hence he gave his entire estate to the defendant, his present wife.

[3] As it relates to the alleged trust arrangement with the defendant to carry into effect the alleged modified agreement of Smith to leave his property equally to plaintiff, her children, and the defendant, the plaintiff is flatly contradicted by the defendant, and the testimony of Jessie Carey Smith lends support to the defendant's testimony. Upon the whole, it is clear to my mind that the plaintiff has failed to establish either the alleged first, or the modified, agreement by such clear and convincing proof as is required for the substantiation of parol agreements of the kind. And as to the alleged trust agreement with the defendant, the clear preponderance of the evidence is against plain-

tiff's contention. I am waiving the question whether the trust agreement is of a character susceptible of enforcement at all.

For these reasons, plaintiff is not entitled to recover, and her complaint will be dismissed, with costs to the defendant.

EDWARDS v. KEITH, Internal Revenue Collector.

(District Court, E. D. New York. July 9, 1915.)

1. INTERNAL REVENUE ⟸2—INCOME TAX—CONSTITUTIONALITY.

Act Oct. 3, 1913, c. 16, 38 Stat. 114, imposing a tax upon incomes, is not unconstitutional as applied to the tax upon returns made in 1914, and estimated or based upon the income for a certain definite preceding period, though such period was partially prior to the enactment of the law, since, if a person is liable for the tax in the future, the method of its computation as estimated upon the past does not invalidate the tax.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. § 2; Dec. Dig. ⟸2.]

2. INTERNAL REVENUE ⟸7—INCOME TAX—WHEN INCOME ACCRUES.

Act Oct. 3, 1913, c. 16, § 2, div. A, subd. 1, 38 Stat. 166 (Comp. St. 1913, § 6319), imposes an annual tax upon the entire net income arising or accruing from all sources to citizens or residents of the United States. Section 2, div. B (section 6321), provides that the net income of a taxable person shall include gains, profits, and income derived from salaries or compensation for personal service, of whatever kind and in whatever form paid, or from businesses, commerce, gains, profits, and income derived from any source whatever. By a contract between an insurance company and an agent he was to receive, as compensation for soliciting insurance, certain specified percentages of the premiums paid on policies written through his solicitation for the first and subsequent years for 20 years from the date of each policy; the contract providing that the commissions should accrue only as the premiums were paid to the company, and that the liability for any particular commission would terminate if the policy ceased to be in force. *Held*, that the specified percentages of premiums for the second and subsequent years of the life of policies, issued prior to the enactment of the statute, constituted income which accrued when such premiums were paid, and were taxable as such.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. § 870; Dec. Dig. ⟸7.]

3. INTERNAL REVENUE ⟸7—INCOME TAX—INCOMES SUBJECT TO TAX.

The liability of the agent's percentage of such premiums to the income tax imposed by Act Oct. 3, 1913, was not affected by the fact that the agent hired subagents and maintained an office force, and that his percentage to some extent represented merely deferred returns, which he had already anticipated and partially expended for office expenses; nor was the liability to the tax affected by the fact that such expenses were paid before the passage of the statute.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 8–10; Dec. Dig. ⟸7.]

4. INTERNAL REVENUE ⟸2—INCOME TAX—CONSTITUTIONALITY.

Act Oct. 3, 1913, is not unconstitutional as applied to the agent's percentage of such premiums on policies issued prior to the passage of the act.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. § 2; Dec. Dig. ⟸2.]

Action by Charles Jerome Edwards against Henry P. Keith, as Collector of Internal Revenue for the United States, First District, State of New York. On demurrer to the amended complaint. Demurrer sustained, and complaint dismissed.

Jones, McKinny & Steinbrink, of Brooklyn, N. Y. (Meier Steinbrink, of Brooklyn, N. Y., and Charles A. Woods, of Pittsburgh, Pa., of counsel), for plaintiff.

Melville J. France, U. S. Atty., of Brooklyn, N. Y., for defendant.

CHATFIELD, District Judge. The plaintiff has brought an action against the defendant, as collector of internal revenue for this district, to recover the sum of $263.90, paid upon October 30, 1914, under protest, and demanded back upon allegations that the tax was illegally levied and collected, and that the law, if so worded as to cover the items taxed, is unconstitutional. The amended complaint was filed on the 3d day of February, 1915, and demurrer interposed upon the 4th day of February, 1915, alleging that the amended complaint did not state facts sufficient to constitute a cause of action. The facts thus admitted, and upon which the questions of law are raised, in so far as they had to do with the question, are as follows:

The plaintiff has been an agent in the employment of the Equitable Life Assurance Society from a time before the 14th of February, 1889. On that day he entered into a contract (a copy of which is set forth with the complaint), and subsequently, upon the 16th of March, 1895, October 21, 1898, December 18, 1899, and November 26, 1906, he made further contracts (copies of which are also annexed to the complaint), under which he was to canvass personally and through his subordinates for applications of individuals to take out life insurance with the said society. By the terms of these various contracts it was agreed with him that he should receive compensation on premiums on policies issued by the society, to persons secured through the plaintiff's instrumentality, to the extent of certain specified percentages of the ordinary premiums paid for the first year of the policy taken out, and other percentages on the ordinary premiums of the second and subsequent years. The many other provisions of these contracts and their varying rates of payment need not be considered, beyond noticing that they cover ordinary life policies, policies for paid-up insurance (after a certain number of premiums), and many differing forms of policies. The contracts set forth the exact percentages of the premiums which the plaintiff would receive from each kind of policy.

The complaint alleges that, as shown by the text of these contracts. the plaintiff was obligated to perform no further services and to do no work in connection with the contract, after the issuance of the policy and the payment of the first premium thereon, although there is a provision in the contract to the effect that the agent may be called upon to assist in defending any item as to which litigation might arise. All the work of collecting the premiums and taking care of the matters covered by the policy subsequent to the payment of the first premium is to be done by the company, and the plaintiff was to receive therefrom, for the term of 20 years from the date of each policy while

in force (and provided the plaintiff act exclusively for the society for the term of 3 years), the commissions above referred to. It is provided in the contract that the "commissions shall accrue only as the premiums are paid to said society in cash." The liability for any particular commission was to terminate if the policy ceased to be in force for the period of six months.

It has been assumed by both parties to this action, and may be taken as a matter of common knowledge, that the rate of commission provided for in the contract was less than or different from what would have been agreed upon as the plaintiff's compensation, if this had been secured to him in one amount, upon the taking out of the policy or the payment of the premium for the first year.

The income tax in question was assessed and collected upon the particular premiums paid (upon policies previously secured through the instrumentality of the plaintiff) to the Equitable Life Assurance Society between March 1, 1913, and December 31, 1913, and therefore claimed by the government to "accrue" within that period, because they immediately gave the plaintiff the right to a percentage of that premium, whether then physically paid over to him, or collected by him from the society, or not.

According to the allegations of the complaint, the items taxed were all percentages of premiums actually received by the society during the period and under the terms of the contracts set forth; but all of these items so taxed were admittedly the commissions provided for by the contracts from premiums actually paid upon the second or subsequent years in the existence of the policies themselves.

The plaintiff therefore claims that these amounts which he, under contract, was to receive as premiums, when paid upon policies from time to time after the first year of the existence of the policy, were deferred payments, in the nature of partial or distributed payments, of a sum already the property of the plaintiff, transferable or assignable by him, and to which he had a complete and vested right, capable of being definitely ascertained and estimated as soon as the contract relating to that particular policy became effective. He admits that the cessation or default of the payments of premiums in any year subsequent to that in which the policy was taken out would thereby stop the payment to him of further commissions, and would terminate the contract with respect to that particular policy, so soon as the policy ceased to be "in force." But he contends that this shows the distributed payments to be like installments upon an amount already secured to and vested in him as accrued income, or like the receipt of a series of portions of principal, the ownership of and the right to which had been held by the individual throughout the entire period.

[1] It is unnecessary to discuss the general provisions of the Income Tax Law passed October 3, 1913 (38 Statutes at Large, p. 166, c. 16), nor is there room for argument as to the general constitutionality of the tax upon returns made in 1914 and estimated or based upon the income of an individual for a certain definite preceding period, even though that period be partially prior to the date of the enactment of the law. If the person is liable for the tax in the future, the method of its computation as estimated upon the past does not invalidate the

tax. Stockdale v. Insurance Companies, 87 U. S. (20 Wall.) at page 331, 22 L. Ed. 348.

[2] The government therefore contends that the payment of premiums under the above contracts, for all years after the first, in the case of each policy, which payments happened to be made between March 1, 1913, and December 31, 1913, made payable to the plaintiff at once certain sums, which by the language of the contract were called "commissions," and which by the language of the contract were to "accrue" to the plaintiff at the time of this payment and not before. It further claims that the express statement of the contract, to the effect that "commissions shall accrue only as the premiums are paid to said society in cash," brings each of these commissions within the scope of the income tax, under subdivision 1, division A, section 2, providing "that there shall be levied," etc., a tax "upon the entire net income arising or accruing from all sources," etc. The later provision that net income of a taxable person shall include gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from businesses, commerce, gains, profits, and income derived from any source whatever (section 2, division B), would plainly cover the commissions which we are discussing, if they are to be classified as profit or income arising or accruing within the months specified.

In the ordinary sense, compensation payable in installments for services rendered during the period would be income arising or accruing within that period. The use of the word "accrued" furnishes a likeness between the statute and the phrase quoted from the contracts in question, and this was the basis of decision No. 2011 by the Treasury Department, issued July 28, 1914, providing that commissions on renewal premiums for insurance and income when received shall be taxed as income for the period in which received. It will be noticed that this decision refers to renewal premiums, and is thus speaking of premiums paid after the first year that the policy is in effect. In case, therefore, the Treasury Decision is correct, the demurrer to the complaint must be sustained.

The government at the outset of its argument presents the situation shown by the converse of the plaintiff's position. If he should to-day, under his present contract with the Equitable Life Society, procure an individual who took out a large policy, to run for at least as long as 20 years, then, on or before the 1st of March, 1916, the government asks the plaintiff if he admits that he would be compelled to file a return including such commissions upon all the future premiums of that policy as constituting his gain, profit, or income for the year 1915, either arising or accruing during the year, as compensation for his services. Such construction of the law might follow as a corollary to the plaintiff's contention, and he might be called upon to include, for the year 1915, the other 19 commissions upon the so-called renewal premiums in which he is interested, whether or not they are paid in the future and the insurance continued in force for the entire 20-year period of this contract. If this were done, and the party insured should cease to pay the premium after the first year, the plaintiff would

have paid a tax upon a considerable amount of so-called earnings or income which he would never receive, and as to which the deferred payment would be rendered impossible. If this should be done, and if payment of premiums on any policy should be stopped during any particular year, the plaintiff would have to deduct or mark off from his income, as loss of income, at the close of that year, the total commissions upon the balance of the premiums which still remained unpaid upon that particular policy. If each year his income exceeded the maximum deduction, he might in the long run balance up the burden of the tax.

But the plaintiff disclaims such construction. He further alleges, as to any policy now taken out and upon which commissions are earned, that the income accruing for each year is to be considered to include merely the amount of commission paid over upon the premiums actually paid. This latter proposition has been the contention of the government also, and it would seem to be the simpler and better rule as to all insurance secured, or as to all policies taken out, after January 1, 1914. But how can the plaintiff distinguish the premiums becoming due and upon which commissions became payable between October 3, 1913, and January 1, 1914, or those premiums paid between March 1, 1913, and the 1st of January, 1914? There would seem to be no reason for treating the commissions arising after a certain date as income and for holding that those before that date were principal.

The plaintiff has stated a number of specific illustrations, in which payments from time to time are merely deferred deliveries of shares or parts of the property itself, and in which the time of payment of the installment has not established the right thereto. He has cited in particular the case of Von Baumbach v. Sargent Land Co., 219 Fed. 31, 134 C. C. A. 649, which distinguishes between income and receipts in the form of periodic payments for ore, which was really principal.

The right to commissions throughout the 20-year period, upon renewal premiums, was held in the case of In re Wright (D. C.) 151 Fed. 361, affirmed 157 Fed. 544, 85 C. C. A. 206, 18 L. R. A. (N. S.) 193, to be, from the standpoint of property, something earned by the agent at the time of securing the business. It was therein held that the bankrupt could have transferred his property right or interest in these commissions at any time, and that therefore the right to receive such commissions upon premiums paid subsequent to the appointment of the trustee in bankruptcy passed to the trustee as to all policies taken out before the adjudication in bankruptcy.

The acquisition of property before adjudication in bankruptcy is the only question under consideration in the Wright Case. The word "property" in that sense has to do with the ownership and right of transfer of the bankrupt, and such right of transfer might be had in an income as well as in the specific capital or source from which it was derived. The plaintiff is seeking to construe the meaning of the word "property" as applied to the income discussed in the Wright Case just as if it were synonymous with "principal." But this does not follow. The right to receive an income might be secured by the payment of a sum of money, like that deposited for the sake of procuring

an annuity. The right to the annuity might be property available for creditors, and yet the annuity would be income within the meaning of the Income Tax Law, and would accrue or arise during the year of payment, instead of back at the time when the deposit of principal purchased the right to the annuity.

From the standpoint of bankruptcy law, the right to receive the income is the test from which, at any particular time, property which is to continue through the future shall be estimated. From the standpoint of the tax, the earning—that is, the performance or happening of the conditions or the happening of the circumstances which complete the obligation to pay the income—determines when the accrual is to be estimated for taxation purposes. Such income is not an asset of which he will be divested by default of the insured, although his contract might be so considered.

The worth or benefit of the policy to the society, as well as the amount of the return to the insured, depends upon the continuation of payment and the total amount received. If the payment of premiums is stopped, then the benefit to the society is decreased, the amount of insurance is either diminished or terminated, and the service rendered by the agent, for which he is to receive his commissions, is diminished in value. It is evident that his services to the society cannot be estimated from the amount of time or trouble expended in getting the business. His compensation is in no way based upon the difficulties and expense or the ease with which he secures the customer.

[3, 4] This brings up the only other practical objection, viz., that the plaintiff has hired a number of individuals and maintained a force in an office throughout the entire period since entering into the contracts offered in evidence, and that his compensation, in the form of commissions upon the premiums when paid, represented merely deferred returns, which he had already anticipated and partially expended for these office expenses. The plaintiff, therefore, urges that his income should not be taxed without regard to the expense to which he had previously been put in securing that income. From one aspect this argument is the same as if he should contend that, having invested a large amount in the purchase of an annuity, it should not be considered income because a part of the capital had gone therein.

To this extent the plaintiff's contention, that his expenses had previously been paid, would not affect its treatment as income. Nor does the fact that the capital was invested or the expenses paid before the passage of the law making the income taxable exempt the income. Its effect is certainly to diminish the income; but, if the income is taxable at all, any tax is a diminution in its amount, and the tax is not thereby rendered unconstitutional. Nor does the plaintiff's contention that the law taxing the income occurred long after the creation of the so-called property right to receive that income render it exempt from taxation. The plaintiff goes so far as to suggest that in the future the entire right to receive the income could be taxed at any time fixed by statute, but that as to the rights secured in the past, for the receipt of income extending over into the future, a tax upon the future installments of that income would be unconstitutional.

The court does not see how any contract right or property right has been guaranteed to the individual, exempt from taxation, merely because postponement of the receipt of the property has been continued until a time when the tax was imposed. If this rendered the tax invalid, then it would be necessary to guarantee to a person making the purchase of certain property as much income, so far as the effect of taxes is concerned, as he had at the time of making the purchase. This answers itself. If the plaintiff could approximate the amount of expense incurred or attributable to the particular item which he was including in his return, and could deduct that expense from the taxable income, he might be sustained in making such deduction before figuring the net income from past contracts; but the income would still be taxable for the net amount.

The demurrer must be sustained, and the complaint dismissed.

BURKE et al. v. MOUNTAIN TIMBER CO.

(District Court, W. D. Washington, S. D. June 15, 1915.)

No. 3.

1. COURTS ⟸269—JURISDICTION OF FEDERAL COURTS—LOCAL SUITS.
A federal court has jurisdiction of a suit against a nonresident defendant to foreclose a mortgage on land within the district, although neither party is a citizen of the state.
[Ed. Note.—For other cases, see Courts, Cent. Dig. § 809; Dec. Dig. ⟸269.]

2. COVENANTS ⟸93—COVENANT OF TITLE—LIABILITY OF COVENANTOR.
A covenantor of title in a deed is not liable to the covenantee for damages sustained by the latter by reason of an unsuccessful attack upon his title by a third person.
[Ed. Note.—For other cases, see Covenants, Cent. Dig. §§ 101–103; Dec. Dig. ⟸93.]

3. VENDOR AND PURCHASER ⟸143—SUIT TO FORECLOSE PURCHASE-MONEY MORTGAGE—DEFENSES.
A purchaser of timberland under a contract which gave it 20 days in which to examine the abstracts of title and provided that any objections to the title not made within that time should be deemed waived, and which has held undisturbed possession and removed the greater part of the timber from the land, cannot defend against a purchase-money mortgage on the ground that as to some of the land there was no title of record in the grantor.
[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 267–270, 311; Dec. Dig. ⟸143.]

4. PARTNERSHIP ⟸147—CONTRACTS—POWER OF PARTNER TO BIND COPARTNER.
The partner of a grantor in a warranty deed, who claimed an interest in the property, *held* to have no authority to bind him by an undertaking to indemnify the purchaser against any possible attacks which might be made upon the transfer of title by such grantor the partner, or their heirs or personal representatives.
[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 256, 257; Dec. Dig. ⟸147.]

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5. INTEREST ⇐50—SUFFICIENCY—KEEPING TENDER GOOD.

Tenders by the maker of notes to the bank at which the notes were payable, after the death of the payee and without the knowledge of his administrator, but which were conditioned on delivery of his receipt and were not kept good by any deposit of the money, *held* ineffectual to stop the running of interest.

[Ed. Note.—For other cases, see Interest, Cent. Dig. § 114; Dec. Dig. ⇐50.]

In Equity. Suit by George B. Burke and E. W. Ferris, as administrator of the estate of David L. Kelly, deceased, against the Mountain Timber Company. Decree for complainants.

Clark, Skulason & Clark, of Portland, Or., and Gordon & Easterday, of Tacoma, Wash., for plaintiffs.

Edmund C. Strode, of Portland, Or., and Imus & Son and Coy Burnett, of Portland, Or., for defendant.

CUSHMAN, District Judge. This is a suit to foreclose a purchase-money mortgage brought by the administrator of the mortgagee, David L. Kelly. A number of claims in recoupment are interposed in the answer, presently to be considered.

[1] David L. Kelly died in Oregon, and an administrator of his estate was appointed in that state. The defendant is a Nebraska corporation. This suit was originally brought by Burke, an assignee of the administrator appointed by the Oregon court. The complaint alleged the citizenship of the defendant and that the assignee was a citizen of the state of Washington, but failed to disclose the citizenship of the assignor, the administrator; but other portions of the record disclosed that he was a citizen of Oregon. Before the trial of this cause, the plaintiff Ferris, a citizen of the state of Washington, was appointed administrator of the estate of David L. Kelly in such state. He intervened and prayed—as well as the assignee—for the foreclosure of the mortgage.

Upon this state of the record, the objection by the defendant to the court's jurisdiction to entertain this cause, it being a foreclosure of a mortgage upon land in this district, is overruled. Gillespie v. Pocahontas Coal & Coke Co. (C. C.) 162 Fed. 743; Wylie Permanent Camping Co. v. Lynch, 195 Fed. 401, 115 C. C. A. 288; Sun Printing & Pub. Ass'n v. Edwards, 194 U. S. 377, 24 Sup. Ct. 696, 48 L. Ed. 1027; Mahoning Valley Railway Co. v. O'Hara, 196 Fed. 948, 116 C. C. A. 495; Greeley v. Lowe, 155 U. S. 58, 15 Sup. Ct. 24, 39 L. Ed. 69; Dick v. Foraker, 155 U. S. 404, 15 Sup. Ct. 124, 39 L. Ed. 201; Kentucky Coal Lands Co. v. Mineral Dev. Co. (C. C.) 191 Fed. 899; Texas Company v. Central Fuel Oil Co., 194 Fed. 8, 9, 114 C. C. A. 21; Western Loan & Savings Co. v. Butte & Boston Co., 210 U. S. 368, 28 Sup. Ct. 720, 52 L. Ed. 1101.

All the following transactions occurred at Portland, Or.:

On November 27, 1909, the mortgagee and his wife contracted to sell defendant the lands covered by the mortgage in the present suit. The contract price was $65,000. The deed was to contain the usual

covenants to warrant and defend the title. A deed to the property was executed upon the same day and placed in escrow.

After the contract was made, one Frank G. Kelly, a brother of the mortgagee, notified the defendant that he (Frank G. Kelly) claimed an interest in the property and that David L. Kelly, the mortgagee, was incompetent to dispose of his property on account of his mental condition. On December 17, 1909, the mortgagee notified the escrow agent not to deliver the deed to defendant. This action appears to have been taken on account of the claim of interest in the land asserted by Frank G. Kelly. Two or three days later, the mortgagee left Portland for California on account of his health. There is no evidence that, after that time, he had knowledge of any of the steps subsequently taken.

Defendant then proposed to Frank G. Kelly to bring a suit to quiet title to the land, in which was to be determined the competency of David L. Kelly. Frank G. Kelly—being desirous that the sale should be consummated—gave, in the name of the D. L. Kelly Lumber Company, described as a partnership consisting of D. L. Kelly and Frank G. Kelly, a bond of indemnity to the defendant, recited to be in consideration of its contracting to purchase said lands, in which bond the obligor warranted the title and undertook to indemnify defendant against all suits, claims, and proceedings which might be brought on account of David L. Kelly and his wife, or Frank G. Kelly, or the heirs of David L. Kelly on account of such land.

At the same time, as a part of the same transaction, Frank G. Kelly gave a quitclaim deed to the defendant, and the defendant promised to pay him $5,000 if he would secure quitclaim deeds from the other heirs. To make it appear that this $5,000 was to be paid him for some other purpose, and thereby provide an answer to the possible contention that this promise to pay for such service was a confession of the defect in the title, an elaborate arrangement was made with Frank G. Kelly, which it is not necessary to describe in detail.

Upon the completion of this arrangement and the delivery to defendant of the foregoing undertaking, the defendant accepted the deed from David L. Kelly and wife; paid $32,500 of the purchase price; and on February 3, 1910, executed two notes—secured by the mortgage now in suit—each for $16,250, one due in one year, the other in two years, with interest at 5 per cent. per annum from date, both payable at the Merchants' National Bank of Portland, Or. The defendant immediately entered into possession of the land, and has so remained ever since, removing the greater part of the timber therefrom, for which the land was chiefly valuable.

On August 18, 1910, David L. Kelly died intestate, leaving surviving him the following heirs at law: Mabel J. Kelly, widow; Thomas G. Kelly, brother; John B. Kelly, brother; Frank G. Kelly, brother; Elizabeth Roberts, sister; Bernice R. Dibbel, sister; Louise S. Kelly, sister; Bernice Killoran, niece. His death was caused by paresis.

In March, 1911, one of his heirs, Thomas G. Kelly, brought suit against the defendant and the other heirs of the mortgagee, alleging that the mortgagee was the owner of the land covered by the mort-

gage at the time of deeding the same to the defendant; that the defendant in the present suit obtained the deed by fraud; that, at the time of its execution, David L. Kelly was insane, and therefore incompetent to give the deed; that defendant acquired the land for $65,000; and that it was actually worth $200,000. The prayer of the complaint in that cause was for the cancellation of the deed to the defendant, the eviction of defendant, and the quieting of title in the heirs of David L. Kelly. Several heirs, including Frank G. Kelly, appeared in that suit, praying the same relief as complainant therein. The widow of David L. Kelly at all times contended for the validity of her deceased husband's deed, and certain of the other heirs took no part whatever in the litigation.

Prior to the hearing of the present suit, settlement was made by the defendant with all the parties in the suit for the cancellation of the deed, save Thomas G. Kelly; the defendant paying such heirs $4,375. After the commencement of the trial of the present cause, Thomas G. Kelly dismissed his suit to quiet title.

A reduction of the amount due, according to the terms of the mortgage, by the amount paid the heirs in settlement of the suit for cancellation of the defendant's deed from the mortgagee, together with the expenses incurred in such cause, is asked in the answer. Upon the trial, this claim was expressly waived by the attorney for the defendant. The following is an extract from the report of the proceedings:

"The Court: I understand your position in the paying of this $5,000, you are not urging that in this case in any way to defeat the note and mortgage? Mr. Strode: No, sir. The Court: You claim that what you spent should lessen the amount of the mortgage, but not defeat it? Mr. Strode: We do not claim that $5,000 as a credit on this mortgage. We paid that as our experience with those people; that is what it cost us."

The defendant in its brief filed has—notwithstanding the foregoing—contended for this reduction.

As this concession of counsel occurred early in the trial, it is manifest that it must be held that defendant is bound by this waiver, as plaintiff had the right to rely thereon throughout the remainder of the proceedings and make no further showing. It is clear, in any event, that it could not be allowed.

In this suit to foreclose, the mortgage upon the realty is incidental to the notes secured by the mortgage. The court is not concerned with the question whether, pending administration, the title to the realty is in the administrator or the heirs. It may be, and the court is inclined from the conduct of the parties in this cause to conclude, that the heirs believe they will be the ones chiefly, in the end, to be benefited by the administrator's recovering in this suit; but the court cannot presume upon this record that they will be the sole beneficiaries, or treat them as the real parties in interest.

[2] The suit to cancel the deed was not between the same parties as the present suit to foreclose, nor their privies. The suit to cancel the deed was in no sense an attack on the grantors' title, showing any breach of warranty or failure of consideration for the notes. That of which complaint was made in that cause was the defendant's fraud

in getting the title, and not an allegation of failure of title. If it cost the defendant to defend against that allegation of fraud, or to settle that controversy, it was nothing for which David L. Kelly was in any wise responsible under the terms of his contract, his deed, or the mortgage accepted by him, and could not be considered as a constructive ouster.

"A covenantor is not liable to the covenantee for damages sustained by the latter by reason of an unsuccessful attack upon his title by a third person." 11 Cyc. 1122d.

This is too obvious to require the citation of further authority. For the same reason, no reduction can be allowed for the expenses incurred by the defendant in the suit by the heirs to cancel the deed.

[3] Defendant seeks a further reduction of the amount due under the mortgage of $5,000 on account of there having been included, in the lands conveyed to defendant and covered by the mortgage, a certain ten-acre tract to which David L. Kelly had no record title. This land, with the timber thereon, was shown by the evidence to be worth not more than $450.

The defendant's contract with David L. Kelly, to purchase the lands, contained the following provision:

"The first parties will, as promptly as possible, cause to be prepared abstracts of title for the said lands and timber showing good and clear title in them and submit the same for examination to the second party or its attorneys; and the second party shall have 20 days from submission of such abstracts to examine the same. Any objections to the abstracts or title not made in writing within said 20 days shall be deemed waived."

The defendant took the land without objection to the title, after full opportunity to examine the abstracts. It has removed the timber and has not been disturbed in its possession. Under these facts, it cannot be relieved against the mortgage merely because there appears to have been no title of record in David L. Kelly. Peters v. Bowman, 98 U. S. 56, 25 L. Ed. 91; Edgar v. Golden, 36 Or. 452, 48 Pac. 1118, 60 Pac. 2; 11 Cyc. 1120, 1126; 8 Am. & Eng. Encyc. Law (2d Ed.) 175.

[4] The bond executed by Frank G. Kelly for himself and David L. Kelly, doing business as D. L. Kelly Lumber Company, undertook to indemnify the defendant—

"from any and all acts, claims, demands, actions, suits or proceedings, of any and every nature that may at any time be made, asserted, brought or prosecuted by, or on behalf of, or on account of the said D. L. Kelly, or his wife, Mabel Kelly, or the said Frank G. Kelly, or the estates, heirs at law, legatees, devisees or personal representatives, executors, administrators or assigns, of either of them, in or to or upon any of the above-described real property and timber."

This undertaking being several as well as joint, it may be conceded that it would afford a ground of recoupment for the sums paid by defendant to the heirs in settlement of the suit to cancel the deed, were it admitted or established that Frank G. Kelly had authority from David L. Kelly for its execution; but such authority is not shown. If these lands were, in fact, those of the partnership, standing in the name of David L. Kelly, and it were conceded that the bond or undertaking would be unaffected by the statute of frauds, still Frank G. Kelly

could only be considered an agent of his partner-brother. In the absence of express authority or ratification, it is doubtful whether he would have the authority to bind his brother by rescinding or modifying such a contract of sale as that already made by David L. Kelly; for by the making of that contract David L. Kelly manifested his intent, and there would be no presumption that he acceded to the modification of that agreement made by Frank G. Kelly.

An agent for the sale of property—and Frank G. Kelly, as a partner, can be held to be no more—would have authority to make covenants of warranty as to the title, because they are customarily made in such sales; but he clearly would have no authority, merely by reason of his partnership, to bind his brother, his partner, as a surety, or indemnitor in an undertaking against possible attacks to be made upon the transfer of title, for such is not the custom or usage in sales of real estate. And he, certainly, would have no authority to bind him as an indemnitor from attacks that might thereafter be made by Frank G. Kelly, the agent, or partner, who would therein, necessarily, have an interest adverse to his principal, the surety, his partner whom he sought thereby to bind, an interest the adverse nature of which is made still more plain by the fact that, as part of the same arrangement, the defendant employed him to secure quitclaim deeds from the other heirs contracting to pay him $5,000 for such service, of all of which matters the defendant, in its dealing with Frank G. Kelly, had knowledge. 31 Cyc. 1365b, 1387g, 1432b, and 1571v.

[5] Defendant relies upon certain tenders to defeat the recovery of interest. By the terms of the notes, they were made payable at the Merchants' National Bank, Portland, Or. Upon the maturity of the first note, defendant made a written tender of the amount due upon the first, and the interest due upon the second. As a condition to the acceptance of the tender, the surrender of the note was demanded and a receipt for the interest paid, signed by the administrator of the estate of David L. Kelly, or other legal representative. This tender was not actually made to, or upon notice to, or with the knowledge of, the administrator of the estate, but to the president of the Merchants' National Bank.

Before the maturity of the second note, the defendant made a further tender of the face amount of the second note and one year's interest, recited to be the interest due to the date of its maturity. This tender was made in the same manner as the first and was like conditioned. It also contained a notice of the former tender and set out a copy thereof, reciting that the defendant, Mountain Timber Company, had been at all times and was ready to comply with the terms of said first tender.

Later, and before the maturity of the second note, a third tender was made. It differed from the other two in that it purported to be made to both the administrator and administratrix of the estate of David L. Kelly. Payment of both notes was tendered in the amount of $34,937.50, being the face of the two notes and interest on one for a year and the other for two years. This tender was conditioned upon the quieting of title to the lands purchased against the claims

of Thomas G. Kelly. The further demand was made, as a condition of the tender, that title and possession of the ten acres, already mentioned, be vested in the Mountain Timber Company. Notice was also included in this of the two former tenders. The third tender was made in the same manner as the other two.

The present suit was brought after these tenders were made. The mortgage provided that any timber cut by defendant upon the mortgaged lands before full satisfaction of the mortgage should be paid for at the rate of $2.50 per thousand feet, at or before the time of cutting the same. There was no attempt to comply with this provision before, or after, the making of these tenders, although a large amount of timber was cut and removed from the land. At the commencement of the suit, the complainant Burke asked an injunction against the further cutting of timber in such manner. To avoid the issuance of such injunction, the defendant, with the United States Fidelity & Guaranty Company as surety, executed a bond to the complainant Burke in the amount of $45,000, conditioned to pay any judgment executed herein.

It appears that defendant had been a depositor and customer of the Merchants' National Bank for two years prior to the tenders. The money accompanying those various tenders was procured in the following manner: The defendant presented a check on a Nebraska bank to the Merchants' National Bank. It was cashed by the latter, the cash tendered the president of the bank with the written terms of tender already mentioned, and the president refused the tender. The money was then taken back to the teller's window and returned to the bank, the bank returning to defendant its check on the Nebraska bank —these transactions all occurring in a few minutes, and it being understood in advance by the defendant and the president of the Merchants' National Bank exactly what would be done. There is no evidence that any money was left with the bank or otherwise set aside to keep these tenders good, or meet either of the notes.

In its answer, the defendant makes no tender, and there has been no attempt in court to keep its tender good, except the recital in its answer first filed herein alleging its willingness to pay and discharge the notes, conditioned, among other things, upon the dismissal of the Thomas G. Kelly suit and the giving of the quitclaim deed by him to the Mountain Timber Company. This offer was not kept good in its later answer wherein a dismissal and stay of the suit were asked for.

Upon this state of facts, it would be inequitable to disallow any part of the interest upon these notes, or hold the mortgage lien discharged by the tenders. Bissell v. Heyward, 96 U. S. 580, at page 587, 24 L. Ed. 678; Eastern Ore. Land Co. v. Moody, 198 Fed. 7, 119 C. C. A. 135; Beardsley v. Beardsley, 86 Fed. 16, at page 23, 29 C. C. A. 538; State of Illinois v. Ill. C. R. Co. (C. C.) 33 Fed. 730, at page 776; Cain v. Garfield, Fed. Cas. No. 2,293; Cheney v. Bilby, 74 Fed. 52, 20 C. C. A. 291; Coghlan v. So. Carolina R. Co. (C. C.) 32 Fed. 316; Hoeschler v. Bascom, 44 Wash. 673, 87 Pac. 943; Silver v. Moore, 109 Me. 505, 84 Atl. 1072; Lewis v. Helton,

144 Ky. 595, 139 S. W. 772; 38 Cyc. 158a, 163c; 28 Am. & Eng. Encyc. Law (2d Ed.) 38.

The court finds that $2,500 is a reasonable amount to be allowed as attorney's fee to the plaintiffs.

Findings and decree may be prepared in accordance with the foregoing.

In re LANCE LUMBER CO.

(District Court, E. D. Pennsylvania. June 30, 1915.)

No. 4666.

1. CORPORATIONS ⟸414—OFFICERS—POWERS.
An officer of a corporation, with authority to issue its promissory notes, has no authority to issue notes for other than corporate purposes.
[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1640–1646; Dec. Dig. ⟸414.]

2. CORPORATIONS ⟸399—AUTHORITY OF OFFICERS—ISSUANCE OF NOTES—LIABILITY.
Where a note of a corporation is issued by an officer acting with apparent authority and within the general scope of his powers and in the regular course of business, any one dealing with him may assume that the note is that of the corporation.
[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1588, 1602–1610; Dec. Dig. ⟸399.]

3. CORPORATIONS ⟸429—AUTHORITY OF OFFICERS—ISSUANCE OF NOTES—LIABILITY.
Where a person dealing with an officer of a corporation knows, or is put on inquiry which will lead to knowledge, that the officer is acting without authority or in fraud of the corporation, the corporation is not bound by the act of the officer.
[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1720–1723, 1725; Dec. Dig. ⟸429.]

4. CORPORATIONS ⟸464—ACTS OF OFFICERS—ULTRA VIRES.
The giving by a corporation of a note is not ultra vires, and becomes such only when the purpose in the giving of it is not for the use of the corporation, but in payment of the obligation of another, without consideration moving to it.
[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1820, 1821, 1828; Dec. Dig. ⟸464.]

5. CORPORATIONS ⟸432—ACTS OF OFFICERS—ULTRA VIRES.
Where prima facie a note of a corporation has been issued without authority and in fraud of its rights, the holder in a proper case may be required to prove authority, or prove facts rendering the corporation liable; but where, on its face, the act is within corporate powers and in the regular course of business, such proof is not necessary to hold the corporation liable.
[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1717, 1718, 1724, 1726–1735, 1737, 1743, 1762; Dec. Dig. ⟸432.]

6. BANKRUPTCY ⟸340—CLAIMS—ESTABLISHMENT—EVIDENCE.
A seller sold lumber to an individual under the understanding that a corporation to be formed would take over the lumber and would be bound for the price as substituted buyer. The corporation was organized, and its notes were exchanged for those of the individual. The seller acted in good faith. The corporation renewed the notes from time to time,

and made partial payments by checks. A proposition to purchase the lumber from the individual by issuing to him certificates of stock was not carried out, and certificates were never issued. The seller at first declined to accept the notes of the corporation, but subsequently did so. *Held*, that, on the corporation being adjudged a bankrupt, the seller could establish a claim against it for the amount due on the notes.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 527; Dec. Dig. ⊂⊃340.]

In Bankruptcy. In the matter of the Lance Lumber Company, a bankrupt. On petition for review of order of referee denying the claim of the George F. Lance Company. Order reversed, and proceedings remanded.

J. Arthur Keppelman, of Reading, Pa., for petitioner.
Joseph R. Dickinson, of Reading, Pa., for trustee.

DICKINSON, District Judge. This case presents the phenomenon observed in those ingeniously devised advertising signs which show the form of different letters and in consequence convey a different meaning according to the viewpoint of the observer. The metal or other substance of which they are composed is fixed and certain. The reading varies as the position of the observer changes. The real facts in this case, as distinguished from the deductions and inferences made and drawn therefrom, are these:

J. Cameron Lance bought of the George F. Lance Company a stock of lumber, for which he gave his promises to pay in the form of promissory notes. The purchase was made with the avowed plan in mind to form a lumber company, which, when formed, was to take over the stock of lumber thus bargained for and be substituted as the purchaser. Such a corporation was organized under the name of the Lance Lumber Company, and its notes were exchanged for those of the purchaser in accordance with the original plan. These corporate notes were executed by the same J. Cameron Lance as treasurer. They were renewed from time to time for reduced amounts. The payments made were by checks of the corporation, likewise signed by J. Cameron Lance as its treasurer, as long as he was connected with the company. The later notes and checks were signed by his successor in office. The transaction in all of its successive steps was made the subject of formal corporate action by the George F. Lance Company. The original sale was duly authorized and the novation of the debt accepted by resolution of its board of directors, which was duly entered upon its minutes. The stock of lumber remained stored on the premises of George F. Lance Company and was taken therefrom by the new company. The Lance Lumber Company having gone into bankruptcy, the George F. Lance Company presented the unpaid last note in this series as a claim against the bankrupt estate.

The meaning which the trustee extracts from these facts is this:

J. Cameron Lance, being indebted to George F. Lance Company, and being also treasurer of the Lance Lumber Company, fraudulently issued the notes and checks of the latter company in payment of his individual debt. The George F. Lance Company had knowledge of

this fraud, in that they knew the notes which they originally held were the debt of J. Cameron Lance, and that the corporation notes and the checks first given were signed by him as treasurer. This inference of fraud is based upon the further fact that the Lance Lumber Company passed a resolution to purchase this stock of lumber from J. Cameron Lance by issuing to him full-paid certificates for all the shares of its authorized capital stock and the negative fact that no corporate action appears by its minutes to have been taken by the Lance Lumber Company in assumption of the J. Cameron Lance note indebtedness.

The position taken by the bankrupt estate, and the argument in support of it deduced from these facts, is this:

The debt started as the debt of J. Cameron Lance. It was known to the holder of the notes to be his debt. The Lance Lumber Company could not, because it lacked the legal power so to do, assume and pay the debt of another. On the very face of the transaction this was what it was attempting to do, even if what was done had been in fact the act of the corporation. The real fact, however, is that what was done was not the act of the corporation, but was wholly the fraudulent act of one of its officers in issuing the notes of the corporation to pay his individual debt. The argument seeks, therefore, to place George F. Lance Company between the horns of this dilemma: If the transaction is taken for what it appeared to be, the corporation was attempting to do what it lacked the legal power to do. If the transaction is to be viewed as what it really was, then the giving of the corporation note was the fraudulent act of J. Cameron Lance, and of him alone. The argument meets the anticipated observation that a denial of the claim would under the circumstances work a hardship to George F. Lance Company by the statement that the latter had the means of the verification of the facts at hand, and if they chose to accept of the representations of J. Cameron Lance, without inquiry as verity, they are visited with the consequences. The inference is also intimated, if not expressly drawn, that George F. Lance Company knew that the corporate notes had been issued without authority, or through the fraud of its treasurer, because George F. Lance Company at first declined to accept the corporation notes in payment for the lumber and to give up the individual notes of J. Cameron Lance which it at the time held. The referee accepted this view and rejected the claim of George F. Lance Company.

From the viewpoint of the holder of the notes the situation is this: The original sale as made contemplated the doing of the very thing which was done. The transaction on its face was in the regular course of business. The thing done was well within the legal power of the corporation to do. It was incorporated to engage in the lumber business. The purchase of lumber was in the regular course of that business. J. Cameron Lance had to the knowledge of the George F. Lance Company lumber to sell. The Lance Lumber Company had full legal power to purchase lumber and issue its notes in payment therefor. When, therefore, the notes were passed over to George F. Lance Company in apparent good faith and in the regular course of business, the latter was justified in like good faith in accepting them,

and, having given consideration, thereby acquired a valid claim against the maker of the notes. Whether a fraud committed upon the corporation by one of its own officers would or would not be a defense to paper regularly issued would turn entirely upon the good faith and knowledge of the person with whom the officer dealt, and as George F. Lance Company had acted in good faith and without notice of the fraud, and had parted with value, it is in a position to hold and enforce the payment of the corporate obligations received by it. The acts and conduct of the corporation for the length of time during which this series of notes was in process of part payment and renewal, both before and after the severance of all relations between J. Cameron Lance and the corporation had ceased, are further urged as strengthening the position of the claimant, and as evidence that the corporation had given the notes in purchase of the lumber which it had received.

[1-3] The decision of the case turns upon a question of fact, or of presumptions of fact, rather than upon any question of law. Whatever difficulty is presented arises, not out of the legal principles which may be involved, but in determining what principle is to be applied. The authority of the treasurer of a corporation to make and issue its promissory notes must be conceded. That an officer has no right, and in this sense no authority, to issue such notes for other than corporate purposes, is clear. When such obligations are issued by an officer acting with apparent authority, and within the general scope of his powers, and in the regular course of business, there is a presumption, and any one dealing with him has the right to assume, that the obligation is that of the corporation. When, however, the person with whom he is dealing has knowledge, or is put upon inquiry which would lead to knowledge, that the officer is acting without authority or in fraud of the rights of the corporation, the latter is not bound by what he does. These principles apply where the thing attempted to be done is in fraud of the rights of the corporation, as well as to cases in which the thing attempted to be done is beyond the power of the corporation to do in the ultra vires sense. It is to be observed, however, that in each class of cases the thing attempted to be done is in fact a fraud upon the corporation, or is in fact beyond the legal power of the corporation to do. These principles are supported by abundant authority, as the following citations will suffice to show: Mapes v. German Bank, 176 Fed. 89, 99 C. C. A. 609; Park Hotel v. Bank, 86 Fed. 742, 30 C. C. A. 409; Merchants' Bank v. Baird, 160 Fed. 642, 90 C. C. A. 338, 17 L. R. A. (N. S.) 526; Young's Estate, 234 Pa. 287, 83 Atl. 201.

[4, 5] It remains only to find the facts in the instant case to which the above principles are to be applied. What the corporation did here, if what was done was its act, was to issue its promissory notes in payment for lumber purchased. The giving of a promissory note by a corporation could not be said in any proper sense to be ultra vires. It becomes such in a subsidiary sense only when the purpose in the giving of the note is found to have been, not for its use and benefit, but in payment of the obligation of another, without consideration moving to it. This essentially involves the thought of a fraud upon the

corporation. Fraud is not a thing to be presumed, or to be so taken for granted as to require to be negatived by anticipation. If the prima facie fact is that the note of a corporation had been issued without authority and in fraud of its rights, then in a proper case the holder may be put to proof of authority, or of such facts and consideration as will render the corporation liable; but where on its face the act is within the corporate powers of the corporation to do, and in the regular course of business, and done by apparent authority, no occasion for such proofs arises. As applied to the facts of this case, if it had been shown, or fairly appeared, that the corporation had been defrauded, then George F. Lance Company might well have been called upon to prove the notes to have been issued with the authority of the corporation and for a consideration moving to it.

[6] This brings the whole inquiry down to the question of whether there was here any fraud committed upon the corporation. We have looked over and through the record for any suggestion that the claim of George F. Lance Company to be paid for its lumber is other than a just claim. The search has been barren of results. The good faith of the claim in itself seems to be admitted. The whole objection is centered and pivoted upon the point that the claim under the facts of the case is against J. Cameron Lance, and that there is no claim against the Lance Lumber Company, the payment of which can be enforced through the remedies provided by law. The acts of George F. Lance Company were in good faith throughout, and, if there was a fraud committed, it was under circumstances which furnished no criticism of them because of the deception which was practiced. They originally sold the lumber with the expectation that just what was afterwards done would be done. The formation of the Lance Lumber Company, its taking over the lumber, and the giving of its notes in payment therefor, was exactly what was looked for and expected to be done. Moreover, the acts and conduct of the corporation already alluded to in following up its notes with partial payments by checks, the later ones of which were signed by an officer of the company other than J. Cameron Lance, the storing of the lumber on the premises of George F. Lance Company, and the taking it therefrom by the Lance Lumber Company for its corporate purposes, were all acts which would have lured any one into the belief that the transaction was in fact what George F. Lance Company believed it to be. Whatever evidential weight these facts and circumstances legally have, they produce upon the mind a prima facie conviction that the lumber company acquired this stock of lumber, knowing it was to be paid for by them, and expecting to pay George F. Lance Company for it.

All there is to remove this impression is, first, the absence of any formal corporate act, evidenced by an entry upon its minutes, that it had undertaken to pay George F. Lance Company. This is in itself a mere circumstance, entitled to consideration, of course, but in itself of little weight. Another fact is that the lumber company by formal action authorized and directed the purchase of this lumber to be made in consideration of the issuance to J. Cameron Lance of certificates of stock representing all its authorized capital. It is this circumstance which lends color to the theory that the lumber company

had taken the lumber of J. Cameron Lance and paid him for it in certificates of stock, and that he had fraudulently sought to have them pay for it a second time by the assumption of his debt. It will not escape notice, however, that this circumstance loses all its persuasive force and absolutely all its evidential value, unless its offer to thus purchase the lumber was consummated by the carrying out of the proposition and its actual issuance of its stock. The search into the actual transaction is here rendered difficult by that curious inability which many people have to distinguish between a corporation and the individual members who compose it. Right here we undoubtedly have an instance of this phenomenon. J. Cameron Lance was evidently the moving spirit in the incorporation of this company. He was *it* in a most emphatic sense. The legal requirements of its formation were complied with by its capital stock being subscribed for by himself and others bearing the same name, and probably members of his family. It is, of course, clear that the subscribers to this stock had thereby obligated themselves to take the stock and to pay for it. The certificates, of course, could not properly issue until the stock had been thus paid for; but if and when paid for the stock belonged to the subscribers, and the corporation was without right, authority, or power to issue certificates to any one else.

Notwithstanding this, however, the corporation assumed this very right and power which it did not possess, and undertook without the authority or sanction of the subscribers to more than half the stock to issue certificates for the whole of it to J. Cameron Lance. If certificates had actually issued in accordance with and in pursuance of this resolution, the subscribers might be presumed to have waived their rights. At least no one else would have been in a position to have complained of the issue. There is, however, absolutely no evidence in this case that the certificates of stock were so issued, and the only evidence we have on the subject is the testimony of J. Cameron Lance, who positively denies that the stock was ever issued to him, and professes ignorance of this plan to purchase the lumber. All we know of the methods and practices of many people in the organization of corporations lends plausibility to the theory that the proposition itself was never a real one, but was merely a plan emanating from counsel, and indicating a method by which the stock might be issued. It further lends equal plausibility to the theory that the plan thus outlined never was carried out, and that there was substituted for it the plan of the corporation paying for the lumber by assuming the payment of the J. Cameron Lance notes, and issuing to J. Cameron Lance the few shares of stock which appeared to have been issued to him. This leaves the corporation in position to enforce the payment of the unpaid stock subscribed for.

The only other fact given us as a circumstance supporting the finding of fraud, and visiting knowledge of that fraud upon George F. Lance Company, is the letter written by George F. Lance Company to J. Cameron Lance, in which they at first declined to accept of the notes of the lumber company in payment of the notes which they then held. We cannot see in this fact the significance which the referee has given to it. On its face it is nothing more than an expression of

the disinclination which any holder of paper would have to give up the liability of a known individual maker for that of a corporation, the value of whose obligation was unknown to him. There is nothing in the case which militates against this view of this circumstance. Afterwards George F. Lance Company receded from this position and accepted the novation of the debt. It is not a violent presumption that they did so when it was explained to them that the corporation had taken over the lumber, and when they sold it would be in a position to pay for it.

We cannot escape the conviction that if George F. Lance Company had brought suit against the corporation on these notes, and it had been shown that the consideration was this stock of lumber which the corporation had received, that the lumber company had not only given its notes, but had renewed them from time to time, making partial payments by its checks, and thus given recognition of the debt after J. Cameron Lance had severed all connection with the corporation, and nothing appeared upon the other side except a proposition to purchase the lumber from J. Cameron Lance by issuing to him certificates of stock, which proposition was never carried out and the certificates never issued, and the letter above referred to, written by George F. Lance Company, and if the question of fact as to whether the corporation had assumed the payment for the lumber had been submitted to a jury, the verdict would have been for the plaintiff, and judgment on the verdict would have been entered by the court.

On the like evidence we feel persuaded of our duty to make a like finding, and the findings made by the referee and his order thereon are accordingly reversed, and the proceedings are remanded, with instructions to the referee to proceed in the case in accordance with this opinion and the order now made.

UNITED STATES v. PITAN et al.

(District Court, D. South Dakota, S. D. July 7, 1915.)

1. COURTS ⟸375—APPLICATION OF LIMITATIONS TO SUITS BY THE UNITED STATES.

State statutes of limitations do not bar suits brought by the United States, in her own courts and in a sovereign capacity, to assert a public interest or to enforce a public right.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 983; Dec. Dig. ⟸375.]

2. LIMITATION OF ACTIONS ⟸11—APPLICABILITY TO SUITS BY THE UNITED STATES.

The general government is not bound by any statute of limitations, unless Congress has clearly manifested its intention that it shall be so bound.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 35–39; Dec. Dig. ⟸11.]

3. PUBLIC LANDS ⟸123—CANCELLATION OF PATENTS—ACTIONS FOR DAMAGES —LIMITATIONS.

Under Act March 3, 1891, c. 561, § 8, 26 Stat. 1099 (Comp. St. 1913, § 5114), providing that suits by the United States to vacate and annul any

patent thereafter issued shall only be brought within six years after the issuance of such patent, an action for damages for fraud in obtaining a patent is not barred by the expiration of six years, as the statute does not, as claimed, bar the right, as well as the remedy, but is intended to give stability to titles depending on patents from the government.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. ⟸123.]

4. PUBLIC LANDS ⟸123—PATENTS OBTAINED BY FRAUD—AMOUNT OF DAMAGES.

In an action for damages for fraud in obtaining a patent for a homestead entry, commuted to a cash entry, the government is entitled to recover at least the minimum government price of the land.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. ⟸123.]

5. PUBLIC LANDS ⟸123—PATENTS OBTAINED BY FRAUD—AMOUNT OF DAMAGES.

Act March 2, 1896, c. 39, § 2, 29 Stat. 43 (Comp. St. 1913, § 4902), providing that if any person, claiming to be a bona fide purchaser of land erroneously patented to another, is made a party to a suit to vacate or annul the patent, and is found to be a good-faith purchaser thereof, the court shall confirm the title in him, and award judgment against the patentee for the value of the land, which in no case shall be more than the minimum government price thereof, is broad enough to include all patents erroneously or fraudulently issued under any of the acts of Congress.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. ⟸123.]

At Law. Action for damages by the United States against Carl Pitan and another. On demurrer to the complaint. Demurrer overruled.

Robert P. Stewart, U. S. Atty., of Deadwood, S. D.

Bartine & Bartine, of Oacoma, S. D., for defendant Carl Pitan.

ELLIOTT, District Judge. This is an action at law to recover damages upon a complaint filed by the plaintiff herein, alleging in substance:

(1) The jurisdictional facts.

(2) That on the 10th day of May, 1902, plaintiff was the owner and in possession of the quarter section of land therein described, the same being public lands of the United States, part of the public domain, and subject to entry and open to settlement under the homestead laws of the United States.

(3) That on or about that date the defendant Henry presented to and filed in the local land office of the plaintiff at Chamberlain, S. D., her homestead application to enter said land under the homestead laws of the United States, and filed her homestead affidavit, in the usual form, in substance that her entry was made for the purpose of actual settlement and cultivation, and not for the benefit of any other person or persons; that she was acquainted with the character of the land; that she was not acting as the agent of any person in making such entry, nor in collusion with any person, to give such person the benefit of the land entered; that she did not apply to enter said land for the purpose of speculation, but in good faith, to obtain a home for herself; that she had not directly nor indirectly made, and would not

make, any agreement or contract in any way or manner with any person or persons by which the title which she might acquire thereto from the United States would or should inure in whole or in part to the benefit of any person except herself, and then and there paid the land office fees required by law, and received a receiver's receipt therefor, and her application to enter such land as a homestead was then and there duly granted.

(4) That on the 27th day of May, 1903, she filed notice of intention to make commutation homestead final proof upon said land, and the register of the land office duly designated July 13, 1903, as the time for making said final proof, and notice thereof was duly given in the manner provided by statute, rules, and regulations.

(5) That on said 13th day of July, 1903, defendant Henry made commutation cash entry for said land, and duly executed the affidavit required under section 2301, Revised Statutes of the United States (Comp. St. 1913, § 4589), and paid the sum of $80, the purchase price of said land, and received receiver's receipt for said commutation homestead entry, dated on that date. She also filed nonmineral affidavit, and testified in support of her said homestead entry for said lands, and the complaint alleges that the defendant Carl Pitan appeared as a witness in support of such entry, and that defendant Henry, by her commutation final proof made and caused it to appear by the testimony of herself and corroborating witness, including the defendant Pitan, under oath, in substance, that she had erected a frame house upon said land, consisting of a 10x12 foot house, with floor, doors, and windows; that she had made valuable improvements upon said land, of the value of $200; that she had resided continuously upon said lands for the full period required by law, with the intention of making it her home, and without absence, from the 26th day of September, 1902, to the date of final proof; that she had not sold or contracted to sell the same, or any part thereof, and was the bona fide owner thereof; that it was made to further appear, under oath, by the testimony of the defendants, that neither the said Carl Pitan nor any other person was interested in said homestead, and that the defendant Henry was acting in good faith in perfecting her said homestead entry; that she had not made said entry for the purpose of acquiring a homestead for the use and benefit of any other person, and had not acquired the same under any agreement whereby the title she might acquire would or should inure to the benefit of any other person.

(6) That thereafter, on the 14th day of March, 1904, there was issued and delivered to the said defendant Carl Pitan, by the local land office, at his request, a patent from the United States of America, in due and regular form, conveying to the defendant Henry the legal title to said lands, which patent was filed in the office of the register of deeds of the county in which the lands are situated January 27, 1906.

(7) That the defendant Henry conveyed, by warranty deed, the said lands embraced within the said homestead entry, to defendant Carl Pitan July 13, 1903, and such conveyance was duly filed and recorded

in the office of the register of deeds of the county in which the land was situated February 26, 1904.

(8) That said lands embraced within said homestead entry were thereafter, by the said defendant Carl Pitan, duly conveyed unto Emil Wilskie, and he ever since has been and now is in the possession thereof.

(9) The complaint further alleges, in substance, that the statements, representations, and testimony of the defendant Henry, contained and set forth in her said application to enter said land and her said homestead affidavit, and the statements, representations, and testimony made and subscribed by her upon her said commutation final proof, and the statements, representations, and testimony of the said Carl Pitan, as one of the witnesses in support of the homestead entry of said defendant Henry, were and are wholly false, fraudulent, and untrue, and were made and caused to be made by the defendants Henry and Pitan for the purpose of deceiving the plaintiff and its officials as to a material inquiry then and there pending, and that such representations and testimony were given, made, and subscribed without any belief on the part of the defendants Henry and Pitan that such statements and testimony were true; that the same were false, fraudulent, and untrue, and that in fact and in truth the defendant Henry was not familiar with the character of said land; that she had not in truth and in fact erected a frame house upon said land, but that the same was erected by the defendant Pitan at his own expense; that defendant Henry had not fenced said lands, but the same had been fenced theretofore by the defendant Pitan; that the defendant Henry had not made valuable improvements on said lands of the value of $200, or of any value; that she had not resided continuously, or at all, upon said lands during the period required by law, or at any time; that she had been absent from said lands continuously during the period required for her residence by law, with the exception of occasional visits to said land, for about the period of one week in September, 1902, and one week in February, 1903, and for about four days prior to the making of her said commutation final proof; that said statements, representations, and testimony were false, fraudulent, and untrue, in that defendants Henry and Pitan, prior to the filing of said homestead application and affidavit by the defendant Henry, to wit, on the 9th day of May, 1902, unlawfully conspired, combined, and agreed together to defraud the plaintiff of the title, possession, and use of said lands and premises embraced within the said homestead entry, by means of false, fraudulent, famed, illegal, and fictitious homestead entry of the lands therein described under the homestead laws of the United States.

(10) It is further alleged that in pursuance of said unlawful conspiracy and agreement, and to effect the object thereof, the defendant Pitan unlawfully persuaded, induced, and hired the defendant Henry to make the said homestead application and affidavit, and to take the oaths and give the testimony and make said commutation final proof, and to do the acts and things in the said complaint alleged, for the purpose of fraudulently procuring the title to the said lands from the plaintiff.

(11) The complaint thereupon states in detail the unlawful agreements and conspiracy covering the acts hereinbefore set forth, stating, in substance, that it was agreed that she was to do the things that it is alleged that she did for the use and benefit of said Pitan, and that the same was to be done at his expense.

(12) It is thereupon further alleged that all the said statements, representations, and testimony made, given, and subscribed by the defendants were false, fraudulent, and untrue, and were well known by each of them to be false, fraudulent, and untrue; that they were made for the purpose of deceiving the plaintiff and its officials, and that the defendant Pitan at all times therein set forth aided, abetted, and assisted, instigated, and participated in and benefited by such fraudulent acts, statements, representations, and testimony; that the defendant Pitan took said deed from defendant Henry with full knowledge then and there of said fraudulent and unlawful agreement, and of the false, fraudulent, and untrue proofs, statements, and testimony of the defendant Henry, and participated in and gave his own false testimony with reference thereto; that in making said final proof the defendant Henry acted as the agent of the defendant Pitan, and was in collusion with him for the purpose of securing the title to said land and deeding the same to him.

(13) That plaintiff, and especially its local officers in the land office, believed and relied upon the said false, fraudulent, and untrue statements, representations, and testimony made by the defendants, and thereby the plaintiff was induced to accept said commutation final proof and to allow said patent to issue in the manner stated.

(14) Plaintiff further alleges that the lands therein described were and are of the reasonable value of $1,600, and by reason of the fraud and deceit of the defendants Henry and Pitan the plaintiff was and is damaged in the sum of $1,600, and demands judgment therefor.

To this complaint the defendant Carl Pitan enters his appearance, and interposes a demurrer to plaintiff's complaint upon the ground that the same fails to state facts sufficient to constitute a cause of action against such defendant.

It will be observed that the patent for this land was issued more than six years prior to the commencement of this action, and this action is not an action in equity for the cancellation of the patent, but an action at law for the recovery of damages sustained by the plaintiff for the reasons set forth in the complaint, the substance of which is as above stated.

[1] It is contended in behalf of defendant Pitan that the cause of action is barred by the statute of limitations. The state statute of limitations does not bar suits of the United States, brought in her own courts in the sovereign capacity, to assert a public interest or to enforce a public right. U. S. v. Thompson, 98 U. S. 486, 25 L. Ed. 194; U. S. v. Inslay, 130 U. S. 263, 9 Sup. Ct. 485, 32 L. Ed. 968; U. S. v. Norris, 222 Fed. 14, 137 C. C. A. 552.

[2] It is further contended in behalf of defendant Pitan that, the statute of limitations adopted March 3, 1891 (26 Stat. 1099, c. 561), having run against annulment of the patent, the statute bars, not only

the remedy, but the right, and therefore this action will not lie for recovery on account of the fraud perpetrated in acquiring title to the lands. That the general government is not bound by any statute of limitations, unless Congress has clearly manifested its intention that it shall be so bound, is so well settled that it needs no citation of authority. U. S. v. Inslay, 130 U. S. 263, 9 Sup. Ct. 485, 32 L. Ed. 968; U. S. v. Jones (D. C.) 218 Fed. 973.

[3] The statute relied upon by the defendant, in so far as it is material here, is as follows:

"An act to repeal timber culture laws and for other purposes," approved March 3, 1891 (26 Stat. 1095, 1099, c. 561).

"Suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents." Section 8.

Does this statute bar, not only the remedy, but the right, and therefore will no other right of action lie for recovery on account of the fraud perpetrated in acquiring title to the lands in question? In view of the rule above stated, that the government is not bound by any statute of limitations unless Congress has clearly manifested its intention that it shall be so bound, can it be said that, by a fair interpretation of this provision of the law of 1891, Congress intended that the United States should from that time be limited, under circumstances such as are alleged in the complaint herein, to an action in equity to cancel the patent?

Clearly the United States, in common with the individual citizen, at the time of the enactment of this statute, might have more than one right of action growing out of the fraudulent acts of the defendants set forth in the complaint, and in my judgment it had the right to avail itself of its different remedies, the same as an individual. One of those remedies was the right to bring an action for damages sustained by the plaintiff by reason of the false and fraudulent representations made by the defendants, whereby the plaintiff was induced to and did part with the title to the land in question.

It is urged, however, that this remedy does not survive the expiration of the statutory period of six years named in this statute; it being conceded that while, in form, this statute only bars suits to annul the patent, by analogy to statutes of limitation generally, with regard to land, it should now be held to affect the title, and that with the loss of the right to retake the title, which has been divested through the defendants' wrong, it follows necessarily that with the loss of that right the plaintiff loses the right to bring the action to recover damages for the same wrong.

I have carefully considered the language of the court in United States v. Chandler Dunbar Co., 209 U. S. 447, 28 Sup. Ct. 579, 52 L. Ed. 881, and find some justification for the defendant's position; but considering the fact that the relief in that case was for the cancellation of the patent, and that the language there used had reference only to the question of plaintiff's right to that relief, I am satisfied it was not the intention of the court to hold that it was the intention of Congress,

when this statute of limitation was enacted, to extend the limitation further than its express language indicates. I am satisfied, also, that by the enactment of this statute there was no intention on the part of Congress to disburb the general governmental policy with reference to the bringing of actions generally by the United States to assert any public interest, or to enforce any public right, and that the rule with reference to such actions, including the right to bring this action for damages, is in no wise affected by the statute in question.

I am of the opinion that the sole purpose of this statute of limitation was to give stability to titles depending on patent from the government; its effect being to confirm such title after six years in the patentee, or his assignee, and to waive any right of action it may have had for annulment of the patent, but in no manner intended to bar the government of its right of action to recover damages for fraud such as is alleged in the complaint herein. It follows, therefore, that this court is of the opinion that the government of the United States has a right of action to recover damages against the defendants Henry and Pitan, sustained by it by reason of the alleged fraud of such defendants.

[4] Inquiry as to the proper measure of the plaintiff's damages is not necessary at this time. Suffice it to say that, upon proof of the allegations of the complaint, the plaintiff is entitled to recover *at least* the minimum government price of the land. U. S. v. Norris, 222 Fed. 14, 137 C. C. A. 552.

[5] In reaching this conclusion I have not failed to take into consideration the provisions of section 2 of the act of March 2, 1896 (29 Stat. 43, c. 39, Comp. Stat. 1913, § 4902) which provides that:

"If any person claiming to be a bona fide purchaser of any land erroneously patented to another, is made party to a suit to vacate or annul the patent, and is found by the court to be a good-faith purchaser thereof, the court shall confirm the title in him and award judgment against the patentee for the value of the land, *which in no case shall be more than the minimum government price thereof.*"

This act indicates the purpose of Congress that as to lands erroneously or fraudulently patented, for which nothing has been received by the government, it shall only recover the minimum government price thereof from the patentee, upon the title being confirmed in a good-faith purchaser from him, and is broad enough to include all patents erroneously or fraudulently issued under any of the acts of Congress. U. S. v. Norris, supra. I therefore, without intending to express an opinion as to whether or not this latter section does apply to a patent for a homestead entry, commuted to a cash entry, conclude that the complaint herein states a cause of action, at least for the minimum government price of the land. U. S. v. Norris, supra.

An order should be entered overruling the demurrer of the defendant Pitan, and giving him 20 days within which to file an answer, if he is so advised.

In re BAKER & EDWARDS.

(District Court, E. D. North Carolina. July 3, 1915.)

1. BANKRUPTCY ⟸320—CLAIMS OF SURETIES FOR BANKRUPT.

Bankr. Act July 1, 1898, c. 541, § 63b, 30 Stat. 562 (Comp. St. 1913, § 9644), provides that unliquidated claims may, on application to the court, be liquidated as it shall direct and may be proved and allowed. General Order XXI, subd. 4 (89 Fed. x, 32 C. C. A. xxiii), provides that claims of persons contingently liable for the bankrupt may be proved in the name of the creditor, when known, but that no dividend shall be paid thereon, except upon proof that it will diminish pro tanto the original debt. Claimant guaranteed the rent of $50 a month under a lease to a partnership, which had 3½ years still to run when bankruptcy intervened. Arbitrators appointed by the referee reported that the rental value was $33⅓ a month. The lessors were not parties to the arbitration, and it did not appear whether they had elected to declare the term forfeited for failure to pay rent, to hold claimant for the full rent, or to take the property at the rental value fixed by the arbitrators. *Held*, that claimant's claim for the difference between the rent reserved and such rental value could not be allowed, but that she might prove the claim for the amount of which she was contingently liable in the name of the lessors, and the dividend thereon should be paid to the lessors in exoneration pro tanto of her liability.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 479, 480; Dec. Dig. ⟸320.]

2. BANKRUPTCY ⟸309—CLAIMS PROVABLE—PARTNERSHIP AND INDIVIDUAL ASSETS.

E.'s wife loaned him $2,000, and he loaned B. $500 thereof; each putting the borrowed money into the business of a partnership organized by them. E. transferred to his wife B.'s note for the borrowed money. On September 9, 1914, the goods and accounts of the firm inventoried $11,550; and the indebtedness, exclusive of that due E.'s wife, was $6,000. On that day E. sold his interest to his wife, and on September 24th she sold such interest to B., taking his notes for $1,500 in payment. On January 29, 1915, B. filed a petition in bankruptcy. *Held*, that the debts due E.'s wife were provable and entitled to share in the assets, consisting of the stock in trade and open accounts, as B. had prior to the bankruptcy become the sole owner of the property formerly belonging to the partnership, and there were no partnership assets entitling the partnership creditors to priority, and E.'s sale to his wife was supported by a consideration, consisting of his indebtedness to her, and was apparently in good faith.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 555–564; Dec. Dig. ⟸309.]

3. BANKRUPTCY ⟸44—VOLUNTARY PROCEEDINGS—PARTIES—PARTNERSHIPS.

B., a member of a firm composed of himself and E., purchased E.'s interest and continued the business in the firm name. He subsequently filed a petition in bankruptcy, which he signed "B. & E., by B." *Held*, that the proceedings should be regarded as having been instituted by B., doing business as B. & E.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 43–46; Dec. Dig. ⟸44.]

In Bankruptcy. In the matter of Baker & Edwards, bankrupts. On petition for review of an order of the referee. Order affirmed in part, and modified in part.

John L. Bridgers, W. O. Howard, and G. M. T. Fountain, all of Tarboro, N. C., for trustee.

H. A. Gilliam, of Tarboro, N. C., for Mrs. Selma K. Edwards.

CONNOR, District Judge. The referee certifies, upon the petition for review of W. O. Howard, trustee, the following facts:

Prior to September 9, 1914, W. C. Baker and L. E. Edwards, as copartners under the firm name and style of Baker & Edwards, conducted in Tarboro, N. C., a mercantile business. On September 9, 1914, L. E. Edwards, for a valuable consideration, assigned and transferred his interest in said firm and its property to Selma K. Edwards, who, on September 24, 1914, transferred the interest which she acquired from her husband to W. C. Baker. At the date of said assignment the indebtedness outstanding against the firm amounted to about $6,000. The stock on hand inventoried $10,300, and the accounts due it $1,350. After purchasing the interest of Selma K. Edwards, W. C. Baker caused to be inserted in the Tarboro Southerner, a newspaper published in the town of Tarboro, N. C., an advertisement stating that he had purchased the interest of his partner in the firm of Baker & Edwards, and that the business would be conducted along the same lines "as heretofore"; that:

"Baker & Edwards wish to thank the people of Tarboro for their liberal patronage in the past and ask for a continuance to the new firm.

"W. C. Baker, 'The Dependable Store.'"

W. C. Baker also gave personal notice of the purchase and dissolution of the firm to several persons with whom the firm had dealt, and to mercantile agencies in Norfolk, Baltimore, and Philadelphia, the residence of a number of persons with whom the firm dealt and to whom it was indebted. Subsequent to September 24, 1914, Baker contracted accounts for goods purchased, due and unpaid, amounting to $1,620.55. The goods purchased by him subsequent to September 24, 1914, were commingled with those on hand at that date. On January 29, 1915, W. C. Baker filed a voluntary petition in bankruptcy and was duly adjudged bankrupt. The petition is filed in the name of, and signed, "Baker & Edwards, by W. C. Baker." The schedule of debts includes the accounts due by Baker & Edwards, prior to September 24, 1914, and those contracted subsequent thereto. The debts hereinafter described, due Mrs. Selma K. Edwards, are also scheduled. The assets, at that time, consist of the stock in trade, inventoried at $7,000, and open accounts, $1,200. W. O. Howard was duly elected trustee, and sold the entire stock of goods for $2,779.61. He has collected about $36 on the accounts and received $64.50 cash on hand. Mrs. Selma K. Edwards filed proof of the following debts:

(1) On August 1, 1913, Baker & Edwards leased from Dr. J. M. Baker and wife a storehouse in the town of Tarboro, N. C., for the term of 5 years at a rental of $50 per month. Mrs. Selma K. Edwards, by a paper writing duly executed, guaranteed the payment of the rent during the entire term. The storehouse was leased for the purpose of conducting the mercantile business of said firm. At the date of the adjudication in bankruptcy, the unexpired term of the lease

was 3 years and 6 months. Both the partners are insolvent. For the purpose of ascertaining the value of the lease during the unexpired portion of the term, arbitrators were appointed by the referee, who reported that the rental value of the property for the remainder of the term was $33.33⅓ a month. Selma K. Edwards was therefore liable for $16.66⅔ a month, amounting, during the unexpired portion of the term, to $700, for which amount she was permitted by the referee to prove a claim.

(2) Mrs. Selma K. Edwards loaned to her husband, September 1, 1913, the sum of $500, which sum he loaned to W. C. Baker, taking his five notes, of $100 each, payable January 1, 1915, September 1, 1915, September 1, 1916, September 1, 1917, and September 1, 1918, carrying interest from date. The money thus borrowed by W. C. Baker was used by him in paying his portion of the capital upon which the firm of Baker & Edwards began business. L. E. Edwards indorsed these notes to his wife, Selma K. Edwards, for value, and they are now, and were at the date of the adjudication of said firm, her property. She offered to prove this debt and share in the distribution of the assets in the hands of the trustee.

(3) On September 28, 1914, W. C. Baker executed to Mrs. Selma K. Edwards three promissory notes, for $500 each, payable January 1, 1915, January 1, 1916, and January 1, 1917, with interest from date. These notes were given for the purchase price of the interest of Mrs. Edwards in the firm of Baker & Edwards, as heretofore set forth. She offered to prove them as a debt against and share in the distribution of the assets in the hands of the trustee. The referee allowed each and every of the said claims to be proven as claims against and entitled to share in the distribution of the funds in the hands of the trustee. The trustee duly objected, and filed his petition for review.

[1] The right to file the proof of claim, arising out of her obligation, accruing on account of the lease made by the bankrupt from Dr. J. M. Baker and wife, is dependent upon the provisions of section 63b and General Order XXI, subd. 4 (89 Fed. x, 32 C. C. A. xxiii). The claim of Dr. Baker, for the purpose of making proof herein, for the rent as it accrues, is fixed; but the amount which he may collect from Mrs. Edwards is contingent. It would seem that, upon the adjudication of the lessees, the lease interest of the bankrupts should have been sold by the trustee; but, as from the report of the arbitrators appointed by the court, it had no value, the rent reserved being in excess of the rental value, no benefit would have accrued to the estate. Mrs. Edwards, as guarantor of the rent, may, if she had seen fit, have taken possession of, and either used or sublet, the property, for her indemnification. Dr. Baker was entitled to declare the term forfeited, upon the failure to pay the rent as provided in the lease. This right is expressly reserved. It does not appear that he has exercised it. If he does not see fit to do so, he may call upon Mrs. Selma K. Edwards at the end of the month, or at the end of the term, for the rent. Her obligation binds her to pay—

"the monthly rental of $50 for the entire period of 5 years, or so much thereof as shall remain unpaid by Walter Baker and L. E. Edwards on the day appointed for such payments in the contract of lease."

It does not appear from the referee's finding what course Dr. Baker has elected to pursue. It is impossible to ascertain what is the extent or the probable amount of Mrs. Selma K. Edward's liability. Dr. Baker and his wife are not parties to, nor are they bound by, the arbitration. If they should elect to take the property for the unexpired term at the rental value fixed by the arbitrators, there would be a deficit of $16.66⅔ per month for that period for which Mrs. Edwards would be liable. Until she pays this amount, she has no provable debt against the estate of Baker. She would, however, be entitled, under the terms of General Order XXI, subd. 4, to prove in the name of the creditor for the amount for which she is contingently liable, and the share which the amount proven receives from the trustee should be paid to Dr. and Mrs. Baker in exoneration pro tanto of her liability.

In Williams v. U. S. Fidelity & Guaranty Co., 236 U. S. 549, 35 Sup. Ct. 289, 59 L. Ed. 549, it was held that, as the surety was permitted, by pursuing the course prescribed by General Order XXI, subd. 4, to prove the debt for which he was liable and share in the distribution of the assets of the principal, bankrupt, his claim against such bankrupt was discharged. Mr. Justice McReynolds says:

"Within the intendment of the law provable debts include all liabilities of the bankrupt founded on contract, express or implied, which at the time of the bankruptcy were fixed in amount, or susceptible of liquidation. * * * It provides complete protection and ample remedy in behalf of the surety upon such obligation. He may pay it off and be subrogated to the rights of the creditor; if the creditor fails to present the claim for allowance against the estate, he may prove it; and in any event he has abundant power by resort to the court or otherwise to require application of its full pro rata part of the bankrupt estate to the principal debt. To the extent of such distribution, the obligation of the bankrupt to the surety will be satisfied."

While it may be that, in the practical working out of the situation, Mrs. Edwards may be fixed with a different amount than that fixed by the arbitrators, that cannot be avoided. Whatever amount she may be called upon to pay will be reduced by the amount which Dr. Baker receives from the trustee. The proof of debt is not in the form contemplated by General Order No. XXI, subd. 4. It may be so amended that the dividend will be paid Dr. and Mrs. Baker. The ruling of the referee, as modified, is affirmed.

[2] In regard to the other claims, a number of interesting questions, not free from difficulty, are presented, upon the facts certified by the referee and the contention of counsel. While certain general principles, relating to the rights and obligations of copartners inter sese and to the creditors of the partnership, are well settled, the courts have found difficulty in the administration of the property of insolvent partnerships. It may be regarded as settled that, while each partner is entitled, in exoneration of his individual liability, to demand that the partnership property be applied to the discharge of partnership debts, before any portion is applied to the debts of the individual partners, the partnership creditors have no lien upon the partnership property. Mr. Justice Strong, in Case v. Beauregard, 99 U. S. 119, 25 L. Ed. 370, says:

"No doubt the effects of a partnership belong to it so long as it continues in existence, and not to the individuals who compose it. The right of each partner extends only to a share of what may remain after payment of the debts * * * and the settlement of its accounts. Growing out of this right, or rather included in it, is the right to have the partnership property applied to the payment of the partnership debts in preference to those of any individual partner. This is an equity the partners have as between themselves, and in certain circumstances it inures to the benefit of the creditors of the firm. The latter are said to have a privilege or preference, sometimes loosely denominated a lien, to have the debts due to them paid out of the assets of a firm in course of liquidation, to the exclusion of the creditors of its several members. Their equity, however, is a derivative one. * * * It is practically a subrogation to the equity of the individual partner, to be made effective only through him. Hence, if he is not in a condition to enforce it, the creditors of the firm cannot be. * * * But so long as the equity of the partner remains in him, so long as he retains an interest in the firm assets as a partner, a court of equity will allow the creditors of the firm to avail themselves of his equity, and enforce, through it, the application of those assets primarily to payment of the debts due them, whenever the property comes under its administration. * * * So, if before the interposition of the court is asked the property has ceased to belong to the partnership if by a bona fide transfer it has become the several property either of one partner or of a third person, the equities of the partners are extinguished, and consequently the derivative equities of the creditors are at an end. It is, therefore, always essential to any preferential right of the creditors that there shall be property owned by the partnership when the claim for preference is sought to be enforced. Thus, in Ex parte Ruffin, 6 Ves. 119, where from a partnership of two persons one retired, assigning the partnership property to the other, and taking a bond for the value and a covenant of indemnity against debts, it was ruled by Lord Eldon that the joint creditors had no equity attaching upon partnership effects, even remaining in specie. * * * The joint estate is converted into the separate estate * * * by force of the contract of assignment. And it makes no difference whether the retiring partner sells to the other partner or to a third person, or whether the sale is made by him or under a judgment against him. In either case his equity is gone."

The learned justice says:

"These principles are settled by very abundant authorities."

Applying the principles to the instant case, where transfers of the individual partners in the partnership property were made before the bill was filed, it is said:

"The effect of these transfers and act of fusion was very clearly to convert the partnership property held in severalty, or, at least, to terminate the equity of any partner to require the application thereof to the payment of the joint debts. Hence if, as we have seen, the equity of the partnership creditors can be worked out only through the equity of the partners, there was no such equity of the partners, or any one of them, as is now claimed, in 1869, when this bill was filed. No one of the partners could then insist that the property should be applied first to the satisfaction of the joint debts, for his interest in the partnership and its assets had ceased."

In Allen v. Center Valley Co., 21 Conn. 130, 54 Am. Dec. 333, Church, C. J., quotes with approval from Bissett on Partnership:

"That, notwithstanding the rights of the joint creditors, the partners may convert the joint property into separate property; for, having no lien on the property, the joint creditors, when notice of dissolution is given, cannot prevent the partners from effectually transferring it, by bona fide alienation. * * * The partners may, during the partnership, convert joint into separate property, or separate into joint, and the property will, at the dissolution, be held to possess that character which is then impressed upon it."

In Howe v. Lawrence, 9 Cush. (Mass.) 553, 57 Am. Dec. 68, Mr. Justice Bigelow says:

"The right of copartners upon dissolution to transfer the joint property to one of the firm is clear and unquestionable. The effect of such transfer as between the partners is to vest the legal title to the property in the individual partner, with the right to use and dispose of it as his separate estate. It would seem to follow as a necessary consequence that the creditors of the firm, after such conveyance, would have no right to look to the property transferred as joint property, upon which they had any special claim or lien. If in such transfer there is no fraud and collusion between the copartners for the purpose of defeating the rights of the joint creditors, and the transaction is made in good faith, upon dissolution, and for the purpose of closing the affairs of the partnership, the joint property thereby becomes separate estate, with all the rights and incidents both in law and equity which properly attach thereto. The mere fact of the transfer of the property does not in any way affect the rights of the joint creditors. During the continuance of the partnership, and before the institution of proceedings in insolvency, the creditors of the firm have no specific claim or lien, and, strictly speaking, no equity as against the effects of the partnership. They can only institute actions at law * * * against the firm on which they can take the partnership property, or the separate estate of each partner, or both, for the purpose of satisfying the executions, which they may obtain upon their judgments against the firm. The joint property, after its transfer to one of the copartners, is equally within the reach of legal process by the creditors of the firm as if it had remained the property of the partnership. Beyond this right to seize the joint property on legal process, the creditors of the firm * * * have no control over the partnership effects, and no right, either in law or equity, to restrain the disposition of them. The partners have the power to transfer them for a valuable consideration to each other or to strangers. The only limitation on this power is that it shall be exercised bona fide, and without any intent to defraud the creditors of the firm, or to deprive them of their legal or equitable claims upon the joint estate in case of insolvency. * * * If the transfer has been made honestly and for a valuable consideration, the property has thereby become separate estate, wholly free from any claims of the joint creditors."

That case arose out of a proceeding in insolvency under the laws of the state of Massachusetts. Shaw and Gardner were, prior to the institution of the proceeding, conducting business as copartners. Shaw sold his interest. The question, as stated by the judge, was:

"Whether, notwithstanding the sale and transfer by one partner to the other, the property is still to be regarded as joint estate, and to be applied to the payment of the debts of the partnership accordingly."

The court found nothing in the evidence to show an intention, in making the sale, to defraud the partnership creditors, saying:

"The subsequent conduct of Gardner is strongly confirmatory of the good faith of the transaction. He continued to carry on the business, formerly conducted by the firm, and notified the creditors by letter of the dissolution, and that the business would be continued by himself. While he so carried on business on his sole account, he made considerable additions to the stock on his own credit, amounting to $500 or $600. Nor is there any positive evidence that either of the copartners, at the time of the dissolution, knew or believed that the copartnership would not be able to pay its debts in full, although in fact it subsequently turned out to have been at the time insolvent. Even if it were insolvent, within the knowledge of the partners, at the time of the dissolution and the transfer of the property, it is by no means certain that the transaction would then be fraudulent."

The cases cited in the note (54 Am. Dec. 73) fully sustain the proposition that, when one or two partners retires from business, relinquishing to the other all his interest in the partnership property, the remaining partner has the same dominion over it as if it had always been his own separate property. The doctrine appears to have its foundation upon the decision of Lord Eldon in Ex parte Ruffin, 6 Vesey, 127.

The principle involved here is illustrated in the case of Sargent v. Blake, 160 Fed. 57, 87 C. C. A. 213, 17 L. R. A. (N. S.) 1040, 15 Ann. Cas. 58. There King and Maxwell formed a partnership. Maxwell borrowed money from his mother to put into the business, giving her his promissory note. Some trouble arising between the partners, by reason of King having drawn out all of the money he had put in the business, except a small amount, King sold his interest in the business and property to Maxwell and executed to him a bill of sale therefor. Both partners were insolvent, but each testified that they did not know of such insolvency. After receiving the bill of sale, Maxwell drew out of the bank sums of money formerly belonging to the company, which he paid to Mrs. Sargent in discharge of the note which she held against him. King testified that he did not consent to the use of the money for the payment to Mrs. Sargent of her note. It appeared that she did not know, nor have reasonable cause to believe, that the payment of her note gave her a preference over the other creditors of Maxwell or the company. Within four months after these transactions, the partnership and King and Maxwell individually were adjudged bankrupt. The trustee filed a bill in equity to recover from Mrs. Sargent the amounts paid her from the money which, before the purchase of King's interest in the property, belonged to the company. The right to recover was based upon two contentions—that the payment was made with intent on the part of Maxwell to hinder, defraud, and defeat the creditors, and that the money was, notwithstanding the bill of sale and purchase by Maxwell of King's interest in the property of the company, subject to the payment of the debts of the company, and that therefore its payment to Mrs. Sargent was unlawful. To this last contention Judge Sanborn says that this cause of action failed, because the payment was not made out of the funds of the partnership. The learned judge discusses the question from every viewpoint, and reaches the conclusion that the effect of the purchase by Maxwell of King's interest in the property of the partnership, prior to the proceeding in bankruptcy, vested the title to the property in him, as his separate estate, which he was entitled to use in the payment of his individual indebtedness, there being no fraudulent intent or purpose in the minds of the partners in the transaction. He says that until the partnership has been brought within the jurisdiction of the court for administration—

"each partner has the plenary power, at any time, to release or waive this right [to require the partnership property to be first applied to the partnership debts] and each partner has done so, and if, at the time the property comes within the jurisdiction of a court no partner has this right, then no creditor of the partnership has it, for a stream cannot rise higher than its source."

The discussion of the questions involved and citation of authorities by the learned judge are enlightening. It is true that many well-considered and well-sustained decisions hold that if a firm is insolvent, or on the eve of insolvency, and both partners are also insolvent, a purchase by one partner of the interest of the other in consideration of the former assumption of debts is upon a consideration which is of no value, no equivalent having been given, the transfer is in effect voluntary, and its only effect, if sustained, would be to hinder partnership creditors, and hence deemed ineffectual to convert the joint property as against the creditors. Bates on Partnership, 584. However that may be, and whatever a decision of a court of equity may have been upon a bill to declare the purchase by Baker from Selma K. Edwards void as against partnership creditors, the question is not, in this proceeding, presented.

The referee finds, and the evidence supports his conclusion, that Mrs. Edwards loaned to her husband, at the time the partnership was formed, $2,000; that he paid $1,500 of this amount into the partnership business, and loaned his copartner the remaining $500, which he put into the business. It appears that, on September 9, 1914, the stock of goods and accounts inventoried $11,550, and the indebtedness, exclusive of the amount due Mrs. Edwards, was $6,000. It cannot be said that, at the time Mrs. Edwards purchased her husband's one-half interest in the property of the firm, it was of no value. It is found that he owed her $1,500, the release of which constituted a valuable consideration. This sale worked a dissolution of the firm. She then owned a valuable, or what evidently all parties then thought to be a valuable, interest in the property. Within a few days she sold this interest to Baker for $1,500, taking his notes running until January 1, 1917, for the purchase price. He at once gave notice, in the usual way, to the public and to persons with whom the firm had been dealing, that he had purchased his partner's interest and would continue the business along the same lines as theretofore. The transaction bears upon its face every indication of good faith and honesty. While on January 29, 1915, he filed a petition in bankruptcy, it is not an unreasonable assumption that on September 24, 1914, he regarded the business as solvent. It it known of all men, now, as world history made during the past nine months, that on account of conditions which wrought financial disaster to those who produced, and those whose business was dependent upon the production of, cotton, as in this section of North Carolina, thousands of men, who on September 1, 1914, regarded themselves as solvent, found themselves, on January 1, 1915, unable to meet their financial obligations.

Viewed in the light of conditions well known, and courts must take account of such conditions, or they will do injustice and work ruin to many honest people, Baker may well have regarded his purchase from Mrs. Edwards as a fair business transaction. It must be kept in mind that the purchase by Baker of the interest in the business and its property made no change in the legal liability of Edwards or himself to the partnership creditors. They continued liable individually, nor did the transaction wihdraw the partnership property from legal

process for the recovery of the debts of the partnership. Edwards and himself could have sold the partnership property, and with the proceeds paid their individual debts, or made any other disposition of them, which was not fraudulent as to their creditors. As we have seen, the partnership creditors had no lien on the property. At the date of filing the petition in bankruptcy by Baker, he was the sole owner of the property formerly belonging to the partnership prior to its dissolution.

[3] The form of the petition is peculiar. Section 5 of the Bankruptcy Act (Comp. St. 1913, § 9589) provides that a partnership, during the continuance of the partnership business, or after its dissolution, and before the final settlement thereof, may be adjudged a bankrupt. The act makes provision for the adjudication of the individual members of the partnership and the manner of administration and distribution of the assets. Questions which have engaged the attention of the courts, arising out of what is termed the "partnership entity doctrine" and the provisions of the act regarding the administration of partnership assets, are not presented here, because there were no partnership assets at the time of filing the petition. While the petition is filed by "Baker & Edwards, by W. C. Baker," it would seem that, as the firm of Baker & Edwards had been dissolved and its entire property transferred to W. C. Baker, the proceeding should be regarded as having been instituted by W. C. Baker, doing business as Baker & Edwards. This is the real status of the petitioner and his business. Thus understood, the method of administration of the assets among his creditors becomes very clear and simple. L. E. Edwards has no interest in the manner of, or order in which, the assets are applied. He parted with his interest by the sale to his wife, Selma K. Edwards, September 9, 1914. Edwards, not being a party to the petition in bankruptcy, and not having elected to come in and join Baker therein, if the partnership still existed, or if dissolved and no final settlement made, could, under the provisions of section 5h, have settled the partnership affairs and administered its assets himself. Having sold his interest in the partnership property, he had no such right thereafter.

The ruling of the referee in regard to the right of Selma K. Edwards to prove her claims of $500 and $1,500 against the bankrupt, W. C. Baker, and share in the distribution of the assets in the hands of the trustee, is affirmed.

ILLINOIS TRUST & SAVINGS BANK et al. v. CITY OF DES MOINES et al.

(District Court, S. D. Iowa, C. D. May 17, 1915.)

No. 18–A.

1. CONSTITUTIONAL LAW ⟸277—DUE PROCESS OF LAW—"PROPERTY"—MORTGAGE.

Under Const. U. S. Amend. 14, providing that no state shall deprive any person of life, liberty, or property without due process of law, and Const. Iowa, art. 1, § 9, providing that no person shall be deprived of life, liberty, or property without due process of law, a mortgage or trust deed securing an indebtedness is "property."

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 762, 766, 949; Dec. Dig. ⟸277.

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

2. CONSTITUTIONAL LAW ⟸251—"DUE PROCESS OF LAW."

"Due process of law" means ordinarily judicial proceedings in court.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 726, 727, 732; Dec. Dig. ⟸251.

For other definitions, see Words and Phrases, First and Second Series, Due Process of Law.]

3. JUDGMENT ⟸685—CONCLUSIVENESS—PERSONS CONCLUDED—MORTGAGEE.

Where a street railway company had mortgaged its property to a trust company to secure a bond issue before an action was begun by the city to have it declared that the franchise had expired, and the mortgagee was not made a party to that action, it is not bound by the judgment therein, since there is privity between a mortgagor and mortgagee in a judgment only where the rights of the latter arose after the action was begun.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1208; Dec. Dig. ⟸685.]

In Equity. Suit by the Illinois Trust & Savings Bank and another against the City of Des Moines and others. On motion to dismiss the bill. Motion overruled.

W. D. McHugh, of Omaha, Neb., and Henry & Henry, of Des Moines, Iowa, for complainants.

H. W. Byers, of Des Moines, Iowa, for respondents.

WADE, District Judge. In 1901, the Des Moines City Railway Company issued bonds of which more than $2,000,000 are still outstanding, secured by a trust deed upon all its assets, including its "liberties, easements, privileges, and franchises." The Illinois Trust & Savings Bank, complainant herein, is trustee in the deed of trust securing said bonds, and as such brings this action to restrain the city of Des Moines from tearing up the tracks of said railway company, and from removing the same from the streets, or interfering with the use of the streets by said company.

The bill recites that on the 4th day of September, 1905, an action was brought by citizens of Des Moines to test the right of the Des Moines City Railway Company to use the streets of the city, alleging that its franchise had expired, and that it had no further rights in

the streets of the city of Des Moines. It is also recited that on the 13th day of May, 1913, by a decree rendered in the Supreme Court of the state of Iowa, it was adjudged that the franchise had expired, and that the Des Moines City Railway Company had no further rights in the streets of Des Moines, and that said decree provided that unless the Des Moines City Railway Company procured a franchise within a time fixed, which time will soon expire, that the city of Des Moines would then have the right to remove the plant, tracks, and equipment from the streets and public places of said city. The bill further recites that neither the trustee, complainant herein, nor the bondholders, were parties to said litigation; that they never were notified to appear in said proceedings, although their trust deed was duly recorded in the records of Polk county, Iowa, and also a matter of public knowledge in the city of Des Moines. It is further alleged that without the franchise the said Des Moines City Railway Company "would be wholly bankrupt and insolvent, and would be wholly unable to pay its said bonds secured by the said trust deed."

The city of Des Moines appears, and by motion raises the question that, conceding all the averments of the complainant's bill, it is not entitled to any relief, for the reason that all the rights of the trustee and the bondholders were adjudicated by the proceedings aforesaid against the Des Moines City Railway Company. Other defenses are raised by the motion, but by agreement of counsel the motion is submitted only for the purpose of having determined the question as to whether or not the judgment rendered in the action against the Des Moines Street Railway Company is binding upon the trustee and the bondholders.

It being conceded, for the purpose of this motion, that neither the trustee nor the bondholders were parties to the suit against the street railway company, we have the question presented as to whether a judgment against a mortgagor of real property is binding against the mortgagee; such action being commenced and judgment rendered after the execution of the trust deed and without notice to the mortgagee. It is not denied that, if the judgment rendered by the Supreme Court is enforced, the bondholders will be deprived of a large part, if not all, of the more than $2,000,000 invested by them.

[1] Article 14 of amendments to the Constitution of the United States provides, among other things:

"Nor shall any state deprive any person of life, liberty, or property, without due process of law."

Section 9, article 1, of the Constitution of Iowa, provides:

"No person shall be deprived of life, liberty, or property without due process of law."

It is fundamental that a mortgage or trust deed, securing an indebtedness, is "property" within the meaning of the Constitution of the United States and the Constitution of the state of Iowa.

[2] "'Due process of law' means, ordinarily, judicial proceedings in court." Stewart v. Polk County Supervisors, 30 Iowa, 9, 1 Am. Rep. 238. "Due process of law means a course of legal proceedings which secures to every person a judicial trial, before he can be de-

prived of life, liberty, or property." Peerce v. Kitzmiller, 19 W. Va. 564. It means "being brought into court to answer according to law." Lowry v. Rainwater, 70 Mo. 152, 35 Am. Rep. 420; Parsons v. Russell, 11 Mich. 113, 83 Am. Dec. 728; Foule v. Mann, 53 Iowa, 42, 3 N. W. 814. After the trust deed was given upon the property of the Des Moines Street Railway Company, the street railway company owned the legal title; the trustee for the bondholders owned the equitable title; each had a separate and distinct and valuable interest in the property.

[3] All of the foregoing will be conceded by counsel for the defendant, but they contend that the mortgagee is bound by the proceedings against the mortgagor, because it is said that the mortgagee is "in privity" with the mortgagor. It is true that there is a "privity" between the mortgagor and the mortgagee, but it is not such privity as to bind the mortgagee in an action against the mortgagor to which the mortgagee is not a party.

It will be observed that the trust deed was executed in 1901. The action to test the rights of the street railway company was commenced in 1905, four years after the execution of the trust deed. The mortgagee is in privity with the mortgagor in the sense that the mortgagee has no greater rights than the mortgagor had at the time the trust deed was executed, and it would be bound by any proceedings instituted against the street railway company prior to the execution of the trust deed; but there is no privity between the street railway company and the trustee, in the litigation which was instituted after the trust deed was executed.

"To make a man a privy to an action, he must have acquired an interest in the subject-matter of the action either by inheritance, succession, or purchase * * * subsequently to the action." Seymour v. Wallace, 121 Mich. 402, 80 N. W. 242.

"A privy to a judgment or decree is one whose succession to the rights of property thereby affected occurred after the institution of the * * * suit, and from a party thereto." Orthwein v. Thomas, 127 Ill. 554, 21 N. E. 430, 4 L. R. A. 434, 11 Am. St. Rep. 159.

It is needless to cite authorities upon these general principles. The very question presented has been settled definitely by the Supreme Court of the United States and by other courts. In Old Colony Trust Company v. City of Omaha, 230 U. S. 100, 33 Sup. Ct. 967, 57 L. Ed. 1410, the Supreme Court of the United States says:

"A prior suit by the electric company against the city, largely, but not entirely, like the present, resulted in a decree against the electric company. The city now takes the position that that decree is conclusive upon the trust company as mortgagee. But the law is otherwise. The trust company's rights, and those of the bondholders whom it represents, were not acquired during or since that suit, but long prior thereto, and the trust company was not a party to it. This being so, the trust company is free to maintain the present suit, unembarrassed by the decree in the other. Keokuk & Western Railroad Co. v. Missouri, 152 U. S. 301, 313 [14 Sup. Ct. 592, 38 L. Ed. 450]; Louisville Trust Co. v. Cincinnati, 76 Fed. 296 [22 C. C. A. 334]."

The foregoing case was almost identical with the case at bar. An action was brought under a mortgage executed by the Omaha Electric Light & Power Company on its property and franchise in the city of

Omaha, to restrain threatened action of the city looking to the cutting of the wires of the company, and the city answered, setting up, among other things, the fact that an action had been begun by the Omaha Electric Light & Power Company, the mortgagor, against the city, to enjoin the threatened action on the part of the city, which resulted in a decree of the United States Circuit Court of Appeals holding that the franchise rights of the company had expired. It was contended that this decree was binding upon the mortgagee, and in holding that the mortgagee was not affected by said decree, because it was not a party to said action, the court uses the language quoted above.

In Keokuk & Western R. R. Co. v. Missouri, 152 U. S. 301, 14 Sup. Ct. 592, 38 L. Ed. 450, the following language is used:

"To the argument that this judgment constitutes an estoppel there are two answers: First. There was no such privity of estate between the defendant in the suit, namely, the Missouri, Iowa & Nebraska Company, and the defendant in this suit, as makes the judgment in that case res adjudicata in this. The mortgage of the Missouri, Iowa & Nebraska Railway Company, under the foreclosure of which this defendant purchased this road, was executed June 1, 1870, and neither the trustee under that mortgage, the Farmers' Loan & Trust Company, nor the bondholders, whom this mortgage secured, were parties to that action, which was begun in 1873 to recover the taxes of 1872. While a mortgagee is privy in estate with a mortgagor as to actions begun before the mortgage was given, he is not bound by judgments or decrees against the mortgagor in suits begun by third parties subsequent to the execution of the mortgage, unless he or some one authorized to represent him, like the trustee of a mortgage bondholder, is made party to the litigation, although it would be otherwise if the mortgage were executed pending the suit or after the decree."

In Louisville Trust Co. v. City of Cincinnati, 76 Fed. 296, 22 C. C. A. 334, the United States Circuit Court of Appeals says:

"In Railroad Co. v. Delamore, 114 U. S. 501, 5 Sup. Ct. 1009 [29 L. Ed. 244], it was held that a grant by a municipal corporation to a railway company of a right of way through certain streets of the city, with the right to construct its railway thereon and maintain and occupy them in its use, is a franchise which may be mortgaged, and would pass to a purchaser at a sale under a foreclosure of the mortgage. There is nothing in the law of Ohio which in any way contravenes the right of a railway company to mortgage its street easements, or which would prevent such easements from passing to a purchaser at foreclosure sale. It therefore follows that the complainant under the mortgage mentioned has acquired the substantial rights in the street easements of the mortgagor company, and cannot be deprived of this security by a proceeding directly impeaching their validity and duration without being made a party thereto."

In view of these different decisions of the United States courts, it is needless to extend this discussion. It will be borne in mind that the principles laid down in the foregoing decisions are recognized, not alone in the federal courts, but in every court of every state where the question has arisen.

Counsel for the city cite numerous cases, but none of them hold that a mortgagee is bound by a decree in proceedings commenced after the mortgage was executed to which he is not a party. Most of them present the well-settled rule that the mortgagee is bound by any and all proceedings prior to the execution of the mortgage, and can acquire no greater rights than the mortgagor possessed.

It is not contended by complainant, nor would such contention be warranted, that the mortgagee herein has any other or greater rights than the street railway company had at the time the mortgage was executed. The sole contention here is that *what those rights were at the time the mortgage was executed* cannot be determined in an action to which the trustee or the bondholders are not made parties. That a man shall have his "day in court" is one of the cherished rights guaranteed under our Constitution. It may be that the results of the action by the mortgagee would be the same as in an action against the mortgagor; but a man does not have his "day in court" unless he has been made a party in the proceeding, duly summoned to appear, with the right to introduce evidence and cross-examine the witnesses, and present to the court his theory of the case. It may be that every question involved was ably presented by counsel for the mortgagor, but the mortgagee is not bound by what the mortgagor does. Their rights are individual, and each is entitled to his "day in court."

If there be those who, in view of this ruling, reflect upon the "law's delays," let them understand that this situation is not the result of the law, nor of any action, or failure of action, on the part of the courts. It is conceded upon this motion that this trust deed was of record in the city of Des Moines, and also a matter of public knowledge. The trustee and bondholders could have been made parties to the original proceeding, and the action could have been determined as to the mortgagor and the mortgagee in one action. This ruling is simply an application of well-settled constitutional principles and a recognition of established legal rights.

To the ruling, overruling said portion of said motion, the defendant excepts.

In re DIXON.

(District Court, D. Massachusetts. January 15, 1915.)

No. 17447.

1. BANKRUPTCY ⇐136—PROPERTY IN BANKRUPT'S POSSESSION—EVIDENCE.
   On petition for an order directing the bankrupt to turn over money in his possession to his trustee, evidence *held* to show that the bankrupt received, over five years before the filing of the petition, a specified sum, and that a part thereof remained in her possession, authorizing relief.
   [Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 233, 235; Dec. Dig. ⇐136.]

2. BANKRUPTCY ⇐136—POSSESSION OF PROPERTY BY BANKRUPT—PRESUMPTIONS—RECENT POSSESSION—FALSE TESTIMONY.
   Recent possession of property by a bankrupt, accompanied by failure to account for it, justifies an inference that the property remains in his possession, and mere lapse of time does not raise any strong presumption in favor of the bankrupt, and, where the bankrupt fails to explain what has been done with the property, and has testified untruthfully about it, an order directing a delivery thereof to his trustee is justified.
   [Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 233, 235; Dec. Dig. ⇐136.]

3. BANKRUPTCY ⟸136—POSSESSION OF PROPERTY BY BANKRUPT—ORDER TO TURN OVER—BURDEN OF PROOF.

A petition by a trustee in bankruptcy to compel the bankrupt to turn over to him assets alleged to be in the possession of the bankrupt will be granted where, by a fair preponderance of the testimony, it appears that the bankrupt has assets which have not been turned over.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 233, 235; Dec. Dig. ⟸136.]

4. BANKRUPTCY ⟸136—COMPELLING BANKRUPT TO TURN OVER ASSETS TO TRUSTEE—CONTEMPT PROCEEDINGS—EVIDENCE.

To justify a commitment for contempt for refusal to comply with an order directing a bankrupt to turn over assets to his trustee, the court must be satisfied beyond reasonable doubt that the assets are in the possession of the bankrupt, who is able to turn the same over.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 233, 235; Dec. Dig. ⟸136.]

In Bankruptcy. In the matter of Ida A. Dixon, bankrupt. Petition to review an order of the referee denying a petition by the trustee. Relief granted.

Fred A. Fernald, of Boston, Mass., for trustee.

Lloyd Makepeace, of Boston, Mass., for bankrupt.

MORTON, District Judge. This is a petition to review an order of the referee denying a petition brought by the trustee in bankruptcy, praying that the bankrupt be ordered to turn over to him, as property to be administered, certain money alleged now to be in the bankrupt's possession.

The facts are as follows:

On December 23, 1905, the bankrupt received $4,850, being the proceeds of the sale of a farm, called the Currier farm. The money here in question is said by the trustee to be a part of that sum.

The bankrupt admits that the $4,850 came into her hands; but she testifies that, after paying $120 to the real estate broker, she turned the rest of it over to her father immediately on receipt of it in 1905, and has never since had any part of it. She further testifies that the money was turned over in the form of bills; that her father, then over 80 years old, continued to live with her until his death, about two years later; and that she does not know what he did with the money, and never saw it, or any part of it, after having turned it over to him. The question at the bottom of this controversy is whether her statement is true.

Six months after her receipt of the money, in June, 1906, a decree had been entered against her in the state courts of New Hampshire which called for the repayment by her of more than $20,000, property which she had obtained without legal right thereto from one Merrill, an old man who had lived in her family. She was about $2,000 short of the amount required, and was brought before the court for failing to satisfy the decree. Her counsel at that time, Mr. Martin, and the then opposing counsel, Mr. Sawyer, testify in these proceedings that she then said that she could not raise the $2,000; that thereupon she was asked about this money from the Currier farm; that she replied

"that she put the currency (from the sale of the Currier farm) into the safety deposit box in the National State Capital Bank," but, on account of the decision which had been made in the state court case, she would have to pay that money over to her father; that the opposing counsel assured her that her right to that money was not affected by the decree against her, and that she ought to use it in satisfaction of the decree; that the judge made an order that she pay $2,000, and "it was arranged when Mrs. Dixon left the courtroom that she should produce $2,000 out of that fund * * * to comply with the order of the court"; that she thereupon went, in the custody of an officer, to the safe-deposit box, and shortly returned with $2,000 in cash, which she paid over on the contempt proceedings. Both these witnesses say that at that time she made no claim that the money from the Currier farm had been paid over to her father, and that they knew of no such claim by her before her testimony in these proceedings.

The bankrupt and her husband admit that $2,000 was paid over, but they now testify that it belonged to the latter, and was money which he had saved up during many years as a carpenter, city messenger, etc., and had put away in the safe-deposit box. They both say, also, that her father never paid any board; and her husband testifies that they buried him, by which I understand is meant paid the expenses of the funeral.

Both the bankrupt and her husband are intelligent persons. I find it difficult to believe that the husband, a man of no considerable property or income, who did business with banks, and for a time had a mortgage on his property, hoarded his savings in cash in a safe-deposit box to such an amount as $2,000, just as I find it very difficult to believe that over $4,700 was turned over in cash by the bankrupt to her father, an old man living in her family, which was a small one, in moderate circumstances, and thereafter was entirely lost sight of by her and her husband. No administration was taken out on her father's estate. What became of the money after it reached her father's possession? Where was it when he died, still a member of her family, about two years later? The only answer which she and her husband make is that they do not know and never heard. The story which the bankrupt and her husband tell about the matter is improbable in itself; it is impeached by the testimony of Mr. Martin and Mr. Sawyer, and is rendered still more doubtful by various incidental facts which need not be stated in detail.

[1, 2] It seems to me altogether probable, and I accordingly find, that in June, 1906, the bankrupt had $4,730 (being $4,850, less $120 paid as commission on the sale of the farm), belonging to her, in cash in a safe-deposit box, that $2,000 was taken therefrom by her at that time, and that the balance of the money was then left in her possession.

This being so, there remains the difficult question whether the money may be found to be still in her possession at the time of this petition. The bankruptcy petition was not filed until over five years after the payment of the $2,000, and there is no direct evidence what has been done in the meantime with the balance of the money. Is it still in the

bankrupt's possession? The principal circumstances warranting such a finding are the absence of evidence as to any other disposition of it and the present concealment or perjury in regard to it which have been resorted to by the bankrupt and her husband. Plainly, no true account of what became of the money has been given. The law is well settled that "recent" possession of property by the bankrupt, accompanied by a failure to account for it, justifies an inference that the property is still in the bankrupt's possession. And bankrupts have been imprisoned for failure to turn over property in cases of that character. Re Wm. H. Goodrich, 184 Fed. 9, 106 C. C. A. 207, Dodge, J., Mass. District, May 26, 1910; Re Lasky (D. C.) 163 Fed. 99; Re De Gottardi (D. C.) 114 Fed. 329; Re Richards (D. C.) 183 Fed. 501; Re Weber Co., 29 Am. Bankr. Rep. 217, 200 Fed. 404, 118 C. C. A. 556. What is meant by "recent" has, so far as I am aware, not been defined; but it does not seem to me that the mere lapse of time raises any strong presumption in favor of the bankrupt. If, during the years, the money had been spent or disposed of, nothing was easier for the bankrupt than to say so; but she makes no such claim. She has failed to explain what really was done with money, and has testified untruthfully about the matter. Where it appears that property was in a person's hands, and that fabricated evidence has been given by that person concerning the alleged items of payment or discharge, the natural inference is that falsehood has been resorted to, because no true and correct items of discharge exist; i. e., that the property is still in the possession of the person into whose hands it was traced. On the fair preponderance of the evidence, it seems to me that the money is still in the bankrupt's hands.

[3, 4] It is argued that this petition should not be granted, unless the court would, upon the evidence before it, commit the bankrupt if the property is not turned over. I doubt the soundness of that contention. In order to justify a commitment for contempt for refusal to comply with an order, the court must be satisfied beyond any reasonable doubt that the property is in fact in the bankrupt's possession, and that the bankrupt is able to turn it over; while, upon a petition like this, the test is whether, by a fair preponderance of the testimony, it appears that the bankrupt has assets which have not been turned over. Re Cole, 144 Fed. 392, 75 C. C. A. 330; Id., 163 Fed. 180, 189, 90 C. C. A. 50, 23 L. R. A. (N. S.) 255; In re Cunney, 225 Fed. 426, Lowell, J., Mass. District, January 8, 1904.

In this respect these proceedings are closely analogous to a suit in equity looking to a decree for the payment of money. Such decrees are entered upon a fair preponderance of the testimony, but are not followed up by commitment for contempt, unless the contempt be proved beyond a reasonable doubt. Moreover, the making of an order on this petition may have other effects than to lay the foundation for contempt proceedings. Aside from the implication that the bankrupt has testified falsely, and thereby disentitled herself to discharge, it is still unsettled whether failure on her part to comply with such an order, whether contemptuous or not, does not bar the discharge. There is the difficulty that the bankrupt may have parted with the money in

some other way than by giving it to her father, as she says, and may find the true explanation of what was done with it obstructed by her misstatements concerning it. Of course, she is not to be punished for perjury on contempt proceedings. An order of committal ought not to be made, unless she is in fact able to turn over the money. Collier on Bankruptcy (10th Ed.) pp. 622, 623; In re McNaught, 225 Fed. 511, No. 6075, Lowell, J., Dec. 22, 1903. The possibility of embarrassment to the bankrupt of the kind indicated seems to me, however, no reason for withholding an order on this petition. That situation can more properly be dealt with on contempt proceedings, if those shall hereafter be instituted, than on this petition.

The trustee agrees that the $2,000, plus $120 paid by her as commission on the sale of the real estate, may be credited to the bankrupt. For the balance, $2,730, it seems to me that he is entitled to an order as prayed for.

In re J. L. PHILIPS & CO. †

In re BAILEY.

(District Court, S. D. Georgia. July 23, 1915.)

1. BANKRUPTCY ⊂⊃195—GARNISHMENT—LIENS.

Where a creditor procured by garnishment in a state court funds of the debtor more than four months before the debtor was adjudged a bankrupt, and the debtor, to secure a release of garnishment, executed a bond, the creditor acquired a lien undisturbed by the subsequent bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 296–305; Dec. Dig. ⊂⊃195.]

2. BANKRUPTCY ⊂⊃407 — DISCHARGE — POSTPONEMENT — ENFORCEMENT OF RIGHTS IN STATE COURTS.

Where a creditor acquired in a state court, more than four months before the debtor was adjudged a bankrupt, a lien by garnishment of funds, and the debtor, to secure a release of the garnishment, executed a bond, the creditor was entitled to a reasonable postponement of the discharge of the bankrupt to enable him to enforce his rights in the state court.

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

3. BANKRUPTCY ⊂⊃416 — DISCHARGE — POSTPONEMENT — ENFORCEMENT OF RIGHTS IN STATE COURTS.

A creditor procured by garnishment in a state court funds of the debtor more than four months before the debtor was adjudged a bankrupt. The debtor gave a bond to secure a release of the garnishment, and obtained a stay of the state action, which was founded on a contract from which a discharge in bankruptcy would be a release. An entry of judgment in the state court in favor of the creditor was a necessary prerequisite to a judgment on the dissolution bond, conditioned on payment to the creditor of such sum as he might recover in the action. *Held*, that the creditor probably acquired a lien by his garnishment, and the court, on his petition for a stay of the debtor's discharge in bankruptcy, must protect him, and will order a discharge on condition that the bankrupt will consent to a vacation of the stay in the state court and to a trial of the cause on its merits, and will stay execution on judgment recovered by

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

† Petition for rehearing pending.

the creditor, so as to form a proper basis for judgment on the dissolution bond.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 707; Dec. Dig. ⊂=416.]

In Bankruptcy. In the matter of J. L. Philips & Co., a corporation, bankrupt. Application of bankrupt for discharge, and petition of J. S. Bailey for stay of discharge. Order of discharge conditionally directed.

Gibbons, Maxwell, McGarry & Daniel, of Jacksonville, Fla., for petitioner.

Reynolds & Rogers, of Jacksonville, Fla., and W. I. MacIntyre, of Thomasville, Ga., for bankrupt.

LAMBDIN, District Judge. J. L. Philips & Co., a corporation, with its principal place of business in Thomasville, Ga., filed its voluntary petition in bankruptcy May 22, 1912, and was duly adjudicated bankrupt on May 25, 1912. In February, 1911, J. S. Bailey instituted a common-law action in assumpsit in the state circuit court of Duval county, Fla., against said corporation to recover the sum of $4,121.93 alleged to be due by said corporation to said Bailey; same being an action ex contractu. On December 6, 1911, more than four months prior to said bankruptcy proceedings, the plaintiff, Bailey, sued out garnishment on said common-law action, and caused same to be served on said date on four national banks located in Jacksonville, Fla. On December 14, said Philips & Co. filed a bond in said state court in the penal sum of $15,000, with the Fidelity & Deposit Company of Maryland as surety, conditioned to pay to the said J. S. Bailey such sum, with interest and costs, as said Bailey might recover in said suit, which bond was approved and accepted by the court, and thereupon the state court granted an order that said garnishees should be released and discharged from liability. Said Bailey never filed his claim against said corporation in the bankruptcy proceedings. Said bankrupt did not schedule Bailey as a creditor in its original schedules, but on March 29, 1913, said bankrupt filed amended schedules, in which it scheduled the claim of said Bailey against it at the amount of $6,357-25; but in said schedules said bankrupt set out a counterclaim in its favor against said Bailey for $8,541.67, which counterclaim arose out of the same contracts that formed the basis of Bailey's suit in the state court. After the filing of said petition in bankruptcy the common-law action in the state court reached an issue of fact and became ready for trial. On April 30, 1913, the bankrupt duly filed in this court its petition for discharge, as provided by law. On May 16, 1913, said corporation filed a motion in the state court in Florida, asking for the stay of said common-law action, and on May 17th the state court granted an order "temporarily staying said action during the pendency of said cause in bankruptcy and then until further order of the court," and no further proceedings have been had in said suit. On May 29, 1913, said Bailey duly filed his petition in the United States District Court, praying that the discharge of the bankrupt

should be stayed until his suit in the state court in Florida should be tried, the stay being asked "for the purpose of enabling him to enforce his rights against the garnishees and against the surety on the bond to dissolve the writ of garnishment"; and he further prayed that the United States court "should direct that the suit in the state court should be allowed to be tried, for the purpose of liquidating and ascertaining the amount of his claim, if any, against said corporation." This petition is now before me for determination.

[1] 1. The question here presented is one of some difficulty. The petitioner, Mr. Bailey, insists that the discharge of the bankrupt should be stayed until he can try his case in the state court in Duval county, Fla., and obtain a judgment against the bankrupt thereon, so that he may be able to use same as a basis for obtaining a judgment on the bond which was given to dissolve this garnishment. By the stay granted by the state court of Florida, however, he is prevented from prosecuting his case in that court. Should the United States court stay the discharge of the bankrupt, without more, the petitioner would still be as far from relief as ever, unless the Florida state court should lift the stay in that court. The matter, therefore, apparently is at a deadlock. The bankrupt insists that the petitioner has already had a sufficient stay of its discharge, so as to enable him to proceed with his action in the Florida state court; but this position comes with poor grace from the bankrupt, inasmuch as the bankrupt itself, by the motion which it filed in the Florida court, stopped the progress of the suit in that court.

The petitioner is evidently entitled to some rights in the premises. He brought suit against the bankrupt, and had garnishments served thereon, more than four months before bankruptcy. By this process of garnishment he must have caught funds of the bankrupt, because the bankrupt filed a good bond in the sum of $15,000, in order to secure a release of the garnishment. This bond, under the well-known principles of law, stands in lieu of the funds thus caught. Petitioner, under the statutes and court decisions generally covering such matters, thereby acquired a lien on the funds so caught, and the court acquired such a hold upon these funds, or the bond which was substituted for same, that the subsequent adjudication in bankruptcy, made more than four months thereafter, did not disturb this lien. National Surety Co. v. Medlock, 2 Ga. App. 665, 58 S. E. 1131, 19 Am. Bankr. Rep. 654; Metcalf v. Barker, 187 U. S. 165, 23 Sup. Ct. 67, 47 L. Ed. 122, 9 Am. Bankr. Rep. 36; Pickens v. Roy, 187 U. S. 177, 23 Sup. Ct. 78, 47 L. Ed. 128, 9 Am. Bankr. Rep. 47; Citizens' Nat. Bank v. Dasher, 34 Am. Bankr. Rep. 136, 16 Ga. App. —, 84 S. E. 482; In re Maher (D. C. Ga.) 22 Am. Bankr. Rep. 290, 169 Fed. 997.

[2] Such being the case, petitioner has an equity entitling him to a "reasonable postponement" of the discharge of the bankrupt, so as to enable him to enforce his rights in the state circuit court of Florida. Lockwood v. Exchange Bank, 190 U. S. 294, 23 Sup. Ct. 751, 47 L. Ed. 1061, 10 Am. Bankr. Rep. 107; Roden Grocery Co. v. Bacon (C. C. A. 5th Cir.) 13 Am. Bankr. Rep. 251, 133 Fed. 515, 66 C. C. A. 497; In re Maher, supra (D. C. Ga.) 22 Am. Bankr. Rep. 290, 169 Fed. 997;

Meinhard & Bro. v. Pincus (C. C. A. 5th Cir.) 29 Am. Bankr. Rep. 619, 200 Fed. 736, 119 C. C. A. 180.

[3] 2. The bankrupt, however, claims that it will not affect the petitioner's rights in the premises if the discharge prayed for is granted. The court is not so certain as to this. The contract sued upon in the state court is one from which the discharge in bankruptcy would be a release, and therefore, if the discharge is granted here, and this discharge is claimed in the Florida court, the petitioner might not be able to enter up a judgment against the bankrupt in that court. The entry of this judgment is a necessary prerequisite to a judgment on the dissolution bond, because this bond is "conditioned to pay to the said J. S. Bailey such sum, with interest and costs, as said Bailey may recover in the suit." Therefore, in order to charge the surety on the dissolution bond, it would be necessary for petitioner to recover a judgment against the bankrupt in said suit. If a discharge should be granted, it might be impossible for petitioner to obtain a judgment against the bankrupt, which would be a necessary foundation for a judgment on the dissolution bond.

The bankrupt, however, claims, under the authority of the case of Hill v. Harding, 130 U. S. 699, 9 Sup. Ct. 725, 32 L. Ed. 1083, and 107 U. S. 631, 2 Sup. Ct. 404, 27 L. Ed. 493, that, even after a discharge is granted by the court, same would not prevent the state court from rendering a special judgment against it in the suit pending in that court, if petitioner is otherwise entitled to same, with a perpetual stay of execution, so as to leave the petitioner at liberty to proceed against the surety on the dissolution bond. This seems to be the holding, also, of the Supreme Court of Connecticut in the case of Schunack v. Art Metal Novelty Co., 84 Conn. 331, 80 Atl. 290, reported in 26 Am. Bankr. Rep. 731, and of the Supreme Court of Maryland in the case of Kendrick & Roberts v. Warren Bros., 110 Md. 72, 72 Atl. 461, and of the Supreme Court of Rhode Island in the case of Butterick Publishing Co. v. Bowen Co., 26 Am. Bankr. Rep. 718, 33 R. I. 40, 80 Atl. 277, and of the Supreme Court of Pennsylvania in the case of Wind Engine & Power Co. v. Iron Co., 227 Pa. 262, 75 Atl. 1094, and of the Supreme Court of New York in the case of King v. Block Amusement Co., 20 Am. Bankr. Rep. 784, 126 App. Div. 48, 111 N. Y. Supp. 102, and also of the United States District Court of the Southern District of New York in Re Maaget (D. C.) 23 Am. Bankr. Rep. 14, 173 Fed. 232. But the Supreme Court of Massachusetts, in the case of Hamilton v. Bryant, 114 Mass. 543, held otherwise; and it is only by virtue of a statute passed in 1882 in that state that plaintiffs in attachments, where bankruptcy proceedings have intervened, are now allowed to enter a special judgment, so as to charge the sureties on the bonds given to dissolve such attachments.

The Supreme Court of Connecticut, in the case of Schunack v. Art Metal Novelty Co., supra, 26 Am. Bankr. Rep. 731, at the bottom of page 737 and top of page 738, 84 Conn. 331, at pages 339, 340, 80 Atl. 290, at page 294, lays down the rule of law prevailing in that state and in the other states named above in the following language:

"Under circumstances where there has been an adjudication in bankruptcy of a defendant, in proceedings begun more than four months after attachment

made, the creditor has by his attachment acquired as security for his claim sued upon a lien upon the property attached, which neither the adjudication nor any of the proceedings in bankruptcy disturbs. The defendant's discharge does not disturb it. It does, however, by precluding a general judgment against the debtor, prevent the creditor from pursuing the usual course to avail himself of this security. The creditor finds himself in the position where, having obtained security by his diligence, the door to reach it is closed to him, unless some form of judgment, not forbidden, can be rendered. His predicament furnishes to those courts which can render a qualified judgment the moving reason for doing so, in order that injustice may thus be avoided, and the creditor be enabled to avail himself of the security which is rightfully and legally his, and of the benefit of which he would otherwise be deprived. Where a bond has been given in substitution for either the property attached or the attachment in such case, the same appeal for a special judgment is made, in order that the creditor may obtain the benefit of that to which he has become rightfully entitled, or to preserve his plain equity."

The case of Hill v. Harding, 130 U. S. 699, 9 Sup. Ct. 725, 32 L. Ed. 1083, does not hold as a principle of law enforceable in all the states, as contended by bankrupt, that petitioner in such cases as the one under consideration, in spite of the discharge of the bankrupt, could obtain a special judgment so as to charge the surety on the dissolution bond. The Supreme Court of Illinois, from which the case of Hill v. Harding was carried by writ of error to the United States Supreme Court, had remanded that case to the court below, with direction that a judgment should be entered against the defendant, with a perpetual stay of execution, so as to enable the plaintiff to proceed against the sureties on the dissolution bond. The Supreme Court of the United States in its decision merely held that Bankr. Act March 2, 1867, c. 176, 14 Stat. 517, did not prevent this from being done. No ruling of the courts of the state of Florida or statute of that state, governing such matters, has been called to the attention of the court. This court, therefore, does not know whether the circuit court of Florida, in which the case in question is pending, would, over the objection of the bankrupt, enforce the rule of the courts of Illinois, Connecticut, Maryland, Rhode Island, and New York, or the rule as it originally stood in Massachusetts.

3. Inasmuch, therefore, as the petitioner has some rights in the matter which this court cannot ignore, and inasmuch as by his superior diligence he has probably acquired a lien by his garnishment proceedings instituted more than four months before the bankruptcy proceedings were begun, the court does not think that he should be deprived of the fruits of his superior diligence. He has an equity in the matter which this court should respect, entitling him to secure a reasonable postponement of the discharge of the bankrupt, so as to enable him to try his case in the circuit court in Florida, and thus to become enabled to charge the surety on the dissolution bond, provided he is able to establish his right to recover against the defendant in that suit. The time that has already elapsed would have been such a "reasonable postponement," if it had not been for the fact that the bankrupt itself had rendered this postponement vain by securing a stay of the suit in the Florida state court. This court cannot say what will be the result of the trial in the state court of Florida on the merits of the case; and it cannot say what the holding of that court will be upon the question

whether petitioner by his garnishment obtained, under the statutes and decisions of the courts of Florida, a lien upon the funds caught to the writ of garnishment, as held by the Court of Appeals of Georgia in the case of Citizens' National Bank v. Dasher, 34 Am. Bankr. Rep. 136, 16 Ga. App. ——, 84 S. E. 482, cited above. The general rule is that a garnishment creates such a lien, but no ruling or law of the state of Florida has been called to the attention of the court on the subject. All of these matters will have to be threshed out in the forum in which the common-law suit was brought. This court is of the opinion that the embargo should be lifted, so that these matters can be fought out and determined in that forum, and that it would be equitable and proper for the bankrupt to consent to lifting the stay of the state court proceeding, so that a special judgment may be entered against it in that case, provided petitioner on the facts is entitled to same, with a perpetual stay of execution, so as to charge the surety on the dissolution bond, as in the case of Hill v. Harding, cited above. If this is done, the bankrupt can be discharged immediately, without further delay. In passing, it may be stated that, inasmuch as the bankrupt in this case is a corporation, the postponement of its discharge until it agrees to vacate the stay of the suit in the state court of Florida will very probably not work a hardship upon it, as in the case of natural persons. The court cannot see what interest the bankrupt can possibly have in further prolonging the stay of the suit in the Florida state court, provided it is protected by a perpetual stay of execution in the event a judgment should go against it in that court.

4. An order will be entered, therefore, providing that upon the filing by bankrupt in the circuit court of Duval county, Fla., in the case pending there, a stipulation that it will consent to the stay in that court being vacated and to the trial of the case on its merits when it is reached in due course, and that petitioner, if the law and facts otherwise justify it, just as if bankruptcy had not intervened, may take judgment against the bankrupt, with a perpetual stay of execution, so as to form a proper basis for a judgment on the dissolution bond, then, upon such stipulation being so filed and approved by the circuit court of Duval county, Fla., and a certified copy filed in this court, an order of discharge will be immediately entered in favor of the bankrupt.

THE ALLEMANNIA.

(District Court, S. D. New York. April 12, 1915.)

1. WHARVES ⇐10—USE OF WHARVES—STATUTORY PROVISIONS—"EXTERIOR END"—"ADJACENT DOCK OR PIER."

Greater New York Charter (Laws 1901, c. 466) § 879, provides that it shall not be lawful for any vessel, canal boat, etc., to obstruct the waters of the harbor by lying at the exterior end of wharves in the North or East River, except at their own risk of injury from vessels entering or leaving any adjacent dock or pier. *Held*, that a car float attached to the south side of Pier 7 in the East River, near the end of the pier, and swing-

ing out into the river beyond the end of the pier, was tied to the "exterior end" thereof, within the statute, while the south side of such pier and the south side of Pier 8 were piers adjacent to the north side of Pier 7, within the statute.

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

2. COLLISION ⟸70—LIABILITY—APPLICABILITY OF STATE LAWS.

While the admiralty jurisdiction is not affected by the penalty prescribed by Greater New York Charter, § 879, relative to tying up to the exterior end of wharves, the conduct of a particular vessel may well be determined by reference to the local statute.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 91–100; Dec. Dig. ⟸70.]

3. COLLISION ⟸72—LIABILITY—BOTH VESSELS AT FAULT.

A tug towing a car float was directed not to tie up on the north side of Pier 7 in East River, and as the south side of such pier and the north side of Pier 6 were crowded, the float was tied near the end of the south side of Pier 7, thus swinging out into the river and extending about to the southerly side of Pier 6 at a distance of about 80 feet therefrom. Outside of Pier 6 a steam tug was lying and taking water from a city hydrant. A vessel bound for the north side of Pier 7, because of her speed, the tidal conditions, and inadequate tug assistance, collided with the car float, damaging it, and causing it to swing against the tug at Pier 6. *Held* that, in view of Greater New York Charter, § 879, both the car float and such vessel were at fault, and the case as between them was one for half damages.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 102; Dec. Dig. ⟸72.]

4. COLLISION ⟸71—LIABILITY—VESSELS AT REST—ADJACENT DOCK OR PIER.

The tug at Pier 6 was not at an adjacent dock or pier, nor far enough out to be an obstruction to the navigation of the vessel, but was at the pier for a legitimate and necessary purpose, and was free from fault, and was entitled to half damages and half costs against the owners of the vessel and car float.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 101; Dec. Dig. ⟸71.]

In Admiralty. Libels by Jerry Petrie against the steamship Allemannia, the Hamburg-American Line, claimant, and another, and by the Erie Railroad Company against the steamship Allemannia, her engines, etc. Decreed in accordance with the opinion.

Herbert Green, of New York City, for libelants and respondent Erie R. Co.

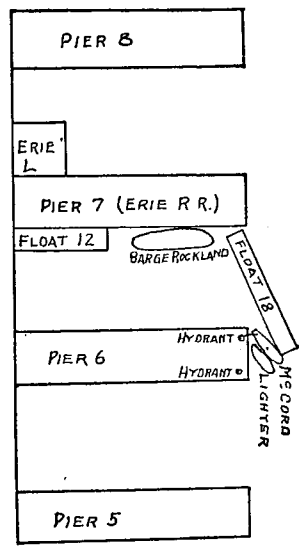
Haight, Sandford & Smith, of New York City (Henry M. Hewitt, of New York City, of counsel), for claimant.

MAYER, District Judge. On June 30, 1913, the steam tug Nanuet, belonging to the Erie Railroad, towed Erie car float No. 18 from New Jersey to Pier 7, East River. On the float were 10 cars, some empty, some loaded. The tug and tow arrived at the north side of Pier 7 about 6:35 a. m., and it was intended to tie up at the innermost berth, marked on Exhibit 1 as "Erie L." The captain of the Nanuet was informed by his mate that some one (presumably in authority) on the Erie Pier 7 had told him not to remain there; and the captain there-

upon, at about 7:20 or 7:30 a. m., proceeded to the slip between Piers 6 and 7.

The north side of Pier 7 was free, but the south side of Pier 7 and the north side of Pier 6 were crowded, so that the captain could not take the float in. The result was that the float (215 feet long) was tied to a "nigger head" near the end of the south side of Pier 7, and thus the float swung out into the river, completely obstructing the slip between Pier 6 and Pier 7 (which was 155 feet wide) and extending about to the southerly side of Pier 6; the distance between the end or face of Pier 6 and the offside of the float being about 80 feet.

A lighter was lying outside of Pier 6, and partly outside of this lighter was the steam tug Henry D. McCord, which had been moored at the northerly side of Pier 6, and which was taking water (or "crotoning," as Capt. Farrell called it) from the city hydrant at the end of the pier. The positions of the various craft are very well shown on the rough diagram Exhibit 1:



The Allemannia, a passenger and freight vessel of the Hamburg-American Line, was bound for Pier 7 under her own steam for the purpose of docking in the slip between Piers 7 and 8. At about 8 to 8:10 a. m. the collision occurred which is here the subject-matter of controversy.

On the evidence the theory of the libelants is that the Allemannia was proceeding at an excessive rate of speed and without the assistance of tugs, with the result that proper allowance was not made for the action on her of the tide (which was strong ebb) and for the presence of the vessels lying off Pier 7, so that she hit the car float and the car float swung in against the McCord, to the damage of both the car float and the McCord.

The theory of claimant, as disclosed in a so-called stipulation setting forth what the captain of the Allemannia would have testified if called (he being now abroad and unavailable), is as follows:

"When abreast of Pier 7, Pilot Kramer, who was in command, bore towards the corner of Pier 7, with the Allemannia going against the tide, and, when the steamship's bow had reached about the north corner of the pier, the engines were stopped and the stern of the vessel was caught by the swift-running ebb tide and swung in towards shore, where the stern came in contact with the Erie car float made fast to the south corner of the pier. The car float was shoved over toward the tug, made fast to the lighter on the end of Pier 6; but the contact was very slight, and I did not think that any damage had been done. The steamship started to go ahead again, in order to make her berth, when the car float, which was hanging loosely to the pier by one line, came sailing after her. This was no doubt due to the suction caused by the screw. Immediately the steamship's engines were stopped, and, as it was impossible to move the screw of the steamer until the car float was removed,

I had the tug Palmer hailed, and asked those in charge of her to keep the car float away from my stern."

As to the facts, I am satisfied from the testimony of Capt. Slater, that the tug Crescent made fast to the starboard bow of the Allemannia at about Pier 4 or 5; but, in view of the conflict of testimony, I am not satisfied that any other tug assisted up to the time the Allemannia reached Pier 7. This conclusion is borne out by the assertion in paragraph 6 of the answers:

"When the Allemannia *arrived off the pier*, two tugs were made fast to her starboard side to assist her in docking, and her port bow was placed against the north side of Pier 7."

The accident happened, in my opinion, because at the speed at which the Allemannia was approaching Pier 7, and in view of the tidal conditions and the inadequate tug assistance, the Allemannia could not be controlled sufficiently well to clear the car float and thus avoid the comparatively slight impact which caused the damage. I doubt whether whistles were blown; but, even so, that would not have helped.

On the other hand, the Allemannia had the right to believe that her course would not be impeded by (as to her) an unlawful obstruction. The captain of the Erie tug saw people waiting on Pier 7, and frankly admitted that he realized a ship was coming in, although he did not know at what time.

He did not make any inquiry, and therefore, for all he knew, the ship might come along at any time. Neither he nor the unnamed Erie Railroad authority on the pier made any effort to arrange for a safe berth on the north side of Pier 7, and the tying up of the float seems to have been merely a matter of greater convenience, easily rendered unnecessary, or probably so, if any effort had been made to avoid potential danger from swinging the car float off the south side when there was apparently plenty of room on the north south of Pier 7.

Claimant seeks to defeat recovery by libelants because of the New York statute, which reads as follows:

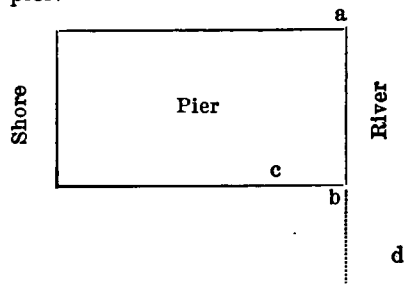
Laws N. Y. 124th Session, 1901, vol. 3, p. 375, § 879: "It shall not be lawful for any vessel, canal boat, barge, lighter or tug to obstruct the waters of the harbor by lying at the exterior end of wharves in the waters of the North or East River, except at their own risk of injury from vessels entering or leaving any adjacent dock or pier; any vessel, canal boat, barge, lighter or tug so lying shall not be entitled to claim or demand damages for any injury caused by any vessel entering or leaving any adjacent pier."

This statute has occasioned considerable discussion. The Cincinnati (D. C.) 95 Fed. 302; The Dean Richmond, 107 Fed. 1001, 47 C. C. A. 138; The Chauncey M. Depew, 139 Fed. 236, 71 C. C. A. 362; The Rosedale (D. C.) 141 Fed. 1001; Wright & Co. v. New England Navigation Co. (D. C.) 189 Fed. 809, affirmed 204 Fed. 762, 125 C. C. A. 129. The case most helpful on the facts here under consideration is The Chauncey M. Depew, supra. Judge Lacombe in that case pointed out that in previous cases the colliding vessel was not bound either in or out of an "immediately adjacent slip." He continued:

"Although broad language is used in the second clause of the section, we are not prepared to attribute to the Legislature any attempt to regulate procedure in the federal courts. * * * All that was intended was a prohibi-

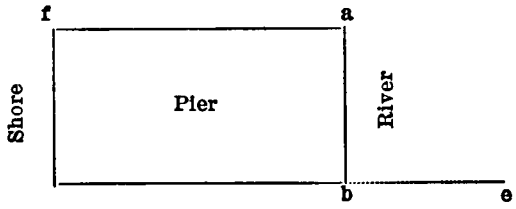
tion against prosecuting the claim or demand for injury, caused by a moving vessel, in the courts of the state. Whether the conduct of a particular vessel has been rightful or wrongful may well be determined by reference to the local statute. * * * The Deyo lay at the end of the pier in flagrant violation of the terms of this statute. * * * She occupied water which * * * was required in order to allow the Sharon to be warped around the corner of the pier. * * * She was lying where she had no right to lie, increasing the difficulties of all boats trying to enter or leave the adjacent slips, and was herself at fault. Moreover, her fault contributed to the collision, whichever way it came about."

[1] It is necessary to determine for the purposes of this case the meaning of "exterior end of wharves" and "entering or leaving any adjacent dock or pier."



"Exterior end" cannot mean only the face of the pier between *a* and *b* in the above diagram, so as to refer only to boats projecting out from the line *a, b*. If a boat is tied to *c*, so as to swing out into the river to a point *d* beyond the prolongated line of *a* and *b* (dotted), such tying up is surely within the prohibition of the statute. If that were not so, then in the case at bar, as applied to a vessel entering the slip between Piers 6 and 7, the statute would have been inapplicable, even though the float completely blocked up the entrance to the slip, and such a construction of the statute would be so technically narrow as to defeat its very purpose.

As to the next point, the wording is "adjacent dock or pier." That means, in my opinion, that when the Allemannia was bound in for the north side of Pier 7, the south side of Pier 7 and the south side of Pier 8 were "adjacent" piers.



If this car float had stretched 200 feet out in the river from *b* to *e*, it would have obstructed the navigation of many craft which, to make their berth on the upper end of the pier *a, f*, must turn or warp around *a*.

[2] I think the statute (although inaptly worded) deserves support in the interest of safe navigation in a crowded port. It prohibits obstructing the waters of the North and East Rivers, and while the admiralty jurisdiction is not affected by the penalty prescribed by the statute, the conduct of a particular vessel "may well be determined by reference to the local statute." The Chauncey M. Depew, supra; Cornell Steam Co. v. Phœnix Cons. Co., 233 U. S. 593, 34 Sup. Ct. 701, 58 L. Ed. 1107.

[3] Holding the views expressed, I am of opinion that both the Allemannia and the car float were at fault, and that the case, as between them, is one for half damages.

[4] As to the McCord: This tug was not at an "adjacent dock or pier," nor was she out far enough to be an obstruction to the navigation of the Allemannia. She was at Pier 6 for a legitimate and necessary purpose, and was free from fault.

The McCord may have the usual decree for half damages and half costs against claimant and respondent.

In re RICCIARDELLI.

(District Court, D. New Jersey. July 30, 1915.)

1. BANKRUPTCY ⟸136—REQUIRING BANKRUPT TO TURN OVER ASSETS TO TRUSTEE—SUMMARY PROCEEDINGS.

A proceeding to require a bankrupt to turn over assets to his trustee and a proceeding for contempt to enforce an order to turn over assets are distinct; and in the former proceeding the question is whether the bankrupt had assets which he failed to schedule and turn over, while in the latter proceeding the question is whether he has present ability to turn over the property pursuant to order therefor.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 233, 235; Dec. Dig. ⟸136.]

2. BANKRUPTCY ⟸136—REQUIRING BANKRUPT TO TURN OVER ASSETS TO TRUSTEE—SUMMARY PROCEEDINGS.

A trustee, in summary proceedings to require a bankrupt to turn over to him assets, has the burden of proving that the bankrupt had assets which he failed to schedule and turn over, and where it is established or admitted that the bankrupt had possession of unscheduled assets very shortly before the institution of the bankruptcy proceedings, a presumption arises that he had them at the time of the institution of the proceedings, and the burden is on him to show why they were not scheduled and turned over.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 233, 235; Dec. Dig. ⟸136.]

In Bankruptcy. In the matter of Orlando Ricciardelli, bankrupt. On a certificate of the referee denying a petition of the trustee to require the bankrupt to show cause why he should not be required to turn over to the trustee a specified sum. Order reversed, with instructions.

Frank W. Hastings, Jr., of Jersey City, N. J., for trustee.
Frank P. Woglom, of New York City, for bankrupt.

RELLSTAB, District Judge. On petition of the trustee, the bankrupt was required to show cause why he should not be ordered to turn over to the trustee the sum of $17,550.

The answer of the bankrupt admitted that in the months of November and December, 1911 (the petition in bankruptcy was filed on the 14th of December, 1911), he withdrew from three bank accounts the sum of $16,350. Of this, the answer asserts, the sum of $7,750 was paid to creditors and $1.200 loaned. The testimony shows that more than $6,000 of these withdrawals is unaccounted for, and the referee so certifies.

[1] The referee dismissed the trustee's petition, holding that in proceedings of this kind, under Epstein v. Steinfeld, 210 Fed. 236, 127 C. C. A. 54, and In re Stern (D. C.) 215 Fed. 979, it is necessary to determine, not only that the property claimed was in the bankrupt's possession or control at the time of the bankruptcy, but also that it is still in his possession or control, and that he is physically able to deliver it to the trustee, and that the evidence did not warrant such a conclusion.

The referee, seemingly, has misread these cases, and has relieved the bankrupt of the burden of proof which is cast upon him in proceedings of this character. In Epstein v. Steinfeld, the order under review, as modified by the District Court (206 Fed. 568), required the bankrupt to turn over property which was in his possession at the time the petition in bankruptcy was filed against him. The referee's order had recited that the bankrupt "still withholds" the unscheduled assets. These words were struck out by the District Court, for the reason that the question whether the bankrupt still withheld such moneys was not then necessary to be determined. What Judge McPherson said in that behalf may justifiably be repeated here, as the Circuit Court of Appeals (210 Fed. 238, 127 C. C. A. 54) pointedly stated that it furnished the correct practice in cases of that kind. He said (206 Fed. 569):

"When the charge is made that assets have apparently not been accounted for, the referee hears and decides the dispute in the first instance. The point of time to which the inquiry is directed is the date of bankruptcy, and the precise question is whether the bankrupt was then in possession or control of money or of goods that apparently should have come into the hands of the trustee. Being fundamental, this question needs to be examined first of all; but it neither involves the bankrupt's present ability to turn over, nor raises the question whether he should be punished for contempt—except, of course, as the complexity of human affairs may compel an occasional approach to these allied subjects. The two questions last referred to, therefore, do not need consideration at the first stage of the investigation. If the assets that presumably should have been in the bankrupt's possession or control at the time of bankruptcy have not been accounted for, the referee may, and probably will, draw the natural inference, and direct the bankrupt to pay the money or deliver the goods, as the case may be. If this order becomes final, either by failure to have it reviewed, or by affirmance in the District Court, a definite step has been taken; the proper tribunal has settled beyond future controversy that the assets described were in the bankrupt's possession or control at the time of bankruptcy.

"Then comes the next question: Are they still there? Or what has become of them? This is evidently a distinct subject, which should not be confused with the other, but should be separately treated. It will need no attention,

unless the bankrupt should fail to comply with the order to hand over; but failure to comply makes him presumptively liable to punishment for contempt. But only presumptively; he may have a complete answer to any attempt to punish, and in any event he cannot be punished until he has been heard. In such a hearing the inquiry is directed to the bankrupt's present ability to pay the money or deliver the goods, and unquestionably he makes a sufficient answer if he shows that he is physically unable to obey the order. If it be true that he does not now possess or control the assets, he may still be liable to the criminal law; but, except for willful disobedience of the court's command, he cannot be confined by civil process. The evidence produced must therefore satisfy the judge that the bankrupt is really unable to obey, and is not merely defying the order. This presents a mere question of evidence, and, if the bankrupt fails to prove that he cannot comply, he is simply in the ordinary position of a suitor that has not offered enough evidence to prove a fact, and is obliged to take the consequence of such failure."

That the distinction between the two kinds of proceedings, viz., that to determine whether the bankrupt had assets which he failed to schedule and turn over, and that to enforce an order that he turn over such assets, is important and should be kept in mind is further emphasized by the course taken by such Circuit Court of Appeals in Re Pennell, 214 Fed. 337, 130 C. C. A. 645. In that case the referee's order, affirmed by the District Court of this district, likewise declared "that the bankrupt has the sum of money named now (April 17, 1911) in his possession or under his control." The finding that the bankrupt had the moneys at the time the proceedings in bankruptcy were begun was affirmed by the appellate court, but the order was modified by striking out the word "now" and adding, after the word "control," the words "on the date of bankruptcy, namely, June 4, 1906"; the court, by his honor, Judge McPherson, saying in that behalf:

"The date involved in the referee's investigation was the date of bankruptcy, and that was June 4, 1906. * * * What may have become of the money since that time is a subject for inquiry under such further proceedings as may be taken."

In re Stern (D. C.) 215 Fed. 979, was a proceeding to hold the bankrupt in contempt for not obeying an order to turn over assets previously found to have been withheld by him. Present ability to turn over the property was therefore a pertinent inquiry. It is not so in the instant case.

[2] While the burden of proof is primarily on the trustee to show that the bankrupt has not accounted for all his assets, yet, when it is established (admitted in this case) that the bankrupt had possession of the unscheduled assets very recently before the bankruptcy proceedings were instituted, a presumption arises that he still had them when such event took place, and the burden is shifted to the bankrupt to show why they were not scheduled and turned over. The bankrupt has not met this burden. He has introduced evidence tending to show what has become of the larger part of these moneys, but, as noted, he fails utterly to account for at least $6,000 of such assets. The referee was not much impressed by the testimony given by and on behalf of the bankrupt, even as to the specific sums of money said to have been disbursed by him, and which, as noted, leaves a large sum unaccounted for. He stated:

"There is no doubt that the testimony of the bankrupt, as well as many of his witnesses, revealed a most remarkable series of transactions, and it is very difficult for me to believe all of them to be true, and his conduct is certainly not that of a man who intends to deal fairly with all of his creditors and it is very evident on his own showing that as to some of his creditors, namely, the ones he claims to have paid, that he intends to prefer them over his other creditors. His action also in making no record or memoranda of such large payments of money is most extraordinary, and to say the least is subject to grave suspicion. But in the last analysis, as this matter appears to me, it resolves itself into the proposition as to whether or not I am to believe, not only that the bankrupt, but also that a large number of his witnesses, perjured themselves on the witness stand. This would have to be my conclusion in the face of the fact that the trustee has not produced any rebutting testimony. I am asked to find that, because shortly before the bankruptcy the bankrupt had some $16,000 in cash in his possession, I must presume, irrespective of the testimony given by the bankrupt and other witnesses, that he still has the money in his possession. From the Stern Case I do not understand that I have a right to presume that the bankrupt still has this fund. The trustee has persistently urged that the burden was upon the bankrupt to account for the money which he admits he had in his possession shortly prior to the bankruptcy. I fully agree with the trustee that the burden is upon the bankrupt, and the bankrupt has endeavored in a way, far from satisfactory, to sustain this burden; but I feel that he has done it to such an extent that I have no right to assume that his testimony and that of his witnesses was all false, and to assume that he still has in his possession the $16,000 sought by the trustee.

"Now, as to the second stage in the proceedings, just one word. It has not been shown by the trustee that the bankrupt is physically able to deliver to his trustee the cash or its equivalent in property, which the trustee seeks to recover. Here again the trustee claims that the burden is upon the bankrupt. The bankrupt's answer to this is, that he is employed by the O. Ricciardelli Company, and is working on a salary, and has no other property or means. The trustee might have produced evidence to show what the bankrupt's interest was in the O. Ricciardelli Company, and what, if anything, that interest was worth; but he has not done this.

"My conclusion, therefore, was that the trustee had failed to bring his case within the rules as laid down in the two cases herein above referred to. * * *"

From this expression of the view of the referee it is evident that he did not dismiss the trustee's petition because the bankrupt had satisfactorily accounted for the large sum of money withdrawn from the bank a short time before the commencement of bankruptcy proceedings against him, or because it was shown that the bankrupt was not then physically able to deliver such property, but because he could not say from the evidence that he still (at the time of considering the petition) had such moneys or any part of them. The referee failed to note the bounds of the present inquiry, and did not take account of the shifting of the burden of proof. As it was no part of the duty of the trustee in the initial proceedings to show that the bankrupt, after the estate was put into bankruptcy, still possessed or controlled the assets thus unaccounted for, the dismissing of his petition because of a failure of proof in that respect was error. It follows that the order dismissing the trustee's petition must be reversed.

The proceedings under review are remanded to the referee, with direction to take such steps as shall be consistent with the view here expressed. If desirable, further testimony may be taken by the trustee and the bankrupt.

In re MANDEL.

Ex parte MANDEL.

(District Court, S. D. New York. April 13, 1915.)

1. BANKS AND BANKING ⟸4—REGULATIONS—VALIDITY.

The business of private banking is subject to general regulation by the state, as embodied in Banking Law N. Y. (Laws 1914, c. 369) §§ 57, 60, empowering the superintendent of banks to seize the property of a private banker where his business is in an unsafe condition, and giving the banker within 10 days thereafter the right to apply for restitution of possession, and where the superintendent of banks seized possession of the goods of a private banker because his bank was thought unsafe, it was only an incident to the right of public control that the banker lost possession which he might have protected against process in a criminal prosecution.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 3; Dec. Dig. ⟸4.]

2. BANKRUPTCY ⟸242—DELIVERY OF PAPERS TO RECEIVER IN BANKRUPTCY—POWER OF UNITED STATES DISTRICT COURT.

The superintendent of banks of New York, acting under Banking Law N. Y. (Laws 1914, c. 369) § 57, took possession of a private banker's assets and books and papers. Subsequently the superintendent was appointed receiver in bankruptcy. The private banker surrendered the books without imposing conditions, and did not suggest any limitation in their use for eight months. *Held*, that the United States District Court would not compel the district attorney of New York to deliver to the receiver the books and papers about to be used in the trial of the banker in the state court, because if there were any privilege it was lost from the failure to assert it at the outset.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 399–401; Dec. Dig. 242.]

3. BANKS AND BANKING ⟸17—STATUTORY PROVISIONS—VISITATORIAL POWERS.

A private banker, continuing in business as such after taking effect of Banking Law N. Y. (Laws 1914, c. 369), is subject to the visitatorial powers given the superintendent of banks by the act.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 21, 22; Dec. Dig. ⟸17.]

In Bankruptcy. In the matter of Adolph Mandel, a bankrupt. On motion by Adolph Mandel to compel the district attorney of New York to deliver to the receiver in bankruptcy books and papers. Denied.

This is a motion to compel the district attorney of New York to deliver to Mandel's receiver in bankruptcy books and papers which he is about to use in the trial of an indictment in the state court. Mandel was a private banker doing business in the city of New York under a certificate from the comptroller of the state issued under subdivision 5 of section 29d of chapter 348 of the Laws of 1910. On August 3, 1914, the superintendent of banks of that state took possession of all his assets, acting under section 57 of chapter 369 of the Laws of 1914, and among them he got the books and papers in question. On August 5th a petition was filed in this court looking towards Mandel's adjudication in bankruptcy, which was followed on November 11, 1914, by the appointment of the superintendent of banks as the receiver in bankruptcy. Mandel insists that the original seizure of his books was illegal under the state law and that the receiver's possession shares in the original illegality,

that he has, therefore, never had any opportunity to assert his privilege against exposure through the use of the books, and that the only method practical for asserting it is by getting them back to the possession of the receiver and instructing him that they are not to be used in the criminal prosecution.

Leon Lauterstein, of New York City, for bankrupt.
Jeremiah T. Mahoney, of New York City, for receiver.
Charles A. Perkins, of New York City, for district attorney.

LEARNED HAND, District Judge (after stating the facts as above). [1, 2] Section 57 of the Banking Law of New York gives power to the superintendent of banks to seize the property of a private banker if his business is in an unsafe condition. Section 60 gives the banker within 10 days thereafter the right to apply for a restitution of possession. The business of private banking is certainly subject to general regulation, such as that of the New York Banking Law, and when the superintendent of banks seized possession of the goods of Mandel, because he thought his bank unsafe, it may have been an incident, but it was only an incident, of the right of public control, that he lost a possession which he might have protected against direct process in a criminal prosecution. The incident is "one of the misfortunes of" insolvency "if it follows crime." Matter of Harris, 221 U. S. 274, 279, 31 Sup. Ct. 557, 558, 55 L. Ed. 732. Matter of Harris did not depend upon the provisions intended to safeguard Harris, for Justice Holmes especially says they were not enough, if the privilege had existed, and that only statutory immunity would have served. It turned upon the theory that, since the bankruptcy court was entitled to possession and afterwards to title, the incidental subjection of the bankrupt to possible exposure did not deprive the court of those rights. The case is applicable here, for, if the superintendent of banks was entitled to possession of the assets for a public administration, the incidental danger of exposure would not have entitled Mandel to refuse possession, had he done so at the time.

The question remains whether this court, having an unconditional possession, should refuse to assist a criminal prosecution. Strictly speaking, perhaps it is not necessary to say what rights Mandel might have got if he had refused to allow the superintendent of banks to take possession, except on condition that the books should not be used against him, though Matter of Harris, supra, seems to decide it. If Mandel had insisted upon the protection of an order such as Harris got, perhaps he might have got it; perhaps not. In fact, he made no such condition, but surrendered the books and has not suggested any limitation in their use for eight months. The privilege must always be claimed, or it is lost, call it by waiver or by failure of conditions precedent, and any right, if he had it, he must have asserted at the outset. As to the propriety of allowing any public authority to use the books, I have considered that question and decided it in Re Tracy (D. C.) 177 Fed. 532.

[3] It is finally suggested that section 502 prevented any action by the superintendent of banks till November 1, 1914. The effect of that section was only to except from repeal chapter 348 of Laws of 1910

It does not follow that article 4 of the Banking Law of 1914 did not go into effect, while article 3a of the earlier law remained unrepealed. On the contrary, it is evident that article 4 was meant to go into effect earlier at least in some respects, because section 172 especially mentioned July 31st as the day after which a private banker must get a certificate from the superintendent of banks. It is therefore possible that between August 1st and November 1st, private bankers were subject to both statutes. However that may be, the question is irrelevant, because the Banking Law of 1914 gave the superintendent of banks visitatorial powers whenever the banker's position became unsafe, and that he was acting within his power is too obvious for argument. By continuing in business as a private banker, Mandel became subject to such powers.

Weeks v. U. S., 232 U. S. 383, 34 Sup. Ct. 341, 58 L. Ed. 652, does not touch the case, because there the original acquisition of the property was illegal, and the accused attempted to get it back before trial, as he had the right to do. If Mandel were convicted by this evidence, and upon appeal it were decided that he was entitled on this motion to have had the books returned to the receiver's custody, then the case would be pertinent. It has no bearing upon whether the books should go back to the receiver, which is the question here.

Motion denied.

UNITED STATES v. GRANT.

(District Court, D. Massachusetts. July 14, 1914.)

No. 233.

1. SEAMEN ⊂⊃32—WAGES AND EFFECTS OF DECEASED SEAMEN—SHIPPING COMMISSIONERS' ALLOWANCES—STATUTORY PROVISIONS.

Rev. St. § 4543 (Comp. St. 1913, § 8332), requiring every shipping commissioner to turn over the money, wages, and effects of deceased seamen, subject to such deductions as may be allowed by the District Court for expenses incurred, gives the court power to allow expenses, provided they are reasonable, notwithstanding section 4545, as amended by Act March 3, 1897, c. 389, § 7, 29 Stat. 689 (Comp. St. 1913, § 8334), providing for the payment into the United States treasury of claimed wages and effects of deceased seamen, which does not mean that all the money paid into court by the commissioner shall be paid to the treasurer.

[Ed. Note.—For other cases, see Seamen, Cent. Dig. §§ 215–217; Dec. Dig. ⊂⊃32.]

2. SEAMEN ⊂⊃32—WAGES AND EFFECTS OF DECEASED SEAMEN—SHIPPING COMMISSIONERS' ALLOWANCES—STATUTORY PROVISIONS.

Allowances paid to a shipping commissioner as expenses under order of court, pursuant to Rev. St. § 4543, as previously construed by the Circuit Judge for the circuit, and followed with no objection, cannot be recovered back by the United States, where the allowances are not excessive, and the United States, wishing to contend that the amount paid under the practice is too large, can do so when a subsequent case arises.

[Ed. Note.—For other cases, see Seamen, Cent. Dig. §§ 215–217; Dec. Dig. ⊂⊃32.]

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3. SEAMEN ⟸32—WAGES AND EFFECTS OF DECEASED SEAMEN—SHIPPING COMMISSIONERS' ALLOWANCES—STATUTORY PROVISIONS.

Act June 19, 1886, c. 421, 24 Stat. 79, providing for the payment to shipping commissioners of salaries, instead of fees for specified services, does not affect Rev. St. § 4543, requiring shipping commissioners to turn over money, wages, and effects of deceased seamen, subject to deductions allowed by the District Court for expenses incurred.

[Ed. Note.—For other cases, see Seamen, Cent. Dig. §§ 215–217; Dec. Dig. ⟸32.]

Petition by the United States against Ernest B. Grant. Dismissed.

Daniel A. Shea, of Boston, Mass., Asst. U. S. Atty.

Ernest B. Grant, pro se.

MORTON, District Judge. This is a petition by the United States attorney for an order directing the shipping commissioner at Boston to return to the court the sum of $35.36 paid him by order of this court on December 8, 1913, as his fees in connection with the wages of deceased seamen. These wages had been paid into court by the commissioner from time to time, and had remained unclaimed for more than six years. On December 8th orders were entered to pay the commissioner the above sum and to pay the balance into the treasury.

The Shipping Commissioners Act was passed in 1872. The parts of it here in question are embodied in R. S. §§ 4543 to 4545, as amended by section 7 of the act of March 3, 1897 (29 Stat. 687), and the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1087).

[1, 2] In this district, ever since the passage of the Shipping Commissioners Act, the commissioner has always turned over the entire fund, and has received his compensation from the court.

In 1873, Judge Shepley, Circuit Judge for this circuit, in the first case with which he dealt under the act, ordered that the commissioner should be paid from the fund the sum of $2 and 1 per cent. The commissioner has ever since, by order of court, received this amount in each case. No objection has hitherto been raised by the United States. Judge Shepley seems to have gone thoroughly into the question, for he seems also to have passed on the question of clerk's fees in such cases. United States v. Hill (C. C.) 25 Fed. 375–377.

Under section 4543, the commissioner is required to turn over the money, wages, and effects of deceased seamen, "subject to such deductions as may be allowed by the Circuit Court for expenses incurred in respect to such money and effects." This plainly gives the court the power to allow expenses in such cases; and "expenses" may include proper fees to the commissioner, who is not required to do such work for nothing. There seems to be no other construction which would authorize the court to pay the clerk's fees from the fund (which is not objected to by the United States attorney), nor the obviously necessary expenses in connection with "effects." Section 4545 does not mean that all the money paid into court by the commissioner shall be paid to the treasurer.

It must be presumed that the order of Judge Shepley was in conformity with the statute, which mentions only "expenses," and that the

allowance to the court was made as part of the expenses in such cases. The effect of the order seems to be that the commissioner shall receive his expenses, which are determined to be $2 and 1 per cent. in each case. The amounts are generally small, and the commissioner's expenses are difficult to ascertain. The allowance does not seem to me excessive. In this case, under Judge Shepley's order, there has been a judicial determination as to the commissioner's expenses, pursuant to the terms of section 4543, and the amount has already been paid to the commissioner. I do not think the transaction can be opened up. If the United States wishes to contend that the amount paid as expenses under the present practice is too large, it can do so when the next case of this nature arises.

[3] The fact that the commissioner is now paid a salary, instead of by fees, is immaterial, as in this matter he is paid the compensation he would have been entitled to prior to the passage of the act changing his method of compensation. Act June 19, 1886 (24 Stat. 79).

The petition is dismissed.

BOOSEY et al. v. EMPIRE MUSIC CO., Inc.

(District Court, S. D. New York. February 11, 1915.)

1. COPYRIGHTS ⊂⊃66—INFRINGEMENT—MUSICAL COMPOSITIONS.

Though otherwise the musical compositions are considerably different in theme and execution, it is enough to warrant the charge of piracy and infringement of copyright that the words "I hear you calling me," with practically identical music accompanying them, appear in the two songs, and are the main thing that impresses one technically untutored.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 63; Dec. Dig. ⊂⊃66.]

2. COPYRIGHTS ⊂⊃85—TEMPORARY INJUNCTION—SUSPENSION.

Temporary injunction in a suit for infringement of copyright of a song will be suspended, on defendant giving a bond and filing statements of sales, where sale of defendant's composition cannot interfere with sale of plaintiffs' composition, because of the inherent difference, generally speaking, of the tastes to which they appeal; but the case involves solely the rights under the statute.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 78; Dec. Dig. ⊂⊃85.]

In Equity. Suit by Charles T. Boosey and another against the Empire Music Company, Incorporated. Temporary injunction granted, with conditional suspension.

Max D. Josephson, of New York City, for plaintiffs.
Nathan Burkan, of New York City, for defendant.

MAYER, District Judge. [1] Plaintiffs claim that a musical composition entitled "I Hear You Calling Me" is infringed by defendant, which is selling another musical composition, entitled "Tennessee, I I Hear You Calling Me." I think the plaintiffs, for the purposes of this motion, have met the objections raised by defendant as to the necessary showing of jurisdictional facts. The question, therefore, is

whether, on the merits, a preliminary injunction should issue because of the alleged infringement.

The composition which plaintiffs own is of a dignified character, has been sung by a distinguished singer, and has as its basic theme a living person standing on the grave of his dead loved one and hearing her voice. The composition owned by defendant is in syncopated time (familiarly known as ragtime), has been sung by a master of that art, and expresses the desire of a negro to go back to his old home in Tennessee. The two compositions are considerably different, both in theme and execution, except as to this phrase, "I hear you calling me," and, as to that, there is a marked similarity.

The words "I hear you calling me," and the music accompanying those words, are practically identical in both compositions, and the real controversy in the case is whether the use of this similar phraseology and the similar bars of music is sufficient to warrant the charge of piracy and infringement of copyright. I have had some one, indifferent to the controversy, play both songs for me, and the sentiment of one song is about the same as the other. Sitting for the moment as the uninformed and technically untutored public, the main thing that impressed me was the plaintive "I hear you calling me" in both songs. I (the public) really was not much concerned as to the details of the solemn song said to have been sung by John McCormack, or the details of the syncopated interpretation of Al. Jolson. The "I hear you calling me" has the kind of sentiment in both cases that causes the audiences to listen, applaud, and buy copies in the corridor on the way out of the theater.

[2] However, these cases must be viewed and dealt with from a practical standpoint. Songs of this character usually have a temporary vogue, and, if the sale is stopped just at the time that the public is keen, serious injury may be done, even though a plaintiff gives a bond or undertaking to respond. On the other hand, the financial showing of the defendant here, so far as disclosed by the papers, is not satisfactory, and, should plaintiffs ultimately prevail, they may have their labor for their pains. A further consideration is that the sale of defendant's composition cannot interfere with the sale of plaintiffs' composition by virtue of the inherent difference, generally speaking, of the tastes to which they appeal; and therefore the case is not one where plaintiffs' commercial exploitation of their composition is interfered with, but one which involves solely the rights under the statute.

Under all these circumstances, I have concluded that the fair course to pursue is as follows: The motion will be granted, but injunction will be suspended, provided defendant files in the office of the clerk, five days after the entry of the order herein, a bond pending final hearing, or appeal from this order, in the sum of $3,000; also a full statement of the sales made by it up to the date of the entry of the order, and thereafter file upon the 15th and 1st days of each month a statement of succeeding sales. In justice to both sides, the cause will be advanced to the March calendar for trial.

Motion granted as indicated, with leave to move after March 1, 1915, to increase the bond, if plaintiffs are so advised.

GRIFFIN v. DAVISON LUMBER CO., Limited, et al.

(District Court, D. Massachusetts. October 22, 1914.)

No. 889.

SHIPPING ⊂=121—LIABILITY FOR DAMAGE TO CARGO BY DIRT—PERILS OF THE SEA—UNFITNESS OF VESSEL.

A vessel *held* not liable for damage to a cargo of lumber from water which entered by reason of her being strained and her seams opened during a severe storm, on evidence showing her to have been seaworthy when the voyage commenced, but liable for injury to the lumber from dirt and coal dust, which was carried up from the limbers by the water which leaked in.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 225, 449–451, 466; Dec. Dig. ⊂=121.]

In Admiralty. Suit by Charles Griffin against the Davison Lumber Company, Limited, and others. Decree for libelant.

George L. Dillaway, of Boston, Mass., for libelant.

Mooers & Whiting, of Boston, Mass., for respondents.

MORTON, District Judge. The damage to the cargo of lumber seems to have been of two kinds: (1) That caused by water; (2) that caused by coal dust and dirt, which were carried up from the limbers of the vessel by the water which leaked in. Both the charter party and the bill of lading are in common form. For the injury caused by the coal dust and dirt, the vessel is, on the authorities, clearly liable. The Lizzie W. Virden (C. C.) 11 Fed. 903, 909; Dene, etc., Co. v. Tweedie, etc., Co. (D. C.) 133 Fed. 589; Id., 143 Fed. 854, 74 C. C. A. 606; The Southwark, 191 U. S. 1, 24 Sup. Ct. 1, 48 L. Ed. 65. Whether she is also liable for the water damage depends upon whether she was tight and seaworthy when she put to sea. She was 40 years old, but she had been thoroughly rebuilt less than a year before, and reclassified A 1½ for 4 years. Her master and steward testify that she was all right. The only evidence to the contrary is such as can be inferred from the fact that in a severe, although not extraordinary, gale, during which she shipped a heavy sea which damaged her forward, she was so strained as to open her seams, and leaked so fast that the hand pumps were unable to keep the water down. The seas were unusually bad, and the vessel was forced to carry sail. The uncontradicted evidence is that under such conditions seaworthy wooden vessels are likely to leak. Some of the leakage may be attributable to the strain caused by the sea which came aboard. While the question is close, and the burden of proving compliance with the warranty is on the vessel (The British King [D. C.] 89 Fed. 872), it does not seem to me that the warranty that the vessel was tight and seaworthy at the beginning of the voyage was broken (The British King, supra). The injury to the cargo caused by the leakage of water alone is attributable to perils of the sea for which the vessel is not responsible.

As to the damages, the evidence of the charterer is that all the underdeck load, about 199,000 feet, was damaged $4 or $5 per thousand, of which about $1.50 is attributed to water damage and the balance to

coal dust. The evidence of the stevedore and of the master and steward of the vessel is that not all the lumber was water-soaked, and that only a small portion of it was injured by coal dust. The vessel had four or five feet of water in her hold, and was in a heavy sea for several days. It seems likely that coal dust and stains would injure the lumber near the bottom, and around the edges, and on the exposed surfaces, but not that the whole cargo would be so seriously affected by it as the respondent contends. The weight of the evidence seems to be to that effect. I find that $300 is a fair allowance to the consignee for the damage which the cargo sustained from the coal dust.

As to the claim by the vessel for demurrage: Upon this cargo, taken as a whole, I think that the customary rate of discharge would be 25,000 feet per day. The vessel is therefore entitled to demurrage for 1½ days at $32.04 per day. There is no dispute as to the amount of freight due, $644.03. This, added to the demurrage, amounts to $692.09. Deducting the amount above allowed for the damage to the cargo, the libelant is entitled to a decree for the difference, $392.09, with interest and costs.

UNITED STATES v. LEW AH JUNG.

(District Court, D. Massachusetts. January 19, 1915.)

No. 1045.

1. ALIENS ⟸32—DEPORTATION OF CHINESE—ADJUDICATION—CONCLUSIVENESS.
An adjudication by a United States commissioner, in proceedings to deport a Chinaman, that he was born in the United States, followed by the issuance to him of a certificate, is conclusive on his right to remain in the United States, notwithstanding any subsequent misconduct.

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

2. JUDGMENT ⟸956—RES JUDICATA—ISSUES—EVIDENCE.
In proceedings to deport a Chinese person who rested his right to remain in the United States on the ground that the issue had previously been decided in his favor in prior deportation proceedings, parol evidence, to show on which of several possible grounds the judgment in the prior deportation proceedings in favor of his right to remain in the country was based, was admissible.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1822–1825; Dec. Dig. ⟸956.]

Proceedings by the United States for the deportation of Lew Ah Jung. Order of deportation rendered by the commissioner. Reversed.

Joseph F. O'Connell, of Boston, Mass., for petitioner.
James A. Hatton, of Boston, Mass., for respondent.

MORTON, District Judge. This appellant rests his right to remain in the country upon two grounds: (1) That he was born in this country; (2) that the issue has already been decided in his favor in previous deportation proceedings.

He testifies that he was born in San Francisco in or about the year 1884; that he remained there until 1890, when he went with his par-

ents to China; and that he returned to this country in 1897 via Canada and Richford, Vt. At that time he was arrested at Richford on deportation proceedings. His case was heard before the United States commissioner in Vermont, who decided that the appellant had, as he then claimed, been born in this country, and thereupon issued a certificate to him, dated June 1, 1897. It has the appellant's photograph annexed to it; the genuineness of it is not questioned by the United States.

[1, 2] It is clear that the appellant is the person then adjudged entitled to enter the country on the ground stated. His subsequent resort to "ways that were dark and tricks that were vain," throws an interesting light on the Chinese character; but it does not deprive him of the rights which he then acquired. Leung Jun v. U. S., 171 Fed. 413, 96 C. C. A. 369. Oral evidence was rightly admitted to show on which of several possible grounds the commissioner's judgment of 1897 was based. Washington, etc., Steam Packet Co. v. Sickles, 24 How. 333, 345, 16 L. Ed. 650.

The order of the commissioner is reversed, and the appellant is discharged.

LUSK et al. v. TOWN OF DORA.

(District Court, N. D. Alabama, Jasper Division. July 31, 1915.)

No. 5.

1. INJUNCTION ⊜105—RESTRAINING ENFORCEMENT OF MUNICIPAL ORDINANCES—JURISDICTION.
   A court of equity has jurisdiction to restrain the enforcement by criminal prosecution of a municipal ordinance, void because violative of the federal Constitution, because unreasonable.
   [Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 178, 179; Dec. Dig. ⊜105.]

2. MUNICIPAL CORPORATIONS ⊜625—ORDINANCES—VALIDITY—PRESUMPTIONS.
   An ordinance regulating the speed of trains, enacted as an exercise of the police power of the municipality delegated to it by its charter, is presumptively reasonable and valid, and not in conflict with the federal Constitution, but the presumption may be rebutted.
   [Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1378, 1379; Dec. Dig. ⊜625.]

3. MUNICIPAL CORPORATIONS ⊜625—REASONABLENESS OF ORDINANCE—QUESTIONS OF LAW.
   The reasonableness of a municipal ordinance, while a question of law, depends on the particular facts in each case.
   [Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1378, 1379; Dec. Dig. ⊜625.]

4. COMMERCE ⊜58—INTERSTATE COMMERCE—MUNICIPAL ORDINANCE—VALIDITY.
   An ordinance of an incorporated town, approximately 1⅕ miles in extent, with a population of about 1,000 and serving numerous mining camps as a station, which limits the speed of interstate trains to 6 miles an hour, imposes an unreasonable burden on interstate commerce, and is unenforceable on that ground, where the track is laid on the railroad company's private right of way, unfit for passage by pedestrians or vehicles except at crossings, four of which are at grade, and where the difficulties in the operation of trains by reason of physical conditions will be increas-

ed by the low speed, and where the dangers created by the passage of trains at a greater speed may be avoided by flagmen.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 77–86, 100; Dec. Dig. ⊂⇒58.]

In Equity. Suit by James W. Lusk and another, receivers of the St. Louis & San Francisco Railroad Company, against the Town of Dora, to enjoin the enforcement of a municipal ordinance. Motion to dismiss bill denied, and injunction prayed for conditionally granted.

Forney Johnston, of Birmingham, Ala., for plaintiffs.

Gunn & Powell, of Jasper, Ala., for defendant.

GRUBB, District Judge. The bill in this case was filed by the receivers of the St. Louis & San Francisco Railroad Company to enjoin the enforcement of a municipal ordinance of the incorporated town of Dora limiting the speed of trains within the corporate limits of the town to 6 miles an hour. The plaintiffs contend that the ordinance is unreasonable in its limitation and in violation of the federal Constitution: (1) Because it deprives the plaintiffs of their property without due process of law; (2) because in the manner of its enforcement a discrimination is worked against the plaintiffs, and they are thereby deprived of the equal protection of the laws; and (3) because, if unreasonable, it operates to burden the interstate commerce conducted by the receivers. The defendant denies that the ordinance is unreasonable in its terms, or that it operates as a burden on the interstate commerce conducted by the receivers, and asserts that it is equally enforced against all railroads operating within the corporate limits of the town.

[1] The jurisdiction of a court of equity to restrain the enforcement of a municipal ordinance by criminal prosecutions, void because violative of the federal Constitution, because of its unreasonableness, is undoubted. If the ordinance complained of is unreasonable, no other question need be considered.

[2] It is conceded that the town of Dora has the power to regulate the speed of trains within reasonable limits, in the exercise of the police power of the state delegated to it by its charter, without coming in conflict with any provision of the federal Constitution. There is a disputable presumption that, when it had done so by ordinance, the ordinance is reasonable and valid. The authority of the courts in the premises is thus expressed in 7 Encyc. Supreme Court Reports, page 354:

"A state statute directed against, or which imposes, a direct burden upon, or substantially prohibits, either foreign or interstate commerce, is void, though it be enacted in the exercise of the police power. Whether state statutes go beyond the danger to be apprehended, and are something more than exertions of the police power, is not a question for the Legislature, but is one for the courts to determine. And as the range of the police power sometimes comes very near to the field committed by the Constitution to Congress, it is the duty of the courts to guard vigilantly against any needless intrusion."

In the case of Hendrick v. Maryland, 235 U. S. 610, 622, 623, 35 Sup. Ct. 140, 142, 59 L. Ed. —, the Supreme Court said:

"The reasonableness of the state's action is always subject to inquiry, in so far as it affects interstate commerce, and in that regard it is likewise subordinate to the will of Congress."

[3, 4] The evidence shows that the corporate limits are approximately 1⅕ miles in extent; that the track of the plaintiffs is at a different and higher level than that of the town; that the railroad is on a high trestle as it passes through the western part of the town; that one street crosses under the trestle, and four other streets, only one of which is considerably traveled, cross the railroad, within the corporate limits, at grade; that the railroad track, through the corporate limits, is curved at several places, and runs also through cuts and upon embankments, presenting physical obstacles to successful operation at low speeds, and obstructing the passage as well as the vision of those crossing or walking along the track. Dora is a town of about 1,000 inhabitants, but serves numerous mining camps as a station. There is evidence submitted as to character and frequency of accidents within the town limits, caused by trains, during the period of the past three years. The plaintiffs, since the filing of this suit, have stationed a flagman at the main crossing during the daylight hours. Other facts reflecting on the necessity or absence of necessity for the maintenance of low speed through the corporate limits appear in the record.

The plaintiffs cite the cases of Meyers v. C., R. I. & P. R. R. Co., 57 Iowa, 555, 10 N. W. 896, 42 Am. Rep. 50, Evison v. Chicago, etc., R. R. Co., 45 Minn. 370, 48 N. W. 6, 11 L. R. A. 434, City v. Hagenbush, 98 Mo. App. 669, 73 S. W. 725, Zumault v. K. C. & I. A. L. Ry. Co., 71 Mo. App. 670, White v. St. L. & S. F. Ry. Co., 44 Mo. App. 540, and Burg v. Chicago, etc., R. R. Co., 90 Iowa, 106, 57 N. W. 680, 48 Am. St. Rep. 419, to the effect that speed ordinances of from 4 to 6 miles an hour are unreasonable. The defendant relies upon the cases of King v. Oregon R. & Nav. Co., 51 Or. 191, 93 Pac. 141, 94 Pac. 504, Buffalo v. New York, L. E. & W. R. R. Co., 152 N. Y. 276, 46 N. E. 496, Missouri, K. & T. R. R. Co. v. Owens, (Tex. Civ. App.) 75 S. W. 579, Washington Ry. Co. v. Lacey, 94 Va. 460, 26 S. E. 834, Chicago & A. R. R. Co. v. Carlinville, 200 Ill. 314, 65 N. E. 730, 60 L. R. A. 391, 93 Am. St. Rep. 190, and St. Louis Southwestern Ry. Co. v. Bolton, 36 Tex. Civ. App. 87, 81 S. W. 123, to the contrary effect.

The reasonableness of an ordinance, while a question of law, is dependent upon the particular facts in each case, and decisions in other cases are to be distinguished for this reason, though persuasive where the facts are similar. In this case, it cannot be said that the railroad passes through a densely populated territory in passing through Dora. The use of the track by citizens, owing to the topography of the land, is largely confined to the street crossings, of which four cross the track at grade, and only one is very considerably traveled. The track is not laid in a public street, within the corporate limits, but on the privately owned right of way of the railroad, and is not left fit for passage of pedestrians or vehicles along the line longitudinally. The only considerable points of danger are the grade crossings.

The operation of trains through the town is made difficult by the

grade and curvature of the railroad. These difficulties of operation are intensified when trains are limited to as low a speed as 6 miles an hour. When this low speed is required to be maintained for as great a distance as 1⅕ miles, the effect of the restriction upon the schedules of fast trains is disastrous, especially when it is considered that other incorporated towns have and may exercise the same right, if the defendant has it. Under modern conditions of transportation, a speed of much in excess of 6 miles an hour cannot be said to be a dangerous rate of speed, except through densely populated territory. It is an inadequate rate of speed. That such considerations are to be given weight by the courts is the holding of the Supreme Court in the case of Cleveland, etc., Ry. Co. v. Illinois, 177 U. S. 514, pages 521, 522, 20 Sup. Ct. 722, page 725 (44 L. Ed. 868). The court said:

"It is evident that the power attempted to be exercised under this statute would operate as a serious restriction upon the speed of trains engaged in interstate traffic, and might, in some cases, render it impossible for trunk lines running through the state of Illinois to compete with other lines running through states in which no such restrictions were applied. If such passenger trains may be compelled to stop at county seats, it is difficult to see why the Legislature may not compel them to stop at every station—a requirement which would be practically destructive of through travel, where there were competing lines unhampered by such regulations. While, as we held in the Lake Shore Case, railways are bound to provide primarily and adequately for the accommodation of those to whom they are directly tributary, and who not only have granted to them their franchise, but who may have contributed largely to the construction of the road, they are bound to do no more than this, and may then provide special facilities for the accommodaton of through traffic. We are not obliged to shut our eyes to the fact that competition among railways for through passenger traffic has become very spirited, and we think they have a right to demand that they shall not be unnecessarily hampered in their efforts to obtain a share of such traffic. It is evident, however, that neither the greater safety of their tracks, the superior comfort of their coaches or sleeping berths, nor the excellence of their tables would insure them such share, if they were unable to compete with their rivals in the matter of time. The great efforts of modern engineering have been directed to combining safety with the greatest possible speed in transportation, both by land and water. The public demand this, the railway and steamship companies are anxious in their own interests to furnish it, and local legislation ought not to stand in the way of it. With no disposition whatever to vary or qualify the cases above cited, neither the conclusions of the court nor the tenor of the opinions are opposed to the principle we hold to in this case, that, after all local conditions have been adequately met, railways have the legal right to adopt special provisions for through traffic, and legislative interference therewith is unreasonable, and an infringement upon the provision of the Constitution which we have held requires that commerce between the states shall be free and unobstructed."

In view of the undisputed injury that will result to the plaintiffs in their operation of the railroad, both in the matter of maintaining schedules and the physical injury likely to happen to trains, when operated at so low a speed as 6 miles an hour, under the unfavorable conditions such as the evidence shows exist in passing through Dora, it is clear that, if there is a method of reasonable avoidance of or minimizing the dangers incident to the passage of trains through the corporate limits of Dora, which does not necessitate the maintenance of such a low rate of speed, it should be adopted in lieu of the reduced speed requirement of the ordinance.

In view of the fact that the railroad, owing to the conformation of its right of way, as compared with the level of the town and its general character, cannot well be used for travel throughout its length, but only at the points of crossing of the streets and the railroad, it would seem that a method which conserved the safety of the public in crossing the railroad at the street crossings would answer the exigency, and if this could be accomplished, without requiring the railroad to reduce the speed of its trains to as low a rate as 6 miles an hour, it would be an unreasonable burden on interstate commerce to exact of it such a maximum speed requirement. It seems to me clear that the grade crossings, even if they are four in number, as contended by the defendant, can be adequately protected by flagmen against the passage of the plaintiffs' trains over the crossings at a very much greater speed than 6 miles an hour. There is now a flagman at the principal crossing. The present record is not convincing as to whether flagmen are required at the other crossings, or whether the present arrangement affords adequate protection. The court is not authorized to determine what would be a reasonable maximum speed limit for the railroad to operate under, but is limited to a declaration that the present ordinance, fixing a maximum speed of 6 miles an hour, is an unreasonable burden on interstate commerce and unenforceable against plaintiffs for that reason. This finding is predicated upon the idea that the danger to be apprehended can be adequately guarded against by properly protecting the crossing or crossings that need protection by flagmen, without unnecessarily impeding the plaintiffs' operation of the railroad by so stringent a speed limit.

The injunction prayed for will be granted, upon condition that the plaintiffs, during the period of its operation, maintain, within the corporate limits of Dora, adequate protection against the hazards arising from the operation of trains across the town streets, at grade, to those using such streets, and the cause will be retained for the purpose of entertaining any application that may hereafter be presented by defendant to modify or dissolve the injunction, in the event the plaintiffs do not continue to supply adequate crossing protection after the passing of the decree. If the town of Dora has the power, under its charter, to require the railroad company to protect the point or points of crossing the public streets by the railroad with flagmen, resort to this court would be unnecessary.

THE MAUD PALMER.

(District Court, D. Massachusetts. March 31, 1915.)

1. MARITIME LIENS ⇐14—ADVANCES—AUTHORITY OF MASTER TO PLEDGE VESSEL.

That libelant had previously made advances to masters of claimant's vessels for their disbursements in port, which were repaid from freights there collected, and that such fact was known to claimant, did not imply authority on the part of the masters to pledge the vessels for such advances which entitled libelant to an implied lien on a vessel for ad-

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

vances made to her master which he appropriated to his own use, on his bare statement that they were needed for her disbursements, when in fact they were not so needed and the master violated his instructions in borrowing the money.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. § 18; Dec. Dig. ⊂=14.]

2. MARITIME LIENS ⊂=65—PLEDGE OF CREDIT OF VESSEL—PRESUMPTION.

The credit of a vessel is presumed not to have been pledged, except when no other means were available to the master to meet her necessities.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. § 103; Dec. Dig. ⊂=65.]

In Admiralty. Suit by Henry L. Garrett against the schooner Maud Palmer. Decree for respondent.

William M. Richardson and J. R. Lazenby, both of Boston, Mass., for libelant.

Edward S. Dodge, of Boston, Mass., and Benjamin Thompson, of Portland, Me., for claimant.

MORTON, District Judge. As the libelant concedes—very properly I think—that this libel cannot be maintained under the general law as to maritime liens, no discussion of the law or statutes on that point is necessary. The lien claimed arises, if at all, either from the alleged special agreement between the libelant and the owners of the Palmer (the claimants here), or from the alleged custom of the port of Portsmouth.

Upon the latter point no evidence was introduced, except that of Mr. Garrett. His testimony amounts rather to a statement of his understanding as to the general law of maritime liens than to an assertion that there is a peculiar customary law respecting them in the port of Portsmouth. It seems clear that no such special custom, on which the lien claimed can be rested, has been established.

[1] The libelant contends that Capt. Cheney was authorized by the owners to borrow money, on the credit of the vessel, for disbursing her, to such amount as he might deem reasonably necessary for that purpose, and that, if so, the right to the lien follows. There is no evidence of any explicit authority to that effect. Such authority arises, if at all, out of previous transactions between Mr. Garrett and masters of this and other vessels belonging to the claimants. Advances had from time to time been made by the libelant to the masters for the disbursement of their vessels at Portsmouth, and had been deducted from the freight moneys. These facts were probably known to the claimants, they never objected, and they must be taken to have assented to, and impliedly authorized, such borrowings. No such advances had been procured from the libelant, however, except when, as he knew, freight money was due to the vessel. In each previous instance, he expected, as he testified, "to be repaid from the freight money" when it was collected from the consignees; and he had been so repaid. He made the advance here in question on the same understanding and expectation, and without ascertaining whether the full amount advanced

was required for disbursing the vessel. It does not appear that on any previous occasion a master had expressly undertaken to pledge the credit of the vessel for such advance, nor that the master did so in this instance, nor that the claimants ever knew of, or acquiesced in, the masters' pledging the credit of their vessels, or borrowing more than was actually necessary to disburse them.

There was no necessity for the master to borrow on this occasion. The claimants had arranged to put him in funds to disburse the vessel, and had so notified him; he acted in violation of instructions in borrowing this money. The portion of it that he actually used for the benefit of the vessel was repaid by the claimants before this suit was brought; the portion now sued for was misappropriated by the master. The home port of the vessel was Portland, Me., within easy reach of Portsmouth; her owners, who were known to the libelant, maintained an office in Portland, to which there was telephone communication from the libelant's store; they were in good financial standing, and the libelant testified that he would have loaned them $500—which would have been sufficient for the vessel's needs—on their personal liability. He made no effort to communicate with them before making the advance.

[2] Under these circumstances, I am not disposed to enlarge the implied authority of the master beyond that necessarily involved in the previous dealings. He had no general power to borrow, on credit of the claimants personally, whatever sums he chose to ask for, upon his bare statement that such sums were needed for the vessel, even though they did not appear excessive for her purposes. An agreement authorizing the master to bind the owners personally has been held not to imply authority to bind the vessel. Berwind v. Schultz (D. C.) 25 Fed. 912, 917. The credit of the vessel is presumed not to have been pledged, except when no other means were available to the master to meet her necessities. The Bertha M. Miller, 79 Fed. 365, 24 C. C. A. 641 (C. C. A. 1st Circuit); Insurance Co. v. Baring, 20 Wall. 159, 163, 22 L. Ed. 250; The Kalorama, 10 Wall. 204, 19 L. Ed. 941. There was in this case no express authority to make such a pledge; as to implied authority, in none of the previous transactions were the circumstances, so far as they have appeared, such as to create a lien on the vessel, or to warrant an inference that the master was authorized to borrow on the credit of the vessel; on the contrary, there were many facts repelling such an inference. I doubt whether the master was authorized to pledge the vessel, even for so much of the advance in question as was applied for her benefit in discharging lienable claims; and I am clearly of opinion that for so much of said advance as was not so applied no right of lien exists.

Libel dismissed.

INSURANCE CO. OF NORTH AMERICA v. McCOACH, Collector of Internal Revenue.

(Circuit Court of Appeals, Third Circuit. July 6, 1915.)

No. 1916.

1. INTERNAL REVENUE ⟸9—EXCISE TAX—FIRE INSURANCE COMPANIES—"SURPLUS."

That an insurance company has a surplus much more than adequate to meet every addition to the reserve fund, as required by the state law, "surplus" being what remains after making provisions for all liabilities of every kind, except capital stock, does not deprive it of its right to the deduction of the amount required for reserve funds, in ascertaining the net income upon which an excise tax levied under Act Aug. 5, 1909, c. 6, § 38, subd. 2, 36 Stat. 112 (Comp. St. 1913, § 6301), is to be paid.

[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, Surplus.]

2. INTERNAL REVENUE ⟸9—EXCISE TAX—FIRE INSURANCE COMPANIES—"RESERVE FUND."

The Corporation Excise Tax Law (Act Aug. 5, 1909) imposes an annual tax upon the privilege of doing business, and bases its assessment upon the annual net income of the corporation. Section 38, subd. 2, provides that such net income shall be ascertained by deducting from the gross income all losses sustained, and in the case of insurance companies the sums other than dividends paid within the year on policy and annuity contracts, "and the net addition, if any, required by law to be made within the year to reserve funds." Act Pa. June 1, 1911 (P. L. 612) §§ 7–9, provides for a reinsurance reserve, and declares that after the insurance commissioner has charged as a liability the reinsurance and loss reserves as defined for insurance companies, other than life, and adding thereto all other debts, he shall ascertain whether the capital stock thereof has been so impaired that the company should be required to make the impairment good. As an item of liability the insurance commissioner has uniformly required the net amount of unpaid losses and claims to be returned, whether adjusted or not. *Held*, that unpaid losses are properly included within the addition to be made to the reserve funds within the Excise Act in determining the net income of a fire and marine insurance company.

[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, Reserve Fund.]

Woolley, Circuit Judge, dissenting.

In Error to the District Court of the United States for the Eastern District of Pennsylvania; Dickinson, Judge.

Suit by the Insurance Company of North America against William McCoach, Collector of Internal Revenue, to recover taxes paid. There was a judgment for plaintiff for less than he demanded (218 Fed. 905), and he brings error. Reversed, with directions.

B. Franklin Pepper, of Philadelphia, Pa., for plaintiff in error.

Francis Fisher Kane, of Philadelphia, Pa., for defendant in error.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

McPHERSON, Circuit Judge. Under the act of August 5, 1909, the government compelled the Insurance Company of North America to pay an excise tax with respect to its net income for the years 1910 and 1911. This suit is brought to recover a part of the tax, the company claiming that too much had been exacted. In the court below two items were in dispute, and, as the company obtained judgment for only one of them, this writ of error presents the question whether judgment should have been entered for the other item also, a sum of $2,503.47, with interest. The opinion of the district judge is reported in 218 Fed. (C. C.) at page 905.

The trial was without a jury, and nearly all the facts were agreed upon, only three witnesses having been heard. The controversy arises in this way: The company, a Pennsylvania corporation chartered in 1794 by a special act (3 Smith's Laws, p. 129), is now subject to the general insurance laws of the state. Its business is confined to fire and marine risks. As the federal statute lays the tax with respect to net income, the question is immediately presented, How is net income to be ascertained? The answer is found in section 38, subd. 2, and we quote so much of the section as is now important:

"* * * Such net income shall be ascertained by deducting from the gross amount of the income of such * * * insurance company, * * * all losses actually sustained, &c. * * * and in the case of insurance companies the sums other than dividends paid within the year on policy and annuity contracts *and the net addition if any required by law to be made within the year to reserve funds.*"

We italicize the words on which the decision turns.

[1] 1. The first matter to be noted is that the deduction in question is such addition as may be "required by law." The parties agree that this phrase means the law of the particular state, for the federal government does not attempt to regulate the internal affairs of insurance companies. In this case, we have to do with the requirements of the Pennsylvania law, and especially with such as concern the reserve funds of fire and marine insurance companies. (The reserves required from companies doing other kinds of insurance are not involved in this controversy.) Whatever sum, therefore, the law of the state required the company to add to its reserve funds during each of the years in question is expressly declared by Congress to be a proper item of deduction from the company's gross income. For the moment, we defer the examination of the Pennsylvania law on this subject, in order to consider the ground on which the district court decided against the company. Briefly, the position taken by the learned judge is this: That, because the company had an ample surplus, much more than adequate to meet every addition to its reserve funds that was required by the state, it could not be allowed the deduction given by the federal statute. One of the additions required was the amount necessary to meet unpaid losses and claims, and the ground taken below seems, in effect, to be this: Since the company had accumulated a surplus more than enough to meet these unpaid claims, it had lost its right to the deduction. We do not know whether the deduction would have been regarded as allowable, if the company had been barely able to provide for these liabilities, but in any event we cannot agree with the conclu-

sion. Surplus is what remains after making provision for all liabilities of every kind (leaving capital stock out of the present consideration); and, as we understand the situation before us, the surplus of the Insurance Company of North America is what remained after it had made provision for these losses by setting aside all that the Pennsylvania law required for that purpose. We are unable to see how the fact can be relevant that (after thus providing once for these losses) the company still had in its treasury a large sum of money out of which it could pay them again, and several times over. In other words, we do not think the company's surplus has anything to do with the present dispute. Congress has in terms allowed the company to deduct from its gross income "the net addition, if any, required by law to be made within the year to reserve funds"; and, as we see the question for decision, it is simply this: What net addition does the Pennsylvania law require to be made to the reserve funds of an insurance company doing a fire and marine business only?

[2] 2. In order to answer this question correctly, we must first ascertain what Congress meant by "reserve funds." Was the phrase used in a special sense, or does it include generally such funds as must be reserved to meet liabilities, whether they be contingent or already adjusted? In our opinion it bears the general meaning. If Congress intended to allow no other deduction on this account except what is technically known as "reinsurance reserve," or unearned premium, it is not easy to understand why that well-known term of art was not used. The plural form, reserve funds, seems also to indicate that Congress intended to include, not only reinsurance reserve, but any other fund as well that a state might require the company to set aside for the purpose of meeting such a liability as unpaid losses and claims. This seems to be the natural and ordinary meaning of the words, and presumably therefore is the construction to be adopted.

What then does the Pennsylvania law require to be added to the reserve funds of a fire and marine insurance company? For more than 40 years the state has had a department of insurance, and a system of regulating the affairs of companies doing that kind of business, and from time to time it has passed statutes on this subject. On June 1, 1911, an act was adopted codifying and superseding many of the previous enactments, and (although this statute is later than 1910, one of the years now in question) we need not go behind it, since for present purposes it does not differ materially from the earlier acts. The system is as follows: A department of insurance is established in charge of a commissioner, whose powers of control are varied and extensive. He is to see that all the laws of the state respecting insurance companies are faithfully executed. At his pleasure he may investigate and examine the affairs of any company with the utmost thoroughness. If it has failed to comply with the law, or if he shall find its assets insufficient, he may suspend its entire business, reporting the delinquent to the Attorney General for further action looking to its dissolution. He is to make an annual report to the Legislature of the condition of all the companies doing business in the state. Every such company must file an annual statement, using the blank forms furnished by the com-

missioner, who may adopt any form he thinks "best adapted to elicit from them a true exhibit of their financial condition." Failure to make such a statement, or the making of a false statement, is severely punished.

The act provides in section 4 the method of ascertaining the "reserve liability" of life insurance companies (with which we have no present concern), and then in sections 7, 8, and 9 turns to the subject of ascertaining the financial condition of other companies. These sections first take up reinsurance reserve, and provide that, "in determining the liabilities upon its contracts of insurance of any insurance company other than life insurance, and the amount such company shall hold as a reserve for reinsurance," the commissioner shall charge casualty insurance companies with a certain proportion of their premiums; and—

"For fire insurance companies he shall charge 50% of the premiums written in their policies upon all unexpired risks that have one year, or less than one year, to run, and a pro rata of all premiums on risks having more than one year to run; on perpetual policies he shall charge the deposit received, less a surrender charge of not exceeding 10% thereof. From [For] marine and inland risks he shall charge 50% of the premium written in the policy upon yearly risks, and the full amount of the premium written in the policy upon all other marine and inland risks not terminated."

Having thus dealt with reinsurance reserve, the statute goes on to unpaid losses, and provides that the commissioner "shall, in calculating the reserve against unpaid losses," pursue a certain method with casualty companies (which does not need consideration now); and then, taking up other classes of companies, it declares in section 9 that after the commissioner has "charged as a liability the reinsurance and loss reserves, as above defined for insurance companies of this commonwealth other than life, *and adding thereto all other debts and claims against the company,*" he shall thus ascertain whether the capital of the company has been so impaired that the company should be required to make the impairment good, as a condition to the doing of further business.

Acting under the authority of the statutes that have been in force since 1873, the commissioner has required the plaintiff and similar companies to return each year, as an item among their liabilities, the net amount of unpaid losses and claims, whether such losses are actually adjusted, or are in process of adjustment, or are resisted; and in so doing he has followed what the department has always understood to be the command of the Pennsylvania law. It is true that in this particular the statutes have never been interpreted by the Supreme Court of the state, but we think it must be conceded that (even if their meaning be considered doubtful) they are susceptible of the construction thus put upon them by the department that completely controls the subject. Moreover, as far as we know, the construction has never been contested, and it is clear that this form of report has been required by the department from the beginning. We have felt at liberty to examine the commissioner's official reports for 1876, 1884, 1894, and 1904 (although these were not in evidence), as well as the company's reports for 1910 and 1911, and we find this item of unpaid losses always charged as a liability. Being a liability, and so charged

in the company's accounts, funds are necessarily "reserved" to meet it, although of course they are not, and need not be, physically set aside for that purpose.

One of the witnesses has been connected with the department for more than 30 years, either as clerk or deputy or as the commissioner himself, and he testified to this construction and gave excellent reasons therefor. Another witness, a man of 45 years' experience, testified that this was the general construction in the insurance business, and no evidence was offered to the contrary. Indeed, it is difficult to see how any other opinion could be entertained. After a loss has happened, the damage done thereby becomes an undoubted liability of the company, and (except now and then) will have to be met. In most cases all that remains to be done is to adjust the loss in order to ascertain the precise amount due, and usually this amount can be estimated in advance with sufficient accuracy to determine how much the company should set aside to make the damage good. Such unpaid losses are "claims against the company," and in our opinion the Pennsylvania law (while it may be somewhat lacking in precision of statement) required them to be added to the company's liabilities, and required funds to be reserved sufficient to meet them in full.

It is hardly necessary to cite authorities on the point that the uniform construction of a statute adopted by the highest administrative authorities is entitled to great respect (U. S. v. Healey, 160 U. S. 141, 16 Sup. Ct. 247, 40 L. Ed. 369; U. S. v. Cerecedo Hermanos y Compania, 209 U. S. 339, 28 Sup. Ct. 532, 52 L. Ed. 821); and we should hesitate long before we differed from such a construction, even where we had more doubt concerning its correctness than we have in the present instance.

The district judge entertained the same opinion concerning the meaning of "reserve funds" as we have just expressed, but was misled (as we think) by his views in reference to the surplus. We conclude that the company was entitled to the reduction in dispute, and the judgment must therefore be reversed, with instruction to allow the claim.

WOOLLEY, Circuit Judge (dissenting). I oppose the judgment to be entered in this case. While approving the judgment below, I do not concur in the reasoning upon which it was entered. With very great respect for the opinions both of the court below and of this court, I am constrained to differ with both; and, being unable, in this peculiar situation, to indicate the grounds for my dissent merely by noting the same, I will state as briefly as may be the matters that have controlled my judgment.

The Corporation Excise Tax Law (36 U. S. Stat. 112) imposes an annual tax upon the privilege of doing business in a corporate capacity, and bases its assessment upon the annual net income of a corporation. Net income is ascertained by deducting from the gross income sundry designated items, as ordinary and necessary expenses actually paid, losses actually sustained, and, in the case of insurance companies, "the net addition, if any, required by law to be made within the year to reserve funds." In permitting a deduction of an addition to the re-

serve funds of a corporation over its reserve funds of the previous year, and thereby exempting them from taxation, Congress recognized that in the case of insurance companies, certain funds are uniformly and necessarily reserved to meet liabilities, which, from the very nature of the business of insurance, are unknown and contingent; and in describing the reserve funds thus to be deducted, Congress made no attempt to define their nature or prescribe their amount, but, in the absence of federal law upon the subject, obviously contemplated and intended such funds as are required to be reserved by the laws of the states in which insurance companies do business. In doing this Congress purposely made the provision so elastic that the federal law might readily be administered in harmony with the laws of different states.

The controversy in this case, therefore, resolves itself into a question of what constitutes the "reserve funds" "required by law" of the state of Pennsylvania, or, stated with reference to the particular claim upon which this suit is founded, does the law of Pennsylvania require fire insurance companies to maintain "reserve funds" to meet "unpaid losses and claims"?

The plaintiff insurance company is a fire and marine insurance company, and for the purposes of this case may be treated with respect to its business of fire insurance alone. The law of Pennsylvania upon the subject of reserves for fire insurance companies, in so far as it affects the question in this action, is embraced in two statutes. The act of April 4, 1873 (P. L. 20), provides for a "reinsurance reserve for unexpired fire risks," to be calculated upon certain percentages of premiums received, and makes no other provision for reserve funds. The act of June 1, 1911 (P. L. 607), requires the maintenance of precisely the same "reinsurance reserve for unexpired fire risks," calculated in the same way, and likewise makes no other provision for reserve funds. The statute, however, requires casualty insurance companies, in addition to such "reinsurance reserve," to maintain reserves to cover "unpaid losses," estimated upon claims presented. The "reinsurance reserve," which is sometimes termed the "unearned premium reserve," indicating a reserve against either the contingency of loss, or protection by reinsurance, or the cancellation of a risk by the insured with a demand for the return of the unearned part of the premium, is by section 7 of the act of 1911 required of all insurance companies other than life. This includes fire insurance companies. A reserve against "unpaid losses" is required by section 8 only of casualty insurance companies. This does not include fire insurance companies. Section 9 of the act, however, contains this provision:

"Having charged as a liability the reinsurance and loss reserves, as above defined for insurance companies of this commonwealth other than life, and adding thereto all other debts and claims against the company, the commissioner shall, in case he finds the capital of the company impaired twenty per cent., give notice to the company to make good the capital within sixty days."

The deputy commissioner of insurance, speaking for the department of insurance of Pennsylvania, testified, and upon his testimony this court and the court below hold that section 9, which defines as a "lia-

bility" the "reinsurance and loss reserves," makes the "reinsurance reserves" and the "loss reserves" together constitute the "reserve funds" of fire insurance companies, "required by law" of the state of Pennsylvania, the annual addition to which may, by authority of the federal act, be deducted from gross income, and escape federal taxation. I regret that for two reasons I cannot concur with this construction of the statute. The first reason is based upon the language of the statute, which in declaring the "reinsurance and loss reserves" to be a "liability" refers to them "as above defined." How are "reinsurance reserves" and "loss reserves" "above defined"? The "reinsurance reserve" is defined by section 7 of the act, and extends to both fire and casualty insurance companies. The "unpaid loss reserve" is defined by section 8 of the act, and relates only to casualty insurance companies. Therefore, in mentioning these two reserves by the general language of section 9, the act was cautious to maintain the distinction which theretofore was made between them by using the words "as above defined," and leaves the reserve required of fire insurance companies just as it is defined by section 7. As the statute by expression makes no provision for a reserve fund against "unpaid losses and claims" of fire insurance companies, a deduction of an addition thereto cannot be allowed in ascertaining the net income of fire insurance corporations upon which to base its corporation excise tax, unless, indeed, it is found, by construction, that the statute makes such provision. Upon this, I surmise, there is entire accord. Can the statute, therefore, be construed to require fire insurance companies to maintain reserve funds against "unpaid losses and claims"?

In considering the language to be construed, it is found that in the part of the statute in which a reserve fund for fire insurance companies is required and defined, but one kind of reserve is denominated, namely, "a reserve for reinsurance." The statute is silent with respect to fire reserves for other purposes, but the statute, taken as a whole, is not silent with regard to its purpose. If its object had primarily been the requirement and establishment of insurance reserves, and, acting under the two statutes for 40 years, the department of insurance had required the maintenance of real reserves against unpaid losses and claims, the effect of a decision contrary to that practice resulting in its disestablishment, this might be an instance in which the meaning of a statute is to be determined by its contemporaneous exposition. But the establishment and definition of insurance reserves do not, in my opinion, constitute the theory of the statute or its purpose, upon which its construction must be founded. The act contemplates something altogether different and altogether more comprehensive. What is its purpose?

Supervision of the business of insurance has everywhere become a function of state government. States have undertaken to protect their citizens from losses incident to the insolvency of insurance companies, and to this end the state of Pennsylvania, by the act of 1911, prescribes the methods by which the protective measures it assumes may be effectuated. While this act deals indirectly with reserve funds to meet contingent liabilities to be incurred by insurance risks of cer-

tain characters, it deals primarily with the whole assets and liabilities of such companies, and provides how such companies may be watched, their solvency determined, and their continuance in business terminated, in order that the public may be protected. The object of this statute is to ascertain the solvency of insurance companies, rather than to prescribe the methods by which solvency may be maintained. In order to determine their solvency, insurance companies are required annually to report their total assets and liabilities. Their liabilities are of two kinds, known and unknown, or fixed and contingent. Against all liabilities of both kinds, the department of insurance is required to ascertain whether there exist assets sufficient to assure solvency. In a sense, assets so set off against all liabilities may represent assets reserved to meet all liabilities, but assets so employed do not constitute "reserves" as used in the nomenclature of the business, or in the sense employed in either the federal or the state statute. In fact, the state statute considers unexpired fire risks as a "liability," and provides a reserve to meet the same. This is the only fire reserve which the statute expressly requires. But the statute also considers all other liabilities of fire insurance companies, and insists that against their liabilities of all kinds there shall be assets enough to maintain solvency. Section 9 of the act clearly discloses this purpose by providing that:

"Having charged as a liability the reinsurance and loss reserves, as above defined, * * * and adding thereto all other debts and claims against the company, the commissioner shall, in case he finds the capital of the company impaired twenty per cent., give notice to the company to make good the capital within sixty days."

Under this section of the statute, the department of insurance requires every insurance company to report all of its liabilities, contingent and fixed, those against which reserves are required by law to be maintained, and those against which reserves are not so required, sets off assets against all of them, and then ascertains whether the company's capital is impaired 20 per cent., and accordingly grants or withholds from it permission to continue business. Among the list of liabilities, fixed and contingent, offset against which assets and capital must be shown intact in order to disclose solvency, are these, as shown by a report of the plaintiff insurance company, in evidence:

(1) "Unearned premiums" (against which the law expressly provides the unearned premium or reinsurance reserve).....	$6,655,570
(2) "Unpaid losses and claims" (which include the item in dispute)	518,000
(3) "Estimated amount hereafter payable for federal, state, and other taxes" (which includes the very tax now in controversy)	90,000
(4) "Brokerage and other charges, due or to become due to agents or brokers".....	80,000
(5) "Contingent fund".....	202,404

Each of these items represents liabilities incurred, but not ascertained. Each represents contingent liabilities of one character or another. The contingent liability of "unearned premiums" is calculated in the way prescribed by law, for which a reserve fund is "required by law" to be charged as a liability. Against the other con-

tingent liabilities, no reserve funds are expressly required by law, but the department of insurance demands that they be reported, and very properly requires that sufficient assets be maintained to meet them when ascertained, thereby to insure the solvency of the company. In this list of estimated contingent liabilities is the disputed liability of "unpaid losses and claims." If an addition to assets retained to meet that liability may be deducted, in ascertaining net income for federal taxation purposes, I do not see why additions to assets held against equally undetermined and contingent liabilities of "federal, state, and other taxes," "brokerage and other charges, due or to become due," and "contingent fund" may not likewise be deducted. If the policy of the law and the practice of the department, in requiring insurance companies to preserve sufficient assets to meet all liabilities, make and constitute such assets "reserve funds" within the meaning of the state statute and within the contemplation of the federal statute, then in logic the whole volume of assets so preserved, and in amount equal to the whole volume of liabilities, constitutes "reserve funds," and when additions are made to the several parts thereof, such additions may be deducted and escape federal taxation. Surely this cannot have been intended by one statute or contemplated by the other.

A careful reading of the Pennsylvania statute, supported somewhat by the testimony of the deputy insurance commissioner, suggests that in the scheme of the statute, the principal reason for a reference to a "reinsurance reserve" for fire insurance companies, and a "reinsurance reserve," plus a fund reserved against "unpaid losses" for casualty companies, is to afford the department of insurance an authoritative method of calculating reserves against liabilities of such contingent characters. "All other debts and claims" which are included among liabilities contemplated by the act may readily be calculated, and when the liabilities of the two classes are added together, they constitute the total liabilities against which the policy of the Pennsylvania law requires assets to be disclosed and capital unimpaired in order to insure solvency. Section 9.

I am of opinion that the difficulty in this case arises out of a confusion in the use of the words "liabilities" and "reserves," and "assets" and "reserves." The statute of Pennsylvania defines the liabilities against which reserves in the technical sense shall be maintained, namely, "reinsurance" or "unearned premiums" in case of a fire insurance company, "reinsurance" plus "unpaid losses," in casualty companies, and requires also that, against all other liabilities, assets shall appear in order to show solvency. Liabilities of the latter class, until met and paid, cannot escape federal taxation by deducting them from the gross income of the corporation. Liabilities of the former class cannot escape taxation by deduction from gross income, unless against such liabilities a reserve fund is specifically required by law.

It has been urged that if the act of June 1, 1911, be construed not to require of fire insurance companies a fund to be reserved against the item of "unpaid losses and claims," the very excellent rules and practice promulgated and pursued by the department of insurance of

the state of Pennsylvania, in ascertaining and enforcing the solvency of insurance companies for the protection of policy holders, will be disturbed, and in fact destroyed. I do not concede this to be true, for if the contention of the government were to prevail, the decision would not affect the department of insurance of the state of Pennsylvania, or disturb its rules and practice in the least. The result would simply be: First, that the plaintiff fire insurance company would not be permitted to escape taxation under the Corporation Excise Tax Law by making a deduction in one year for losses not yet determined, and thereafter conceivably deducting in the next year for the same losses when actually determined and paid; second, the plaintiff insurance company would be taxed only for the privilege of doing business after deducting for losses actually sustained when their amounts were precisely ascertained; and, third, the department of insurance of the state of Pennsylvania would proceed as before and require all insurance companies, seeking the privilege of doing business in Pennsylvania, to disclose assets equal to all liabilities, and stay solvent or stop business. There is no occasion for these results to be confused, as the questions presented in this controversy are separate and distinct. The first is a question for the department of insurance of the state of Pennsylvania, and is whether an insurance company is insolvent, and whether its business is being legally conducted. This fact may be ascertained, as it is now from time to time ascertained, without inquiry as to the requirements of the laws of Pennsylvania respecting the maintenance of reserve funds.

The other question is one for the United States Commissioner of Internal Revenue, and is whether anything more than a "reinsurance reserve" is required by the laws of Pennsylvania to be maintained by a fire insurance company as distinctively a reserve fund. If nothing more is found in the law, then the federal government can lay its tax and disallow deductions for unpaid losses and contingent expenses, without regard to the conduct of the insurance department of the state of Pennsylvania in treating the same items to determine the solvency of the company. I concur with the view expressed in the majority opinion that the fact that the plaintiff insurance company had a surplus neither determines what is required by the law of Pennsylvania with respect to reserve funds, nor gives to an insurance company the right to a deduction under the federal statute, when without a surplus it would be without such a right. It was upon the fact that the plaintiff insurance company had a surplus that the District Court disallowed the deduction, after having held, as this court holds, that the laws of Pennsylvania, when construed in the light of practice, require reserve funds against unpaid losses and claims of fire insurance companies. It is upon this point that I am embarrassed in finding myself at variance with the reasoning of both the trial court and the appellate court.

For the reasons that I have given, I am of opinion that the deductions were properly disallowed, and that recovery for the amounts paid should be denied.

UNITED STATES v. GRAND RAPIDS & I. RY. CO.

(Circuit Court of Appeals, Sixth Circuit. June 30, 1915.)

No. 2536.

1. COMMERCE ⟸58—REGULATION OF HOURS OF SERVICE—VALIDITY.
Hours of Service Act March 4, 1907, c. 2939, 34 Stat. 1415 (Comp. St. 1913, §§ 8677–8680), limiting the hours of service of employés of carriers engaged by railroad in interstate commerce, is within the power of Congress to enact.
[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 77–86, 100; Dec. Dig. ⟸58.]

2. MASTER AND SERVANT ⟸13—REGULATION OF HOURS OF SERVICE—VALIDITY.
The purpose of Congress in enacting the Hours of Service Act, limiting the hours of service of employés of carriers by railroad engaged in interstate commerce, is to deal with all telegraph offices through which interstate train orders are transmitted.
[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 14; Dec. Dig. ⟸13.]

3. MASTER AND SERVANT ⟸13—REGULATIONS—HOURS OF SERVICE—STATUTES—CONSTRUCTION.
The statutory limits of service which can be exacted of a telegraph operator within a 24-hour period, as prescribed by the Hours of Service Act, must be observed; and a railroad company may not so dispose of hours of work as to require service by operators in excess of the statutory limit, notwithstanding ample resting intervals are in the company's opinion provided for.
[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 14; Dec. Dig. ⟸13.]

4. MASTER AND SERVANT ⟸13—REGULATION OF EMPLOYMENT—HOURS OF SERVICE—TELEGRAPH OFFICES.
A telegraph office in charge of one operator from 4:30 a. m. to 6 a. m., from 7 a. m. to 11 a. m., and from 12 m. to 5 p. m., while another operator serves from 12 m. to 9:30 p. m., and a telegraph office in charge of one operator from 6:30 a. m. to 12 m., and from 1 p. m. to 6 p. m., and in charge of another operator from 11 a. m. to 1 p. m., and from 2 p. m. to 5 p. m. and 6 p. m. to 11 p. m., are offices within the Hours of Service Act, limiting the hours of service of employés, and providing that no operator, who by the use of the telegraph, reports, transmits, receives, or delivers orders pertaining to or affecting interstate train movements, shall be permitted to be or remain on duty for a longer period than 9 hours, etc., in offices continuously operated night and day, nor for a longer period than 13 hours in offices operated only during the daytime.
[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 14; Dec. Dig. ⟸13.]

5. CONSTITUTIONAL LAW ⟸238—EQUAL PROTECTION OF LAW—CLASSIFICATION.
The Hours of Service Act, classifying telegraph offices into two classes, one class composed of offices continuously operated night and day, and another class composed of offices operated only during the daytime, and declaring that no operator shall be permitted to remain on duty for more than 9 hours in any 24-hour period in night and day offices, nor for more than 13 hours in daytime offices, provides for a classification which is reasonable and valid.
[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 688–690, 695, 706–708; Dec. Dig. ⟸238.]

6. MASTER AND SERVANT ⊂⊃13—REGULATION OF EMPLOYMENT—HOURS OF SERVICE—STATUTORY PROVISIONS—"CONTINUOUSLY."

A telegraph office operated from 4:30 a. m. to 9:30 p. m., subject to negligible intermissions and a telegraph office operated from 6:30 a. m. to 11 p. m. subject to negligible intermissions, are not offices operated only during the daytime, but are offices operated during the day and night, within Hours of Service Act limiting the hours of service of employés, and declaring that no operator reporting, transmitting, receiving, or delivering train orders shall be permitted to remain on duty for more than 9 hours in any 24-hour period in offices continuously operated night and day, nor for more than 13 hours in offices operated only during the daytime, for the words "only" and "continuously" must be read in connection with their respective classes, and as descriptive of conditions recurring and demanding day service on the one hand, and night and day service on the other, and offices are "continuously" operated night and day whenever the same or similar and substantial lengths of service recur therein regularly every day and night for a series of successive 24-hour periods, even though the offices are not operated continuously during every hour from midnight to midnight.

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

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

7. MASTER AND SERVANT ⊂⊃13—REGULATION—HOURS OF SERVICE—STATUTES—CONSTRUCTION.

The Hours of Service Act, limiting the hours of service of employés of carriers by railroad in interstate commerce, though enforceable through penalties will not be construed so strictly as to defeat the obvious intention of Congress to promote the safety of employés and travelers on railroads.

[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 & T. Ry. Co., 125 C. C. A. 485.]

In Error to the District Court of the United States for the Western District of Michigan; Clarence W. Sessions, Judge.

Actions by the United States of America against the Grand Rapids & Indiana Railway Company, in which there was a judgment for defendant, and the United States brings error. Reversed and remanded for further proceedings.

P. J. Doherty, of Washington, D. C., and Myron H. Walker, U. S. Atty., of Grand Rapids, Mich., for the United States.

J. H. Campbell, of Grand Rapids, Mich., for defendant in error.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

WARRINGTON, Circuit Judge. The government commenced two actions of a civil nature against the railroad company to recover penalties amounting to $60,000, for alleged violations of the federal statute commonly known as the Hours of Service Act (34 Stat. 1415). A plea of the general issue was filed to each declaration. The actions appear to have been submitted as a single cause by consent of counsel and upon an agreed statement of facts. An instructed verdict was rendered in favor of defendant, judgment was entered accordingly, and the government prosecutes error.

The services in question were rendered during the month of September, 1911, in two telegraph offices maintained by the defendant, one at Pellston and the other at Traverse City, Mich., for purposes, among others, of there receiving and delivering interstate train orders. Two telegraph operators were employed in each office. Defendant's main line extends from Mackinaw City, its northern terminus, through Pellston, some 18 miles southwardly, and to Ft. Wayne, Ind., with a branch line connecting with the main line at Walton Junction and extending a distance of 26 miles to Traverse City. Admittedly the service imposed upon each of the operators in every 24-hour period of the month in issue exceeded 9 hours. At Traverse City, one of the operators was on duty from 4:30 a. m. to 6 a. m., from 7 a. m. to 11 a. m., and from 12 m. to 5 p. m., a total of 10½ hours; and the other operator served from 12 m. to 9:30 p. m., or 9½ hours. It will be observed that the service of both operators was simultaneous from 12 m. to 5 p. m., or 5 hours, though neither was on duty from 6 a. m. to 7 a. m., nor from 11 a. m. to 12 m.; and the office was closed every night from 9:30 p. m. to 4:30 a. m., or 7 hours. At Pellston, during every 24-hour period, one of the operators worked from 6:30 a. m. to 12 m., and from 1 p. m. to 6 p. m., or 10½ hours; and the other operator worked from 11 a. m. to 1 p. m., from 2 p. m. to 5 p. m., and from 6 p. m. to 11 p. m., in all 10 hours. Here both operators were on duty regularly from 11 a. m. to 12 m. and from 2 p. m. to 5 p. m., in all 4 hours; and the office was closed every night from 11 p. m. to 6:30 a. m., or 7½ hours.

[1, 2] Counsel in effect agree that the case must turn upon the single question, whether the places of service were "night and day" offices; but the arguments lead also to an inquiry into what are "daytime" offices. The question involves an application of the phrase "offices * * * continuously operated night and day," [1] to the particular hours and the length of service stated. The words quoted have been judicially considered a number of times, and still their meaning, when applied to the facts above pointed out, is by no means settled. There are, however, at least two settled features of the statute, which are helpful here. One is that the enactment of the law was within the constitutional power of Congress (Balt. & Ohio R. R. v. Int. Com. Comm., 221 U. S. 612, 31 Sup. Ct. 621, 55 L. Ed. 878), and the other is that the legislative purpose was to deal with all telegraph offices through which interstate train orders are transmitted (United States v. Atchison, T. & S. F. Ry. Co., 220 U. S. 37, 31 Sup. Ct. 362, 55 L. Ed. 361).

[3] 1. Much is said in argument touching the right of a railroad company in many instances so to dispose the hours of work as justly to require services on the part of each of its telegraph operators in excess of 9 hours in the course of each 24-hour period. The theory is that the character and extent of the work arising in some of the offices, especially in interstate train dispatching, admit alike of such excess in length of service and ample resting intervals for the operators. The effect of this insistence, as it seems to us, is to substitute the judg-

[1] These words are hereafter set out with their context.

ment of the railroad companies for that of Congress; and if such a practice can be indulged in at all, it is not easy to perceive where legislation is to end and observance of the legislative enactment is to begin. Mr. Justice Hughes said in the Baltimore & Ohio Railroad Case, supra, at page 619 of 221 U. S., at page 625 of 31 Sup. Ct. (55 L. Ed. 878):

"The length of hours of service has direct relation to the efficiency of the human agencies upon which protection to life and property necessarily depends. * * * In its power suitably to provide for the safety of employés and travelers, Congress was not limited to the enactment of laws relating to mechanical appliances; but it was also competent to consider, and to endeavor to reduce, the dangers incident to the strain of excessive hours of duty on the part of * * * telegraphers, and other persons embraced within the class defined by the act. * * * If, then, it be assumed, as it must be, that in the furtherance of its purpose Congress can limit the hours of labor of employés engaged in interstate transportation, it follows that this power cannot be defeated either by prolonging the period of service through other requirements of the carriers or by the commingling of duties relating to interstate and intrastate operations."

We may therefore safely assume that the statutory limits of service, which can be exacted of a telegraph operator within the 24-hour period, must be observed.

[4] 2. The portion of the act under which another feature is settled, as stated, is found in the first proviso to section 2:

"That no operator, * * * who by the use of the telegraph * * * 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, nor for a longer period than thirteen hours in all towers, offices, places, and stations operated only during the daytime. * * *"

It appeared in the Atchison Railroad Case, supra, that the telegraph office in question was "shut from 12 to 3 by day and by night, but open the rest of the time." The government claimed, among other things, that Congress intended by the proviso to legislate in respect of all towers, offices, etc., and in the course of the opinion Mr. Justice Holmes said, at page 43 of 220 U. S., at page 363 of 31 Sup. Ct. (55 L. Ed. 361):

"We think the government is right in saying that the proviso is meant to deal with all offices. * * *"

In construing the language of the proviso, then, we may regard the law as settled that the offices now in question were embraced within the terms of the act.

[5, 6] 3. We thus come to a consideration of the question: Were the places of service at Traverse City and Pellston, during the time in issue, "night and day" offices? All telegraph offices falling within the purview of the statute are resolved into two classes—those "continuously operated night and day," and those "operated only during the daytime." Since the statute in its present form has been declared to be constitutionally valid (Baltimore & Ohio Railroad Case, supra), the validity of its scheme of classification is not, and it hardly would be, questioned here (United States v. St. Louis S. W. Ry. Co. of Texas,

[D. C.] 189 Fed. 954, 961, and citations, affirmed by the Circuit Court of Appeals, Fifth Circuit, St. Louis S. W. Ry. Co. of Texas v. United States, 199 Fed. 990, 117 C. C. A. 666). The principles underlying classification such as this do not require precise adjustment of all the rights and duties involved as respects either persons or things. Even the rule of equality admits of practical inequalities; for, after all, reasonable approximation to exactness furnishes the only standards attainable. Magoun v. Illinois Trust & Savings Bank, 170 U. S. 283, 296, 18 Sup. Ct. 594, 42 L. Ed. 1037; Billings v. Illinois, 188 U. S. 97, 102, 23 Sup. Ct. 272, 47 L. Ed. 400; Fidelity & Casualty Co. v. Freeman, 109 Fed. 847, 856, 48 C. C. A. 692, 54 L. R. A. 680 (C. C. A. 6th Cir.); Kane v. Erie R. Co., 133 Fed. 681, 685, 67 C. C. A. 653, 68 L. R. A. 788 (C. C. A. 6th Cir.). See, also, Lindsley v. Natural Carbonic Gas Co., 220 U. S. 61, 78, 31 Sup. Ct. 337, 55 L. Ed. 369, Ann. Cas. 1912C, 160; Jeffrey Mfg. Co. v. Blagg, 235 U. S. 571, 576, 577, 35 Sup. Ct. 167, 59 L. Ed. ——.

The railroad seeks in two ways to escape the "night and day" class. One is by insisting that the words "continuously operated night and day" signify continuously "during every hour from midnight to midnight," and that as these offices were not so operated the defendant is not liable. The other is that the offices belong to the class which are "operated only during the daytime." It is said of the latter that the operation here, though admittedly extending into the night and also the day, is consistent with the permission to exact 13 hours of services in offices "operated only during the daytime," because in this latitude there are not that many hours of daylight each day for the greater portion of the year. The contention for the railroad thus comes to be a virtual concession that, unless the offices can rightfully be placed in the "daytime" class, the statute was violated.

The present classification was evidently made, and theoretically it must be regarded as having been made, through selection of characteristics that were common to the respective groups of objects which were intended to be erected into classes. The objects of the classification were "towers, offices, places, and stations." In considering these objects, in connection with the services therein rendered, it will at least be an aid to interpretation to observe the characteristics which were employed to describe and distinguish the two classes created—the "daytime" class and the "night and day" class. It will be found that the characteristics are not arbitrary, but that they are natural and reasonably constant. The dominant characteristic of the "daytime" class is that for a substantial portion of the year the whole service, and for the rest of the year by far the greater length of the daily service, falls within the hours of daylight; while the controlling characteristic of the "night and day" class is that the service extends into both night and day throughout the year. The fluctuations in length of service that may be rendered during the hours of daylight do not seem to us to be material, whether the one or the other of these classes be considered.

As respects the "daytime" class, the maximum service prescribed for a single operator (13 hours) cannot, it is true, be performed during the greater part of the year within the hours of daylight, yet the

parts of service which cannot be so performed correspond in time with hours of daylight for a substantial portion of the year, and so are, for all purposes of the classification, parts of the day, and not of the night; and as respects the "night and day" service, it always falls in material parts within both the night and the day. When the two classes are so considered, we do not see why confusion should arise from the use either of the word "only" in connection with the "daytime" class or the word "continuously" with the "night and day" class. The words "only" and "continuously" are to be read in connection with their respective classes, and as descriptive of conditions recurring and demanding "day" service, on the one hand, and "night and day" service, on the other. The fact that such conditions may or may not recur, and also remain throughout, each day or each night and day, cannot affect the identity of either class. Can it be doubted, for example, that offices are "continuously operated night and day," within the true intendment of the statute, wherever the same or similar and substantial lengths of service recur therein regularly every day and night for a series of successive 24-hour periods, even though the offices are not operated continuously "during every hour from midnight to midnight"? Is not the word "continuously" thus given due effect? Of course, the statute could not practically apply to any case where the office is not open more than 9 hours in any 24-hour period.

In order to exclude the offices in question from the "daytime" class, we have only to recall that, subject to negligible intermissions, the Traverse City office was operated from 4:30 a. m. to 9:30 p. m., and the Pellston office from 6:30 a. m. to 11 p. m. Another view of the situation will lead to the same result. The service rendered at Traverse City in every 24-hour period of the month in issue was 17 hours, and at Pellston 16½ hours; and thus there were 4 hours more service required at the one place, and 3½ hours more at the other, in each 24-hour period, than would have been permissible as to one telegraph operator even in a "daytime" office. It was therefore necessary to place more than one operator in each of the offices, and to require the two, who were placed in each office, to work during the same hours for a material part of each 24-hour period. As Mr. Justice Holmes said in the Atchison Railroad Case, and in part already quoted at page 43 of 220 U. S., at page 363 of 31 Sup. Ct. (55 L. Ed. 361):

"The antithesis is between places continuously operated night and day and places operated only during the daytime. We think that the government is right in saying that the proviso is meant to deal with all offices, and, if so, we should go farther than otherwise we might in holding offices not operated only during the daytime as falling under the other head."

No decision has come to our notice which sanctions a service in any office such as those here concerned for more than 9 hours in any 24-hour period. Indeed, under conference ruling No. 287 (March 16, 1908) of the Interstate Commerce Commission (Conference Rulings [Ed. April 1, 1911] p. 92), as well as by the decision in United States v. Atlantic Coast Line R. Co., 211 Fed. 897, 901, 128 C. C. A. 275 (C. C. A. 4), the present offices would be excluded from the daytime class and regarded as in the day and night class. See United States v. St. Louis & S. W. R. Co. of Texas, supra; United States v. M., K. &

T. R. R. Co. (D. C.) 208 Fed. 957, 959. In the Atlantic Coast Line Case, supra, Judge Woods, in a concurring opinion, used this language:

"There is some reason for attributing the meaning of habitually or regularly to the word continuously; but the plain construction, and that which will give the statute its full signification, is to take the whole phrase 'offices, places, and stations continuously operated night and day' to mean offices whose operation is continued from the day into the night."

It results from the views we have expressed that during the month here involved the offices in question belonged to the "night and day" class. Any other conclusion would eliminate them altogether from the operation of the statute. In view of the Atchison Railroad Case, it was not necessary that the service should be continuous; it might be intermittent. The defect, then, in defendant's plan, was that each telegraph operator was required to work more than 9 hours. The purpose of the act as defined in its title is "to promote the safety of employés and travelers upon railroads by limiting the hours of service" of the employés. The subject was peculiarly within the province of the lawmakers. Effective service and the average in hours of human endurance are vitally related. And, in the light of the ruling in the Baltimore & Ohio Railroad Case, the salutary effect of such an act cannot be frittered away through any opposed theory of the carrier, as here, touching the proper duration of time for work and for recuperation.

[7] Although the act is to be enforced through the imposition of penalties, it is "not to be construed so strictly as to defeat the obvious intention of the Legislature." United States v. Wiltberger, 5 Wheat. 76, 93, 5 L. Ed. 37; Johnson v. Southern Pacific Co., 196 U. S. 1, 17, 25 Sup. Ct. 158, 49 L. Ed. 363; Frank Unnewehr v. Standard Life & A. Ins. Co., 176 Fed. 16, 25, 99 C. C. A. 490 (C. C. A. 6th Cir.).

The judgment must be reversed, and the case remanded for further proceedings not inconsistent with this opinion.

AMERICAN SURETY CO. OF NEW YORK v. JONES et al.

(Circuit Court of Appeals, Fourth Circuit. May 6, 1915.)

No. 1334.

1. INJUNCTION ⟸239—LIABILITY ON BOND TO OBTAIN INJUNCTION.

J. brought two actions at law against W., and W. filed a bill to enjoin such actions and have the controversy adjudicated in equity. The court enjoined such actions, a bond being given, conditioned that W. should abide the decision of the court and pay all damages and costs adjudged against him because of the injunction. The court decided for W. as to the claim asserted in one of the actions at law, and perpetually enjoined such action, but allowed a recovery by J. as to the claim in the other action, subject to certain conditions which established rights of W. that could be secured only in equity, and, such conditions having been complied with, it entered a decree that the injunction enjoining the prosecution of such action be dissolved and that such action be dismissed. *Held*, that the surety on the bond was not liable for J.'s recovery against W., nor for any costs, expenses, or damages, as the bond was merely intended

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

to indemnify J. against any damage he might sustain if it should be determined that his actions at law ought not to have been stayed, and the relief granted to W. established that the injunction was not improvidently awarded, while the injunction was not dissolved because it was improvidently awarded, but because it had fully performed its office.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 542, 543; Dec. Dig. ⊂⊃239.]

2. APPEAL AND ERROR ⊂⊃344—TIME FOR APPEAL—COMPUTATION.

In a suit to enjoin actions at law, and to have the controversy determined in equity, the court rendered a decree allowing a recovery by the defendant and providing that, if plaintiff failed to pay the amount awarded within 60 days, the surety on the injunction bond should be required to show cause why it should not be held liable. A final decree was subsequently entered, adjudging the surety liable for certain damages and expenses. *Held*, that an appeal by the surety within 6 months from this final decree was in time, as it could not appeal until there was an order or judgment against it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1889–1893, 1896; Dec. Dig. ⊂⊃344.]

Cross-Appeals from the District Court of the United States for the Eastern District of Virginia, at Richmond; Edmund Waddill, Jr., Judge.

Suit by Joseph W. Woolfolk against John T. Jones. From a decree (216 Fed. 807) against the American Surety Company of New York, the surety on an injunction bond, in favor of the defendant and in favor of Henry R. Miller and another, special master and stenographer, respectively, Jones and the Surety Company appeal. Reversed and remanded.

B. Rand Wellford, of Richmond, Va. (Wellford & Taylor, of Richmond, Va., on the brief), for appellant American Surety Co. of New York.

George L. Christian and Marshall M. Gilliam, both of Richmond, Va., for appellant Jones.

Henry R. Miller, of Richmond, Va. (Miller & Miller, of Richmond, Va., on the brief), for appellees Miller and Brown.

Before KNAPP and WOODS, Circuit Judges, and CONNOR, District Judge.

KNAPP, Circuit Judge. The question for decision on this appeal is the liability of the surety on an injunction bond, and the material facts appear to be these:

The appellee, John T. Jones, brought two actions at law in a state court of Virginia against Joseph W. Woolfolk, one for $10,000 and the other for $25,000, basing his right to recover upon certain contracts previously entered into between the parties. These actions were removed into the District Court of the United States for the Eastern District of Virginia. Before trial, Woolfolk filed a bill on the chancery side of the court, reciting at length the actions against him and the contracts upon which they were founded, alleging defenses that could not be set up in a suit at law, and asking that the prosecution of the actions be enjoined and the entire controversy adjudicated by a court

of equity. After hearing upon notice the court granted the prayer, and enjoined the prosecution of the actions at law upon condition that complainant give a bond in the penalty of $10,000 with approved security. The bond in question was accordingly given and contains the following provisions:

"The condition of this obligation is such that, whereas, Joseph W. Woolfolk having filed on the chancery side of the United States District Court for the Eastern District of Virginia a bill against the said John T. Jones, and having obtained an allowance of an injunction as prayed for in said bill from said court: Now, therefore, if the said Joseph W. Woolfolk shall abide the decision of the said court, and pay all damages and costs which shall be adjudged against him because of the granting of said injunction in case the said injunction shall be dissolved, then this obligation shall be void; otherwise, to remain in full force and virtue."

There was a demurrer to the bill, which was overruled, answer was filed, and the cause referred to a special master, with instructions to inquire and report. After an extended hearing the special master found and reported, as stated in the stipulation of counsel:

"That Jones was not entitled to recover anything on the $10,000 claim asserted in the first suit at law, and that as to the $25,000 claim asserted in the second suit at law Jones was entitled to $8,651.16, subject to offsets allowed Woolfolk which reduced Jones' net recovery to $6,220.22, with interest from March 14, 1910; and the special master recommended that Jones and Woolfolk each be required to do certain things before receiving the benefit of the master's findings."

By decree of October 23, 1913, the District Court overruled defendant's exceptions to this report so far as the $10,000 suit was concerned and perpetually enjoined its prosecution. As to the $25,000 suit the court held, disagreeing with the special master, that Jones was entitled to recover the sum for which he had sued, subject to certain conditions with which Jones afterwards complied. It is sufficient to say of these conditions that they related to and established rights of Woolfolk which he could not assert in the law action and which could be secured to him only in a court of equity. In January, 1914, after Jones had met the requirements of the November decision, the court made the further decree:

"That the injunction heretofore awarded to said Joseph W. Woolfolk, enjoining the prosecution of the suit at law brought against him by the defendant John T. Jones to recover the sum of $25,000, be and the same is hereby dissolved, and that the said suit at law be dismissed at the costs of the said Joseph W. Woolfolk."

There was a further provision that if Woolfolk failed to pay the sums awarded against him by these decrees within 60 days the surety on his bond be required to show cause why it should not be held liable. The final decree of August 6, 1914, adjudged the surety liable for the special master's fees of $2,500, and the stenographer's charges of $310.15, and also liable to Jones for the—

"sum of $1,835.33 on account of interest which accrued by reason of the delay in the entering of a decree in his favor, whereas a judgment at law would have been quickly had, * * * and the sum of $2,000 as costs incurred in connection with the expensive and serious litigation in which he was involved by the complainant Woolfolk in the injunction proceedings."

From this decree the surety company appeals, on the ground that it is not liable at all, and Jones appeals on the ground that the surety company is bound, to the extent of the penalty named in the bond, for the judgment against Woolfolk.

[1] As above shown the condition of the bond was that Woolfolk "shall abide the decision of the said court and pay all damages and costs which shall be adjudged against him because of the granting of said injunction in case the said injunction shall be dissolved," and Jones contends that the phrase "abide the decision of the said court" imposed the obligation to comply with and carry out the judgment rendered on the merits; that is, to do and pay whatever the court might decree. We are constrained to reject this contention. The bond in question is not an appeal bond or a supersedeas bond. It is distinctly an injunction bond, which was designed to accomplish the ordinary purpose for which security is required when a preliminary injunction is granted, namely, to protect the party enjoined from any loss occasioned by awarding the injunction. It was not intended to secure payment of the sum which might be adjudged due from Woolfolk to Jones, but merely to indemnify the latter against any damage he might sustain if it should turn out that his actions at law ought not to have been stayed. In seeking the meaning of this disputed provision, account must be taken of the situation of the parties, the nature of the litigation, and the extent to which there appeared probable cause for invoking equitable relief. Woolfolk asserted that he had defenses to the suits of Jones which were not available at law, but which would be recognized and given effect in a court of equity. He therefore sought to have the law actions enjoined and the rights of the parties determined in an equitable proceeding, and the allegations in his bill were ample to justify the exercise of equitable jurisdiction. If the outcome of the trial should establish his right to seek the interposition of a court of equity, the law actions against him ought not to be prosecuted, and no injustice would be done to Jones if those actions were stayed. But since it might transpire that Woolfolk's claim to equitable relief was unfounded, and that in such case Jones might suffer damage because his suits were enjoined, the court very properly required Woolfolk to give security for the payment of whatever damage resulted to Jones from having his law actions stayed, if the event proved that their prosecution ought to have been permitted. In our opinion this was the evident and only purpose of the bond, and its provisions should be construed accordingly. It is not necessary to speculate upon what was meant by the words "abide the decision of the said court," or decide whether they added anything of consequence to the other provisions of the bond, since it is enough to say that they were not intended, and could not have been intended, to secure payment of the judgment which might be rendered against Woolfolk on the merits of the dispute.

The foregoing suggests the views we entertain as to the liability of the surety. This depends, in our judgment, upon whether the injunction was properly awarded, and the result of the litigation removes that question from the field of doubt. The injunction was merely ancillary to the equity suit, and the object of granting it was

to allow a court of equity to adjudicate the entire controversy between the parties unrestrained by the pending actions at law. If that controversy could have been determined in the common-law actions, their prosecution ought not to have been stayed; but if it was of such a nature that the aid of a court of equity was necessary to the ends of justice, the suits at law were properly enjoined. In other words, if Woolfolk had failed to establish his right to have the whole dispute settled in a court of equity, it would follow that the injunction he sought was improvidently awarded. In that case his bill should have been dismissed and Jones thereby left free to go on with his law actions. Had this been the result, Jones would have been entitled under the terms of the bond to recover from the surety such damages as might be shown to have been suffered by him in consequence of holding up his suits by injunction. But that was not the outcome of the litigation. On the contrary, the record shows that Woolfolk was sustained in his appeal to a court of equity, and this conclusively appeals from the course of the proceedings and the decrees finally entered. So far from dismissing Woolfolk's bill on final hearing, the court held in effect that he had good cause for invoking equitable relief, because the rights he claimed as between Jones and himself, and which were in part accorded to him, could not be secured in the suits at law. Not only was his resort to equity justified by the action and decision of the court, but he was afforded substantial relief. The action for $10,000 was completely defeated and permanently enjoined. It is true that Jones was given a judgment for $25,000, the sum for which his second action was brought; but to obtain this judgment he was required to do certain things which were of material advantage to Woolfolk. The conditions imposed upon Jones related to matters which apparently would have prevented recovery in his law action, if Woolfolk had been able to prove them in that action. It thus appears, even as to the $25,000 suit, that Woolfolk was entitled to maintain his bill in equity, and that the injunction was properly awarded. In short, the record demonstrates that the controversy between the parties was of such a character and involved such issues as to require in the interest of justice the adjudication of a court of equity. This being so, and it seems to us indisputable, there is no ground for contending that the injunction was improvidently granted. The whole scope of the inquiry and the decrees of the trial court affirmed the propriety of settling this complicated dispute in an equitable proceeding, and that proceeding was rightfully made exclusive by restraining the common-law actions.

The asserted liability of the surety company rests altogether upon the decree of November, 1913, which in form of words dissolved the injunction. But this dissolution, to treat it as such, was not ordered because the injunction had been improvidently awarded, but because it had fully performed its office. The controversy between Jones and Woolfolk was completely determined in the equitable proceeding, to which the injunction was an aid, and it was then of no consequence whether the injunction was dissolved or made perpetual. The whole litigation was ended in that proceeding, so far as the trial court was concerned, and this accomplished the purpose for which the injunction

was granted. After Jones had complied with the conditions imposed by the first decree, the court proceeded to give full relief and finally adjudicate in the chancery cause all the rights of both parties. The necessary effect of this was to put an end to the common-law action, and it did not then matter whether that action was dismissed or permanently enjoined. If the decree had made permanent the injunction against the $25,000 suit, instead of dismissing it, there would be no ground for claiming that the surety was liable; but the substance and effect of the decrees actually entered are precisely the same as they would be if the common-law action had been left nominally pending, but perpetually stayed, because the most effectual stay of that action was its dismissal. The liability of the surety must be measured by the results accomplished in the equity suit, the substance and necessary effect of the adjudication in that suit, and not by the form of words embodied in the decree. Upon the issue as to whether the equity suit was warranted, it is evident from the developments at the trial and the comprehensive decrees entered that Woolfolk prevailed, and since he prevailed upon that issue it cannot be said that the injunction was not properly awarded. The test of liability on the bond was the right of Woolfolk to have the law actions enjoined and the whole controversy settled in a court of equity. That right was fully established by the outcome of the litigation, and it therefore follows that the surety is not liable. These views are sustained by authority, and no case at variance therewith has been brought to our notice. We quote the following:

"And, in general, wherever an injunction is rightfully obtained upon sufficient grounds, and is afterwards dissolved upon the removal of those grounds, complainant should not be required to pay damages upon the dissolution, having had good cause for the injunction in the first instance. Thus, where judgments for the purchase money of real estate are enjoined on the ground of the defective title, and the dissolution is granted upon the title being made good, no damages should be allowed against complainant." High on Injunctions, § 1678.

"It is held that no right of action accrues upon an injunction bond until the court has finally decided that plaintiff was not entitled to the injunction, or until something occurs equivalent to such decision. But no damages can be recovered by the party enjoined, although the Court of Appeals decided the suit against plaintiff, unless the judgment amounts to a determination that plaintiff was not entitled to the injunction at the time it was issued." 22 Cyc. 1027. See note 39.

[2] It is argued on behalf of the special master and the stenographer that the appeal as to them should be dismissed, because not taken in time; but we think it clear that the contention is without merit. The surety company could not appeal until there was some order or judgment against it, and that did not happen until the entry of the decree of August 6, 1914, which was less than six months before the appeal was brought.

The conclusions above stated make it unnecessary to refer to the other questions discussed in brief and argument. The decree against the surety company must be reversed, and the cause remanded for further proceedings in conformity with this opinion.

Reversed.

NATIONAL BANK OF COMMERCE v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. July 12, 1915.)

No. 2458.

1. BILLS AND NOTES ⊂=119—CONSTRUCTION—PAYABLE TO BEARER—UNITED STATES DEPOSITORIES—FORGED CHECKS.

Notwithstanding Rem. & Bal. Code Wash. § 3400, subd. 3, providing that a bill of exchange is payable to bearer, when it is payable to the order of a fictitious person and such fact is known to the person making it so payable, checks drawn by a government disbursing officer, payable to fictitious payees, on a national bank constituting a depository, under regulations of the Treasury Department declaring that any check drawn by a disbursing officer on moneys deposited must be in favor of the party by name to whom the payment is to be made and payable to order, are not payable to bearer, and the bank, paying the checks on forged indorsements of the officer, who misappropriated the money procured thereon, cannot escape liability to the government for the loss on that theory.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 255–259; Dec. Dig. ⊂=119.]

2. APPEAL AND ERROR ⊂=1097, 1195—LAW OF THE CASE.

A decision of the court on appeal is the law of the case on a subsequent trial and appeal, and a question determined will not be entertained on a subsequent appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4358–4368, 4427, 4661–4665; Dec. Dig. ⊂=1097, 1195.]

3. BANKS AND BANKING ⊂=267—UNITED STATES DEPOSITORIES—FORGED CHECKS—ACCOUNTING.

In an action by the United States against a national bank, constituting a depository, for payments made by it on checks drawn by a disbursing officer in favor of fictitious payees and containing forged indorsements made by the officer, the bank is not entitled to credit for money paid out by the disbursing officer, upon legitimate claims incurred through his agency, in the absence of an accounting between the disbursing officer and the government.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 1013; Dec. Dig. ⊂=267.]

4. BANKS AND BANKING ⊂=267—UNITED STATES DEPOSITORIES—PAYMENT OF FORGED CHECKS—RECOVERY OF MONEY—ESTOPPEL.

The act of the government in prosecuting for embezzlement a disbursing officer, drawing checks on a government depository, forging indorsements thereon, and applying to his own use the proceeds on the depository paying the checks, did not estop the government from proceeding against the bank to recover the payments made on the theory that the money was the property of the bank, whether the bank was a debtor to the government to the amount of the deposits, or it held the same in specie subject to government's checks or demands, since the funds were the funds of the government.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 1013; Dec. Dig. ⊂=267.]

5. TRIAL ⊂=252—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

It is not error to refuse an instruction, where there is no pertinent testimony on which to base it.

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

6. APPEAL AND ERROR ⊂⊃870—GRANT OF NEW TRIAL—DISCRETION OF TRIAL COURT.

No error is assignable from a denial of a motion for a new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3451, 3487-3489, 3491-3512; Dec. Dig. ⊂⊃870.]

Ross, Circuit Judge, dissenting.

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 the United States against the National Bank of Commerce. There was a judgment for the United States, and defendant brings error. Affirmed.

During the years 1907, 1908, and 1909 one M. P. McCoy was an examiner of surveys and special disbursing agent for the Interior Department of the United States. While McCoy was such examiner and disbursing agent, plaintiff (defendant in error here) caused to be deposited with the National Bank of Commerce (plaintiff in error) considerable sums of money to his credit, to be used by him solely for the purpose of making payment of the expenses which he was authorized to incur on account of plaintiff as such examiner and disbursing agent. The deposits were made with defendant as a government depository, and in accordance with the laws of Congress and regulations of the Treasury Department relating to the deposits and disbursements of public moneys. McCoy, at various times within the dates mentioned, fraudulently and without authority of plaintiff, drew checks on the defendant bank, aggregating $15,129.81, payable to the order of fictitious payees, and thereafter forged the indorsement of such fictitious payees upon the checks, and procured from various banks for his own use the amounts of the checks. Subsequently such checks were presented from time to time to the defendant, and were wrongfully, and without authority from plaintiff, paid by it and charged against the public funds on deposit with it to the credit of McCoy. The forgeries being discovered by plaintiff, suit was instituted on or about December 22, 1910, to recover the amount of such deposits thus paid out by the defendant bank.

Three defenses were interposed: First, that the relation of debtor and creditor existed between plaintiff and defendant; that it was not the duty of defendant to inquire as to the name of the payee on such checks; that monthly statements of account were rendered to plaintiff, and to McCoy, its agent, in accordance with the usual custom of banks; that it was the duty of plaintiff to examine such statements and the vouchers accompanying them, and to notify defendant of such forgeries within a reasonable time; and that by reason of the neglect of such duty the defendant has been damaged, and plaintiff is now estopped to maintain the action; second, that the money sued for was expended by McCoy in payment of claims against the United States that he was authorized to pay; and third, that subsequent to the issuance of such checks plaintiff, with full knowledge of the facts, ratified and approved the action of McCoy in drawing them in the way in which they were drawn, and the action of defendant in paying and discharging them.

James A. Kerr and Evan S. McCord, both of Seattle, Wash., for plaintiff in error.

Clay Allen, U. S. Atty., of Seattle, Wash., and G. P. Fishburne, Asst. U. S. Atty., of Tacoma, Wash.

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

WOLVERTON, District Judge (after stating the facts as above). [1] This is the second appeal. Counsel for appellant here say:

"We again desire to present our contention that the checks in question were in legal effect negotiable instruments, payable to bearer, and that no liability resulted to the defendant bank in paying the checks as they did, even though the money was in the end misappropriated by McCoy to his own use."

And they rely upon the provision of 2 Rem. & Bal. Code, § 3400, subd. 3, which reads:

"A bill of exchange is payable to bearer: 'When it is payable to the order of a fictitious or nonexisting person, and such fact was known to the person making it so payable.'"

It is urged, therefore, that the checks in question were, in a legal commercial sense, payable to bearer, imputing knowledge of the fact that the checks were payable to a fictitious person to the government, because it is assumed McCoy was its agent so to issue the checks. Thus predicating their argument, counsel further rely upon Phillips v. Mercantile National Bank of New York, 140 N. Y. 556, 35 N. E. 982, 23 L. R. A. 584, 37 Am. St. Rep. 596, which it must be conceded is an analogous case, if counsel's premises are well founded. But there is this obvious distinction between that case and this: The government is a party here, and not a private person, and the government had, through its Treasury Department, promulgated Department Circular No. 102, of which the defendant, being a national depository, was bound to take notice, and it must be assumed had knowledge, in the following language:

"Any check drawn by a disbursing officer upon moneys thus deposited must be in favor of the party, by name, to whom the payment is to be made, and payable to 'order,'" with certain exceptions not material to the inquiry.

McCoy was a disbursing officer of the government, and of this fact the defendant also had knowledge. Thus it follows that the paper in question cannot be considered or treated as payable to bearer, so far as the defendant is concerned, it being a government depository acting and operating under the regulation above quoted, and the case of Phillips v. Mercantile National Bank of New York, supra, is wholly without application.

[2] When the case was here upon the former appeal, this court held that the knowledge of McCoy was not to be imputed to the government, and in the end decided the very question that is now again insisted upon against the contention of counsel. United States v. National Bank of Commerce, 205 Fed. 433, 123 C. C. A. 501. A decision so rendered becomes the law of the case, and the litigant will not again be heard, upon a subsequent appeal, to urge the same question. Nor will the court again entertain his suit in that relation.

"It has been settled by the decisions of this court," says the Supreme Court, "that after a case has been brought here and decided, and a mandate issued to the court below, if a second writ of error is sued out, it brings up for revision nothing but the proceedings subsequent to the mandate. None of the questions which were before the court on the first writ of error can be reheard or examined upon the second. To allow a second writ of error or appeal to a court of last resort on the same questions which were open to dispute on the first would lead to endless litigation. In chancery, a bill of

review is sometimes allowed on petition to the court; but there would be no end to a suit if every obstinate litigant could, by repeated appeals, compel a court to listen to criticisms on their opinions, or speculate on chances from changes in its members." Roberts v. Cooper, 20 How. 467, 481, 15 L. Ed. 969.

So it was said by Mr. Chief Justice Strahan, in Kane v. Rippey, 22 Or. 299, 301, 29 Pac. 1005, 1006:

"Upon a second appeal, the opinion of the court upon the former appeal, so far as the same facts appear, becomes the law of the case and governs and controls the parties and the court in every subsequent step in the cause."

To the same purpose see Corning v. Troy Iron & Nail Factory, 15 How. 451, 465, 14 L. Ed. 768; Martin v. Hunter's Lessee, 1 Wheat. 304, 355, 4 L. Ed. 97; Powell v. D., S. & G. R. R. Co., 14 Or. 22, 12 Pac. 83; Portland Trust Co. v. Coulter, 23 Or. 131, 31 Pac. 280; Stager v. Troy Laundry Co., 41 Or. 141, 68 Pac. 405.

[3] Another question presented by defendant here is whether it is entitled to credit as against the government for moneys paid out by McCoy, if he paid any such, in disbursement on legitimate claims incurred through his agency; it being claimed that the money sued for in the action, or some part of it, at least, was so disbursed by McCoy. But it can hardly be maintained, in any event, that the defendant is entitled to such moneys, or any part of them, until there is an accounting between McCoy and the government and there is found to be a balance due from the government to him. No such accounting was possible in the present controversy. The question was presented by a requested instruction, which was denied.

[4] Another proposition advanced is that the government has ratified the acts of McCoy in drawing the money from the defendant bank in the manner he did, or at least as to $5,718 thereof, and that, the government having elected to treat the money as government funds, it is now estopped to proceed against the bank, on the hypothesis that the money was the property of the bank. The contention arises in this way: McCoy was prosecuted by the government for embezzling its funds, namely, $5,718, being part of the very funds sued for. It is claimed that, prior to such withdrawal by McCoy, they were not the funds of the government, but of the bank, by reason of the fact that they had been deposited with the bank, and that thenceforward the government and the bank occupied the relationship of depositor and debtor; the bank becoming and being indebted to the government only, and not a holder of the public funds. So that, when the government was willing to treat the money withdrawn as its money, it ratified what McCoy did in withdrawing it through checks drawn to fictitious payees, and pretending to indorse them with the fictitious payees' names, and thus it has relieved the bank of all obligation.

Answering the contention, the very simple and obviously reasonable and common-sense view of the situation is that the bank was the depository of public moneys, to be drawn upon by the government or its authorized agent for public use, and it can make no sort of difference whether the bank is regarded as a debtor to the government to the amount of such moneys so deposited, or as holding the same in specie subject to the government's check or demand. The funds are

nevertheless the funds of the government. Nor can it make any difference whether they are drawn out by the fraudulent practices of the government's agent, or paid out without lawful warrant by the bank; the liability of either to reimburse the government is just the same. While the bank may not be, and is not, liable criminally, it is liable civilly. As in the case of United States v. National Exchange Bank, 214 U. S. 302, 29 Sup. Ct. 665, 53 L. Ed. 1006, 16 Ann. Cas. 1184, the defendant might have been sued as it was, or for money had and received, so McCoy may be sued for money had and received to his use, although he embezzled the public funds. We find no merit in the contention.

[5] Another instruction was requested to the effect that, if the jury should find from the evidence that, at the time the account was opened with the bank in the name of McCoy, the plaintiff instructed the defendant bank to honor all checks drawn upon said account by him, without limitation or condition, then the defendant had the legal right to honor any checks so drawn by McCoy, regardless of the fact as to whether the payees were fictitious or otherwise. This was refused, and error assigned. We have examined the record diligently, and find no pertinent testimony upon which to base such a request, and it was therefore properly denied.

[6] The next question urged is that the trial court erred in denying defendant's motion for a new trial. The motion is predicated upon alleged newly discovered evidence. A showing is made by affidavits to the effect that McCoy, when he entered upon his appointment, gave a bond in the sum of $3,000, conditioned upon the faithful performance of the duties of his office, with the United States Fidelity & Guaranty Company as surety, and that since McCoy's defalcation the Surety Company has paid to the government the amount of the bond; that upon the payment of said sum the government proceeded to reconstruct McCoy's account, and charged back to him $3,000 for salary, which it was claimed McCoy did not earn during the time he was perpetrating the frauds in question. It is claimed, therefore, that the government should be required to give credit for the amount to the defendant, and that the cause should be opened up, so that defendant might have the same allowed as an offset to the government's demand. The government, by counter affidavit, has shown that the Treasury Department had a settlement with McCoy February 9, 1910, which comprised the item of $3,000 paid by the Surety Company, and there was found to be due the government the sum of $15,221.54—a sum greater than the amount sued for. The action was not commenced until December 22, 1910. Upon this showing, pro and con, the trial court decided that the defendant was not entitled to a new trial.

No error is assignable from a denial of a motion for a new trial. Pickett v. United States, 216 U. S. 456.[1] And that the motion is based upon newly discovered evidence does not constitute an exception. Holmgren v. United States, 217 U. S. 509, 521, 30 Sup. Ct. 588, 54 L. Ed. 861, 19 Ann. Cas. 778.

Judgment affirmed.

ROSS, Circuit Judge (dissenting). There was evidence given tending to show that a part of the money that the government deposited with

[1] 30 Sup. Ct. 265, 54 L. Ed. 566.

the bank to McCoy's credit, to be disbursed by him in the course of his duties as the government's agent, was actually expended by him in legitimate work done by him for the government, although drawn by him from the bank in a fraudulent manner, and there was also evidence given to the effect that the government, subsequent to the fraudulent acts of McCoy, caused him to be indicted, prosecuted, convicted, and imprisoned for the embezzlement of $5,718 of the moneys fraudulently withdrawn by him from the bank. Based upon that evidence the bank requested the trial court to instruct the jury, among other things:

That if they should find "that any portion of the money sued for in this action was so expended by the said McCoy in payment of legitimate claims against the United States, created by him and which he had a right to create, then I instruct you that the plaintiff cannot recover for such portion of the sum sued upon as was so expended by the said McCoy," and that if the jury should find "that the said sum of $5,718, referred to in said indictment and introduced in evidence in this case, constituted a portion of the $15,129.81 sued for in this action, then I instruct you that the plaintiff cannot recover for the said sum of $5,718, and such sum must be deducted from the total amount of $15,129.81, for the reason that the judgment of conviction against the said M. P. McCoy upon said indictment conclusively established the fact that such sum of $5,718 was the money and property of the United States, and by filing such indictment against the said McCoy for such sum, and procuring a conviction thereon, the United States elected to treat said sum mentioned in said indictment as its own property, and thereby waived its claim for said sum against the defendant bank."

The court below refused to give either of those instructions, but, on the contrary, directed a verdict for the government for the full amount claimed, which was returned, and to which action the bank reserved exceptions.

It must be remembered that the government's action in this case is against its depository, and not against McCoy, and I am unable to see that it has any legal or moral right to recover from the bank that portion of the money in question actually withdrawn and expended by its agent in the legitimate business of the government, nor am I able to see how the rights of the bank in respect to such portion of the money can be made to depend upon the ultimate adjustment of McCoy's accounts with the government. And while it is perfectly true that the criminal prosecution and punishment of its dishonest agent would in no respect bar the government from also recovering from him by civil process all the money that he embezzled, I am inclined to think that it should not be allowed to recover from its *depository* money paid out by the latter, and which money the government thereafter procured to be adjudged to have been *embezzled from it* by its agent.

In re VALENTINE BOHL CO.

Appeal of SOUTHERN COTTON OIL CO.

(Circuit Court of Appeals, Second Circuit. June 22, 1915.)

No. 278.

1. BANKRUPTCY ⟸60—ACTS OF BANKRUPTCY—CONCEALMENT OR REMOVAL OF PROPERTY.

The filing of a petition in the state court for the appointment of a receiver for a corporation by its majority stockholder, who was also its president and a director, to which the company filed no answer, was not a concealment or removal of property by the corporation with intent to hinder, delay, or defraud creditors, within Bankr. Act July 1, 1898, c. 541, § 3a (1), 30 Stat. 546 (Comp. St. 1913, § 9587), providing that such concealment or removal shall constitute an act of bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 80; Dec. Dig. ⟸60.]

2. BANKRUPTCY ⟸81—PETITION—SUFFICIENCY—SPECIFICATION OF ACTS OF BANKRUPTCY.

An involuntary petition in bankruptcy, alleging that the alleged bankrupt, a corporation, had permitted a receiver of its property to be appointed by a state court because of insolvency, though its language was inartificial, might properly be held to cover an act of bankruptcy under Bankr. Act, § 3a (4), providing that an act of bankruptcy is committed when, because of insolvency, a receiver or trustee has been put in charge of the bankrupt's porperty under the laws of any state.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 59, 113–118, 125; Dec. Dig. ⟸81.]

3. BANKRUPTCY ⟸60—ACTS OF BANKRUPTCY—APPOINTMENT OF RECEIVER BECAUSE OF "INSOLVENCY"—"INSOLVENT."

Bankr. Act July 1, 1898, c. 541, § 1a (15) 30 Stat. 544 (Comp. St. 1913, § 9585), provides that a person shall be deemed "insolvent" whenever the aggregate of his property, exclusive of any conveyed, transferred, etc., with intent to defraud creditors, shall not at a fair valuation be sufficient in amount to pay his debts. Laws Conn. 1903, c. 194, § 26, provides that when any corporation having a capital stock has violated its charter, etc., or whenever its assets are in danger of waste, application may be made to the superior court for a dissolution of the corporation and the appointment of a receiver. A petition was filed in a state court for the appointment of a receiver for a corporation, which petition alleged that the corporation had no money available for its use and could not borrow any, that it owed a large amount of debts, which it was unable to pay, and by reason of its unpaid debts and its inability to carry on its business its assets were in danger of waste, that there was no prospect of its condition improving, and that it ought to be dissolved. On such petition a receiver was appointed. *Held*, that no act of bankruptcy, within Bankr. Act, § 3a (4), was committed, since "because of insolvency" in that subdivision means insolvency as defined in section 1a (15), and the record of the state court indicated that, if the receiver was appointed because of insolvency at all, it was "insolvency" in the ordinary sense of inability to meet current obligations.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 80; Dec. Dig. ⟸60.

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

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

Walter S. Schultz, and John H. Cassidy and Lawrence L. Lewis, both of Waterbury, Conn., for appellant.

William E. Thoms, of Waterbury, Conn., for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

WARD, Circuit Judge. November 21, 1914, an involuntary petition in bankruptcy was filed against the Valentine Bohl Company in the District Court of the United States for the District of Connecticut. Two acts of bankruptcy were charged to have been committed within four months preceding the filing of the petition: First. That the company had permitted to be concealed or removed a part of its property with intent to hinder, delay, or defraud its creditors. Section 3a (1). Second. That it had permitted a receiver of its property to be appointed by a state court because of insolvency. Section 3a (4). The District Court appointed a receiver.

December 3, 1914, a creditor, the Southern Cotton Oil Company filed an answer, denying the commission by the Bohl Company of the acts of bankruptcy charged and denying its insolvency. December 11, 1914, the issue was referred to a special master to take testimony and report.

July 29, 1914, upon the petition of one Bohl, president and director and the largest stockholder of the Valentine Bohl Company, the superior court of Connecticut appointed a temporary receiver, and October 2, 1914, made the receivership permanent. The special master reported that on the above dates the assets of the company at a fair valuation were worth $159,314, and that its debts were $192,635.15, so that it was insolvent under section 1a (15), and that it had committed both acts of bankruptcy charged in the petition.

February 3, 1915, upon exceptions filed to the report by the Cotton Oil Company, and upon the petitioning creditors' motion to confirm, the District Judge confirmed the report, from which order the Cotton Oil Company appeals, under section 25a (1) of the Bankruptcy Act (Comp. St. 1913, § 9609).

Section 3a (1) and (4) of the Bankruptcy Act provides:

"Sec. 3a. Acts of bankruptcy by a person shall consist of his having (1) conveyed, transferred, concealed, or removed, * * * any part of his property with intent to hinder, delay, or defraud his creditors, or any of them; * * * (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."

Section 26, c. 194, Laws 1903 of Connecticut reads:

"Whenever any corporation having a capital stock has willfully violated its charter or exceeded its powers, or whenever there has been any fraud, collusion, or gross mismanagement in the conduct or control of such corporation, or whenever its assets are in danger of waste through attachment, litigation, or otherwise, or such corporation has abandoned its business and has neglected to wind up its affairs and to distribute its assets within a reasonable time, or whenever its stockholders or directors have voted to discontinue its business, or whenever any good and sufficient reason exists for the dissolution of such corporation, any stockholder or stockholders owning not less than one-tenth of its capital stock or, in the case of a corporation not

having capital stock, any member of such corporation may apply to the superior court in the county wherein such corporation is located, for the dissolution of such corporation and the appointment of a receiver to wind up its affairs. Such court may, if it finds that sufficient cause exists, appoint one or more receivers to wind up the business of such corporation, and may at any time, for sufficient cause shown, make a decree dissolving such corporation and terminating its corporate existence. Whenever such decree of dissolution is passed, it shall be the duty of the receiver or receivers to cause a certified copy thereof to be filed in the office of the secretary of the state, and said secretary shall thereupon record such certified copy in a book kept by him for that purpose. Such court, in every case in which it appoints a receiver, shall by its order limit a time, which shall not be less than four months from the date of such order, within which all claims against such corporation shall be presented, and all claims not presented within such time shall be forever barred. When such receivership shall be terminated by the court, the receiver or receivers shall file with the secretary of the state a certificate similar to the final certificate required of directors in section 34 of this act, and said secretary shall thereupon record such certificate in a book kept by him for that purpose."

The material part of the petition for a receiver in the state court is as follows:

"The Valentine Bohl Company is a joint-stock corporation duly organized under the laws of this state for the sale of beef and provisions, and for furnishing cold storage, and for other purposes as stated in its articles of association, and is located in said Waterbury, and has a capital stock of $150,000, divided into 1,500 shares of the par value of $100 each, of which capital stock only 1,100 shares have been issued and are now outstanding.

"(2) The plaintiff is the owner of 838 shares of said 1,100 shares and is one of the directors and president of said corporation.

"(3) The plaintiff has been for many years a director and the president of said corporation, and has been and still is the general manager of the same.

"(4) Said corporation has now no money available for its use, and cannot borrow any money, and for a long time has been, and still is, embarrassed by the lack of money to carry on its business, and it is now impossible to carry on said business on account of the lack of money. Said corporation owes a large amount of debts, which it is unable to pay, and checks have been issued which it cannot meet, and certain checks issued by it have been protested, and by reason of said unpaid debts and its inability to carry on its business its assets are in danger of waste through attachment and litigation. There is no prospect of its condition improving, and said corporation ought to be dissolved.

"(5) All the directors of said corporation are the plaintiff and John Sachsenhauser and Martin J. Carroll, all of said Waterbury.

"The plaintiff claims:

"(1) That a receiver be appointed to wind up the affairs of said company as by statute provided.

"(2) That said corporation be dissolved."

[1, 2] We think there is no evidence whatever of the first act of bankruptcy charged, viz., concealing or removing property with intent to hinder, delay, or defraud creditors. The petition in the state court was not filed by the Bohl Company, but by an individual stockholder acting on his own behalf, who happened to be the president and a director and owner of a majority of the capital stock. The company filed no answer. It was perhaps intended to justify this charge by the form in which the second act of bankruptcy was charged, viz., that the company suffered and permitted the receiver to be appointed. But the statute describes no such act of bankruptcy. Its language is the appointment of a receiver under the laws of a state "because of

insolvency." In re Spalding, 139 Fed. 244, 71 C. C. A. 370. The language of the petition, though inartificial, may properly be held to cover such an act of bankruptcy.

[3] We think "because of insolvency" must mean insolvency as defined by Bankruptcy Act, § 1a (15). In re Golden Malt Co., 164 Fed. 326, 90 C. C. A. 258; In re Wm. S. Butler & Co., 207 Fed. 705, 125 C. C. A. 223. It is impossible to say that the state court appointed the receiver baceuse of insolvency. The record of the court, so far as it is before us, indicates that, if appointed for insolvency at all, it was insolvency in the ordinary sense of inability to meet current obligations. This is sufficient to dispose of the case. However, we may add that the proofs seem to us to show that the company was not insolvent within the meaning of the Bankruptcy Act. The Watertown National Bank held a note for $42,000, made by Valentine Bohl and indorsed by the company. The money for which it was given was used to purchase stock of the Valentine Bohl Company for Bohl, who was the owner of it. The law did not permit the company to buy its own stock. If to the assets as found by the master be added Bohl's liability as maker to the company as indorser of the note for $42,000 held by the Watertown National Bank and included in its liabilities, and if $7,000 for taxes and insurance erroneously included twice be deducted from the liabilities as found by him, the account will read:

Assets	$159,314	+ $42,000	= $201,314
Liabilities	192,635	− 7,000	= 185,635
Surplus			$ 15,679

Or if the claim of the company as indorser against Bohl for $42,000 be not included in the assets, and there be included in the company's liabilities only the balance of the $42,000 after deducting $24,657, which the company owes him, the account will be:

Liabilities	$185,635	− $24,657	= $160,978
Assets			159,314
Deficiency			$ 1,664

—against which is to be placed the company's claim against Bohl for the balance of the $42,000, viz., $17,343. Counsel for petitioning creditors, upon whom lay the burden of proving insolvency, objected to Bohl's testifying before the special master as to his financial condition, and he refused to do so. Under the circumstances, we are not satisfied that the company was insolvent.

The order of adjudication is reversed, and the court below directed to dismiss the petition.

MASLAND et al. v. E. I. DU PONT DE NEMOURS POWDER CO. et al.

(Circuit Court of Appeals, Third Circuit. June 6, 1915.)

No. 1954.

CONSTITUTIONAL LAW ⟸312—DUE PROCESS OF LAW—RIGHT TO CONFER WITH WITNESSES.

In a suit to restrain a former employé of plaintiff from divulging its secret processes used in making artificial leather, wherein defendant claimed that such processes were well known to the trade, an order restraining defendant from disclosing the processes to experts, or to fact witnesses produced at or during the taking of proofs at the trial, constituted an undue restriction upon defendant's right to due process of law, since as to the issue whether the processes were in fact trade secrets the defendant had the right to consult and confer with witnesses before and at the trial and would therefore necessarily be obliged to divulge such processes to them.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 928; Dec. Dig. ⟸312.]

Appeal from the District Court of the United States for the Eastern District of Pennsylvania; Dickinson, Judge.

Suit in equity by the E. I. Du Pont de Nemours Powder Company and another against Walter E. Masland and others to restrain defendant from divulging trade secrets. From an order refusing to vacate a temporary restraining order (222 Fed. 340), defendants appeal. Reversed.

Geo. Q. Horwitz, of Philadelphia, Pa., for appellants.

Edwin J. Prindle, of New York City, for appellees.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

McPHERSON, Circuit Judge. The situation presented by this appeal is rather out of the common, and calls for a somewhat detailed statement in approaching the point for decision.

The only plaintiff that need be noticed at this stage is the E. I. Du Pont de Nemours Powder Company, and the only defendant is Walter E. Masland. During the last four or five years the company has been engaged in making artificial leather, among other products, and for nearly ten years Masland was a chemist in the company's employ. He gave up his position on June 13, 1914, and on July 3 the pending bill in equity was filed. In brief, it charges as follows: As a part of the company's extensive and varied business, experimental stations are maintained for the purpose of investigation, invention, and discovery; some of these inventions and discoveries are protected by letters patent, and others are guarded as trade secrets. Masland was employed with the understanding that the secrets of the business were not to be disclosed to others, or used in any manner by himself or other employés. In August, 1910, the company turned its attention to artificial leather, and early in 1912 placed Mas-

land in charge of experimental work in connection therewith, giving him access to all the secret processes. In June, 1914, Masland left the company's employ, and is now intending to begin the manufacture of artificial leather, and to use therein the company's "secret processes, apparatuses, articles of manufacture, and compositions of matter."

The bill prayed for a preliminary injunction to restrain such threatened use or disclosure. Affidavits were filed by both parties, and on July 15 the motion was argued. On July 22 Masland filed an answer, which admitted much in the bill, including his purpose to make artificial leather, but denied his intention to use any of the plaintiff's secret processes, etc. He averred that he had never agreed with the plaintiff "regarding any confidential relations in connection with the manufacture of artificial leather," and declared that he intended "to manufacture artificial leather by processes which are common knowledge of artificial leather manufacturers, and when engaged in this work it is my intention to use some basic raw materials which, so far as I know, are not used and never have been used by the (plaintiff), but which are used in some degree and in certain units by competing companies." He averred that knowledge regarding these materials was common to all makers of artificial leather, and repeated the assertion that he did not intend to use or disclose any knowledge obtained by him in any confidential relation while in the employ of the plaintiff, declaring again that many processes and formulas claimed by the company as its own secrets were well known to the trade. On August 5, the answer as well as the affidavits being before Judge Dickinson, he refused a preliminary injunction for the reasons stated in the margin, also reported in E. I. Du Pont de Nemours Powder Co. v. Masland (D. C.) 216 Fed. 271.[1]

[1] Dickinson, District Judge. We follow the usual practice in not discussing the merits of the bill on this motion further than is necessary to make clear the reason for the conclusion we have reached.

The bill alleges knowledge of secret processes of manufacture necessary to the successful prosecution of the business of plaintiff, gained by one of the defendants while in the employ of the plaintiff and maintaining confidential relations with it.

The further averment is that these processes will be disclosed, unless such disclosure is prohibited by the court. The other defendants are alleged to be associated with the plaintiff's former employé in a contemplated business which will involve the use of plaintiff's processes and a disclosure of the secrets of its business.

The answer denies all the salient averments of the bill. The line which terminates the limits where the rights of the plaintiff end and those of the defendants begin is a difficult one to draw. The iniquity of an employé who takes away with him the property of his employer, existing in the form of valuable processes, is as clear as if he asported any other form of property. The right of the employé to use his abilities, developed through his experiences, to the utmost of his capacity, is equally clear. This right of the employé and his obligation to preserve to the full the property rights of the employer are shaded into each other by lines so fine that it is doubtful whether anything but a nice sense of honor can keep them distinguished.

To award an injunction pendente lite is to in some measure at least prejudge the case, and involves a finding that the defendants are disposed to act contra bonos mores. At the same time it is within at least the theoretic possibilities that to refuse the writ is to permit a great injustice to be done the plaintiff. There are considerations to be taken into the account, how-

As will be observed, he coupled the refusal "with leave to renew the application at any time," and on November 20 the plaintiff did renew the application. On November 25 another argument was had, but this was not disposed of until February 25, when the court filed an opinion saying, inter alia:

"The right of the plaintiffs is that the secret processes which they claim as their exclusive property should not have their value destroyed by a disclosure pending the proof of the right. The right of the defendants is to have the extent of the plaintiffs' rights properly found and determined, so that the defendants may not be hampered in their business activities. It results from this that the case should be set down for trial by the plaintiffs at the earliest convenient time, and meanwhile that a restraining order issue against any disclosure of processes claimed to be the property of the plaintiffs. The equity rules, supplemented by the discretionary power of the trial judge, afford the means of ample protection to both parties in their rights. The proof supporting the case which the defendants are to meet can be submitted by the plaintiffs at an early date, and sufficient time then be given to the defendants in which to present reply proofs. The protection to be thrown around the taking of such proofs, and who shall be permitted to attend thereat, can be agreed upon by counsel, or determined by the court at the time. If an early date for final hearing is fixed, defendants can submit to an ad interim restraining order without injury. Unless the case can be promptly disposed of, the order should not continue indefinitely."

No formal order, however, was made at that time, and on March 25 the case came on for final hearing in camera. The plaintiff took testimony on March 25 and 26, but as no report of the proceedings has been laid before us we do not know precisely what was offered. It sufficiently appears, however, that difficulty and friction developed, for on March 26, while the plaintiff was still presenting its case and had already disclosed some (if not all) of the disputed formulas, the court made an order (following the opinion of February 25), restraining the defendant "from directly or indirectly disclosing any and all processes, etc., in issue herein, claimed to be the property of the plaintiffs." The defendant was expressly enjoined from disclosing such processes, etc., either "to experts or to fact witnesses produced at or during the taking of proofs of trial," but excepting his counsel from the scope of the order. He was also given leave "to move to vacate said injunction if occasion to consult expert witnesses or otherwise arises," and the order further provided "that sufficient time be given defendant in which to present reply proofs to the proofs submitted by plaintiffs." Finally the court added "that the protection to be thrown around the taking of proofs, and who shall be permitted to attend thereat, may be agreed upon by counsel or determined by the court at the time such proofs are taken."

ever, which promise a more satisfying judgment of the respective rights of the parties after a full hearing than now.

The defendant especially concerned has denied all intention to do the plaintiff the injury which the latter thinks to be threatened. It is to be expected that the defendants will continue to see the wisdom and prudence, as well as the righteousness, of abiding in this position and awaiting a determination of their rights and those of the plaintiff on final hearing.

The preliminary injunction is now refused, with leave to renew the application at any time, and costs to await final decree.

On April 7, at an adjournment of the trial, the defendant moved to vacate the order so far as it restrained him or his counsel from disclosing "to experts or to fact witnesses, produced at or during the taking of proofs of trial," the processes, etc., claimed to be the plaintiff's property, asserting his right to consult with either class of witnesses regarding these processes "either during cross-examination or in preparation or presentation of the defendant's case." Affidavits were presented by both parties, and a few days afterwards the trial judge filed another opinion—also quoted below, but not otherwise reported—which sets forth some of the difficulties of the situation:

"An unusual situation is presented in this case, the only way to cope with which is by a pro forma refusal of the present motion and the entry of an order continuing the trial of the cause until the question can be passed upon by an appellate court.

"The question arises out of this condition of facts: The bill was filed to restrain the defendant from disclosing what are claimed to be the trade secrets of the plaintiff, knowledge of which came to the defendant while in plaintiff's employ, and which were confidentially communicated to him. An application for a preliminary injunction was refused because, among other reasons, no finding against the defendant of any intention to disclose was at the time justified. The case was met in the highly commendable spirit on both sides of a due regard for the rights of each other, and it was arranged that no disclosure should be made by defendant without notice beforehand sufficient to give plaintiff time to apply for relief, and express leave was granted plaintiff to renew its application for a preliminary injunction or restraining order should need for protection arise. Efforts were then made to devise some method of trying the case without divulging any of the processes claimed to be the property of the plaintiff. To this end depositions were taken and the defendant given information of what the claimed secret processes were, the formulæ of which were kept in camera. A predicament then arose. The defendant maintains that some of the claimed secret processes are not such at all, but processes which any one in the business has the free right to use. The truth of the averments on the one side and the other are asserted to be the proper subject of expert knowledge and testimony. The defendant therefore notified the plaintiff and the court that they proposed to exercise their claimed right of employing experts and discussing with them the features of the case which were in controversy. This, as was to be expected, alarmed the plaintiff who renewed its application for a preliminary injunction or restraining order. The dilemma in which the plaintiff was placed could not be ignored.

"The exigencies of the case were met by the order of the court allowing the injunction. This was made with the thought in mind that there was no immediate need for the employment of experts and that the cause might proceed to trial in the hope that some method of conserving the rights of both parties could be found. Leave was therefore given the defendant to move to vacate the order at any time, and if unprepared at the trial to present his defense, to move for a continuance. To this as a practical expedient, defendant had no objection, provided he was fully protected in the assertion of his claimed rights. The order was therefore made and an exception allowed to the defendant and the parties proceeded to trial. To further raise the question witnesses for the plaintiff were asked on cross-examination to state the formulæ embodying the secret processes, and the present motion to vacate was made.

"This brings us face to face with the predicament which now must be met. The dilemma of the plaintiff has become acute. It would, of course, be idle to the point of flat absurdity for the trial judge to compel the plaintiff to publicly disclose its processes in the act of protecting them from disclosure. This difficulty could be met by an approprate order for keeping the answers to the questions asked in camera. There is an admitted necessity that the trial judge, parties and counsel on both sides should know. To this plaintiff does

not object. Counsel for defendant claims (and we cannot do otherwise than find this to be in good faith) that it is necessary for them to employ and confer with experts. They claim this to be their right. If it is allowed by the trial judge the practical result is that plaintiff is driven to an abandonment of its case without being able to have the ruling reviewed by an appellate court. The only way out of this dilemma is for us to pro forma refuse the defendant's motion and continue the preliminary injunction, restraining the defendant from disclosing to expert witnesses employed by them the processes claimed by the plaintiff as its secrets in order to afford an opportunity to the defendant to appeal from this order and to have their rights in the premises declared."

On April 13, an order was made refusing to vacate the preliminary injunction, or restraining order, entered on March 26, but adding a proviso "that defendants shall not be deprived of the right to examine expert and fact witnesses"—still with the important exception that such witnesses might not be examined with reference to the processes, etc., "in issue herein and claimed to be the property of the plaintiffs." The pending appeal is from this order, which refuses to vacate (while it somewhat amends) the restraining order or injunction of March 26. We have had some doubt whether this order is appealable. It was made during the progress of the trial, apparently before the company had finished the presentation of its case, but at all events before the defendant had offered any evidence, and may be construed with little difficulty as a mere direction concerning the method of conducting the trial. But, as the order is regarded as vital by both parties, we shall treat the general subject as properly before us.

In the first place, it should be observed that the situation does not present the question, how a conceded trade secret should be protected: it is true, the company asserts these formulas to be its own private property, but the defendant denies the assertion, declaring them to be matters of common knowledge, and the district judge has found this issue to be tendered in good faith. By whom, therefore, and how, is this fundamental controversy to be decided? Obviously, by the tribunal to which the company itself has appealed, and by the use of the flexible procedure and the elastic process of a court of equity. It is undeniable that the subject-matter of the dispute is property—perhaps of much value—namely, the defendant's right to pursue a lawful business unmolested, as well as the company's right to prevent competitors from making an unlawful use of its private methods. But the peculiar nature of the property requires the court to take peculiar care to avoid doing injury to either party. If the formulas are in reality trade secrets, they are entitled to protection; if in fact they are already well known, the defendant has a right to use them freely. The truth upon this subject is therefore the very first fact to be determined, and the court could not evade that duty, even if it so desired. The method of ascertaining any fact in the trial of a cause is so largely within the discretion of the trial judge that an appellate court is not likely to interfere with details of administration; these must of necessity be entrusted to the better judgment of a court of first instance. But there are certain fundamental rights to which a defendant is entitled if he is to enjoy due process of law. Among them are these; he must be allowed to learn his adversary's case, and he must be heard in his own

defense. In order to be heard (within the proper meaning of that word) he must be allowed to prepare his defense, and this he cannot do unless he be permitted to consult with witnesses upon the matters in issue, and to examine them in court according to the established rules that govern a trial. If the trial involve a question that can only be properly understood by the aid of expert testimony, he must be allowed to consult such witnesses in order that he may have the help of their skill and knowledge.

When in the course of a plaintiff's case he is obliged to disclose a process whose secret character is in dispute, he necessarily offers the process to be examined by his antagonist as well as by the court; and while the court may and should guard the disclosure as carefully as possible, the defendant cannot be denied his right to a proper presentation of his defense. Ordinarily he cannot be confined to testimony from his own lips; he is entitled to call other witnesses in support of his asserted right, and he is equally entitled to confer with them in advance. And, if this involves a certain risk in case the process should turn out to be really a secret, we do not see how the risk can possibly be avoided. The method of taking testimony in court is always in the power, and largely in the discretion, of the trial judge, and in such a case as this the hearing is properly in camera, with such restrictions on the presence of witnesses as the circumstances may fairly indicate, and as the rights of the parties may permit. We think that the power of the court to enjoin and enforce secrecy on all the participants in such a trial is likely to be effective, but after all some risk must inevitably be run; a trial is a trial, and a court is a court, where a judicial hearing can only be conducted by obeying the fundamental rules that govern such investigations. We cannot avoid the conclusion, therefore, that the order in question restricted the defendant unduly in the exercise of his right to be heard; as it stands, he would find great difficulty in putting an expert on the stand, and practically he could call no other witness than himself. At all events, he would be so hampered that little freedom would remain. We make no suggestion about the manner of conducting the trial; it is not for us to offer advice on this subject, and we are sure that the trial judge will continue to act with the scrupulous care and caution he has already displayed. But the order before us is too sweeping, and should be modified in accordance with this opinion. Our knowledge of the situation is necessarily imperfect, and we cannot undertake to do more than state the foregoing rules. Before the mandate issues, perhaps the parties may be able to agree on details; if not, we are compelled to commit the subject of modification to the court below, and as already stated the manner of conducting the trial must be left in large measure to the discretion of the trial judge. We will only add that we repose implicit confidence in the honor of the defendant and his counsel that in the preparation and the conduct of his side of this difficult case they will impress strongly on such of their witnesses as must of necessity learn something of the subject-matter the serious obligation these witnesses assume to preserve inviolate the secrecy of these processes until their true character shall be finally determined. If they turn out to be really secrets the power of the district court should be exercised, and

no doubt will be exercised, without hesitation to give them adequate protection; if they are really open to the world no harm will have been done, but it appears to be inevitable that to some extent a preliminary disclosure must be permitted.

The decrees of March 26 and of April 13 are reversed.

STANDARD PAINT CO. v. RUBBEROID ROOFING CO. et al.

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

No. 2077.

1. TRADE-MARKS AND TRADE-NAMES ⟸3—UNFAIR COMPETITION.

Descriptive words, like geographical and proper names, may acquire a secondary significance, and in that meaning are the subject-matter of ownership, to be protected against unfair competition.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 4–7; Dec. Dig. ⟸3.

Unfair competition in use of trade-mark or trade-name, see notes to Scheuer v. Muller, 20 C. C. A. 165; Lare v. Harper & Bros., 30 C. C. A. 376.]

2. TRADE-MARKS AND TRADE-NAMES ⟸3—UNFAIR COMPETITION.

Complainant's product was known as "Ruberoid" roofing, and although the word was descriptive and as such not subject to appropriation as a trade-mark, it had acquired a secondary meaning which indicated complainant's product. After it was decided that complainant had no trade-mark in the name, the defendant corporation, known as the "Rubberoid Roofing Company," was organized, and its product was advertised as "Rubberoid," there being an obvious intent to palm it off as the goods of complainant. *Held*, that complainant would, by an injunction, be protected from such unfair competition.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 4–7; Dec. Dig. ⟸3.]

Appeal from the District Court of the United States for the Eastern District of Illinois; Francis M. Wright, Judge.

Bill by the Standard Paint Company against the Rubberoid Roofing Company and another. From a decree dismissing the bill, complainant appeals. Reversed with directions.

W. Clyde Jones, of Chicago, Ill., and Alan D. Kenyon, of New York City, for appellant.

H. F. Driemeyer and Clarence E. Pope, both of East St. Louis, Ill., for appellees.

Before BAKER, SEAMAN, and MACK, Circuit Judges.

MACK, Circuit Judge. This is an appeal from a decree dismissing a bill of complaint for want of equity. Unlike the suit brought by the complainant in the Eighth circuit (Standard Paint Co. v. Trinidad Asphalt Co., 220 U. S. 446, 31 Sup. Ct. 456, 55 L. Ed. 536, affirming 163 Fed. 977, 90 C. C. A. 195), it is based solely upon alleged unfair competition.

No attempt is made to reopen the question determined by the Supreme Court that the word "Ru-ber-oid" is a misspelling of rubberoid

and, as such, is descriptive and, therefore, in its primary signification, not susceptible of exclusive appropriation as a trade-mark. The further decision that, on the evidence presented by the record in the Trinidad Case, unfair competition had not been established, settled solely a question of fact, and therefore is without binding force in the solution of a similar question in this case.

Appellee, Rubberoid Roofing Company, is a dealer, not a manufacturer. It was organized with a capital stock of $1,000 after the decision of the Circuit Court of Appeals in the Trinidad Case. Prior thereto its organizer and principal stockholder had been engaged in business for a number of years under other corporate names, marketing the identical flexible or rubberoid roofing material under the brands "Century," "Mutual," and "Victor." Appellee, All Roofing Company, an independent corporation, manufactured and labeled the material for all of these corporations.

[1, 2] It is now well settled that descriptive words, like geographical and proper names, may acquire a secondary signification and, in that meaning, are the subject-matter of ownership to be protected against unfair competition. Reddaway v. Banhan, 1896, A. C., 199; Williams v. Mitchell, 106 Fed. 168, 45 C. C. A. 265. And, while the mere use of the descriptive word or of some word closely resembling it (rubbero for rubberoid) will not of itself constitute unfair competition—

"the manufacturer of particular goods is entitled to protection of the reputation they have acquired against unfair dealing. * * * The essence of such a wrong consists in the sale of the goods of one manufacturer or vendor for those of another." Trinidad Case, supra.

The evidence before us clearly establishes that the word "Rubberoid," recently changed to "Ru-ber-oid," had long before the commencement of these proceedings acquired a secondary signification in connection with flexible or prepared roofing, as indicating roofing of appellant's manufacture. Appellant and its predecessor in the business and title had used the word as a trade-name since 1892. Flexible roofing is not a patented article; it is produced by many manufacturers, none of whom, except appellee and the Trinidad Company, had designated it by the trade-name "Rubberoid" or any similar name. Every manufacturer or dealer, including three corporations controlled by the principal stockholder and organizer of appellee, Rubberoid Roofing Company, had some other distinctive trade-name or brand for its flexible or rubberoid roofing. While this general acquiescence in appellant's claim of exclusive rights may have been due to its registration in 1901 of the word "Ruberoid" as a trade-mark, yet, inasmuch as appellant was therein apparently acting honestly and not fraudulently, it cannot, on that account, be deprived of protection against unfair competition. If appellee used the word "rubberoid" merely as descriptive of its roofing, there could be no cause for complaint. But it goes further; it designates its product, not adjectively and descriptively as a rubberoid roofing, but substantively and by a trade-name as "Rubberoid." The noun rubberoid, not the adjective, is expressly claimed to be the brand of its roofing. In one of the letters in evidence it speaks

of "our Rubberoid brand roofing." The evidence clearly demonstrates that the use of the word as a trade-name or brand was not adopted innocently and in ignorance of appellant's rights, or continued in a way clearly to differentiate the two products, but that it was done willfully and fraudulently, with full knowledge of the secondary signification that the word had acquired, with the intent and in a manner—

"calculated to mislead the public with respect to the origin * * * of the goods and thus to invade the right [of appellant] to the use of the name or term as a designation of (its) merchandise." Davids Co. v. Davids, 233 U. S. 461, 34 Sup. Ct. 648, 58 L. Ed. 1046.

The decision in the Trinidad Case, supra, furnishes no justification for such acts. The court there found as a fact that, although the word "rubbero" was used as the name of an article, there was no unfair competition; that the defendant therein did "not use the word 'rubbero' in such a way as to amount to a fraud on the public." Appellee in the instant case, however, not merely adopted the well-established trade-name of appellant's product to designate its roofing, but it did so with the intent to induce the belief that it was handling appellant's goods. When "Ru-ber-oid" was requested, it and its dealers supplied its "Rubberoid" brand; it evasively failed to answer specific questions of a prospective customer as to whether its goods, sold at a much lower price, were identical with those manufactured and sold by appellant; it misappropriated, altered, and misused a testimonial letter given on behalf of appellant's roofing. It is immaterial that, in some instances, the purchasers were not in fact deceived because they were acting on behalf of appellant for the very purpose of securing positive proof of appellee's willingness, when the opportunity presented itself, to palm off its goods as those of appellant. The corporate name, Rubberoid Roofing Company, was adopted to obtain the benefit of the decision that "Ruberoid" was not a trade-mark. If the new company had dealt fairly with the public and its competitors in the sale of an article which could properly be described as rubberoid roofing, even though in fact, as the evidence in this record clearly shows, it ordinarily was described as rubber roofing or flexible roofing, the corporate name, in and of itself, would furnish no ground for complaint; the use therein of the word "Rubberoid" could well be descriptive and, as this court held in the recent case of Keystone Oil & Manufacturing Co. v. Buzby, 219 Fed. 473, 135 C. C. A. 185, such use would not constitute unfair competition. Appellee, however, has gone further. It has so printed the word "Rubberoid" in its corporate name, on circulars, letters and labels as to make this word appear as its trade-name.

Under all of these circumstances appellant is entitled to such relief as will afford it adequate protection in its property rights. Chickering v. Chickering, 215 Fed. 490, 131 C. C. A. 538. In so far as the decision in Walter Baker & Co. v. Gray, 192 Fed. 921, 113 C. C. A. 417, 52 L. R. A. (N. S.) 899, is inconsistent with the views expressed by this court in the Chickering Case and in the case of Walter Baker & Co. v. Slack, 130 Fed. 514, 65 C. C. A. 138 (cited with approval in Her-

ring Safe Co. v. Hall's Safe Co., 208 U. S. 554, 559, 28 Sup. Ct. 350, 52 L. Ed. 616), we must decline to follow it.

The appellees should be enjoined from using the word "Rubberoid" or "Ru-ber-oid," or any similar name as the trade-name or brand of the Rubberoid Roofing Company's roofing or as part of such trade-name or brand, or from using such word descriptively in circulars, letters, advertising, or labels, in reference to such roofing material, in any way that does not clearly indicate that such use is merely descriptive. Appellee, Rubberoid Roofing Company, should further be enjoined from so using the word "Rubberoid" in its corporate name, on circulars, letters, advertising, or labels, as to emphasize such word in relation to the other words in its name or as to indicate that such word is the brand or trade-name of its product, and, for the reasons stated in the Keystone Case, supra, it should be required clearly to state on all letters, circulars, advertising, and labels on which its corporate name appears, in effect, that its roofing product is not that of the Standard Paint Company.

The decree of the District Court is therefore reversed, with directions to enter a decree in accordance with the views herein expressed.

MORGAN, Warden of U. S. Penitentiary, v. WARD et al.

(Circuit Court of Appeals, Eighth Circuit. May 17, 1915.)

No. 4282.

1. HABEAS CORPUS ⊜30—GROUNDS OF REMEDY—WRIT OF ERROR.

Where an indictment was bad, the petitioners, having opportunity to challenge it in the lower court and if necessary by writ of error from the Circuit Court of Appeals, whether they availed themselves of such opportunity or not, could not use the writ of habeas corpus for the purpose of a writ of error.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 25; Dec. Dig. ⊜30.]

2. INDIANS ⊜38—INTOXICATING LIQUORS—AMENDMENT AND REPEAL—PENALTY—"INDIAN COUNTRY."

Act July 23, 1892, c. 234, 27 Stat. 260, prohibited the introduction of intoxicating liquors into the Indian country, and fixed the penalty at imprisonment for not more than two years and a fine of not more than $300. Act Jan. 30, 1897, c. 109, 29 Stat. 506 (Comp. St. 1913, § 4137), prohibited the introduction of intoxicating liquors into the Indian country and specifically provided that the term "Indian country" should include any allotment while the title thereto was held in trust or was inalienable without the consent of the government, under penalty of a fine, and imprisonment for not less than 60 days, specifying no maximum limit of imprisonment, and by section 2 thereof repealed so much of the former act as was inconsistent therewith. *Held*, that the later act was an amendment of the former act, that the introduction of intoxicating liquors into an Indian allotment was an introduction into Indian country not intended to create any new offense as to such allotments, and that the maximum penalty provision of the former act was not inconsistent with the penalty provision of

the later act, so that a sentence of two years upon conviction under the later act was valid.

[Ed. Note.—For other cases, see Indians, Cent. Dig. §§ 22, 64, 66; Dec. Dig. ⟸38.

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

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

3. COURTS ⟸405—UNITED STATES COURTS—JURISDICTION—CIRCUIT COURT OF APPEALS.

Where it was contended on appeal from habeas corpus proceedings discharging from imprisonment for introducing liquor into an Indian allotment, that the jurisdiction of the trial court was in issue, and that the case involved the construction of the Constitution of the United States within the Judiciary Act of 1891 (Judicial Code, §§ 236, 238 [Act March 3, 1911, c. 231, 36 Stat. 1156, 1157 (Comp. St. 1913, §§ 1213, 1215)]), and that the Supreme Court of the United States had exclusive jurisdiction of the appeal, but there was no certificate of the trial court as required by section 238, showing that a question of jurisdiction was in issue, and where other questions of controlling importance were involved and considered by the Circuit Court of Appeals, that court had jurisdiction to entertain the appeal.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1097–1099, 1101, 1103; Dec. Dig. ⟸405.

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

Appeal from the District Court of the United States for the District of Kansas; John C. Pollock, Judge.

Habeas corpus by Dan A. Ward and another against Thomas W Morgan, Warden of the United States Penitentiary at Leavenworth. Kan. From an order discharging the petitioners, the defendant appeals. Reversed, and case remanded, with direction to dismiss the petition and remand the prisoners.

Isaac D. Taylor, Asst. U. S. Atty., of Guthrie, Okl., and L. S. Harvey, Asst. U. S. Atty., of Kansas City, Kan. (Fred Robertson, U. S. Atty., of Topeka, Kan., on the brief), for appellant.

I. J. Ringolsky, of Kansas City, Mo. (Harry L. Jacobs, of Kansas City, Mo., on the brief), for appellees.

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

ADAMS, Circuit Judge. This was an appeal from an order of the District Court in a habeas corpus proceeding discharging the appellees, Dan A. Ward and W. A. Greenwood, from imprisonment in the United States penitentiary at Leavenworth, Kan., of which the appellant, Morgan, was warden.

The appellees had been indicted in the District Court of the United States for the Western District of Oklahoma for the offense created by the act of January 30, 1897 (29 Stat. 506), had pleaded guilty to one of the counts of the indictment, and sentenced to pay a certain fine and be imprisoned in the penitentiary at Leavenworth for the

period of two years, and were afterwards committed to the prison in execution of the sentence. The count of the indictment upon which the plea of guilty was entered charged that the appellees—

"did unlawfully and feloniously introduce intoxicating liquor, to wit, whisky and beer, into and upon the south half of the southeast quarter of section one (1), township twenty-three (23) north, range eleven (11) east, of the Indian meridian, in said Osage county, said land being then and there an Indian allotment, to wit, the allotment of Ethel Evant, an Osage Indian, the title to the said allotment being then and there inalienable by the said allottee without the consent of the United States."

[1] After being incarcerated, the appellees filed in the court below their petition for a writ of habeas corpus, alleging that they were unlawfully restrained of their liberty by the appellant, the warden, for the reasons: First. Because the indictment was bad: (a) In that it did not charge that they introduced liquor into the Indian country, but only into a certain described Indian allotment; (b) in that it did not aver that the liquor was introduced into the allotment knowingly, and for several other reasons specified in the petition. And second. Because they were sentenced to imprisonment for a period of two years' time without any warrant of law authorizing the same, and therefore beyond the power of the court. Whether or not the indictment was bad for any of the reasons alleged in the petition for the writ cannot now be considered. The writ of habeas corpus cannot serve the purpose of a writ of error; if the indictment was bad, the appellees had an opportunity to challenge it, first in the trial court and afterwards, if necessary, by writ of error from this court, and, whether they availed themselves of either of these opportunities or not, they cannot now, according to familiar principles of practice, make use of the writ of habeas corpus for the purpose.

Was the judgment authorized by law? This raises the serious question in the case.

It is contended by the appellees that the act of 1897 provided for a minimum punishment of 60 days, but fixed no maximum limit at all, that as a result the minimum is also the maximum term of lawful imprisonment, and that because the District Court of Oklahoma imprisoned appellees for the period of two years, its judgment was in excess of its power, the sentence void, and did not warrant the detention of the appellees by the warden. The learned judge of the trial court adopted this view, and discharged the prisoners, holding that the judgment of the District Court of Oklahoma, in so far as it sentenced the appellees to imprisonment for any period in excess of 60 days, was void. An able argument was made by counsel for appellees in support of this ruling, and if it were true that Congress fixed no maximum penalty of imprisonment, but left the law with a minimum term of imprisonment fixed at 60 days, a serious question as to the power of the Oklahoma court to impose the sentence of imprisonment for the period of two years would be presented.

The warden contends that the act of 1897 must be read in connection with and be supplemented by the act of July 23, 1892, and as so read and supplemented makes adequate provision for a maximum

imprisonment of two years for the offense with which the appellees were charged. This contention will therefore be first considered.

[2] The act of July 23, 1892 (27 Stat. 260), prohibited the introduction of intoxicating liquors of any kind into the Indian country, and fixed the penalty for its violation at imprisonment for not more than two years and a fine of not more than $300. Afterwards Congress passed the act of 1897 (29 Stat. 506). This act also prohibited the introduction of intoxicating liquors of any kind into the Indian country, and specifically provided that the term "Indian country" should include any Indian allotment while the title to the same should be held in trust by the government, or while the same should remain inalienable by the allottee without the consent of the United States, and provided as a penalty for its violation a certain fine and imprisonment for not less than 60 days, specifying no maximum limit of imprisonment. The second section of this act provides as follows: "That so much of the act of July 23, 1892, as is inconsistent with the provisions of this act is hereby repealed." Both the act of 1892 and of 1897 contain similar provisions against the selling of intoxicants of any kind to Indians, but it is thought these provisions throw no light upon the question under present consideration, namely, whether the act of 1897, in view of the provisions of the act of 1892, empowered the District Court of Oklahoma to impose a penalty of imprisonment for a period of two years for introducing intoxicating liquor into an Indian allotment.

That the act of 1897 is an amendment of the act of 1892, although not so entitled, is now well settled and must be so treated (United States v. Wright, 229 U. S. 226, 230, 231, 33 Sup. Ct. 630, 57 L. Ed. 1160; Joplin Mercantile Co. et al. v. United States, 236 U. S. 531, 35 Sup. Ct. 291, 59 L. Ed. —, just decided; Ammerman v. United States. 132 C. C. A. 470, 216 Fed. 326, 327), and that Congress did not intend to repeal the act of 1892 by the enactment of 1897 is clear. The latter act itself by necessary implication so declares. It provides that so much of the act of 1892 as is inconsistent with the provisions of this act is hereby repealed. This clearly means that the parts of the act of 1892 which are consistent with the act of 1897 still remain the law. The question, therefore, is this: Whether that part of the act of 1892 which provides a maximum punishment of two years is inconsistent with the provision of the act of 1897 which fixes the term of imprisonment for its violation at imprisonment for not less than 60 days with no maximum limit whatever specified. There is manifestly no actual or physical inconsistency between the two. Both can certainly stand in perfect harmony. The maximum imprisonment provided by the act of 1892 can in no sense be said to be inconsistent with the minimum imprisonment provided by the act of 1897, especially as no maximum limit of any kind is there specified.

If counsel for the appellees are correct in one proposition strenuously maintained by them, namely, that because the act of 1897 in itself fixed a minimum time of imprisonment and nothing more, the courts were vested with no discretion or power to fix any greater punishment than the minimum, or if this proposition were even de-

batable, it would seem that Congress ought, in some way, to have supplied this manifest failure of legislation to meet the reasonable demands of public justice. No one can seriously claim that Congress had done its full duty when it fixed the penalty for violating a law, intended to aid in the execution of a great public trust, at the short, inflexible term of imprisonment for not less than 60 days, with no discretion left, like that very generally lodged in the trial court in other legislation fixing penalties, to vary or enlarge it according to the circumstances of each case. We think Congress never intended to leave this important legislation so impotent in the way of enforcement. The act of 1892 provided a reasonable maximum term of imprisonment, and that act, as already seen, was repealed only so far as it was inconsistent with the provisions of the act of 1897. As the act of 1897 made no provision whatever for the maximum imprisonment, clearly such a provision found in the act of 1892 is not only not inconsistent with the provisions of the act of 1897, but is a very sensible provision for its reasonable enforcement, and was therefore not repealed by the act of 1897. Our own court, in the case of Ammerman v. United States, supra, in discussing this subject remarked as follows:

"It will be noticed that the punishment provided for a violation of the act of 1897 is imprisonment for not less than 60 days, * * * but provides for no maximum imprisonment or fine. In view of the fact that the act of 1897 is an amendment to the act of July 23, 1892, as was held by the Supreme Court in United States v. Wright, 229 U. S. 226, 230 (33 Sup. Ct. 630, 57 L. Ed. 1160), it may be assumed, although we do not deem it necessary to determine it in this case, that the maximum punishment provided for in the act of 1892 is still in force."

While these observations were obiter, they are in such perfect accord with our present views that we reproduce them with satisfaction.

Argument is made that the introduction of intoxicating liquor into an Indian allotment constituted no offense under the act of 1892; that it first became an offense upon the passage of the act of 1897, which first forbade its introduction into such allotment; that Congress could not have intended to make the penalty for violating the old act of 1892 applicable to an act first made penal by the act of 1897. If the premises assumed in this argument were correct, a serious question would be presented; but we cannot admit the premises. The act of 1892 made it a crime to introduce intoxicating liquor into Indian country. The act of June 30, 1834, as interpreted in the case of Bates v. Clark, 95 U. S. 204, 24 L. Ed. 471, and Evans v. Victor, 122 C. C. A. 531, 204 Fed. 361, provided a definite test for determining what Indian country is, and the Supreme Court in the case of Clairmont v. United States, 225 U. S. 551, 32 Sup. Ct. 787, 56 L. Ed. 1201, after considering the act of 1834 and the opinion in the case of Bates v. Clark and stating, in substance, that they laid down a proper criterion for determining whether a given tract of land was Indian country or not, said: "It must be assumed that, in the act of 1897, Congress used the words 'Indian country' in the accepted sense." Accordingly, any land that came within the description of "Indian country" as so accepted was, by the express provisions of the act of 1897,

subject to its penalty. Owing, however, as suggested by counsel, to some difference of opinion which had arisen with respect to whether an Indian allotment was "Indian country," Congress doubtless made the declaration in that act that the term "Indian country" included Indian allotments, etc., to relieve the then existing uncertainty relative to that question.

In United States v. Pelican, 232 U. S. 442, 449, 34 Sup. Ct. 396, 399, 58 L. Ed. 676, the Supreme Court, treating of questions cognate to those now under consideration, said:

"The lands, which prior to the allotment undoubtedly formed part of the Indian country still retain during the trust period a distinctively Indian character, being devoted to Indian occupancy under the limitations imposed by the federal legislation. The explicit provision in the act of 1897 as to allotments we do not regard as pointing a distinction, but rather as emphasizing the intent of Congress in carrying out its policy with respect to allotments in severalty, where these have been accompanied with restrictions upon alienation or provision for trusteeship on the part of the government."

In view of these considerations and authorities we think it clear that Indian allotments, qualified as specified in the act of 1897, are Indian country, and that it was not intended by the last-mentioned act to create any new offense with respect to such allotments. Without the act of 1897 it would have been an offense under the act of 1892 to introduce liquor into an Indian allotment of the character specified in the act of 1897. That act was merely declaratory of the law as it existed before its passage. The case of appellees is therefore not strengthened by the argument that the court imposed a punishment provided for by the act of 1892 and for an offense first created by the act of 1897.

The conclusions already reached render unnecessary any consideration of the other question whether the act of 1897, in and of itself, afforded warrant for the sentence as imposed.

[3] Appellees have filed a motion to dismiss this appeal on the ground that this court is without jurisdiction to entertain it. It is argued that the jurisdiction of the trial court was in issue, and also that the case involved the construction or application of the Constitution of the United States within the meaning of the judiciary act of 1891 (see sections 236, 238, Revised Judicial Code), and that as a result the Supreme Court of the United States is vested with exclusive jurisdiction to hear and determine the appeal. We fail to find anywhere in this record that the jurisdiction of the trial court was ever questioned below, and certainly there is no certificate of the trial court showing that a question of jurisdiction was in issue as is required by section 238, supra. If the construction or application of the Constitution of the United States is in any way involved (which does not appear), other questions of controlling importance are involved, and have received consideration by us, as appears in the opinion. Such being the case, this court has jurisdiction to entertain the appeal. Spreckels Sugar Refining Co. v. McClain, 192 U. S. 397, 407, 24 Sup. Ct. 376, 48 L. Ed. 496, and cases cited.

It results that the judgment of the District Court must be reversed, and the case remanded, with directions to dismiss the petition and

remand the prisoners, or if they are at large to take such measures as it, either by itself or in conjunction with the District Court of the Western District of Oklahoma, may lawfully take to secure their reincarceration.

KANSAS CITY SOUTHERN RY. CO. v. LUSK et al.

(Circuit Court of Appeals, Eighth Circuit. July 9, 1915.)

No. 4346.

1. APPEAL AND ERROR ⟸919—PRESUMPTIONS—PLEADING—MOTIONS TO STRIKE —EFFECT.

Where paragraphs presenting a defense were on motion stricken from the answer, whatever facts contained therein were well pleaded must on appeal be taken as true.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3713; Dec. Dig. ⟸919.]

2. RAILROADS ⟸208—RECEIVERS—CONTRACTS—RENUNCIATION.

The receivers of an insolvent railroad company applied for leave to disaffirm and renounce a contract whereby the corporation had leased terminal facilities from the appellant, on the ground that the contract was burdensome to the company; it having acquired its own terminal facilities for those places. The contract was one not binding on the receivers until assumed under direction of the court. The insolvent company had acquired its own terminal facilities some 14 years before the application. *Held* that, as the matter was one of business expediency, the court would not investigate, on the ground that the receivers did not come into court with clean hands, the question whether the property was acquired in violation of Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 209.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 685–691; Dec. Dig. ⟸208.]

3. MONOPOLIES ⟸16—ANTI-TRUST LAWS—VIOLATION.

Where a railroad system becomes insolvent, the court does not, by taking possession of the property through its receiver and operating it, violate the anti-trust laws of the state or federal government, though the insolvent corporation acquired some of its mileage in violation of such laws.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 12; Dec. Dig. ⟸16.]

4. APPEAL AND ERROR ⟸101—DECISIONS APPEALABLE—ORDERS.

An order whereby a receiver of an insolvent railroad corporation was authorized to renounce a contract for the renting of terminal facilities is appealable; the decision being final in its nature, in view of the fact that such contract was practically ended.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 681–687; Dec. Dig. ⟸101.]

Appeal from the District Court of the United States for the Eastern District of Missouri; Walter H. Sanborn, Judge.

Application by James W. Lusk and others, receivers of the St. Louis & San Francisco Railroad Company, to disaffirm and renounce a contract with the Kansas City Southern Railway Company. From an order granting the application, the Railway Company appeals. Affirmed.

F. H. Moore, of Kansas City, Mo. (Samuel W. Moore, of Kansas City, Mo., on the brief), for appellant.

Edward T. Miller, of St. Louis, Mo. (W. F. Evans, of St. Louis, Mo., on the brief), for appellees.

Before CARLAND, Circuit Judge, and LEWIS and BOOTH, District Judges.

CARLAND, Circuit Judge. This appeal arises out of an application on the part of the receivers of the St. Louis & San Francisco Railroad Company, hereafter called the Frisco, to disaffirm and renounce a contract entered into February 28, 1898, between the predecessors of the Kansas City Southern Railway Company, hereafter called the Southern, and the predecessors of the Frisco, and other contracts supplemental thereto, whereby the predecessors of the Southern Company granted to the predecessors of the Frisco the right to use the depots and terminals of the predecessors of the Southern Company at a minimum monthly rental of $3,000 per month. The duty of the receivers to renounce the contract was approved by the District Court, and the Southern Company appealed.

[1-3] There is no question here but that the right of the receivers to renounce the contract is supported by sound administrative and business principles, conceding the use by the receivers of the terminals of the old Kansas City, Ft. Scott & Memphis Railroad, acquired by the Frisco in 1901, is lawful. The Southern, by its answer to the application of the receivers, and during the subsequent proceedings, contended that the only reason that the contract of 1898 had become burdensome to the Frisco was because of the acquirement by it in 1901 of the Kansas City, Ft. Scott & Memphis Road, which gave the Frisco terminals at Kansas City over its own rails thereby causing a diversion of traffic which rendered the use of the terminal facilities granted by the contract of 1898 largely unnecessary. It was further contended that the acquirement of the Ft. Scott & Memphis by the Frisco, owing to the ownership by the Frisco of the Kansas City, Osceola & Southern Railway, was in violation of section 17, art. 12, Const. Mo., and section 3081 of the Revised Statutes of Missouri for 1909, and also in violation of the act of Congress of July 2, 1890, relating to trusts and monopolies. It is therefore argued that, as the receivers were using the Ft. Scott & Memphis terminals, acquired by the Frisco in 1901, they did not come into court with clean hands in asking that the receivers be allowed to renounce the contract of 1898. The paragraphs which presented this defense were on motion struck out of the answer, and hence on this appeal whatever facts were contained therein which were well pleaded must be taken as true.

It is well not to lose sight of the question which the District Court had before it. It was simply whether the court in its discretion and as a business proposition would continue to perform the contract of 1898. The contract was not one binding on the receivers until renounced, but was one not binding on them until assumed under the direction of the court. In this condition of the case, to hold that the court could be asked to investigate the circumstances attending the acquire-

ment of the Ft. Scott & Memphis by the Frisco after the lapse of 14 years, not for the purpose of enforcing the Anti-Trust Law, but to enable it to decide whether it would as a matter of business assume the performance of the contract, would be to decide a matter irrelevant to the issue before the court. The Southern has no interest in the enforcement of the anti-trust laws, other than to use them to prevent, if possible, the disaffirmance by the receivers of the contract of 1898. Therefore we view with some moderation its allegation that the receivers do not come into court with clean hands. Moreover, the District Court took possession of the whole Frisco System through its receivers for a specific purpose. The whole system belonged to the Frisco. The court violated no anti-trust law of the United States or Missouri in taking possession of or in operating the Frisco System, as a reference to those laws will clearly show.

[4] The point is made that the order appealed from is not appealable. The order, of course, did not affect the validity of the contract between the Southern and the Frisco, but simply refused performance thereof on the part of the receivers. Still the effect of the order was to suspend a payment of $36,000 per annum on a contract which had 10 years to run before its expiration. We think we may take judicial knowledge of the fate of contracts made by an insolvent railroad company which passes into the hands of a receiver and are not assumed by him. Such contracts are practically ended. We therefore think the order was appealable. Felton v. Ackerman, 61 Fed. 225, 9 C. C. A. 457; General Electric Co. v. Whitney, 74 Fed. 664, 20 C. C. A. 674; Kirkpatrick v. Eastern Milling & Export Co. (C. C.) 135 Fed. 151.

Order affirmed.

CENTRAL TRUST CO. v. CHICAGO, R. I. & P. R. CO.

In re BRAND et al.

(Circuit Court of Appeals, Second Circuit. June 22, 1915.)

No. 316.

COURTS ⊂=264—FEDERAL COURTS—RESTRAINING SUITS IN STATE COURTS.

A suit by a trustee of a mortgage of a railroad company for appointment of a receiver and distribution of the property of the company among all its creditors, brought in the same District Court in which the trustee had previously sued to foreclose the mortgage, without praying for a receiver and without necessity for a receiver, is not ancillary to the foreclosure suit, but is independent of it, and the court may not in such suit enjoin the prosecution of actions in state courts instituted before such suit was begun.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 801; Dec. Dig. ⊂=264.

Enjoining proceedings in state courts, see notes to Garner v. Second Nat. Bank, 16 C. C. A. 90; Central Trust Co. v. Grantham, 27 C. C. A. 575; Copeland v. Bruning, 63 C. C. A. 437.]

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

Roger Foster, of New York City, for appellants.

Albert Rathbone and L. H. Freedman, both of New York City (Henry V. Poor, of New York City, of counsel), for respondent Central Trust Co.

White & Case and R. H. Hansl, all of New York City, for respondent Chicago, R. I. & P. R. Co.

Before LACOMBE, WARD, and ROGERS, Circuit Judges.

WARD, Circuit Judge. This is an appeal from an order of the District Court of the United States for the Southern District of New York denying the prayer of the petitioners for leave to intervene to vacate an injunction restraining them from proceeding against the defendant in certain actions brought by them as bondholders of the Chicago, Rock Island & Pacific Railroad Company in the City Court for the City of New York against it and others before this suit was instituted.

September 3, 1914, the Central Trust Company, as trustee of a mortgage of the Chicago, Rock Island & Pacific Railroad Company, covering the entire capital stock of the Chicago, Rock Island & Pacific Railway Company, began suit to foreclose the mortgage. There was no prayer for the appointment of a receiver, nor any need of one, because all the property covered by the mortgage was in the actual possession of the trustee. In this suit it was so proceeded that all the property covered by the mortgage was sold December 22, 1914, and a large deficiency judgment entered against the defendant January 15, 1915.

January 18, 1915, the Central Trust Company, trustee as aforesaid, instituted a suit against the same company in the same district, asking for the appointment of a receiver of the company's property and the distribution of the same among the complainant and the other creditors of the company. The defendant having admitted the allegations of the bill, a receiver was appointed, and, among other things, all creditors and stockholders of the defendant the Chicago, Rock Island & Pacific Railroad Company were enjoined from instituting or prosecuting any proceedings at law or in equity against it.

In the meantime, however, the petitioners, bondholders of the Chicago, Rock Island & Pacific Railroad Company, had begun eight actions in the state court. It will only be necessary to consider three of them, brought by Frances E. Hidden and Sadie E. Hidden, respectively, against the defendant company, as well as against the Chicago, Rock Island & Pacific Railway Company and various directors of each company, who were charged with negligence and malfeasance in office. The plaintiffs asked that the directors be required to account to the companies, and among other things that a receiver be appointed of the property of the Chicago, Rock Island & Pacific Railroad Company, and the same applied first to the payment of the plaintiffs' claims, and thereafter to payment of such other creditors as might prove claims. The complainants alleged that the Central Trust Company, trustee, and the officers of both the railroad companies have refused to bring the actions.

We do not think there is any necessity for the petitioners to intervene in the federal suits. If the injunction improperly restrains them, they are entitled to relief without becoming parties. The material question is whether the receivership suit begun in the federal court was ancillary to and therefore a part of the earlier foreclosure suit, or was new and independent. If it were ancillary, and such a remedy were necessary, the District Court had a right to protect its own prior jurisdiction by the injunction. Gunter v. Atlantic Coast Line, 200 U. S. 273, 292, 26 Sup. Ct. 252, 50 L. Ed. 477. On the other hand, if it were independent, jurisdiction of the state court, having attached before it was instituted, could not be disturbed by the District Court.

We think it was a new and independent suit. The foreclosure suit asked relief for the bondholders only against such of the defendant's property as was secured by mortgage. No receivership of the defendant's property generally could have been asked for in that suit, nor any relief for defendant's creditors generally. But in the subsequent suit a receivership of all the defendant's property for distribution among all its creditors was asked for and granted. The distinction is pointed out in Mutual Reserve Fund Life Association v. Phelps, 190 U. S. 147, at page 159, 23 Sup. Ct. 707, at page 709 (47 L. Ed. 987). Mr. Justice Brewer said:

"Again, the proceeding for the appointment of a receiver was not a new and independent suit. It was not in the strictest sense of the term a creditors' bill. It did not purport to be for the benefit of all creditors, but simply a proceeding to enable the plaintiff in the judgment to obtain satisfaction thereof, satisfaction by execution at law having been shown to be impossible by the return of nulla bona. It is what is known as a supplementary proceeding, one known to the jurisprudence of many states, and one whose validity in those states has been recognized by this court. Williams v. Hill, 19 How. 246 [15 L. Ed. 570]; Atlantic & Pacific Railroad Co. v. Hopkins, 94 U. S. 11 [24 L. Ed. 48]; Ex parte Boyd, 105 U. S. 647 [26 L. Ed. 1200]; Street Railroad Co. v. Hart, 114 U. S. 654 [5 Sup. Ct. 1127, 29 L. Ed. 226]. It is recognized in some cases in Kentucky. Caldwell v. Bank of Eminence, 18 Ky. Law Rep. 156 [35 S. W. 625]; Caldwell v. Deposit Bank, 22 Ky. Law Rep. 684 [58 S. W. 589]. This proceeding was treated by the state court as one merely supplemental in its character. It was initiated by the filing of an amended and supplementary petition. It was a mere continuation of the action already passed into judgment, and in aid of the execution of such judgment. As such it was not subject to removal to the federal court, the time therefor prescribed by the statute having passed. 24 Stat. 554; Martin v. Baltimore & Ohio Railroad, 151 U. S. 673–684 [14 Sup. Ct. 533, 38 L. Ed. 311]."

The plaintiffs in the actions in the state court who are asserting causes of action belonging to the corporations are neither stockholders nor judgment creditors of the Chicago, Rock Island & Pacific Railroad Company. It is to be presumed that court will dispose of all questions relating to the rights of parties in the actions there pending both justly and correctly.

The order granting the injunction is reversed.

HALL v. BUTLER.

(Circuit Court of Appeals, Sixth Circuit. June 30, 1915.)

No. 2641.

1. CORPORATIONS ⟸116—SALE OF STOCK—CONSTRUCTION OF CONTRACT—NEW CONTRACT.

Where complainant originally purchased certain mining stock out of the proceeds of a note executed by him to defendant and discounted on the credit of defendant as indorser, with an agreement that defendant could pay the note and acquire the stock at the cost price, but subsequent dealings between the parties confused their rights to the stock, and thereafter complainant wrote defendant, demanding payment of interest on the note, and stating that the complainant had no right or interest in the stock and was in no way liable for the payment of the note, to which letter defendant agreed, the exchange of letters created a new contract between the parties, and the complainant thereafter had no right in the stock.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 493, 494, 496; Dec. Dig. ⟸116.]

2. APPEAL AND ERROR ⟸719—ASSIGNMENTS OF ERROR—NECESSITY.

In a suit to determine the rights of the parties arising out of a mining stock transaction, where defendant had tendered certain stock to complainant, who refused it, error, if any, in considering such tender, because it was made conditionally, where there was no allegation that complainant was thereby excused from accepting the tender, is not an error which will be noticed without an assignment of error, under Sixth Circuit Court of Appeals rule 11 (202 Fed. viii, 118 C. C. A. x), authorizing the court at its option to notice a plain error not assigned.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2968–2982, 3490; Dec. Dig. ⟸719.]

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Ohio; William L. Day, Judge.

Suit by Robert C. Hall against Joseph G. Butler, Jr. Decree for defendant, and complainant appeals. Affirmed.

A. O. Fording, of Pittsburgh, Pa., for appellant.

W. W. Zimmerman, of Youngstown, Ohio, for appellee.

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

DENISON, Circuit Judge. Hall filed this bill in the court below against Butler to obtain an adjustment and settlement of their dealings concerning a block of mining stock. Butler answered, counterclaiming a balance due him, and on final hearing the court decreed that Hall should pay Butler about $1,315.

It was at first agreed between them that Hall should give his note to Butler for $10,000; that Butler should procure it to be discounted on his credit and send the money to Hall; that Hall should purchase therewith 100,000 shares of this stock; that Butler should have the optional right to pay the note himself and take the stock at this original price of 10 cents per share; but that until the exercise of such option Butler was accommodation indorser for Hall. The matter ran on through

several note renewals, and the relations between the parties became somewhat confused. Hall repeatedly urged Butler either to pay the note or assume the primary liability thereon and thereupon to take the stock; and, while Butler had not definitely agreed to do so, he had not refused. Thereupon the following correspondence ensued:

Hall to Butler:

"May 20, 1912.

"I herewith hand you statement of interest paid by me on my note for $10,000 which you discounted with your collateral to raise funds to pay 100,000 shares Tonopah Merger Mining Company stock, which notes were renewed from time to time; the total amount of interest paid by me being $1,205, interest thereon being $80.19, making a total of $1,285.19, due me this date, for which you will please hand me your note at 4 months drawn with interest, this being your obligation.

"In reference to my note of $10,000, maturing June 15th, it is hereby understood between us that you assumed full liability for the payment of said note. I am willing, however, to renew same from time to time as you may request, or you may continue to secure its discount for your convenience; it being understood, however, that I have no right nor title to any part of the 100,000 shares of Tonopah Merger stock and am in no way liable for the payment of the $10,000 note."

Butler to Hall:

"May 21, 1912.

"I have before me your letter of the 20th, handed to me yesterday. The same is entirely satisfactory. I am inclosing note, duly signed, for $1,285.19."

[1] We are satisfied that these letters make a complete contract, and that from this time forward the stock belonged to Butler, without any remaining interest in Hall, and the duty to pay the principal note and the interest note became absolutely fixed upon Butler. No here proved later hesitation or default on his part, either in taking care of the note or in their subsequent dealings concerning the stock, could restore any confusion of interest or any common interest which may have existed before the exchange of these letters; nor could such default or such conduct support the rescission which Hall claims he later made. There was neither fraud nor mistake. It results that Hall had nothing to protect by the filing of his bill; and it was rightly dismissed.

During the next two months after their May contract, the parties had dealings regarding 15,000 shares, parcel of the 100,000, and 5,000 shares, parcel of the 15,000. From these later dealings resulted the balance found by the trial court in Butler's favor.

[2] The record suggests the question whether Hall might be entitled to damages against Butler for failure to deliver the 5,000 shares as agreed; but Hall refused a tender thereof when it was made, and perhaps preferred to adhere to his claim of an interest in the main body of the stock rather than to accept a clearer right in the parcel. If the tender was made under conditions which excused Hall from accepting, there is no such claim in the bill, and there is no assignment of error raising the question. If there was any error—which we do not intend to intimate—it is not of such character that we ought to notice it without assignment, under rule 11 (202 Fed. viii, 118 C. C. A. x). City of Memphis v. St. Louis Co., 183 Fed. 529, 531, 106 C. C. A. 75.

The decree is in all respects affirmed.

RINEHART et al. v. VUKNIC.

(Circuit Court of Appeals, Third Circuit. July 26, 1915.)

No. 1930.

MASTER AND SERVANT ⇐279—ACTION FOR DEATH—SUFFICIENCY OF EVIDENCE —VICE PRINCIPAL.

Evidence in an action for the death of plaintiff's husband, killed by a cave-in while working in a trench as a laborer in the employ of defendants, *held* to justify a finding that the foreman was in charge of and directing the particular work in which decedent was engaged at the time of his death, and a vice principal, within Act Pa. June 10, 1907 (P. L. 523), expressly making a principal liable in such case.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 973-975, 978-980; Dec. Dig. ⇐279.]

In Error to the District Court of the United States for the Eastern District of Pennsylvania; William H. Hunt, Judge.

Action by Eva Vuknic against Harrison Rinehart and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Denna C. Ogden, of Greensburg, Pa., for appellants.

A. J. Eckles, of Pittsburgh, Pa., for appellee.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

McPHERSON, Circuit Judge. While the husband of Eva Vuknic was working at the bottom of a trench as a laborer in the employ of Rinehart Bros., contractors engaged in building a sewer in the borough of West Kensington, Pa., he was killed by the caving in of the earth, and this action charges that his death was due to the negligence of the contractors in not protecting the sides of the trench. The testimony was conflicting, but since the verdict we must take the facts to be as follows:

Vuknic was an ordinary laborer, and had been in this country about a year. During most of that time he had been employed by the Pennsylvania Railroad Company along its right of way, mainly in digging and shoveling earth in cuts and fills. He had been in the service of Rinehart Bros. only a short time, and indeed, as we gather from the evidence, he had been put to work in this trench on the very day of his death. The heavy part of the excavation was done by a machine, weighing from 8 to 10 tons. The machine was on wheels, and moved slowly forward on the surface as the work progressed. Attached to an arm projecting from the rear were the appliances for digging and for hoisting the dirt. While the machine was working it shook the ground, and on the day in question a bystander called the foreman's attention to the danger of doing the work "without a brace in it," and received the reply "that it was safe enough—it was all right." Vuknic's place of work was at the bottom of the trench, which was about 3 feet wide and not far from 11 feet deep. His business was to smooth off the ground and shovel dirt into the buckets that were carried to the

surface by an endless chain. The ground was a loose mixture of clay, sand, and small gravel, and the sides of the trench were in no way protected. About 300 feet of the sewer had already been dug, and as yet there had been no fall of earth. The work was being done in March, and at that season the ground was damp, and some water was running on the surface. About 11 o'clock in the morning a small quantity of earth fell from one of the sides, and Vuknic called the foreman's attention to that fact, saying that the place was dangerous. The foreman assured him that there was no danger, declaring that he was on guard, and would give proper warning if the need should arise. At dinner time Vuknic renewed his complaint, and once afterwards when another small quantity of earth fell in. On both occasions the foreman repeated his assurances, but a few moments after the last complaint a much larger quantity fell, burying Vuknic completely and causing his death.

The principal controversy at the trial was over the foreman's relation to the work; the plaintiff contending that he was a vice principal, and the defendants contending that he was merely a fellow servant. In our opinion he was a vice principal by the force of the Pennsylvania Act of 1907 (P. L. 523), which makes the principal liable for—

"the neglect of any person engaged as superintendent, manager, foreman, or any other person in charge of or control of the works, plant, or machinery; the negligence of any person in charge of directing the particular work in which the employé was engaged at the time of the injury or death," etc.

The evidence fully justified the jury in finding that the foreman was in charge of directing the particular work in which Vuknic was engaged at the time of his death, and the court gave adequate instructions upon this question, as well as upon the question of contributory negligence.

We have considered all the assignments of error, but find no other subject that calls for discussion. The case presented mainly questions of fact, and the trial judge dealt with them satisfactorily.

The judgment is affirmed.

STUBER et al. v. CENTRAL BRASS & STAMPING CO.

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

No. 2101.

1. PATENTS ⊂=26—"PATENTABLE INVENTION"—UNITING PARTS OF PRIOR DEVICE.

The uniting of the separate parts of a device in one does not amount to "patentable invention," unless it accomplishes a new result.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 27–30; Dec. Dig. ⊂=26.

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

2. PATENTS ⊂=328—VALIDITY AND INFRINGEMENT—HOSE-JOINER.

The Paradice patent, No. 758,099, for a hose-joiner, was not anticipated, and discloses patentable invention; *held* infringed.

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

Suit in equity by Joseph Stuber and Henry G. Kuck against the Central Brass & Stamping Company. Decree for defendant, and complainants appeal. Reversed.

D. W. Evans, of Peoria, Ill., for appellants.

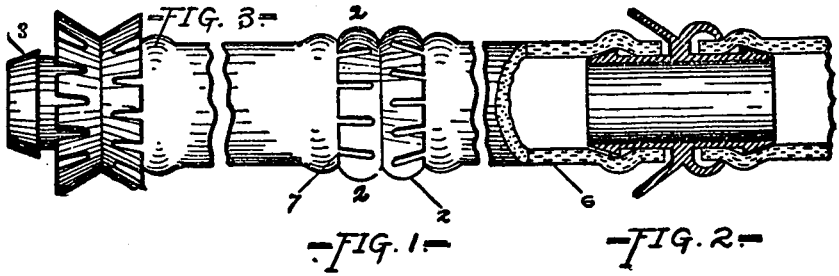
W. V. Tefft and John M. Elliott, both of Peoria, Ill., for appellee.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

KOHLSAAT, Circuit Judge. Appellants filed their bill to restrain appellee from infringement of patent No. 758,099, issued to F. H. Paradice April 26, 1904, for a hose connection, and assigned to them. The only claim of patent reads as follows, viz.:

A hose-joiner complete in one article consisting of an inner tube with enlarged spigot ends for insertion into hose to be joined, and an outer portion or shell which will surround the hose to be joined; the edges of said portion forming circles which are greater in diameter than any other part of the joiner and set at an angle relative to the longitudinal side of the inner tube of from 1 to 90 degrees and being slotted, substantially as set forth.

The device of the patent covers a method of uniting two sections of hose. Combined figures 1, 2, and 3 of the drawings of the patent are herewith reproduced:



The patent was held to be invalid by the District Court, which dismissed the bill for want of equity.

Appellee denies both validity of the patent in suit and infringement. By amendment to answer it sets up estoppel of appellants to assert infringement, upon the following state of facts: That prior to the filing of the bill, appellants licensed one L. R. Nelson and his assigns to manufacture hose couplers and menders under an application which afterwards eventuated in the issuance of letters patent, No. 946,703, to said Nelson and to appellants, the latter having obtained a one-half interest therein before issue, which license contract was assigned to appellee, who "is and always has been manufacturing all of its hose couplers and menders by the license of the complainant." The license contract, referred to in the amendment to the answer aforesaid, is set out, in substance, in the opinion of this court in case No. 2120, wherein appellee herein was complainant and appellants were defendants below,

herewith decided. For reasons stated in that opinion, we held that that contract was not assignable, and that appellee herein took no right thereunder, by reason of the attempted assignment, to manufacture the device of the Nelson patent. That being so, appellants are not estopped thereby from asserting infringement of the Paradice patent by appellee's use of the device of the Nelson patent. Both the answer and the evidence established the fact that the alleged infringing device was that of the Nelson patent. The device of the patent in suit will be readily understood from the drawings.

"The manner in which this mender is attached," says the patentee (line 82, p. 1), "is as follows: The end of the tube [*3*] is forced into the hose [*6*], the spigot causing the hose to expand and as it passes the spigot to contract, as shown at Fig. 2. The other end [of the tube] is then forced into the other section of hose which is to be joined. Then the points of the menders are hammered down as indicated at Fig. 3. When hammered down, the mender assumes the form as shown at Fig. 1."

The idea of the use of clamping fingers upon hose connecting devices was not new with Paradice. He had himself, as early as July 24, 1899, conceived a hose ends connector, which seems to have differed from the patent in suit mainly in providing the inner tube *3* with the spigot or enlarged ends shown in the present device, whereby there is presented a shoulder against which the ends of the fingers *2* abut when forced down upon the hose end. In the earlier patent the fingers simply clamped the hose end upon the inner tube, which was of even bore and exterior, and without any spigot end or other feature calculated to assist the fingers in clamping the hose end onto the inner tube. The use of fingers is also found in several patents of the prior art, as in Levering patent, No. 28,544, issued May 3, 1898, where four so-called fins are shown, and Wise patent, No. 631, issued in 1881, showing a somewhat indistinct means of holding the hose ends in place. The record discloses so little concerning this Wise patent that we are unable to determine its value as an anticipation. The drawings and the evidence are insufficient to that end. Dayton patent, No. 164,816, issued June 22, 1875, shows the hose ends clamped by an annular ring, as does Kennedy patent No. 213,577 Some of the patents show the inner tube roughened or screw-threaded to prevent slipping off of the hose ends, as in Kempshall patent, No. 512,252, of January 2, 1894, where two arms or fingers are used. The nearest approach to the patent in suit is found in patent No. 714,243, issued to Sargent November 25, 1902, for a hose coupling, in regard to which the patentee says (line 17, p. 1):

"The invention consists in a shank preferably tapered from the center toward the ends and provided with a centrally-disposed annular rib and adapted to be inserted into the adjacent ends of the hose-sections and two collars engaging the shank on opposite sides of the rib and with lugs spaced apart and extending in opposite directions and preferably interlocking and adapted to be forcibly engaged with the opposite hose sections."

[1, 2] The two collars, formed at the several ends of the tapered shanks, appear from the drawings to be little larger in diameter than the hose ends, so that when the hose ends are forced over them onto the upward tapering exterior of the shank, the hose shows little en-

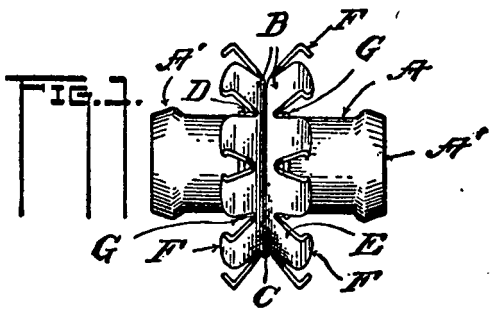
largement therefrom. In operation, the shank is provided with two independent pieces, termed "collars" in the patent. One of these is slid over the hose end. Then the end is thrust over the one of the two ends of the shank adjacent to and along the upward slanting arm of the shank to a point near the center. Then the collar is slipped over the beaded end of the shank arm until it crowds the hose end, much distended, against a central rib which encircles the center portion of the shank. Then the other end of the shank is similarly dealt with. These two collar pieces carry integrally spaced lugs or large fingers which interlace with each other. These lugs are then crowded down until the depending spurs at the end of the lugs are driven into the portion of the rubber hose opposite the collar of which the lug is an integral part, thus forming cross-holds both for the collars and the hose ends. It will be seen that this device is formed of three parts, viz., the shank and the two collars; whereas the device of the patent in suit consists of one integral article. Ordinarily it is not invention to unite the several parts of a device in one. Unless, therefore, some new result is accomplished in doing so, the combination of the three elements of Sargent's hose-mender into one would not, in a patentable sense, amount to invention.

It is appellee's contention that Paradice has simply combined the three parts of Sargent's device in rigid union as one implement. Several advantages over Sargent are said by appellants to be attained by their mender: (1) The substitution of one object for three effects very considerable advantage in handling and using, both in trade and in practice. (2) The Sargent lugs or finger ends do not crowd and hold the hose against the collars or buttons on the ends of the shank, thereby giving a firm grasp, as in Paradice patent, but, on the contrary, depend for strength upon the bite of the spurs of the lugs or fingers on the hose, which, at the point where they are applied, to wit, about one-half of an inch from their ends, is much attenuated by being drawn up over the enlarged center part of the shank. (3) The centrally arranged collars of Sargent are held together by the interlaced lugs which are carried by the two collar pieces, respectively, whereas the lugs or fingers of the patent in suit are carried by collars or rings which are rigidly attached to each other, and which receive no considerable help from the fingers. (4) Although Sargent says (line 12, p. 2), "Any required number of the lugs *18* may be employed, but generally four will be sufficient, as shown," yet it is apparent, from the fact that the lugs are much larger at their line of union with the collars than at their outer ends, that the fingers do not entirely surround the hose, as in Paradice, since their ends are widely separated. These propositions we find to be supported by the evidence.

From the foregoing enumeration of the patents of the prior art, it will be seen that Paradice, in the patent in suit, made provision for conditions which the prior patents of the Sargent type do not cover, especially in these respects, viz.: That his device is a unit; the enlargement of its collars at the ends of the even-bored shank; the close arrangement of its fingers forming an uninterrupted band about the

hose; and the firmness with which the fingers sink into the hose back of the end collars and abut thereon. All these are new in Paradice. Taking, therefore, into consideration the foregoing advantages, together with the presumption arising from the grant, we hold it to be a valid patent.

The alleged infringing device as manufactured by appellee is, as above stated, the device of the Nelson patent. It is clearly disclosed in Fig. 1 of the drawings of the Nelson patent here reproduced.



Nelson says, in the specification to this patent, that one object of the patent—

"is to construct a hose coupling of sheet metal and formed tubing whose members, though of separate parts, can be assembled as a single complete article, the parts of which are inseparable."

At line 74, p. 2, the specification reads:

"The connector is distinguished from the prior art in having enlargements or heads at its ends greater in diameter than the body of the tube and in having the spurs of the fingers lying just behind them so that the hose ends after being stretched or forced over said enlargements or heads and contracting to their normal diameters upon the body, will be engaged by the spurs."

In practice, the Nelson patent is a unitary device. Nelson made his hose mender in two parts or finger bearing collars, and then placed the two between the ribs *G* raised on the tube near its middle. Paradice also made his mender in two parts or collars, likewise carrying fingers integral therewith.

The foregoing is sufficient to show that the Paradice and Nelson devices are, for the purposes hereof, the same, the only difference being that Nelson's is made of sheet metal, sometimes with formed tubing, and has spurs upon the ends of its fingers. These latter were old in the art, and are found in Sargent and other patents.

Appellee was, at the time this suit was begun, infringing the patent in suit, and appellants are entitled to the relief prayed for. The decree of the District Court is reversed, with direction to sustain the patent in suit and decree infringement thereof by appellee.

BEACHEY & LAWLOR v. McWILLIAMS.

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

No. 2108.

PATENTS ⇐328—VALIDITY AND INFRINGEMENT—PANEL BOARD FOR ELECTRICAL POWER DISTRIBUTION.

The McWilliams patent, No. 920,490, for a panel board for electrical power distribution especially adapted for use in large office buildings and for a system of electrical power distribution, was not anticipated and discloses invention; also *held* infringed.

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois; Kenesaw M. Landis, Judge.

Suit in equity by Arthur C. McWilliams against Beachey & Lawlor. Decree for complainant, and defendant appeals. Affirmed.

Appellee filed his bill for injunctional and other relief, which was granted. This appeal involves claims 1, 5, 6, 9, and 10 of patent No. 920,490, granted May 4, 1909, to A. C. McWilliams for a panel board for electrical power distribution. The claims read as follows, viz.:

"1. A metering panel board having crossed permanent conductors, the conductors running one way being for the meter circuits and those running across them being for the consumption circuits, said conductors being adapted to be electrically connected at their points of crossing, one set of conductors being arranged alternately, so that one conductor leads toward one edge of the board for connection to its circuit, while the conductors on either side thereof lead toward the opposite edge of the board for connection to their circuits."

"5. A metering panel board having parallel conductors adapted for electrical connection to the consumption circuits, said parallel conductors being arranged alternately, so that one conductor leads toward one edge of the board, while the adjacent conductor leads toward the opposite edge of the board, and other conductors adapted for electrical connection to the meter circuits, said meter conductors being parallel to each other and arranged in a plane parallel to the plane of the consumption conductors, said conductors being adapted for electrical contact at their intersections substantially in the manner and for the purpose described.

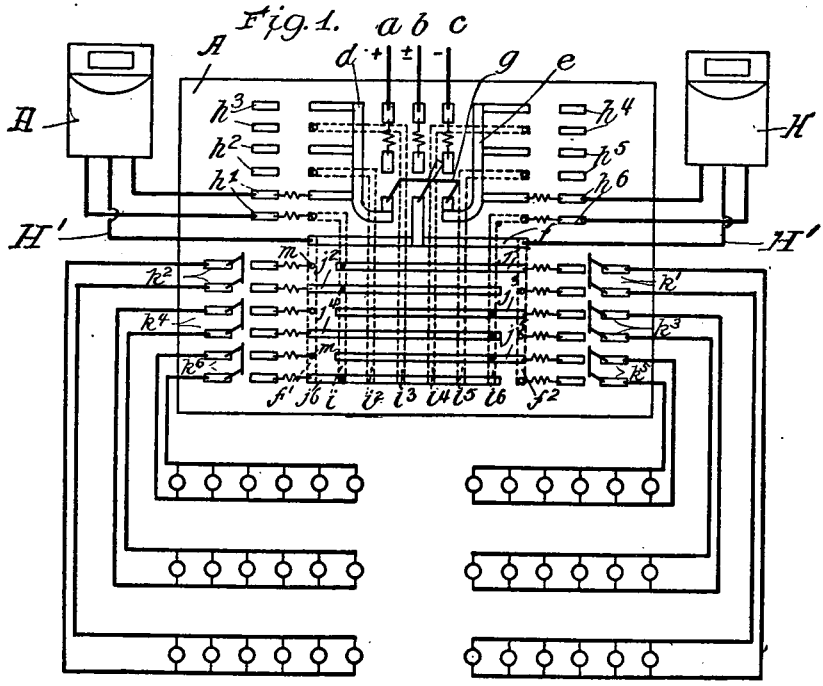
"6. A system of electrical power distribution including consumption circuits extending from districts of consumption to a panel board, bus bars on said board connected to said consumption circuits, meter circuits, other bus bars on said board connected to said meter circuits, means for interchangeably connecting the bus bars associated with the consumption circuits with the bus bars belonging to the meter circuits, one of said sets of bus bars being provided with terminals arranged along the two edges of the board, and connected to their bars alternately, substantially as described."

"9. A panel board having fuses arranged along the vertical edges of the board, a conductor bar running horizontally inward from each of said fuses and being arranged alternately so that one bar is associated with a fuse at one edge of the board and the adjacent bar is associated with a fuse at the opposite edge of the board, and another set of bars arranged at an angle to the first and having proper terminal connections, one of said sets of bars being for the consumption circuits and the other set for the meter circuits, said bars being adapted for electrical connection at their intersections.

"10. In a metering panel board, a set of meter circuit conductors and a set of consumption circuit conductors, the bars of one set being arranged at an angle to the bars of the other set and said bars being adapted to be interchangeably connected at their points of intersection, one set of bars being provided with terminals so arranged that adjacent bars are associated with terminals on opposite sides of the board."

Claims 1, 5, 9, and 10, it will be seen, call for a mechanical device—a metering panel board carrying various permanent appliances, such as crossed permanent conductors and the specific alternate arrangement of one set of permanent conductors; while claim 6 covers a system of electrical power distribution as a whole, implying everything necessary for a complete system, read in the light of the specification. It includes the panel board with its bus bars connected with its consumption and meter circuits, etc. "The object of the invention," says the patentee, "is to facilitate the interchanging of the consumption circuits with the meter circuits, so that any consumption circuit may be readily connected to any meter and as many consumption circuits as desired may be readily connected to any one meter. It is also an object to provide a compact, economical metering panel board usable in connection with such a system."

Figure 1 of the drawings of the patent is herewith reproduced:



The device is described in the specification, beginning at line 31:

"The apparatus here illustrated is arranged for a three-wire system, although the invention is equally applicable to a two-wire system. The supply mains *a*, *b*, *c*, which are respectively positive, neutral and negative, are adapted to be connected respectively to the positive, neutral and negative bus bars *d*, *f*, *e*, through the switch *g* in the ordinary manner.

"The parts are mounted on the board *A*, which may consist of marble or any other suitable insulating material. In the drawings are shown six pairs of meter circuit terminals h^1, h^2, h^3, h^4, h^5, and h^6, each one of which is adapted to have a meter *H* connected thereto. One of each pair of said terminals is connected to a main, the remaining terminal being connected respectively to one of the stationary conductors i^1, i^2, i^3, i^4, i^5, i^6, which in the present design are mounted on the back of board *A*, and arranged vertically. A third wire H^1 is shown to be connected from the neutral bus bar *f* to the meter *H* to furnish a shunt current for operating them in the customary manner.

"Arranged transversely to the meter circuit conductors i^1, i^2, i^3, i^4, i^5, i^6, are the consumption conductors j^1, j^2, j^3, j^4, j^5, and j^6, which in the present design are mounted horizontally on the front side of board *A*. Each of these last-mentioned conductors mounted on the front of the board is arranged to be fuse-connected to the adjacent terminal of a consumption circuit by means of a shallow binding screw *o* or other suitable device, which does not penetrate into the board or to the bars f^1 or f^2 behind, but merely holds the fuse in contact with conductors j^1, j^2, etc. Said consumption circuits may include lamps, as shown, or any other kind of load. Said bars f^1 and f^2 are permanently mounted on the board, preferably on the back thereof, and by means of the plugs or screws *m* which penetrate the board, are adapted to be fuse-connected to the remaining terminals of the pairs of consumption circuit terminals k^1, k^2, k^3, k^4, k^5, and k^6. Thus in each pair of consumption circuit terminals one is connected by a penetrating plug *m* to one of the mains (the neutral one in this instance), while the remaining terminal is adapted to be permanently fuse-connected by means of a binding screw *o* to one of the set of permanent consumption circuit conductors j^1, j^2, j^3, j^4, j^5, or j^6. By the word 'permanent' is meant such parts as are intended to be part of the apparatus itself in distinction to the wiring or other parts that are intended to be altered to suit requirements for rearrangement of metering. In consequence of the above, in each meter circuit in this three-wire design one terminal of each pair of meter terminals is connected to either the positive or negative supply main and the other terminal is connected to its respective conductor i^1 or i^2, etc.; while in each consumption circuit one terminal is connected to the neutral supply main and the other terminal is connected to one of the conductors j^1 or j^2, etc. Each one of the meter conductors i^1, i^2, etc., crosses each one of the consumption conductors j^1, j^2, etc., and therefore in order to complete the circuit through a meter and a consumption circuit it is only necessary to connect one of the conductors i^1 or i^2, etc., with a conductor j^1 or j^2, etc. In the present case, provision is made for this by aperturing the board *A* at the different crossing points to receive plugs or screws *n*, *n*, as best shown in Fig. 3.

"In operation, suppose it is desired to throw consumption circuit k^2 onto the meter circuit h^2, it is merely necessary to put in a plug or screw *n* at the intersection of conductors i^2 and j^2 as shown, among other combinations, in Fig. 2. If it is desired to substitute consumption circuit k^4 this may be done by removing the aforesaid plug and placing it at the intersection of conductors i^2 and j^4. All consumption circuits may be connected to meter circuit h^2 if desired by putting in a plug at each of the intersections of conductor i^2 with the conductors j^1, j^2, j^3, j^4, j^5, and j^6. In a similar manner any consumption circuit may be readily connected to any meter, and as many consumption circuits as desired may be connected to any one meter. It will be noted that no change of wiring of any kind is required, the entire operation consisting in simply inserting or removing one or more plugs as the case may be."

The device is particularly meant for use in connection with the lighting plants of large office buildings, where many light wires are required, which must often be placed in new combinations. The patentee has provided for economy of space by arranging his conductor bars alternately, so that one bar leads to a terminal at one edge of the panel board, while the adjacent bar leads to a terminal at the other edge of the board. This doubling up or staggered plan serves to greatly shorten up the length of the panel board from what its length would be were only one side employed—quite a desirable result in locations where space is to be economized. Switches and fuses may be included as parts of the permanent structure.

Prior to 1903 light terminals consisted only in exposed ends, which were both dangerous and confusing. On November 20, 1903, G. H. Jones filed his application for a patent panel board for electrical distribution, which was issued to him on April 12, 1904. By this device, the light wire ends were compactly gathered into a panel board wherein there are arranged meter and board fuse-protected contacts and the necessary conductors and conducting bus bars, switches, etc. The contacts, however, are made by manually fastening the proper wire end to its binding post and otherwise connecting up the parts by hand. This was a great improvement upon the prior art, but still left much exposed wire and some confusion. It did away with a great deal

of the inconvenience of the old wire-adjusting method and covered the general idea of housing the wire ends and forming a serviceable light wiring switchboard. McWilliams, two years after Jones' application, invented the combination of the patent in suit, wherein he did away with all exposed wires and eliminated confusion, by substituting for Jones' hand adjustment of the ends of the light wires an adaptation of what is termed the "Liviss Commutator," or the "Western Union Grid," shown in patent No. 90,270, granted to C. S. Jones May 18, 1869, for a telegraphic switchboard, in Sheehy patent, No. 284,247, granted September 4, 1883, for a switchboard for electric light stations, and in Farnham patent, No. 413,276, granted October 22, 1889, for central station calling apparatus. When asked whether there was any other difference in substance, between the G. H. Jones panel board and that in suit, than that Jones has the so-called jumper wires, while McWilliams has the cross-bars and connectors, appellee's expert, McElroy, replied: "Broadly speaking, and as I understand your question is intended, that is correct."

It was stipulated on the hearing that appellant's device was like that of appellee's. The only errors assigned go to the alleged error of the court in holding that claims 1, 5, 6, 9, and 10 aforesaid were good and valid in law, and in ordering an accounting.

Lincoln B. Smith, of Chicago, Ill., for appellant.
Howard M. Cox, of Chicago, Ill., for appellee.

Before BAKER, KOHLSAAT, and MACK, Circuit Judges.

KOHLSAAT, Circuit Judge (after stating the facts as above). The device of the patent in suit is the result of the effort of the patentee to meet more satisfactorily some of the exigencies growing out of the constantly increasing application of electricity to practical uses. The installation of light plants in large buildings involves questions of efficiency, convenience, and economy of space, not to mention attractiveness in appearance. The G. H. Jones patent made a great advance upon the prior art by compacting the wire ends upon the panel board and simplifying their adjustment when changes for lighting purposes were desirable. That patent seems to have solved the question of space and efficiency, but not that of safety and convenience, since it left the matter of connections, in large part, to manual adjustment, thereby exposing the manipulator to danger from shocks. By reason of disarrangement of some of the wires, there appears to have resulted both confusion and delay in the connecting up of the jump wires to their proper winding posts. It was with a view to eliminating these defects that McWilliams took out the patent in suit. He made no claim to the discovery of anything new in the movement or direction of electrical currents. He simply provided a device which would adapt itself conveniently to the already well known requirements of the currents, as disclosed in the prior lighting art and its allied arts. This much he accomplished over Jones; i. e., he made it possible for one not skilled in the art to adjust any number of light wires in such combinations as to suit the demands of any given situation without danger to the person, or to the building, or to the lighting plant. This had not been done before. The so-called "Liviss Commutator" had been used in the telegraphic art, but not in combination with a modern light system. Sheehy says:

"The object of my invention is to provide means for readily interchanging the connections of the respective generator and electric lighting circuits for

the purpose of placing one or more light circuits in connection with a single generator or of connecting two or more generators with a single electric light circuit and at the same time remove the danger to which the operator is frequently exposed, of receiving an electric shock by accidentally completing the circuit of the generator through his body, as well as to avoid the liability of the completion of a short circuit between two adjacent conductors of opposing potential through the framework and mechanism of the switchboard."

In this device there is shown a series of horizontal metallic conducting rods arranged in pairs, constituting the terminals of a series of electric generators, and a series of vertical conducting plates separated by air spaces from the former and constituting the terminals of a system of electric light circuits, in combination. In order to apply Sheehy's lamp circuit to any given meter circuit at the points of crossing of the rods and plates, it would be necessary, in the opinion of the expert, to connect the same at two points for each circuit, which seems to be the case. Moreover, no means is shown for supplying electrical energy to either set of rods or plates. The device fails to suggest a metering panel-board, and has only half the capacity of McWilliams' patent. It does not, in our judgment, serve to lead, nor has led, any mere mechanic to the device of the patent in suit, whose novelty consists in the combination of the elements therein disclosed, notwithstanding it had been public for more than 14 years.

The Farnham patent aforesaid, for a central telephone station calling apparatus, makes no provision for the metering of, nor clearly shows any consumption circuits. To assume such to exist would leave no provision for the supply of current to the board. In the upper left-hand corner of its drawing, Fig. 1, is shown what the patent calls a distributing switchboard. "By employing the switchboard *A* and varying the position of its plugs," says the patentee, "any desired generator can be connected with any particular section of switchboard, as the exigencies of the service may require, or several switchboard sections may be connected to one generator." Here, also, if double or two-sided electrical currents should be employed, it would be necessary to make two connections at two points of intersection. It hardly seems possible that mere mechanical skill could adjust this cross-bar switchboard to the Jones device. Indeed, we look upon the adaptation of the Leviss commutator to the G. H. Jones switch as a substitute for the jumper wires as involving some patentable degree of invention. It has added much to the safety and convenience of the Jones patent and the art. It cannot be deemed a mere aggregation, for the reason that its presence pervades the whole panel board system. It comes to us with all the prestige and presumption attending the government grant. It supplies a real need. It serves a new and beneficial purpose.

The decree of the District Court is therefore affirmed.

LAWLESS v. WOODS.

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

No. 4301.

PATENTS ⊂=328—VALIDITY AND INFRINGEMENT—SILO DOOR.

The Farrar & Clark patent, No. 952,876, for a door for silos, *held* not anticipated, valid and infringed.

Appeal from the District Court of the United States for the District of Nebraska; Thomas C. Munger, Judge.

Suit in equity by Mark W. Woods, substituted for Werter S. Farrar, against Christopher J. Lawless. Decree for complainant, and defendant appeals. Affirmed.

D. J. Flaherty, of Lincoln, Neb. (Charles A. Robbins, of Lincoln, Neb., on the brief), for appellant.

George E. Folk, of Chicago, Ill. (George P. Barton, of Chicago, Ill., and John M. Stewart, of Lincoln, Neb., on the brief), for appellee.

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

AMIDON, District Judge. This suit was brought to restrain the infringement of letters patent No. 952,876, issued to Farrar and Clark, and now owned by appellee, Woods. The trial court sustained the patent, found that claim 1 was infringed, and passed a decree restraining the infringement and awarding damages in the sum of $375. The defendant appeals.

The answer sets up the usual defenses of want of novelty, anticipation, and noninfringement. We think the device of plaintiff embodies patentable invention. It marks a real improvement in the art of constructing a door for a silo that can easily be moved out of the way, and when closed fits tightly so as to exclude air from the silage. It has the further advantage that the hinges serve the purpose of a ladder, an indispensable part of a silo. The defendant's structure is a rather poor copy of the plaintiff's. It seeks to avoid infringement by omitting the fastening appliance. The evidence shows clearly, however, that the defendant's structure contemplates that the purchaser will supply that appliance in some form. We therefore conclude that infringement is established. The case turns wholly upon questions of fact. We do not think any useful purpose would be subserved by a careful analysis of the several structures to show in detail the reasons for the conclusions at which we have arrived.

The decree of the trial court was right, and it is affirmed.

GRAY ENGINE STARTER CO. v. GRAY & DAVIS, Inc.

(District Court, D. Massachusetts. December 2, 1914.)

No. 555.

1. PATENTS ⊂=219—LICENSES—VALIDITY OF CONTRACT.
That the licensors in a contract granting an exclusive license under a patent represented that they were sole owners of the patent, and warranted that they had full right to grant the license, does not render the contract voidable by the licensee for fraudulent representation or breach of warranty, although the licensors owned only a part interest, where they had authority to make the contract from the other part owners, and where the licensee has had the benefit of the exclusive right granted.
[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 339–349; Dec. Dig. ⊂=219.]

2. PATENTS ⊂=213—CONTRACTS—ASSIGNABILITY—FALSE REPRESENTATION.
A contract granting an exclusive license under a patent, with a warranty of its validity and a covenant to protect the licensee against attack, in the absence of provisions therefor, is not assignable as a whole by the licensors; but an assignee may maintain an action to recover accrued royalties thereunder.
[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 315–320; Dec. Dig. ⊂=213.]

At Law. Action by the Gray Engine Starter Company against Gray & Davis, Incorporated. On demurrer to declaration. Sustained.

Storey, Thorndike, Palmer & Dodge, of Boston, Mass., for plaintiff.

Sherman L. Whipple and Currier, Young & Pillsbury, all of Boston, Mass., for defendant.

Ham, Frederick & Yont and Ralph H. Willard, all of Boston, Mass., for New England Casualty Co.

MORTON, District Judge. This is an action brought by the plaintiff upon a written contract made between the defendant and two third parties, named Light and Gray, respectively, and by them assigned to the plaintiff, for the recovery of royalties alleged to be due under said contract. The declaration alleges, among other things, that Light and Gray owned three-quarters of a certain invention; that one Bosson and one Spann together owned the other quarter; that letters patent for said invention were issued to said Light, Gray, Bosson, and Spann for said invention; that Light and Gray, being duly authorized by Bosson and Spann to act for them, entered into said contract with the defendant; that said letters patent and said contract relating thereto were duly assigned to the plaintiff; that the defendant had due notice of said assignment; that Light and Gray and the plaintiff have fully performed all their obligations under the contract; and that the defendant owes $45,000 to the plaintiff for royalties under said contract. By the contract, a copy of which is annexed to the declaration, it appears that Light and Gray represented therein that they were the sole owners of the invention, that they granted the defendant an exclusive license under it, and that they warranted that they had

full right to grant such exclusive license, and that the patent was valid, did not infringe any other patent, and would be protected by them against attack.

[1] The case is here on demurrer. The first two grounds of demurrer are that the contract was void because of misrepresentation which the defendant alleges appears in the declaration in regard to the ownership of the invention, and because by reason of that, and of the breach of warranty, which it also alleges appears in the declaration, it was absolved from performance of the contract. But, for aught that appears in the declaration, the defendant had full knowledge of the state of the title. The declaration contains nothing from which a fraudulent misrepresentation in relation thereto can be inferred. As to the alleged breach of warranty, it is very doubtful, to say the least, whether there is any breach. The warranty is "that they [Light and Gray] have full right to grant this exclusive license." The declaration avers that Light and Gray had authority from Bosson and Spann to enter into the contract so far as related to their interest. The declaration alleges, expressly or by inference, that the defendant has made extensive and exclusive use of the invention. It is difficult to see, therefore, how there is or can have been any breach of the warranty. Whether, if the defendant had been induced to enter into the agreement by fraudulent misrepresentations by Light and Gray as to the extent of their own ownership, or if there had been a breach of the warranty, the defendant could, on one or both of these grounds, avoid the payment of royalties that have accrued, it is not necessary to consider. Those two grounds of demurrer do not seem to me to be well taken.

[2] The third and remaining ground of demurrer is that the contract was not assignable, and that therefore the plaintiff cannot bring this action upon it. This presents a more difficult question.

The general rule is that when a contract involves personal confidence or skill, or obligations of such a nature as to import personal performance thereof by the parties, it is not assignable, but that when the obligation is simply to pay money or deliver goods, or has been so far performed that only the delivery of goods or the payment of money remains, the contract may be assigned. In Arkansas Smelting Co. v. Belden Co., 127 U. S. 379, 8 Sup. Ct. 1308, 32 L. Ed. 246, it was held that in a contract for the sale and delivery of ore the seller could not be compelled "to accept the liability of any other person or corporation as a substitute for the liability of those with whom it had contracted." See, also, Delaware County v. Diebold Safe & Lock Co., 133 U. S. 473, 10 Sup. Ct. 399, 33 L. Ed. 674; Boston Ice Co. v. Potter, 123 Mass. 28, 25 Am. Rep. 9; Burck v. Taylor, 152 U. S. 634, 14 Sup. Ct. 696, 38 L. Ed. 578. On the other hand, it was held in the House of Lords, in Tolhurst v. Associated Portland Cement Mfg. Co., [1903] A. C. 414, s. c. [1902] 2 K. B. 660, that a contract running for 50 years for the supply of chalk to the amount of at least 750 tons per week at 13.3d. per ton, and as much more as the buyer should require for the whole of its manufacture of Portland cement upon land near the chalk quarries, was assignable by it—three judges, Lords MacNaghten, Shand, and Lindley, constru-

ing the contract to mean the same as if it read "with the contractor, its successors and assigns, owners and occupiers of the works." The Lord Chancellor, the Earl of Halsbury, agreed to this conclusion, but "with very great hesitation." Lord Robertson dissented. In British Waggon Co. and Parkgate Waggon Co. v. Lea & Co. (1880) 5 Q. B. D. 149, a contract whereby 50 waggons were let for a term of years at an annual rent, the lessor agreeing to keep the waggons in repair, was held assignable. The court held that the repair of the waggons by the party to whom the contract was assigned was a sufficient performance of the contract.

The agreement in the present case expressly provides that the license may be assigned by the defendant company in case of a sale or consolidation of the business conducted by it. There is no provision for an assignment by Light and Gray, the other parties to the contract. The absence of such a provision, or of the word "assign," would not be fatal, if it appeared from the true construction of the contract that the parties contemplated that it might be assigned by Light and Gray. But the covenants in the warranty import personal and important liabilities on the part of the warrantors; and the defendant, in the absence of an agreement by it to that effect, cannot be compelled to substitute therein the plaintiff for Light and Gray.

It follows, I think, that the contract was not assignable as a whole, and that this action in its present form cannot be maintained. The Massachusetts statute relating to suits by assignees of contracts does not enlarge the right of partial assignment of contracts. Rev. Laws, c. 173, § 4. But the declaration alleges that royalties have become due under the contract, and it seems to me that the assignment may be given effect as an assignment of such accrued and unpaid royalties. This would require an amendment of the writ, so that the action should appear to be brought in the name of Light and Gray for the benefit of the Gray Engine Starter Company.

The demurrer is sustained, with leave to the plaintiff to move to amend the writ and declaration, if so advised.

HIRAM WALKER & SONS v. GRUBMAN et al.

(District Court, S. D. New York. March 31, 1915.)

1. TRADE-MARKS AND TRADE-NAMES ⇐70—UNFAIR COMPETITION—IMITATION OF CANADIAN WHISKY.

Complainant and two or three other Canadian manufacturers make and sell in the United States whiskies which are different in color, composition, body, and flavor from any made in the United States, and which are known by the generic name of "Canadian" whiskies. Complainant is the largest seller of such whisky under its registered trade-name "Canadian Club." Defendants make and sell in the United States whiskies which are an imitation in color and flavor as near as may be of the Canadian. *Held*, that while defendants have the right to make and sell such whisky, it should be so distinguished that purchasers will not be deceived and buy it as the genuine Canadian; that a label thereon "Canadian Type Whisky" printed all in type of the same size and color and preceded by the maker's

name, is within his rights, but that another using the same name, but with the words "Canadian" and "Whisky" printed in red letters on a white ground with the word "Type" in black letters within a black circle, or any other form of label which gives undue prominence to the word "Canadian," is not within the maker's rights and their use constitutes unfair competition as against complainant.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 81; Dec. Dig. ⟸70.]

2. TRADE-MARKS AND TRADE-NAMES ⟸70—UNFAIR COMPETITION—DISTINGUISHING IMITATION GOODS.

When one is frankly putting out an imitation he should be held very strictly to the requirement of distinguishing his goods from the original, and any doubt must be resolved against him.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 81; Dec. Dig. ⟸70.]

3. TRADE-MARKS AND TRADE-NAMES ⟸93—UNFAIR COMPETITION—INJUNCTION.

A complainant who wishes to enjoin another from selling under its true name a commodity which he has the right to make and sell, on the ground that it is an imitation of complainant's product, must go further than merely to show that at present defendant's product is not known. He must show that defendant will not, in fact, make known as he proposes the fact that it is an imitation, and that the result will be to pass off the substitute as the original.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 104–106; Dec. Dig. ⟸93.]

4. TRADE-MARKS AND TRADE-NAMES ⟸72—UNFAIR COMPETITION.

Under evidence showing that much the greater part of imitation Canadian whisky made in the United States, or "Canadian Type" whisky, when bought by retailers in the wood, is used for refilling bottles which originally contained genuine Canadian whisky and are so labeled, wholesalers of such whisky in the wood are chargeable with contributory fraud and with unfair competition with the makers of genuine Canadian whisky, unless before making the sales they have reasonable assurance that the buyer will not use the whisky in substitution for the genuine.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 83; Dec. Dig. ⟸72.]

In Equity. Suits by Hiram Walker & Sons against Jacob H. Grubman, doing business as the West Shore Wine & Liquor Company, Maurice Lewis, and Albert Berge; against Samuel Luria and Charles A. Schreiber; against Henry Eising, Edwin Eising, and Emil Steinbarter, doing business as the E. Eising Company, Charles Spanton, and Alice Schoenholz; against Adolph Prince & Co., a New York corporation, Adolph Prince, Felix Prince, and Leonard Prince; against Louis M. Goldberg and Alexander Schwettenberg; against the Cook & Bernheimer Company, a New York corporation, Meyer A. Bernheimer, Morris Cohen, Louis R. Buchbee, George Corrigan, John Hahlers, and Charles Soyge; against Picker Bros., a New York corporation, Frederick Picker, Isadore Picker, David Gottheimer, and Charles Klein; against James D. Smith and Sydney Darling, copartners doing business as Smith & Darling; against the Bowling Green Distilling Company, Christian Plumb, John Hank, Edward Smith, James Lynch, and Michael Purcell; against Edwin Hahn, Louis Hessel, David Hunter, and William Funke; against Philip Goldberg, Louis Goldberg, and Samuel Goldberg; against David Kahn, Louis Pol-

lak, and Joseph Beck; against James M. Bell & Co., a New York corporation, James M. Bell, Gustave Spreckle, Jean Spreckle, George McFarland, and Edward Flanagan; and against Morris Ritterman, David Kraemer, and John Ring. On final hearing. Decrees for complainant.

See, also, 222 Fed. 478.

These are 14 cases brought by the same plaintiff against different defendants for unfair competition in the sale of whisky. The plaintiff alleges that it is the maker of a well-known brand of Canadian whisky which has been sold in the United States for more than 25 years under the title "Canadian Club," a name registered in the Patent Office since 1891, and that the defendants, who are all wholesale liquor dealers in the city of New York, were engaged in putting out a whisky made in imitation of the plaintiff's under the name "Canadian Type" whisky, which was an infringement of the plaintiff's rights, and were also selling such whisky in bulk in the wood to saloon keepers for the purpose of refilling the plaintiff's bottles in substitution for the plaintiff's whisky. The bills contain the usual prayer for an injunction and accounting. The defendants deny the allegations of wrongdoing, and allege that there is a type of whisky known as "Canadian" which they have the right to imitate, and which they do imitate and sell under the name "Canadian Type" whisky.

The cases were heard all together, though not formally consolidated, and upon the hearing the following facts developed:

In the United States three or four brands of whisky made in Canada have been sold for many years. By far the largest sale of these whiskies is the plaintiff's with its "Canadian Club," the next best known being Seagram's and Gooderham & Worsts'. Some sale was also shown of a Canadian whisky known as Wiser's of the same general character. These whiskies are all light in color, and made out of corn and rye in a many-chambered still, which eliminates a larger part of the essential oils that give flavor, rendering them milder to the palate, or as the phrase is, "light-bodied." No American whiskies are like these three brands in color, though some of the Bourbons approach them; none have a flavor like them, though many are not far off. There are also white Canadian whiskies of an entirely different character, which need not be considered. For many years prior to the enactment of the Pure Food Act in 1906, American whiskies were sold under the name "Canadian," with various suffixes, e. g., Canadian Malt, Canadian Wheat, Canadian White, some of which imitated the three brands in question either in color or "body." In 1906 it became illegal to sell American whisky under the name "Canadian," and all these whiskies had to conform to that requirement. Those American imitations of the three Canadian brands here in question thereupon changed their name and have for some 8 years or more gone under the name "Canadian Type" or "Canadian Style." These are and were from the outset frank imitations of the whisky sold by the plaintiff, Seagram and Gooderham & Worsts, and their sale, which has reached very substantial quantity, is justified upon the right of the distillers to make and sell any whisky, provided they honestly disclose what it is. The largest distillers of this imitation Canadian whisky are Corning & Co., of Peoria, Ill., the National Distillers Company of New York, and Clark Bros. Corning & Co., the largest distiller, sells it in the wood to wholesalers, and furnishes them labels containing the words "Corning's Canadian Type Whisky." The wholesalers, or owners of what are called "Family Liquor Stores," sell this to customers in substantial quantities in glass, either in quart or pint bottles, and quite as large, if not larger, quantities, to saloon keepers in the city of New York. There was a good deal of testimony regarding the demand for this whisky over the bar by the drink, the plaintiff asserting that there was no demand for it by the name "Canadian Type Whisky," and the defendants asserting the contrary. An analysis of that testimony will be taken up in the opinion.

In May, July, and August of 1913 the plaintiff employed detectives to go to the defendants' places of business and there to represent themselves as

saloon keepers to make purchases of Canadian Type whisky, and to see how far the defendants would advise them to use this whisky to refill Canadian Club bottles. Nine of the cases were stipulated to abide the event in the case against Philip Goldberg, and in this case the plaintiff claims to have made four visits, the first two in May and the last two in July and August. Purchases were made in May and in July of the Canadian Type whisky in five-gallon kegs, which is the smallest amount the defendant was permitted to sell. One question, sharply litigated, was as to the talk at the time of purchase, the plaintiff's witnesses asserting that the defendants had urged them to use this whisky in refilling Canadian Club bottles and had told them how it could be done, the defendants saying that although the plaintiff's witnesses had said that they meant to use the whisky to refill, they had discouraged any such practice. Six men in all visited Goldberg's store, four detectives of the Thiel Agency and two corroborating witnesses. They made reports in all cases either on the same or the next day on which the interviews took place, and these reports were sent to the agency headquarters, where they remained until shortly before the trial. In the case of the two corroborating witnesses, who were not professional detectives, the reports were not signed by them, but were written out by the daughter of one of them, a woman 30 years old, at their dictation, and at their request she signed their names. The reports with the testimony of the witnesses and the receipted bills for the purchase of the whisky constitute all the plaintiff's proofs. The defendants answer by their own oaths, admitting the purchases, but denying the incriminating advice put into their mouths.

In the other four cases which were tried, two of the detectives who appeared against Goldberg took no part. The proof consisted of the testimony of the two others and of the two corroborating witnesses. It was of the same general character, purchases of Canadian Type whisky, corroborated by documents and oral testimony that the defendants had advised them to refill bottles. The defendants in each case deny giving the advice to refill, but in most cases admit that the buyers, who represented themselves as saloon keepers, said that they purposed refilling. The testimony, so far as particular, is considered separately in the opinion.

George Gordon Battle, of New York City, and Alfred Lucking, of Detroit, Mich., for plaintiff.

Joseph M. Proskauer, Arthur L. Strasser, and Norman P. S. Schloss, all of New York City, for defendants.

LEARNED HAND, District Judge (after stating the facts as above). [1] The defendants had the right to imitate the plaintiff's whisky as closely as they could, in color, in flavor, in composition. What they made they might sell; the only limitation being upon the name and dress under which they sold it. Had they called it "Imitation Canadian Club," there could have been no quarrel; the first question is whether they might call it "Canadian Type," assuming that the final consumer is adequately advised that the whisky is in fact Canadian Type. That question breaks into two: First, whether there is a Canadian Type; second, and if there is not, whether consumers might be misled into drinking whisky, called Canadian Type, supposing it was Canadian Club. I think that there may fairly be said to be a Canadian type of whisky in this sense, that these three brands are all substantially alike in color, mode of manufacture, and resulting taste to the palate, and that no other whiskies made in America are so much like them as they are like one another. I base this chiefly upon the color, but color is a most important quality in a beverage; I base it also upon the testimony relating to the mildness and lack of "body,"

which was not contradicted by the plaintiff. While, therefore, there are other whiskies made in Canada which have not this color or flavor, but which are like other whiskies made elsewhere, it seems to me that it may fairly be said that the words "Canadian Type" convey the meaning that the whisky is of the kind represented by these three Canadian whiskies. It follows that as any one may make them, he may sell them under that name if the consumer knows that he is getting the type and not the Canadian whisky itself.

[2] So far as concerns the sale by wholesalers and retail liquor shops in the bottle, I think that a label like Corning's present one is permissible. The word "Type" is of the same size as the other words; it is not disguised; it is in the same script. I cannot see that a wholesaler should be required to do more than advise the consumer of the contents of his bottle in that form. I do not think that the label of the Bowling Green Distilling Company is a proper one; the word "Type" is large enough, but it seems to my eye too much like a pattern to be effective at a distance. Whether designed or not to conceal the word, the contrast between the red letters "Canadian Whisky" upon the white background and the black letters "Type" within the black circle are in fact likely to result in the sale of the whisky as genuine Canadian whisky, which it is not. No conceivable reason appears why the word "Type" should have been so differentiated, unless it was to suppress it. Similarly, the Canadian Pacific label appears to me improper. The meaning of that title is not clear; it suggests either that it is the same whisky as sold to the Canadian Pacific Railroad or manufactured for it. This inference is much fortified by the shields bearing the words "Canadian Pacific" and surmounted by the beaver, the well-known heraldic animal of Canada. There can be no doubt that the label suggests Canadian manufacture. Goldberg's other label, Exhibit No. 11, seems to me objectionable because of the small size of the word "Type." When one is frankly putting out an imitation one should be held very strictly to the requirement of distinguishing one's goods from the original. Any doubt must be resolved against the imitator; he assumes the duty of making clear that his imitation is in fact not the real article.

I think that the plaintiff may complain of the sale of any whisky of this kind labeled "Canadian." It is true that it calls its whisky "Canadian Club," but it is the largest seller of this kind of Canadian whisky, and when a consumer asks for Canadian whisky, he means either plaintiff's or one or two other distillers'. To give him an American whisky is to divert him from the plaintiff's trade, not certainly, but probably. Where the field is so limited and the plaintiff occupies so large a part of it, a diversion of the demand from Canadian whisky is enough of a risk to the plaintiff's trade to justify an injunction. Goldberg's Canadian Pacific label is not so clear; while it probably means a Canadian whisky, it certainly means a kind of Canadian whisky which is not the plaintiff's, at least to any one who reads. While I dare say that any demand for it may arise from the popularity of the plaintiff's whiskies, I find it difficult to suppose that any one could buy it under that name with the idea that he was getting the plaintiff's

whisky. In this respect the addition of the word "Pacific" serves to create a species of Canadian, which, though itself spurious, is distinguished from the genuine species of the plaintiff. The plaintiff may therefore take a decree against both the labels first mentioned but not the last.

[3] In connection with the labels the question arises of an existing demand for Canadian Type whisky in bottles; the plaintiff contending that all such whisky, no matter what the label, really passes off as Canadian Club or some other Canadian whisky. No doubt there could arise cases where no amount of labeling would serve to advise the trade; the conditions of consumption might be such that any goods made in imitation would be reasonably certain to pass for the original. However, such conditions must be abundantly proved. In the case at bar they have not been. There is undoubtedly some honest demand for the whisky in retail liquor stores, and the plaintiff's efforts to show that there was none were not successful. Yet it would have made no difference, in my judgment, if there had been none in fact. A man who wishes to stop another from selling under its true name a commodity he has the right to make and sell must go further than merely to show that at present it is not known. He must show that the proposed seller will not in fact make known that it is an imitation in the way he proposes; that the result will be to pass off the substitute. Even if there were no existing demand for Canadian Type in bottle, I see no reason to say that when sold with an honest label, it will necessarily pass as Canadian Club. I will not say that dishonest dealers may not use such labels to the plaintiff's injury, but none of the defendants have been shown to do so with the bottled whisky. If the consumer buys of the liquor store bottles with such labels as Corning's, the chance of his buying it for Canadian Club seems to me one inherent in the right to sell the American whisky at all. Of course, I might insist upon some grotesque exaggeration of the fact that the American article was an imitation, but courts have not done this, and if it should be necessary, it can only be after some proof. Therefore I hold that the defendants may sell Canadian Type whisky in the bottle to the consumer with Corning's label or its equivalent.

[4] The next question is of the sale of Canadian Type whisky to saloon keepers in the wood. I am satisfied that the demand for this whisky over the bar is of the most trivial character. The defendants brought forward 11 (not 12, for Rand had no bar) witnesses to prove this demand against some 14 of the plaintiff. Of these 11 Nibur and Herts had a trade wholly among blacks, and it is very hard for me to believe that they ever ask for Canadian Type whisky. The phrase is awkward, and would come very hard to most men who are not trained to it; I should be disposed to accept their testimony as covering a small minimum of cases. Maronna and Lambienti knew only Canadian Pacific, which I have already found to be a misleading name, though not injurious to the plaintiff. Blois had heard of Canadian Type in the past, but now knew only Canadian Pacific. Raichle's testimony was somewhat confused; he had known of Canadian Type for 16 or 17 years, which was certainly untrue. Now he was selling a whisky

under the name Elmont, though how he sold it is not clear. It must be accepted that he sold to some who asked for Canadian Type. Bartels sold his Canadian Type whisky as Canadian whisky or "his own Canadian," which was certainly a deception and prejudicial to the plaintiff. Pottberg had a bar where people helped themselves, but he also sold Canadian Type when they asked for a drink of Canadian whisky, which is a fraud. Sternberg seems to have sold honestly. Tischler knew only a slight demand. Newgold was either an entirely reckless or a dishonest witness. Probably he had a small demand.

The upshot of all this is that there probably has arisen a very small and in my judgment an almost negligible bar demand for Canadian Type whisky. Along with it has grown up a fraudulent substitution of which we get some evidence in cases like the Canadian Pacific and Bartels and Pottberg. I am satisfied that bar drinkers will never in any quantity ask for Canadian Type whisky; there will be here and there some particular person who can be educated to it, but for the great mass of consumers the whisky will pass off as Canadian whisky. The plaintiff's testimony seems to me to show that there is nothing of the sort generally known.

Having found the fact as stated, the first question is whether the whole bar supply becomes illegal. I think not. The whisky is capable of an honest use, and the mere purchase of it by a saloon keeper is not certain evidence that he means to use it dishonestly, though I am convinced that he generally does so use it. The mere possibility of fraudulent use is of course not enough to prevent all sales (Rogers v. Wm. Rogers Manufacturing Co., 70 Fed. 1019, 17 C. C. A. 575 [C. C. A. 2d Cir.]), yet if the inevitable use of the article sold be a tort, or if the buyer announce his purpose of so using it when he buys, then the law, in my judgment, regards the seller as a contributor to the tort. The nearest analogy in the law is the doctrine of contributory infringement of patents. It has long been settled that the selling of part of a patented invention which can be used only in violation of the patentee's rights is an infringement. Wallace v. Holmes, 9 Blatch. 65, Fed. Cas. No. 17,100; Heaton Button-Fastener Co. v. Eureka Specialty Co., 77 Fed. 288, 25 C. C. A. 267, 35 L. R. A. 728; Rupp & Wittgenfeld Co. v. Elliott, 131 Fed. 730, 65 C. C. A. 544; Leeds & Catlin v. Victor Talking Mach. Co., 154 Fed. 58, 83 C. C. A. 170, 23 L. R. A. (N. S.) 1027; Id., 213 U. S. 325, 29 Sup. Ct. 495, 53 L. Ed. 805. When the article may be used honestly or in violation of the plaintiff's rights another question arises. Should knowledge of how the buyer means to use the goods be enough? That was directly decided in the affirmative in Henry v. A. B. Dick Co., 224 U. S. 1, 32 Sup. Ct. 364, 56 L. Ed. 645, Ann. Cas. 1913D, 880. There while Mr. Justice Lurton agreed that there must be some intent and purpose that the article shall be illegally used, he thought it enough when the only fact certified was that the seller sold with the expectation that the buyer would use it to infringe. Bauer v. O'Donnell, 229 U. S. 1, 33 Sup. Ct. 616, 57 L. Ed. 1041, 50 L. R. A. (N. S.) 1185, Ann. Cas. 1915A, 150, however it may affect Henry v. Dick Co., supra, does not touch this part of it. This case has been recognized by the Circuit Court of Appeals of this circuit

as deciding that knowledge was enough. Crown Cork & Seal Co. v. Brooklyn Bottle Stopper Co. (C. C.) 172 Fed. 225: Id., 200 Fed. 592, 119 C. C. A. 20. Judge Ward so interpreted it, when sitting alone in Rajah Auto Supply Co. v. Rex Ignition Supply Co. (D. C.) 209 Fed. 622. Crown Cork & Seal Co. v. Brooklyn Bottle Stopper Co., supra, was particularly analogous to the case at bar, because the possible honest use was of a very limited character. In Kalem Co. v. Harper Bros., 222 U. S. 55, 32 Sup. Ct. 20, 56 L. Ed. 92, Ann. Cas. 1913A, 1285, the films apparently had a possible innocent use, but the defendant had invited a guilty use, so that the case is hardly an authority.

On the other side is unquestionably a decision of Judge Wheeler in Hostetter v. Van Vorst (C. C.) 62 Fed. 600. Apparently the defendant had assented to the suggestion, though he himself had not suggested, that the imitation might be sold as an original. The case is certainly in point here, but it was decided before Henry v. Dick Co., supra, and besides especially in this field the law has grown much since that time. Another case is the decision of Judge Wallace in Hostetter v. Fries (C. C.) 17 Fed. 620, over 30 years ago. The facts are somewhat hard to ascertain from the report, and certainly a part of the opinion is not now the law when applied to this subject-matter:

"Even if it could be assumed that they [the defendants] contemplated the further wrongdoing of the retailers, the law does not visit motives or intent unaccompanied by a wrongful overt act."

It does not appear that the jobbers to whom the defendants sold themselves in turn sold only to fraudulent retailers. If the defendants are to be understood, as in parts of the opinion seems to be suggested, as having actually shown the jobbers how to disguise the bitters for the plaintiff's, it goes beyond what I should suppose ever was permissible. Kalem Co. v. Harper Bros., supra.

Another analogy is in the law of contracts where there is and always has been great confusion. An illustration of the refinements which may arise is to be found in two decisions of the Massachusetts Supreme Court in the same case, Graves v. Johnson, 156 Mass. 211, 30 N. E. 818, 15 L. R. A. 834, 32 Am. St. Rep. 446; Id., 179 Mass. 53, 60 N. E. 383, 88 Am. St. Rep. 355. The seller finally recovered because he only divined that the buyer was to sell the liquor illegally without being told, and also because he was indifferent to it and did not desire it. Tracy v. Talmage, 14 N. Y. 162, 67 Am. Dec. 132, lays down the rule, probably more generally accepted in the United States than any other, that mere knowledge of the buyer's illegal purpose will not defeat action for the price. Comstock, J., on reargument (page 215) suggests that the rule would be different if the purpose was immoral as well as illegal; and it is generally said that if the purpose be a heinous crime, the seller may not sue. Hanauer v. Doane, 12 Wall. 342, 20 L. Ed. 439, was, it is true, a case of treason and on the facts not applicable, but Mr. Justice Bradley made the same distinction as Judge Comstock in Tracy v. Talmage, supra, saying that recovery could be had only when the case involved malum prohibitum, or "inferior criminality." Ernst v. Crosby, 140 N. Y. 364, 35 N. E. 603, was a case where the purpose

was to run a brothel, an inferior crime, but not merely malum prohibitum. The later English cases have perhaps gone to greater lengths than our own. Langton v. Hughes, 1 M. & S. 593, Lightfoot v. Tenant, 1 B. & P. 551. While the refilling of bottles is only an inferior crime, it is against common honesty in a very different sense from selling liquor in violation of prohibition laws, which has been the occasion of many cases like Graves v. Johnson, supra, in our books. The sale of an imitation liquor which the buyer has announced that he means to use to defraud another might therefore raise no obligation to pay the price.

However, I do not think that it is necessary to consider nicely just what is the law on contracts, because it is quite plain that different considerations control those cases and this. When the seller of an innocent article knows that the buyer means to use it in wrong of a third person, but nevertheless delivers the goods, his delivery is an act the natural consequence of which to his own knowledge will produce injury. It is true that the injury can arise only through the mediation of the buyer's own will, but that would not ordinarily affect legal responsibility. The sale is the seller's voluntary act, and he is responsible for its known results, unless he can show an excuse. The only excuse here is his right to sell, which is of course conditioned upon the general social results of its particular exercise. While it would be an unfair condition to impose upon that right to say that the seller must inquire into, or follow up mere intimations of the buyer's purposes, there is, in my judgment, nothing unfair in imposing some duty of inquiry upon him when it is reasonably certain that the buyer will commit a tort. On the other hand, to declare a contract void between buyer and seller when the buyer announces his purpose to use the thing illegally certainly does not raise the question of the seller's responsibility to the injured person. In such cases the law forfeits the seller's right to the price because of his misconduct, which may well require a greater degree of participation than would fasten him with civil responsibility to the injured party. Such forfeiture is not in aid of any reparation; it arises from the law's refusal to give any relief to a wrongdoer. It does not follow that every wrongdoing which creates a civil liability will be grave enough to provoke such a forfeiture. I cannot therefore accept the same test as might control if the suit were by the sellers for the price of the liquor, whatever that test may be.

I therefore conclude that to sell Canadian Type whisky to one who announces that he means to use it for refilling Canadian Club bottles is a tort. Of this tort P. H. Goldberg was guilty upon his own admissions. His statement that he told them he did not recommend or advise such a practice did not fulfill the measure of his duty. I think he was obliged reasonably to assure himself that they proposed to sell the whisky honestly before he was free to sell. The exact terms of such an assurance it is impossible to fix in advance; the buyer's merely formal, and obviously colorable, assent would not be enough, but clearly the seller's duty does not extend to a supervision over the buyer's trade. On the other hand, I think that, considering the character of the bar demand, the duty of the seller should not depend

upon the buyer's actually announcing that he means to refill bottles. The facts in this case show that the great proportion of this whisky is sold in substitution, and I can see no reason why any of the defendants should shut their eyes to facts which must be clearer to them than any one else. When they sell Canadian Type whisky to saloon keepers they know that in nine cases out of ten, probably in much greater proportion, the whisky must be used to pass off in one form or another. I cannot think that this is a mere possibility which they may disregard; I think it imposes upon them the same active duty of assuring themselves before sale that the sale in question is one of the few which will result in honest trade. Prima facie such purchases are a fraud; a seller should take some pains, when that is so, to see to it that he is not abetting such a fraud. Therefore a decree will go in all the cases for an injunction against sales of Canadian Type whisky to saloon keepers in the wood, except when the seller shall receive reasonable assurance that the buyer will use it honestly. An accounting will also be allowed for past sales upon the same basis.

This disposition of the cases makes unnecessary any decision upon the conflict of evidence between the detectives and the defendants. Against the event, however, that the Circuit Court of Appeals may take a different view from mine regarding the duty of a seller under these circumstances, and in view of the fact that I have seen the witnesses, I shall discuss the evidence upon the assumption that the defendants may be enjoined only from actively counseling the substitution of Canadian Type whisky for Canadian Club. In what cases have they actually done this? At the outset I think we should remember that, as I have said, the great proportion of bulk sales to saloon keepers must be known by the defendants to result in a fraud. When the question arises of the probability of the defendants having counseled substitution, this is, to my mind, a most important consideration. Any indignation at the suggestion that they actually counseled what all knew was most probable seems to me absurd. If in fact they did not quite freely discuss and recommend substitution, it could hardly have been from any genuine scruple, but rather from timidity, or a belief in what they supposed were their exact technical rights. I cannot therefore regard the detectives' stories as being inherently unlikely; nor does the case come at all as if the defendants did not, at least indirectly, contribute to what they must certainly know to be frauds. Furthermore, that they should deny the words put in their mouths is not too unlikely, because, while sales like these are perhaps not gravely wrong, surely they show a moral obtuseness to fair dealing which cannot be disregarded, especially when the denials are necessary to avoid a criminal exposure.

Coming to the plaintiff's evidence, it is certainly strong enough unless it was altogether fabricated. The reports are said to have been written out either upon the day of the talk or the day after; the detectives were out to get evidence of substitution, and it is hardly within the bounds of reason that they should have honestly but mistakenly imagined that the defendants said what they put into the reports. So far as honest forgetfulness may explain the divergence of story, the chances are all against the defendants to whom these

visits were one or two among many which occurred daily in their business, and which remained wholly unimportant for several months, until these suits were brought. As respects Gleason and Gates the reports are much fortified by the testimony of Mrs. Burchardt, who impressed me most favorably. I do not regard as very important the physical appearance of the reports themselves. They are rather surprisingly fair on their face, it is true, but not wholly so; for there are some which have four or five whole lines changed, while a word or two is corrected now and then elsewhere. We are not to suppose these reports to have been prepared with the nicety of a pleading; it is quite likely that Gleason and Gates agreed roughly and not too accurately upon what the interviews really were, and told Mrs. Burchardt to put it down, well prepared to stand behind it as literally true, though it was nothing of the kind. That is the natural psychology of many men, and its possibility here influences me little towards concluding that they were capable of a comprehensive web of perjury. Neither of these men seemed to me mentally capable of anything of the sort. A more reasonable explanation, assuming that Gleason and Gates should be entirely discredited, is Mr. Proskauer's, that Secord prepared the reports or told Gleason and Gates what to put in them, and that they acted at his direction. I should hardly have supposed that with men of their intelligence, such a course could have escaped Mrs. Burchardt's knowledge, or that she could have sworn as she did, if it had been done in that way.

Of the six men themselves, Wright and Brady made the best appearance both for honesty and intelligence. Gleason was next in my judgment, a heavy, dull man, who stuck very persistently to his report, but who nevertheless seemed to me honest. Gates did not carry as much weight as Gleason, but stood much better than Secord and Payne. Upon the latter's testimony uncorroborated, I should not base a finding, if they were contradicted by honest seeming witnesses.

The combination of these six witnesses, coupled with the inherent probability of their story, leads me to find that the defendants Goldberg did counsel the substitution of Canadian Type for Canadian Club. The defendants object to several details in Wright and Brady's report. Thus they say that Goldberg could not have told them that he had shipped Canadian Type to Maurer. I cannot see why he should not have seized his last customer for an illustration, and the fact that he did ship to Maurer on the 13th lends color in my mind to the statement that Wright and Brady were there on that day. The Hannah shipment gives such a conclusion much greater certainty. Again, I can find no very good explanation for the bill which reads, "C. Whisky"; nor does the occurrence of Mrs. Carroll's name in the reports seem to me very well explained. Upon this conflict of testimony I find for the plaintiff, and the finding applies to all nine cases.

The next case is Cook & Bernheimer's. This depends upon the testimony of Secord and Payne for the first interview, and of Secord, Gleason, and Gates for the second. It is in my judgment corroborated by the exchange of letters. The defendants of course realized that these letters, taken as they read, left no room for an innocent interpretation, and they explained it upon the theory that it was a

decoy. I do not accept this explanation for several reasons. In the first place the salesman who had gone to Stamford to look up Secord and Payne was not called, though still in their employ. In the second, Buchbee's testimony was contradictory as to whether he had given Wahlers instructions to refer the detectives to him should they call again; moreover he did not greatly impress me on the stand, as also Cohn did not. Again, Wahlers' story seems to me certainly false. It is of course possible that though Buchbee had told him to refer the detectives to him, and though he knew that they were detectives, he should still have failed to connect the two, but it is in the highest degree improbable. He acknowledges that he had heard of but one set of detectives out for evidence about Canadian Club, and that he at once thought these were they. Gleason and Gates, it is true, had different names, but Secord was there, and he had written to Secord and Payne. Again I can see no reason to believe the detail of Secord's asking for a commission. We know in fact that Secord, whether honest or not, could not have expected a commission because Gleason and Gates made no purchases in any of the stores. Why should Secord have supposed that such a ruse would have added to the verisimilitude of the trap? If it had been his practice I think we should have seen it in the other reports. It was in my judgment added by Wahlers to discredit Secord, but in that aspect is absurd. Sozzi's testimony is most unsatisfactory. His suspicions excited by Wahler's conduct are, in my judgment, an afterthought. Finally, consider the case more broadly. Cohn says that nothing was said at the first interview about substitution. If he is right, is it possible that Secord would have written the letter? He must at least have hoped that he would get a favorable answer, and if the interview had been as Cohn says, is it conceivable that he should have thought such an answer possible? The answer he must have thought he would get would have completely destroyed the case; it would have asked what he was about. Or if Buchbee had meant to decoy Secord and Payne, instead of merely repudiating their suggestion, his letter was not apt for his purpose. He could easily have induced them to come in on a pretense of better matching Canadian Club, and have prepared a case which would certainly have cleared him. I have no hesitation in finding for the plaintiff in this case.

The next case is Kahn's, which depends wholly upon Secord and Payne's testimony, together with such corroboration as is to be found in two circumstances: First, the label of his Canadian Style whisky, and the name of his gin; second, his unwillingness to complete the sale. As to the first, I am satisfied that the label was intended as an imitation of Gooderham & Worsts'. No explanation is suggested, and the use of "G. W. W." in such a connection is hardly explainable upon any other theory. I cannot regard as honest the name, "Douglas & Son Brand" when applied to gin sold in bulk. Gordon gin has the greatest market, and there can, to my mind, be no reason for selecting that arbitrary name except with the hope of confusion. I do not say that one infringes the other, but I do think the motive is apparent.

Kahn's refusal to complete the sale or give back the money without the bill is more perplexing. His explanation and Pollak's is not prob-

able, i. e., that Pollak had found after the document passed that Secord and Payne proposed refilling, and that they did not wish a bill in the hands of such men. It was perhaps reasonable to refuse to fill the order, but there was no occasion for solicitude about the bill, provided Secord and Payne gave a receipt for the money, which they offered to do. If it was only the case of dishonest saloon keepers to whom they had refused to sell, and to whom they had paid back the money, why should they have anticipated trouble from possession of the bill? Such men would not trouble them; the only possibility was of blackmail, and that was not in Kahn's mind. I must conclude that before August 13th, the date of Kahn's first interview, he had learned that they were detectives and wanted to get back the bill for that reason. Moreover, Pollak must have had some reason before July 25th, or thereabouts, for refusing to fill the order, because in normal course it would have gone out within a day or two after July 23d, when it was given. I cannot think that his reason was the word dropped by Secord before he left. In the first place it would not have disturbed a man who was habitually selling Canadian Type in bulk, who put out the label on the G. W. W. bottle and who sold "Douglas & Son brand" of gin; in the second, had it shocked his scruples, I think, it would have called out some remark at the time. I believe that Pollak became suspicious thereafter, and that was because he had heard something of Secord and Payne. It is true that the time seems a little early, but we know that the warning circular went out to the trade dated August 1st, and the news may well have got to Pollak within a few days of the order. Of course Kahn's subsequent efforts to get the bill are not necessarily evidence of the truth of Secord and Payne's report. A man may wish to get back documentary evidence because he fears a case which he knows to be spurious in fact. Yet such concern is more consonant with guilt than with innocence, especially when it is afterwards supported by a denial of the true explanation. Taking this case in its entirety, I believe that the reports are corroborated, and I find for the plaintiff.

There remain the two cases of Smythe and Hahn. Upon these the testimony of Secord and Payne is not corroborated at all, except as to the defendant Funke in Hahn's case. The only circumstance which influences me to accept their story is that, having found them to have been truthful in so many of the cases, it seems hardly proper to disregard them when they chance to be unsupported. I can only say in answer that while my guess would be that they were right in both these cases, I have too much question to make a finding upon the uncorroborated testimony of Secord and Payne. The plaintiff may, however, take a decree against Funke, if it wishes, because I shall accept the report of Gleason and Gates added to that of Secord and Payne. It seems to me most unlikely that only Payne and Gleason should have called upon what was obviously a "follow-up" visit. The purpose of such visits was to obtain cumulative testimony, and the four always went together except once. Payne was away on the "follow-up" visit to Cook & Bernheimer, but that fact was mentioned in the report made of that visit, which was not the case here. Gleason and Gates always

went together, and there is no reason why they should not have done so here. Again, Funke said on direct examination that one of the two visitors on the first visit, who were concededly Secord and Payne, brought a "young man" with him as his partner on the second visit. Later he identified Gleason as the "young man," though no one could possibly ever describe him as such. Moreover, Secord and Payne never introduced the others as partners, but as friends about to go into a new business. Either Funke remembered nothing about the visit, or he did not mean to tell the truth. While it does not follow that he actually said what was put in his mouth, yet his denial seems to me of small probative weight, and I find against him.

The decree will be substantially as follows, subject to any modification on submission by the parties of proposed decrees:

This cause came on to be heard at the March term of this court and was argued by counsel, and thereupon, upon consideration thereof, it is

Ordered, adjudged, and decreed that the defendants, A. B. and C., be and they hereby are, each and all, enjoined from selling Canadian Type whisky in the wood to saloon keepers, unless they receive reasonable assurance from the buyers that they will not use it in substitution for the plaintiff's whisky; and it is further

Ordered, adjudged, and decreed that ———, Esq., take and state an account of the profits of all such Canadian Type whisky sold by each and all of the defendants during the past 6 years, the defendants having the burden of showing, either that such whisky was not in fact used in substitution for the plaintiff's whisky, or that they had, at the time of sale, received reasonable assurance that it would not be so used; and it is further

Ordered, adjudged, and decreed that, the said defendants having recommended said Canadian Type whisky when sold in the wood to saloon keepers for the purpose of substitution, they are, each and all, hereby enjoined from so recommending the said whisky in any manner; and it is further

Ordered, adjudged, and decreed that the defendants are hereby enjoined from using as labels on Canadian Type whisky when sold in the bottle the label annexed at the foot hereof, or any other label, substantially like the same; and it is further

Ordered, adjudged, and decreed that the plaintiff do recover its costs of the defendants to be taxed by the clerk.

The third paragraph will be omitted from the Smythe and Hahn cases, except as to Funke; the fourth paragraph will appear only in the Goldberg and Smythe cases with the proper label annexed.

The plaintiff must not use this decree or opinion for advertising purposes beyond a fair statement of its contents and moderate comment therein. If such advertisements appear as have appeared in other cases, I will entertain a motion to vacate these decrees and hold open the cases undecided.

In re MOSHER.

FIRST NAT. BANK OF ALBANY, N. Y., v. HAMBLIN.

(District Court, N. D. New York. July 21, 1915.)

1. BANKRUPTCY ⇐172—MORTGAGE BY BANKRUPT—RIGHTS OF HOLDER.
The assignee of a mortgage given by a bankrupt to third persons stands in no better position than his assignor, where he took with knowledge of all the facts.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 220; Dec. Dig. ⇐172.]

2. PRINCIPAL AND SURETY ⇐147—SECURITY GIVEN SURETY—RIGHTS OF CREDITOR.
Where a surety on a note was given a mortgage, the creditor is entitled to the benefit of the mortgage in case it is valid.
[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 402–412; Dec. Dig. ⇐147.]

3. BANKRUPTCY ⇐172—MORTGAGE BY BANKRUPT—VALIDITY—RECORDATION.
Real Property Law N. Y. (Laws 1896, c. 547) § 241, declares that mortgages may be recorded, and, if not recorded, shall be void as against any subsequent purchaser in good faith and for a valuable consideration whose conveyance is first recorded. A mortgage, given by a bankrupt for a valuable consideration more than four months before the filing of the petition in bankruptcy, was not recorded. *Held*, that such mortgage was valid as against the trustee in bankruptcy; he not being a subsequent purchaser in good faith.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 220; Dec. Dig. ⇐172.]

4. BANKRUPTCY ⇐175—CONVEYANCES—FRAUD OF CREDITORS.
Failure to record a New York mortgage is not, as to general creditors, a badge or indicia of fraud; the statute authorizing recordation not being for their protection.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 247, 248; Dec. Dig. ⇐175.]

5. BANKRUPTCY ⇐178—MORTGAGE BY BANKRUPT—VALIDITY—BONA FIDES.
A mortgage, given by one subsequently bankrupt, *held* intended to be valid and to be part of a transaction whereby he secured indorsers of his note.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 221, 264–274, 283, 284; Dec. Dig. ⇐178.]

6. BANKRUPTCY ⇐303—CONVEYANCES BY BANKRUPT—MORTGAGES—VALIDITY.
Evidence *held* insufficient to show that mortgagees who indorsed a note of one subsequently bankrupt and received the mortgage as security knew of his insolvency, or were guilty of any fraud in agreeing not to record the instrument.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 458–462; Dec. Dig. ⇐303.]

7. BANKRUPTCY ⇐181—PREFERENCES—WHAT CONSTITUTES.
Where one subsequently bankrupt, to obtain a loan, gave a mortgage to persons who indorsed his note, such mortgage is not a voidable preference within Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 562) § 60b, as amended by Act Feb. 5, 1903, c. 487, § 13, 32 Stat. 799, and Act June 25, 1910, c. 412, § 11, 36 Stat. 842 (Comp. St. 1913, § 9644); for a transfer, to constitute such a preference, must be on account of a pre-existing debt.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 259, 260, 271, 273, 274; Dec. Dig. ⇐181.]

8. BANKRUPTCY ⟸184—FRAUDULENT CONVEYANCES—VALIDITY.

Where one subsequently bankrupt, to procure persons to indorse his note, gave them a mortgage, and they agreed as a favor to him not to record it, the mortgage was not invalid as a fraudulent conveyance, though Real Property Law N. Y. (Consol. Laws, c. 50) §§ 263–266, declares void conveyances fraudulently intended to hinder or delay creditors, it not appearing that the indorsers intended to withhold the instrument from record so as to defraud creditors, and there being no duty requiring them to record the instrument.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 275–277; Dec. Dig. ⟸184.]

9. BANKRUPTCY ⟸172—CONVEYANCES—ENFORCEMENT.

Where a mortgage which had not been promptly recorded was valid in the hands of a mortgagee who had indorsed a bankrupt's note to a bank, the bank, though it knew of the mortgagor's insolvency and of the delay in recording the mortgage, at the time of taking it over, may take over and enforce the conveyance.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 220; Dec. Dig. ⟸172.]

In Bankruptcy. In the matter of the bankruptcy of James T. Mosher. Contest as to the ownership or right to a fund of $7,348.14, derived from the sale of certain real estate of the above-named bankrupt, James T. Mosher, deposited in court under stipulation to await its decision as to the right thereto of the First National Bank of Albany, N. Y., under a certain mortgage given by the now bankrupt to Samuel G. Galib and Joseph G. Galib, comprising the firm of Galib Bros., who were indorsers on the notes of said Mosher given to said bank, and which mortgage was subsequently assigned to and is now held by said bank. Order of referee reversed, and moneys awarded to the bank.

John. F. Gleason, of Albany, N. Y., for claimants Galib Bros.

Tracey, Cooper & Townsend, of Albany, N. Y., for claimant First Nat. Bank of Albany.

Geo. J. Hatt, 2d, of Albany, N. Y., for trustee.

RAY, District Judge. November 20, 1913, a petition in bankruptcy was filed against said James T. Mosher, and December 8, 1913, he was duly adjudicated a bankrupt. January 2, 1914, Emery A. Hamblin was duly appointed and qualified as trustee. Mosher, the now bankrupt, had been a customer of the First National Bank of Albany, N. Y., for some years prior to April 16, 1913, discounting paper at said bank from time to time, and on that day he informed Mr. Gallogly, the vice president of said bank, that he desired a loan of $10,000, in response to which Mr. Gallogly stated the bank would make the loan if secured. Mosher offered a second mortgage on his real estate, but Mr. Gallogly declined this, on the ground the bank could not make loans on mortgage, but at the same time informed Mosher he could give his note indorsed by some friend and secure such indorser by a mortgage on his real estate. Thereupon Mosher suggested Galib Bros. as indorser, and as Gallogly had known the said firm for some years and regarded the members as good business men and the firm responsible for a reason-

able amount, the note for $10,000 was made by Mosher, indorsed by Galib Bros., and Mosher executed and delivered to that firm the mortgage in question to secure it on such indorsement. The note, so indorsed, due in four months, was thereupon delivered to the said bank by Mosher and discounted by it for his benefit. In August, 1913, the note was renewed for two months, and October 20, 1913, was again renewed. In April, 1913, when Mosher applied to Galib Bros. for their indorsement, he informed that firm that he was a little short of money and desired to uphold his business. The members of the firm were acquainted with Mosher and his fellow countrymen, all being Armenians. Mosher at the time of giving the mortgage requested Galib Bros. not to record it, saying:

"Don't record it because I want to do some business. If you record it, it might be hard for me to do business"

—and thereupon Galib Bros. agreed not to record such mortgage. Of this agreement the said bank had no knowledge. This mortgage was not recorded until October 30, 1913, or 20 days prior to the filing of the petition in bankruptcy and 10 days subsequent to the last renewal of the note. November 5, 1913, Galib Bros. assigned such mortgage to the said bank, and the assignment was that day recorded. This was done under the following circumstances, viz.: In October, 1913, Mr. Gallogly, vice president of the bank, heard that Mosher was in financial trouble and gambling heavily, which Mosher admitted, and thereupon turned the matter over to its attorneys, who learned that the mortgage had not been recorded. Galib Bros. were sent for and informed of Mosher's financial condition and practices, and an assignment of the mortgage was thereupon requested and given. About this time Mosher offered the bank additional collateral security by way of chattel mortgage, but the bank declined, as under the then existing conditions it had no right to take same.

It conclusively appears that prior to taking the assignment of the mortgage to the bank Mr. Gallogly had become acquainted with Mosher's financial condition, but there is no evidence to sustain a finding that the bank, or any of its officers, had any knowledge of the true financial condition of Mosher at the time the $10,000 note was given, indorsed by Galib Bros, and at the time the mortgage was given by Mosher to Galib Bros. as security to them for their indorsement. Some point was made in the testimony that the note was indorsed and delivered prior to the execution and delivery of the mortgage. This is of no consequence, as the mortgage was given the same day that the note was executed and delivered, and with the understanding and agreement that the mortgage was to be given as a part of the transaction. Some point has also been made that the bank did not have actual knowledge that the mortgage was in fact executed and delivered at the time or on the day the note was indorsed and taken. This I regard as of no consequence, for the bank understood that Galib Bros. was to indorse the note and be secured by the mortgage executed by Mosher. It was all a part of the one transaction. There is no evidence or statement in the case that the bank declined to discount the note with Galibs' indorsement thereon, and required as a condition of

discounting the note that Galib Bros. be secured. The bank simply knew that Galib Bros. was to be secured by the giving of the mortgage, and understood that it had been done.

It is not disputed that from time to time Mosher, now bankrupt, made financial statements to various commercial agencies which were communicated to the trade for the purpose of obtaining credit. Such statements were made in February, 1913, August, 1913, and possibly at other times. Other parties investigated Mosher's condition by making inquiry and made reports as to his financial condition and the credit that was due him. The existence of the unrecorded mortgage was not disclosed by Mosher in making these financial statements, or in answer to inquiries made by other parties.

During all of this time, including the time when the $10,000 note was given and the mortgage executed, Mosher was insolvent. And thereafter, and while the mortgage remained unrecorded, it is a fact that various parties, relying upon the reports of the trade agencies and upon the information given to other parties in answer to inquiries, and upon the apparent equity of Mosher in this mortgaged property, filled orders given by Mosher and extended new and further credit to him. There is no evidence that Galib Bros., or either of the firm, was cognizant of the financial condition of Mosher at the time they indorsed the note and took the mortgage as security to their indorsement, and there is no evidence that the bank had any knowledge, at the time the note was discounted and the mortgage executed to secure the indorsement of Galib Bros., that Mosher was insolvent or financially embarrassed to a serious extent. Neither is there any evidence that the bank or Galib Bros. were informed that Mosher was making financial statements which concealed the existence of the mortgage. There is no evidence in the case, or in the statement of facts, that would justify the inference or conclusion or a finding that Galib Bros. neglected or failed to record the mortgage for the purpose of cheating or defrauding then existing, or subsequently existing, creditors of Mosher. Galib Bros. of course knew that a failure to record the mortgage would keep record knowledge of its existence from then existing and subsequently existing creditors of Mosher, but there is no evidence that they had any information which led them to believe, or which ought to have led them to believe, that Mosher would make any false or untrue statements as to the existence of such mortgage. When the mortgage was assigned to the bank it had knowledge for the first time of the agreement not to record it. I do not think it can be held or found that there was any express purpose or design on the part either of Mosher or Galib Bros., at the time the note was indorsed and the mortgage given, to cheat, defraud, deceive, or mislead existing creditors, or those persons who should subsequently become creditors. The mortgage at that time was not intended as a preference, inasmuch as it was given to secure Galib Bros. for its indorsement upon a note given for a new consideration; that is, a present loan of money made by the bank.

Under the conditions existing and known to Galib Bros. when the note was indorsed and the mortgage delivered, it was a valid security, unless the agreement not to record, entered into for the purpose stated, made it void as to general creditors who should thereafter become such.

Galib Bros. of course knew that Mosher desired the mortgage kept from record in order that he might secure credit upon the faith of his apparent ownership of the real estate unincumbered by this particular mortgage. Mosher expressed the wish that the mortgage be not recorded for that very purpose.

The real questions are:

1. Was this mortgage fraudulent and void as to the general creditors of Mosher, who thereafter extended credit to him on the faith of his real estate being unincumbered by such a mortgage? If so, it was void for the same reason in the hands of the bank. The bank did not discount the note on the faith of the mortgage being given to the indorsers as security. No evidence or concession sustains such a conclusion.

2. Was the bank entitled to an assignment of such valid security as the Galibs or Galib Bros. had?

3. Another question under the facts of this case is this: Is the mortgage deemed to have been given to secure an antecedent debt and given as of the date of its record and therefore within the four months preceding the filing of the petition in bankruptcy, or did the four-month period begin to run at the date of the record of the mortgage?

[1] If this mortgage was valid in the hands of Galib Bros. as a security for their indorsement on this note of $10,000, and could have been enforced by that firm and it was competent for Galib Bros. to transfer this security to the bank as security for the payment of the note, then it is good and valid in the hands of the bank. The bank, however, is in no better position than its assignor, Galib Bros.

[2] On the second proposition stated there can be no serious contention. Catskill National Bank v. Dumary, 206 N. Y. 550, 558, 559, 100 N. E. 422, 425, and cases cited. The court says:

"A rule within those constituting the doctrine of subrogation is that the creditor shall have the benefit of any obligations or collateral securities which the principal debtor has given to the surety or person standing in the situation of a surety. Such securities are regarded as trusts for the better security of the debt, and the fact that the creditor did not originally rely upon the credit of such collateral security, or know of its existence in the first instance, is immaterial. Vail v. Foster, 4 N. Y. 312; Curtis v. Tyler, 9 Paige [N. Y.] 432; National Bank of Newburgh v. Bigler, 83 N. Y. 51; Wager v. Link, 134 N. Y. 122 [31 N. E. 213]; Keller v. Ashford, 133 U. S. 610 [10 Sup. Ct. 494, 33 L. Ed. 667]; New London Bank v. Lee, 11 Conn. 112 [27 Am. Dec. 713]; Meyers v. Campbell, 59 N. J. Law, 378 [35 Atl. 788]; First Nat. Bank v. Hunton, 70 N. H. 224 [46 Atl. 1049]; Matter of Fickett, 72 Me. 266; Kramer & Rahm's Appeal, 37 Pa. 71. The rule is applicable here. The right of subrogation is founded upon principles of equity, and not in contract. It is to be so administered as to accomplish, through general equitable rules, what is just and fair between the parties. It does not depend upon privity, nor is it confined to cases of strict suretyship. Subrogation is an act of law, and a mode which it adopts to compel the ultimate discharge of the debt by him who in good conscience ought to pay it, and to relieve him whom none but the creditor could ask to pay. If in the performance of a contract conditions arise which require to effect such result the intervention of the right, the court will so decree, provided that in so doing the law is not violated or a contract altered. Pease v. Egan, 131 N. Y. 262 [30 N. E. 102]; Morehouse v. Brooklyn H. R. R. Co., 185 N. Y. 520 [78 N. E. 179, 7 Ann. Cas. 377]; Arnold v. Green, 116 N. Y. 566 [23 N. E. 1]. The defendant became surety to the Brick Company for the payment of the debt of the Contracting Company. His guaranty was a separate, independent contract that he would pay the debt if the company did not. He placed his financial responsibility as

a security for the payment of the purchase price of the bricks. The trust for the better security of the debt attached to the guaranty as it would have attached to property deposited by the Contracting Company with the Brick Company as security."

There is no pretense or evidence to show that the bank connived at keeping the mortgage from record, or in the making of representations as to the financial condition of Mosher. The main question is, Could Galib Bros. have enforced the mortgage on payment of the note? There is no pretense that that firm is not liable to the bank on its indorsement.

[3, 4] A mortgage given and received in fraud of creditors, or to hinder, delay, or defraud creditors is invalid as to creditors. But a mortgage not so given, that is, not given and received for such a purpose, if there be a good present consideration and it is given more than four months prior to the filing of the petition in bankruptcy in New York, is good and valid as to creditors and the trustee in bankruptcy, whether recorded or not. Under the Bankruptcy Act a mortgage is not "required" to be recorded as to general creditors and a trustee in bankruptcy, when it is not required to be recorded except as to subsequent purchasers in good faith and subsequent mortgages. If good as to general creditors without being recorded, then as to general creditors and the trustee in bankruptcy representing them and their interests it is not "required" to be recorded within the meaning of the Bankruptcy Act. In re Boyd (C. C. A., Second Circuit), 213 Fed. 774, 130 C. C. A. 288, approving In re Hunt (D. C.) 139 Fed. 283; In re Klein (Dougherty v. First National Bank of Canton), 197 Fed. 241, 116 C. C. A. 603, 28 Am. Bankr. Rep. 263 (C. C. A., Sixth Circuit); Little v. Holley-Brooks Hardware Co., 133 Fed. 874, 67 C. C. A. 46 (C. C. A., Fifth Circuit); Meyer Bros. Drug Co. v. Pipkin Drug Co., 136 Fed. 396, 69 C. C. A. 240 (C. C. A., Fifth Circuit); In re Sturtevant, 26 Am. Bankr. Rep. 574, 188 Fed. 196, 110 C. C. A. 68 (C. C. A., Seventh Circuit); Telford v. Hendrickson, 120 Minn. 427, 139 N. W. 941, 31 Am. Bankr. Rep. 866. I am fully aware there are cases to the contrary, but the case of In re Boyd, supra, having been decided by the Circuit Court of Appeals in this circuit, is binding upon the court.

The New York statute in effect simply declares that an unrecorded real estate mortgage is not good as a lien as against—

"subsequent purchaser in good faith and for a valuable consideration, from the same vendor, his heirs or devisees, of the same real property or any portion thereof, whose conveyance is first duly recorded."

It is good against such purchasers unless they first record their conveyances. The statute as to recording such a mortgage is permissive. The language is—

"may be recorded in the office of the clerk of the county where such real property is situated."

Then comes the penalty for not recording, viz.:

"Every such conveyance not so recorded is void as against any subsequent purchaser in good faith and for a valuable consideration, from the same vendor, his heirs or devisees, of the same real property or any portion thereof, whose conveyance is first duly recorded."

In New York a mortgage of real estate not recorded is good and valid as to all the world except the class of persons, expressly described, who purchase in good faith, pay a valuable consideration, and first record their conveyances. Real Property Law, § 241 (Laws 1896, c. 547, p. 607). In New York the filing of chattel mortgages stands on an entirely different footing. Skilton v. Codington, 185 N. Y. 80, 77 N. E. 790, 113 Am. St. Rep. 885. This real estate recording statute is not designed to "require" mortgages to be recorded generally, or as to general creditors, but to protect subsequent purchasers of the property who purchase in good faith, without notice of the prior unrecorded mortgage or deed, and who pay a valuable consideration, and who first record their mortgage or deed. A purchaser for a present valuable consideration has a good title and a mortgagee for a present valuable consideration has a good and valid lien even if they fail to record their conveyances, except as to subsequent purchasers and mortgagees in good faith of the same property, or any part of same, who pay a valuable consideration and first record, and these persons may, if they desire, protect themselves against prior unrecorded conveyances and subsequent conveyances by recording. It is a permissive and protective statute, and not a mandatory one. It protects subsequent purchasers and mortgagees who purchase in good faith, pay a valuable consideration, and first record. As to such persons the prior unrecorded conveyance is a nullity, but not as to any other person or persons. The recording statute was not designed to protect general creditors, or those extending credit. Failure to record in no sense affects the validity of the unrecorded conveyance except as to the subsequent conveyances mentioned. Trustees in bankruptcy are not subsequent purchasers in good faith and for value, but the title and ownership of the real property of the bankrupt vests in them—is devolved upon them—by operation of law, subject to all existing valid liens not affected by fraud and equities in favor of other parties. And failure to record, of itself, is not as to general creditors a badge or indicia of fraud. It is a circumstance which, with other facts and circumstances, may be evidence of a purpose to defraud or aid in defrauding. Failure by the holder, grantee, or mortgagee to record a deed or mortgage is not a representation by him that his grantor or the person in whose name the record title stands either owns the property, or owns it free and clear of his unrecorded mortgage.

[5] Was this mortgage given and recorded as a mere friendly act, not intended to be bona fide, or to create a lien on the property mortgaged? I think not. The agreed state of facts and testimony of Galib as a whole does not establish such contention. I cannot so construe them. This is not a case where the instrument was made within the four months pursuant to an agreement to give a mortgage at a future time. True the note was actually executed and indorsed before the mortgage was actually executed and delivered, but it was all done the same day, as stated, and pursuant to the understanding that the one act was to accompany the other.

[6] Assuming that Mosher was insolvent when he procured the loan from the bank on Galib Bros.' indorsement, there is not a scin-

tilla of evidence that either the bank or Galib Bros. actually knew this fact. Mosher was doing business, and expressed a purpose to continue business, and unless the borrowing of $10,000 indicated insolvency, there was nothing to put Galib Bros. on inquiry. It does not appear that this was an extraordinary loan for Mosher to secure. The bank required an indorsement of the note, and told Mosher he could have the money on an indorsed note, and could secure the indorser. But this does not indicate that the bank supposed, or had any cause to believe, that Mosher was insolvent, or that any fraud was intended. It seems that Mosher offered to secure Galib Bros. on their indorsement. But this does not show that Galib Bros. knew that he was insolvent or seriously involved financially. Obtaining their indorsement establishes nothing of the kind, or that Galib Bros. had reasonable cause to believe Mosher was insolvent. That firm had indorsed for him before to the extent of $3,000, and so far as appears the note had been paid. There is no evidence that at the time the mortgage was given Mosher was gambling, or drinking, or not paying attention to business. It is undisputed that when the mortgage was given Mr. Galib inquired of Mr. Nellis, the attorney who drew it, if it was necessary to record it and he stated that it was not. This advice was not given because of any agreement or understanding that the mortgage was not to be a lien or actual security for the indorsement. So far as appears it was given and accepted in good faith, unless it be that the agreement not to record shows its absence. Mr. Samuel G. Galib, one of the firm, who seems to have done the business, testified:

"Q. Will you please state the circumstances leading up to the execution and the delivery of that bond and mortgage to you? What the mortgage was given for and all of the circumstances connected with it? A. The mortgage was given to us to secure our indorsements on Mosher's notes to the First National Bank. Q. In what sum were these notes? A. $10,000. Q. When was the mortgage given? A. It was given in Mr. Nellis' office. Q. By which you mean Mr. Merwin H. Nellis of this city? A. Mr. Nellis, Jr.; yes, sir. Q. At whose request did you go to Mr. Nellis' office? A. Mosher's. Q. State what took place there, describing all the transactions in detail?"

Here objections were interposed, but he was finally allowed to answer. Of the competency of the testimony there can be no question. It was then and there that the mortgage was drawn, delivered, and accepted. This was the transaction the validity of which is in question; this the res gestæ.

"A. Mr. Mosher, and my brother, and Mr. Nellis and myself were there. And when Mr. Nellis drew the mortgage, before signing it we asked him if we could go and show it to another party to see if it was all right or not, and he said 'Certainly, you can.' Mosher and I went to Mr. Gleason's office, and Mr. Gleason read over the mortgage, and he suggested that a few things should be in the mortgage, which he wrote on a slip of paper and gave to us to take to Mr. Nellis. And so we took down the mortgage to Mr. Nellis, and Mr. Nellis accepted the changes. In the meantime, after signing the mortgage, we asked Mr. Nellis if this mortgage should be put on record. He said, 'Not necessarily.' He said, 'This is a blanket mortgage and don't have to be on record.' And he went in the back room, I suppose he talked to his father. He went to his father and had a conversation with him, and he came back and told us we didn't have to put the mortgage on record. So, finally, we took the mortgage over and kept it to ourselves. Later on, when we heard that

Mosher was gambling heavily, we went to Mr. Gleason and told him the facts, and he said, 'Let me have the mortgage,' and I said, 'The mortgage is with us here,' and he said, 'Why didn't you have it on record?' and we said, 'Mr. Nellis told us we didn't have to put it on record, being a blanket mortgage,' and he said, 'Go and put it on.' * * *

"Mr. Hatt: Q. Mr. Galib, you indorsed the $10,000 note for Mosher prior to receiving and prior to the execution of the mortgage which you subsequently took on his property? A. Yes. Q. And without receiving any security at the time you indorsed it, did you not? A. Yes.

"Mr. Hatt: Q. On the same day that you indorsed the note? A. I think it was. * * *

"Mr. Savage: Q. The mortgage was given to secure your indorsement? A. Yes. Q. Mr. Hatt asked you if you had indorsed the note before you got the mortgage, and you answered that you had. At that time did you, or did you not, understand that you were to get a mortgage to secure your indorsement? A. Certainly we understood so. Q. What was your delay in getting the mortgage? A. It was done right the same day."

It is not questioned that the mortgage was executed and delivered the same day the note, or notes, was indorsed. It is agreed that before the note and mortgage were executed:

"Mosher told the Galibs when he asked them to indorse the note that he was a little short of money and wanted to uphold his business. They had known Mosher a good many years, were fellow countrymen, and agreed to do it. Mosher asked them not to record the mortgage, saying, 'Don't record it, because I want to do some business. If you record it it might be hard for me to do business'—and they agreed to withhold it from record. Of this agreement the bank had no knowledge. Galibs admit that they made no investigation as to Mosher's liabilities, that they knew he was in business, and that his credit would be affected by the recording of the mortgage. Mr. Samuel G. Galib testifies: 'The transaction between Mr. Mosher and us was merely a friendly matter; we had previously indorsed his notes to the amount of $3,000. We thought, of course, that this mortgage was not really a lien against the property. It was merely a security for these notes.' Galib never received any interest on the mortgage; 'it was merely done for a favor.'"

Is there anything here that put Galib Bros. on inquiry, or made it incumbent on that firm to inquire of Mosher as to his financial condition and charge them with all the knowledge they might have obtained? This was not the obtaining security for the payment of an antecedent indebtedness, but security for the present indorsement of Mosher's note or notes to the extent of $10,000.

An agreement not to file a chattel mortgage is a badge of fraud, and may invalidate it as to subsequent creditors. Such a mortgage is required to be filed, and is notice to all subsequent creditors, and intended as such. Filing a chattel mortgage is for the purpose of giving notice. To agree not to file is substantially equivalent to agreeing not to give notice. It is not conclusive, but a circumstance of more or less cogency, and there must be some proof of actual fraud as distinguished from constructive fraud, based on a failure to record. Collier on Bankruptcy (10th Ed.) page 957, and cases there cited. Is this true of a real estate mortgage? If it is "required" to be recorded within the meaning of the Bankruptcy Act, and is not recorded until within the four-month period, it is a preference if not given in good faith and for a present adequate consideration; that is, is given to secure an antecedent debt.

[7] A transfer by an insolvent person to constitute a voidable preference (I am not speaking of a fraudulent transfer) under section 60b of the Bankruptcy Act of July 1, 1898, as amended, must be on account of a pre-existing debt. Ernst v. Mechanics' & M. National Bank, etc., 201 Fed. 664, 120 C. C. A. 92, decrees affirmed National City Bank of New York v. Hotchkiss, 231 U. S. 50, 34 Sup. Ct. 20, 58 L. Ed. 115, and Mechanics' & M. National Bank, etc., v. Ernst, 231 U. S. 60, 34 Sup. Ct. 22, 58 L. Ed. 121; Collier on Bankruptcy (8th Ed.) p. 664; Loveland on Bankruptcy (4th Ed.) § 512; Coder v. Arts, 152 Fed. 943, 82 C. C. A. 91, 15 L. R. A. (N. S.) 372; Id., 213 U. S. 223, 29 Sup. Ct. 436, 53 L. Ed. 772, 16 Ann. Cas. 1008.

In the case now before this court there was a present valid and adequate consideration for the execution and delivery of the mortgage, viz., the indorsement by Galib Bros. of Mosher's note for $10,000, and the mortgage was given to secure the indorsement, that is, secure Galib Bros. against loss by reason of that firm lending their credit becoming responsible for the payment of such note. The note was at once discounted, and Mosher had the money. So far as appears, it was used by him for legitimate purposes in his business. It is a somewhat startling and novel proposition that, if A. borrows money of B. for the conduct of his business and evidences the debt by his promise to pay negotiable note, indorsed by C., A. cannot secure C., as a condition of his making the indorsement, by giving a mortgage on his real estate, even if A. is insolvent at the time, but C. is ignorant of the fact. Is it possible that before indorsing and taking his security therefor C. must inquire of A. as to the condition of his business and as to his solvency? And suppose that A. does ask C. not to record such mortgage for the reason the recording of it would injure his business and credit, and C. agrees that he will not record, thereby taking his chances that A. will not execute any other conveyance by way of deed or mortgage, is this of itself either a preference or a fraud? In such case there is no proof of actual fraud, and it seems clear there is no constructive fraud, as under the New York statutes general creditors are in no wise affected by the nonrecording of a real estate mortgage. In the Matter of the Metropolitan Dairy Co., Bankrupt, 224 Fed. 444, — C. C. A. —, decided June 22, 1915, the Circuit Court of Appeals, in this, the Second, circuit, said:

"It is a wholly novel proposition to us that the officer and director of a corporation which is losing money, is in financial straits, and facing imminent failure may not lend it money of his own on its mortgage of its personal property—to secure only the cash turned over, without any subterfuge, including any existing indebtedness to him. No authority to such a proposition is cited; certainly neither the Bankrupt Act, nor section 66 of the New York Corporation Law, supports it. It certainly is not giving a preference to give security on free assets to the extent of new hard cash paid into the treasury by any one."

In Coder v. Arts, 213 U. S. 223, 29 Sup. Ct. 436, 53 L. Ed. 772, 16 Ann. Cas. 1008, it was held by the Supreme Court:

"In this case a mortgage given within four months of filing the petition to secure advances, and while the mortgagee did not know of the mortgagor's insolvency, although the latter did, and which mortgage was found not to have

been made with intent to hinder, delay, or defraud creditors, held not to be voidable under section 67e of the Bankruptcy Law, and that the mortgagee was entitled to priority thereon with interest."

[8] I discover nothing whatever in this case to impeach the validity of the mortgage given to Galib Bros. as security for their indorsement, unless it be the agreement by that firm not to record it. A finding of fraud which will invalidate the mortgage cannot be predicated or based on the mere fact that it was withheld from record. There must have been a fraudulent intent on the part of Galib Bros. in withholding it from the record. Thomas v. Kelsey, 30 Barb. (N. Y.) 268, cited in Pond v. Harwood, 139 N. Y. 125, 34 N. E. 768. It was there held:

"A mortgage, being a valid instrument, as between the mortgagor and mortgagee, a subsequent judgment creditor has nothing to say, in respect to its being recorded or otherwise. The recording act relates to subsequent purchasers in good faith and for a valuable consideration, and not to judgment creditors. A subsequent judgment will not be preferred over a prior unregistered mortgage given to secure future advances or liabilities, unless there has been a fraudulent intent, on the part of the mortgagee, in withholding his mortgage from the record. The mere fact of retaining a mortgage six or seven months, without having it recorded, will not operate as a fraud upon subsequent creditors of the mortgagee, by the mortgagor, so as to postpone the mortgage to their judgments."

The court also said, all concurring:

"There is no case holding that a mortgage to secure future advances, or the liability to be incurred by future indorsements, must be recorded, to protect the mortgagee against subsequent judgments."

The recording of an incumbrance upon property [real] is notice to subsequent purchasers or incumbrancers only and has no retrospective effect upon prior lienors. Ackerman v. Hunsicker, 85 N. Y. 43, 39 Am. Rep. 621. The recording of a deed or mortgage is constructive notice only to those who have subsequently acquired some interest or right in the property under the grantor or mortgagor. Williamson v. Brown, 15 N. Y. 354.

The sole object and effect of the recording acts is to protect subsequent purchasers and incumbrancers against previous deeds, mortgages, and liens which are not first recorded, and the record of a deed or mortgage is constructive notice to those only who subsequently acquire an interest or right in the property under the mortgagor or grantor. Stuyvesant v. Hall, 2 Barb. Ch. (N. Y.) 151; Stuyvesant v. Hone, 1 Sandf. Ch. (N. Y.) 419; Hall v. Nelson, 23 Barb. (N. Y.) 88; Id., 14 How. Prac. (N. Y.) 32.

If, as to general creditors, Galib Bros. had a perfect right not to record this mortgage, and it was not a badge of fraud not to record it, how could it be a fraudulent act to agree not to record it so far as general creditors are concerned, that firm having no notice Mosher would run in debt on false representations, or that he was in fact insolvent? How can it be a fraud as to general creditors to agree not to do that which the person charged with fraud had a perfect right not to do? If the evidence should show that such person in so agreeing was acting to aid a scheme or purpose to defraud, it would be

different, of course. In such case the agreement to be inactive might evidence a participation in the fraudulent scheme—an aiding of it, and a fraudulent intent. When a person goes to the records and finds that A., his customer seeking credit, owns of record real estate, and that, so far as the records are concerned there is no incumbrance, he has no right to assume that it is unincumbered by mortgage, as he is presumed to know the law, and that so far as general creditors are concerned it does not demand or require that mortgages be recorded. In such case he should go to the owner and make inquiries of him. If misinformed by him, and it should appear that this misinformation was given credence by the nonrecording of a mortgage pursuant to an agreement not to record, entered into for that purpose, a very different case would be presented. In the instant case no such facts appear. Sections 263–266, Real Property Law of New York, provide as follows:

"Sec. 263. Conveyances with Intent to Defraud Creditors Void.—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.

"Sec. 264. Conveyances Void as to Creditors, Purchasers and Incumbrancers, Void as to Heirs and Assigns.—A conveyance, charge, instrument or proceeding, declared by this article to be void as against creditors, purchasers or incumbrancers, is equally void as against their heirs, successors, personal representatives or assigns.

"Sec. 265. Fraudulent Intent, Question of Fact.—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 adjudged fraudulent as against creditors, purchasers or incumbrancers, solely on the ground that it was not founded on a valuable consideration.

"Sec. 266. Rights of Purchaser of Incumbrancer for Valuable Consideration Protected.—This article does not in any manner affect or impair the title of a purchaser or incumbrancer for a valuable consideration, unless it appears that he had previous notice of the fraudulent intent of his immediate grantor, or of the fraud rendering void the title of such grantor."

My conclusions are:

1. That there was no preference, as the mortgage was accepted in good faith as security for a present indorsement by the mortgagee of Mosher's note for $10,000, and that this was an adequate present consideration for its execution and delivery. Therefore there was no constructive fraud. Also, that the Bankruptcy Act as to general creditors does not require such a mortgage to be recorded, and as it was given more than four months prior to the filing of the petition, it can only be avoided for actual fraud, although not recorded until within four months of the filing of the petition in bankruptcy.

2. That as Galib Bros. did not know Mosher was insolvent, had no information which imposed on that firm the duty of making inquiry so as to charge the firm with knowledge of his insolvency when the mortgage was given, and as there was no duty to record or obligation resting on Galib Bros. so far as general creditors were concerned, the agreement not to record the mortgage does not establish fraud.

3. That the mortgage was a good and valid security in the hands of Galib Bros., that the firm could have enforced it, and that the bank had the right to an assignment thereof, and occupies the same position Galib Bros. did.

[9] 4. The facts that the bank, when it took the assignment, had learned that Mosher was then insolvent, and was insolvent when the mortgage was given, and that recording had been postponed pursuant to an agreement between Mosher and Galib Bros. do not avoid or defeat the mortgage as a valid security in the hands of the bank, the holder of the note secured thereby.

This case is not within and covered by the case of Blennerhassett v. Sherman, 105 U. S. 100–117 (26 L. Ed. 1080), where it was held:

"1. A mortgage of his entire estate, executed by an insolvent mortgagor to a creditor, who knows of his insolvency, and who, for the purpose of giving him a fictitious credit, actively conceals the mortgage, withholds it from record, and represents him as having a large estate and unlimited credit, by which means he is enabled to contract other debts which he cannot pay, is void at common law.

"2. A mortgage executed by an insolvent with intent to give a preference to a creditor, who has reasonable cause to believe him to be insolvent, and knows that it is made in fraud of the provisions of the Bankrupt Act, and who, for the purpose of evading them, actively conceals it and withholds it from record for two months, is void, although executed more than two months before the filing of a petition in bankruptcy by or against the mortgagor."

There the court said, and we assume advisedly:

"It is not to be disputed that, except as forbidden by the bankrupt law, a debtor has the right to prefer one creditor over another, and that the vigilant creditor is entitled to the advantage secured by his watchfulness and attention to his own interests. Neither can it be denied that the mere failure to record a mortgage is not a ground for setting it aside for the benefit of subsequent creditors who have acquired no specific lien on the property described in the mortgage.

"But where a mortgagee, knowing that his mortgagor is insolvent, for the purpose of giving him a fictitious credit actively conceals the mortgage which covers his entire estate and withholds it from the record, and while so concealing it represents the mortgagor as having a large estate and unlimited credit, and by these means others are induced to give him credit, and he fails and is unable to pay the debts thus contracted, the mortgage will be declared fraudulent and void at common law, whether the motive of the mortgagee be gain to himself or advantage to his mortgagor."

It is obvious that no such state of facts have been shown in the case at bar. So far as the evidence and agreed statement show, the firm of Galib Bros. was ignorant of the insolvency of Mosher, of his running in debt and making untrue statements, and of his purpose so to do, and they made no statements or representations whatever as to his financial condition or responsibility, and were not called upon to do so.

In Re National Boat & Engine Co. (Butterfield v. Woodman) (D. C.) 216 Fed. 208, Judge Hale, at page 214, correctly stated the doctrine of the Supreme Court of the United States, viz.:

"Where, by collusion of the mortgagor, the mortgagee withholds a mortgage from record for the purpose of giving the mortgagor a fictitious credit, and inducing others to give him credit, * * * the mortgage is fraudulent at common law."

As repeatedly stated, the evidence in this case at bar fails to establish such purpose or intent on the part of Galib Bros. Fraud must be proved. It cannot, to defeat a mortgage, be inferred from conceded or proved facts, except when the inference of a fraudulent intent and purpose is the only natural or reasonable one under all the known and proved facts and circumstances of the case. As already stated, Galib Bros. knew that if a prospective creditor of Mosher looked at the records, he would not find their mortgages of record. That firm also knew they were under no obligation or duty to such a person to put the mortgage on record. The firm also knew it would be the duty of such person, would he become informed, to inquire of Mosher, and Galib Bros. had the right to assume that if such person did inquire, he would be correctly and truly informed of the existence of the mortgage. That firm had no reason to apprehend false statements or fraudulent conduct on the part of Mosher. This case discloses no connivance or purpose on the part of either of the Galibs to misinform inquirers or mislead. I know of no moral or legal obligation resting on the holder of an unrecorded real estate mortgage to give the fact publicity, or make its existence a matter of common gossip or notoriety. Failure to record is not concealment as to general creditors. The Legislature has disclosed its policy by making it essential for the owner of such a mortgage to record as to subsequent purchasers and mortgagees who first record only. There may be states where their recording statutes differ from those of New York, but in this case the New York recording acts control.

Lastly. The order of the referee must be reversed, and an order made awarding the money in controversy to the bank, to be applied on the note.

So ordered.

UNITED STATES v. CHIN SING QUONG.

(District Court, N. D. New York. August 2, 1915.)

1. ALIENS ⇐32—DEPORTATION OF CHINESE—EVIDENCE—ADMISSIBILITY.

In proceedings to deport a Chinese person, a paper reciting that the person declared that he came to the United States and became a member of mercantile firms and was not a laborer, verified by him before a United States commissioner, and attached affidavits of citizens averring that the affiants had been acquainted with the Chinese person for more than a year, and that during that time the affiants had personal knowledge of the fact that he was a merchant as a member of a designated firm at a designated place, are properly excluded, where the United States commissioner and the affiants were not called as witnesses, nor good cause shown why they were not produced.

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

2. ALIENS ⇐32—ADMISSION INTO UNITED STATES—CERTIFICATE OF RETURN—EVIDENCE.

Congress may determine the quantity, character, and quality of evidence that shall be required to admit an alien into the United States, or grant him a certificate of return after absence, or establish his right to remain on being found here; but, where it does not do so, the court must receive

the testimony of all qualified witnesses and give it the weight to which it is entitled.

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

3. ALIENS ⟸32—DEPORTATION OF CHINESE—EVIDENCE—ADMISSIBILITY.

A Chinese person may, in proceedings to deport him, establish his right to remain in the United States by the testimony of Chinese persons alone, in the absence of congressional action defining the competency of witnesses; but the court, in weighing the testimony of the Chinese witnesses, will consider the policy of Congress, as declared in Act May 5, 1892, c. 60, § 6, 27 Stat. 25 (Comp. St. 1913, § 4320), and Act Nov. 3, 1893, c. 14, § 2, 28 Stat. 8 (Comp. St. 1913, § 4324), declaring that credible witnesses, other than Chinese, are necessary to obtain a return certificate, or to prove that a Chinese was a resident of the United States at the time of the passage of the act, on his application for a certificate.

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

4. ALIENS ⟸32—CHINESE DEPORTATION PROCEEDINGS—BURDEN OF PROOF.

In proceedings to deport a Chinese, the government must prove that defendant is a Chinese person, or a person of Chinese descent, and that he was found within the United States; but, when that is done, the burden shifts on defendant, and he has, under Act May 5, 1892, c. 60, § 3, 27 Stat. 25 (Comp. St. 1913, § 4317), the burden of establishing by affirmative proof his lawful right to remain in the United States.

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

5. ALIENS ⟸32—CHINESE DEPORTATION PROCEEDINGS—WEIGHT OF EVIDENCE.

The right of a Chinese person sought to be deported to remain in the United States must be established by affirmative proof to the satisfaction of the judge or commissioner, and testimony that the person is a merchant, without stating the facts, is a mere conclusion.

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

6. ALIENS ⟸32—CHINESE DEPORTATION PROCEEDINGS—APPEAL—DUTY OF COURT.

The court, on appeal from an order of a United States commissioner directing the deportation of a Chinese person, must consider and decide the case de novo, either on the evidence before the commissioner, or on entirely new evidence, or on both.

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

7. ALIENS ⟸32—CHINESE DEPORTATION PROCEEDINGS—RIGHT TO REMAIN IN UNITED STATES—MERCHANT—EVIDENCE.

It is not incumbent on the government, in proceedings to deport a Chinese person, to prove that defendant was not a merchant; but defendant must prove that he was a merchant, by proving that he was engaged in buying and selling merchandise at a fixed place of business, conducted in his name or in the name of a firm of which he was a member, and that during the time he was so engaged as a merchant he did not engage in any manual labor, except such as was necessary in the conduct of his business as a merchant.

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

8. ALIENS ⟸23—DEPORTATION OF CHINESE—GROUNDS.

Where, in 1901, 1902, and 1903, and before that, a Chinese person sought to be deported was a merchant in the United States, he was not required

to take out a certificate, and the fact that he subsequently became a laborer was no ground for deportation.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 76-90; Dec. Dig. ⇐23.]

9. ALIENS ⇐32—CHINESE DEPORTATION PROCEEDINGS—RULINGS ON EVIDENCE —HARMLESS ERROR.

Errors in sustaining objections to questions put to witnesses in Chinese deportation proceedings are not ground for reversal, where the answers, if favorable to defendant, could not have changed the result.

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

10. ALIENS ⇐32—CHINESE DEPORTATION PROCEEDINGS—EVIDENCE.

Error in sustaining an objection to a question asked a witness, testifying in proceedings to deport a Chinese person, as to whether he knew of his own knowledge whether the Chinese person was a member of a mercantile firm, was harmless, where other examination of the witness disclosed that his knowledge was founded on hearsay.

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

11. ALIENS ⇐32—DEPORTATION OF CHINESE—EVIDENCE—SUFFICIENCY.

Mere proof that a Chinese person, sought to be deported, had been in a store or about a store, was insufficient to show that he was a merchant, unaccompanied by evidence that he was the proprietor of the business, or one of the firm conducting the business.

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

12. ALIENS ⇐32—DEPORTATION OF CHINESE—EVIDENCE—SUFFICIENCY.

Evidence *held* to justify an order directing the deportation of a Chinese person for failure to show that he had been a merchant.

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

Proceeding by the United States for the deportation of Chin Sing Quong. From an order and judgment of a United States commissioner directing the deportation of Chin Sing Quong, he appeals. Affirmed.

Harry V. Borst, Asst. U. S. Atty., of Amsterdam, N. Y.
Lester W. Bloch, of Albany, N. Y., for defendant.

RAY, District Judge. This record is so full of speeches and affirmations by defendant's counsel, which are unsupported by any testimony, that it requires study and discrimination to ascertain what the evidence itself discloses. It was established that the defendant is a Chinese person, born in China, and that he was in the United States, working as a laundryman, without any of the papers or certificates required by law to entitle him to be and remain here, if his residence and occupation in the United States have been such as to require him to have papers. It is contended that he came to this country in 1895, or 1896, and was a merchant in San Francisco, and later in Boston, before going to Albany, where he was arrested. It is claimed by the United States that this fact, or these facts, were not established by competent evidence, and the commissioner struck out the testimony of two

Chinese witnesses, who testified as to the defendant's occupation in San Francisco and Boston some years ago, and refused to consider it.

[1] He produced a paper, which was received in evidence, but not to prove the facts there stated, reading as follows:

"I, Chin Shin Quong, on oath declare that I was born in China, of Chinese parents; that in May, 1886, I came to the United States by way of San Francisco, California, where I resided six years; from thence I came to Boston, Massachusetts, where I have resided ever since; that I am now a member of the firm of Quong Ark Yuen & Co., dealers in Chinese provisions and dry goods, at No. 38a Harrison avenue, in said Boston; that my interest in said firm amounts to the sum of four hundred dollars ($400); and that I have other personal property and debts due me from various persons in this commonwealth amounting to the sum of nine hundred dollars ($900).

"I further declare that I am not a laborer, and that during the year last past I performed no manual labor other than such as was necessary in the transaction of my business as a merchant.

"My age is 25 years; height, 5 feet 1 inch. A photograph of myself is attached to this affidavit.

"[Notarial Seal.] [Signed] Chin Shin his X mark Quong.

"[Chinese characters.]

"Subscribed and sworn to before me this 20th day of November, 1896.

"[Commissioner's Seal.]

"[Signed] George P. Sanger, U. S. Commissioner.

"We, the undersigned, citizens of the state of Massachusetts, on oath declare that we have been acquainted with Chin Shin Quong, who signed the foregoing affidavit, more than one year last past, during which time we have personal knowledge that he has not been a huckster, peddler, laundryman, or otherwise engaged in skilled or unskilled labor of any kind whatsoever, but during all our acquaintance with him he has been a merchant in good standing as a member of the firm of Quong Ark Yuen & Co., at No. 38a Harrison avenue, in Boston.

"We further declare that the declaration of said Chin Shin Quong is in all respects true, and that we recognize the photograph thereto attached to be his correct likeness. [Signed] L. Gaddis, 15 Harrison Ave.,

"Wm. K. Jones, 61 Court St., Boston.

"United States of America, District of Massachusetts—ss.

"On this 20th day of November, 1896, personally appeared before me the above-named L. Gaddis and Wm. K. Jones, known to me to be reputable persons, whose statements are entitled to full credence and belief, and made oath to the foregoing.

"[Commissioner's Seal.]

"[Signed] George P. Sanger, U. S. Commissioner."

As this document is not required or sanctioned by any statute or rule of the Department of Commerce and Labor, or any department of the government, and was not at the time made or thereafter presented to or used in any court or legal proceedings, or as a part thereof, its worthlessness as evidence on the issues here is apparent. So far as the defendant is concerned, it may have been signed by him, and sworn to by him, and it may not. Sanger, the commissioner, before whom it purports to have been sworn to, was not called as a witness, and at best it is a self-serving declaration or statement. The affidavits of L. Gaddis and Wm. K. Jones attached thereto are ex parte, and not competent evidence of any fact therein stated. Neither of the said affiants was called or sworn as a witness, and they were not examined in open court, and could not have been subjected to cross-examination. These men may have known this defendant, and they may not. Some other

Chinese person going by that name, or using that name, may have appeared before Sanger and signed and swore to the affidavit. The Chinese marks thereon, if claimed to be defendant's signature, are not shown by sufficient evidence to have been made by this defendant. No good or sufficient excuse for not producing the affiant, now living, or not having his testimony taken, was given. Ample time by adjournments was given to produce witnesses.

The defendant at first stated that he entered the United States by way of Malone, a port of entry, and later that he came first to San Francisco, then to Boston and New York, and thence to Albany, where he was arrested. He made conflicting statements as to the time when he came to the United States, and told the inspector that the paper referred to was sent to him in China. When under examination before he obtained the services of an attorney, after answering a number of questions, he claimed to be sick. After an adjournment of several days, and after securing the services of an attorney, he changed his former statements and evidence in all important particulars.

The testimony of the only person not Chinese, given as to the defendant having been a merchant or engaged in that business in the United States before he became a laborer, was that of Mary J. Matthews, and is purely hearsay, except on the point that defendant had been in Albany some 18 years. She had no knowledge that the defendant was ever engaged in the mercantile business, or was at any time a merchant, in the United States. Her testimony cannot be used to prove that defendant was ever a merchant, and the commissioner so held.

The defendant called two Chinese witnesses, Lee Wo Jue and Jo Kim, to prove that this defendant, Chin Sing Quong, was a merchant in the United States during the period of registration. When their testimony was offered the commissioner said:

"It is expected, Mr. Bloch, that the testimony of these witnesses is to be used in corroboration of his claim to have been a merchant during the period of registration.

"Mr. Bloch: We intend to lay a foundation by these witnesses for corroboration by white witnesses (non-Chinese).

"The Commissioner: Under these circumstances the testimony will be received."

[2, 3] In his opinion or written decision (not the order of deportation) the learned commissioner said:

"Objection was made to the reception of the testimony of Lee Wo Jue and Jo Kim, on the question of defendant's former status as a merchant, on the ground that such fact must be established by the testimony of witnesses other than Chinese. Defendant's counsel having stated that it was intended by the introduction of such testimony to lay the foundation for subsequent corroboration by white witnesses, the objections were overruled and the testimony taken. Subsequently motions to strike such testimony out on the same ground were made, on which decision was reserved. No testimony of witnesses other than Chinese was subsequently introduced, save that of Miss Matthews, which only tends to show that defendant was in Albany for at least 18 years and had always borne a good reputation. On the question of merchant status, Miss Matthews' testimony was pure hearsay. The motions to strike out were renewed at the close of defendant's case, and decision again reserved.

"It seems proper to approach at this time the question so raised by the Assistant United States Attorney, before weighing the case as a whole, in order that, if possible, the real issues may be arrived at. Therefore the question is: Can the testimony of Chinese persons, uncorroborated by other evidence, be used to establish the defendant's former status as a merchant? Upon application for re-entry because of former status as a merchant in the United States, the applicant must 'establish by the *testimony* of two credible witnesses *other than Chinese* the fact that he conducted such business.' Act Nov. 3, 1893, § 2. To obtain a return certificate, upon proceeding abroad temporarily, the applicant must furnish in his application 'the names and addresses of two (or more) credible witnesses *other than Chinese* who are able and willing to testify' as to his former status. Rules Governing Admission, rule 15b. Where a laborer, resident in the United States during the period of registration, failed to register, he must, upon subsequent application for a certificate, 'prove by at least one credible *white* witness' that he was a resident of the United States at the time of the passage of the act. Act May 5, 1892, § 6.

"Can this defendant now come into a commissioner's court, and by proof that would not admit him if seeking re-entry from China, or be sufficient to obtain for him a certificate of residence if he voluntarily made application therefor on the ground of excusable neglect to register, establish his right to be and remain within the United States? If the commissioner were to hold that he could, such a holding, if followed in other jurisdictions, would practically result in the encouragement of unlawful entry, and would point out a way for those who unlawfully entered to thereafter establish their apparent right to be and remain within the United States, by proof that could not be accepted at a port of entry if they made lawful application for permission to enter. Nothing would then be easier than for a smuggled Chinese alien to produce any number of Chinese witnesses before the commissioner by whom he was being tried, prepared to testify that he was formerly a merchant at some place within the United States. The laws and regulations which are usually enforced at the ports of entry would become practically inoperative, so far as any practical results are concerned. Commissioners would become the sole judges of the right of an alien Chinese to enter, instead of that duty resting with the Department of Labor, as intended by the law.

"The commissioner is constrained, therefore, to hold that the evidence of Lee Wo Jue and Jo Kim, being originally admitted for the purpose of being afterwards corroborated, and no corroboration being offered, is inadmissible to prove the fact of defendant's former status as a merchant. Motion of counsel for the government to strike out their entire testimony is therefore granted."

The real question in this case is: Was this ruling, striking out the testimony, correct, or, if incorrect, was it harmless, and can the error be disregarded, or can this court now consider all the evidence, including that stricken out, and decide the case on its merits?

The value or probative force of the testimony given by Chinese persons in certain of these Chinese cases, admission, etc., has been determined by act of Congress. Clearly Congress has the right to determine the quantity and character and quality of evidence that shall be required to admit an alien person into the United States, or grant him a certificate of return after absence, etc. But, unless it does so, must not the court receive the testimony of all qualified witnesses and give it the weight to which entitled? I am not aware of any statute declaring that a Chinese person cannot establish his right to be and remain in the United States, for the reason he was a merchant at the time above referred to, by the testimony of Chinese persons alone. Testimony produced may be insufficient in quantity or quality to establish a necessary fact, but still admissible. It may not satisfy the judicial mind, but still be admissible.

I am of the opinion that, until Congress acts and establishes a rule of evidence, in such a case as this, which excludes from consideration the testimony of Chinese persons, or requires that the fact be established by non-Chinese witnesses alone, the testimony of Chinese persons is competent, and must be received and considered. The weight to be given it is quite another matter, and in determining its weight the policy of Congress as declared in the statutes referred to by the commissioner (Act May 5, 1892, § 6, and Act Nov. 3, 1893, § 2) may be considered. But, as Congress has not seen fit to provide that Chinese persons found in the United States must establish their right to remain by testimony other than that of Chinese witnesses, even though it has done so as to Chinese persons seeking re-entrance on the ground they were formerly engaged as merchants in the United States, I do not think the testimony of Chinese witnesses can be excluded on the issue of the right of a Chinese person found here to remain in the United States. Congress by express provision has made a certain character and quality of evidence necessary in the one case, but has failed to do so in the other. I do not think the courts are at liberty to supply the omission, if it be such. I find several cases where the right to remain has been established by the testimony of Chinese witnesses, and the Circuit Court of Appeals has not suggested such testimony is not competent on that issue. If it must be supplemented by other evidence from non-Chinese witnesses, still that of the Chinese must be admitted.

In Ah How v. United States, 193 U. S. 65, 75, 24 Sup. Ct. 357, 48 L. Ed. 619, and Tom Hong v. United States, 193 U. S. 517, 521, 24 Sup. Ct. 517, 48 L. Ed. 772, the court refers to the fact in one case that the defendants offered the testimony of witnesses other than Chinese that they were residents of the United States on May 5, 1902, and in the other that the defendants had shown without contradiction and by disinterested witnesses other than Chinese that the appellants, defendants, had been in the United States for periods varying from 10 to 30 years, and that from 1891 to 1895 they were carrying on a Chinese grocery in New York, etc. These remarks were made with reference to the probative force and weight of the testimony in the case, but it was not said or held that testimony from witnesses other than Chinese *must* be produced to establish a right to *remain* in the United States, defendants having been found here, or that testimony of Chinese persons on such an issue is inadmissible. There must be evidence from at least one witness other than Chinese that the Chinese person was a resident of the United States at the time of the passage of the act. Fong Yue Ting v. United States, 149 U. S. 698, 729, 13 Sup. Ct. 1016, 37 L. Ed. 905. But this does not exclude the evidence of Chinese witnesses on the question of status as a merchant.

I think the evidence of Chinese witnesses admissible; but there come the questions of who are they, what are their characters and antecedents, and what weight shall be given their testimony—what credence are they entitled to? On such an issue they cannot be ignored for the sole reason they are Chinese persons; but that fact may be considered in determining what the truth is. In United States v. Lee Seick, 100 Fed. 398, 400, 40 C. C. A. 448, it was held by the Circuit Court of Ap-

peals, Ninth Circuit, Mr. Justice McKenna sitting, that the statutory "requirement that the mercantile character of a Chinese person prior to his departure for China must be established by two witnesses (other than Chinese) on his application for re-entry *is special,* and does *not* apply to other issues, such as the American nativity of the Chinaman, which are to be determined by the ordinary rules of evidence" (cited 193 U. S. 78, 24 Sup. Ct. 357, 48 L. Ed. 619, with evident approval).

This holding clearly indicates that while a Chinese, seeking readmission to the United States on the ground he was a resident merchant at the time of his departure from the United States, must prove such fact by witnesses other than Chinese, still when such person has not departed from the United States, and bases his right to remain in the United States on the alleged fact he was a resident Chinese merchant, and within the definition of "merchant" as specified in the act during the registration period, a different issue is presented, one not covered by the "special" provision as to the testimony that must be produced, and the defendant may present and have considered the evidence of Chinese persons. In Fong Yue Ting v. United States, 149 U. S. at page 729, 730, 13 Sup. Ct. at page 1028 (37 L. Ed. 905), the court said:

"The provision which puts the burden of proof upon him of rebutting the presumption arising from his having no certificate, as well as the requirement of proof, 'by at least one credible white witness, that he was a resident of the United States at the time of the passage of this act,' is within the acknowledged power of every Legislature to prescribe the evidence which shall be received, and the effect of that evidence, in the courts of its own government. Ogden v. Saunders, 12 Wheat. 213, 262, 349 [6 L. Ed. 606]; Pillow v. Roberts, 13 How. 472, 476 [14 L. Ed. 228]; Cliquot's Champagne, 3 Wall. 114, 143 [18 L. Ed. 116]; Ex parte Fisk, 113 U. S. 713, 721 [5 Sup. Ct. 724, 28 L. Ed. 1117]; Holmes v. Hunt, 122 Mass. 505, 516-519 [23 Am. Rep. 381]. The competency of all witnesses, without regard to their color, to testify in the courts of the United States, rests on acts of Congress, which Congress may at its discretion modify or repeal. Rev. Stat. §§ 858, 1977. The reason for requiring a Chinese alien, claiming the privilege of remaining in the United States, to prove the fact of his residence here, at the time of the passage of the act, 'by at least one credible white witness,' may have been the experience of Congress, as mentioned by Mr. Justice Field in Chae Chan Ping's Case, that the enforcement of former acts, under which the testimony of Chinese persons was admitted to prove similar facts, 'was attended with great embarrassment, from the suspicious nature, in many instances, of the testimony offered to establish the residence of the parties, arising from the loose notions entertained by the witnesses of the obligation of an oath.' 130 U. S. 598 [9 Sup. Ct. 627, 32 L. Ed. 1068]. And this requirement, not allowing such a fact to be proved solely by the testimony of aliens in a like situation, or of the same race, is quite analogous to the provision, which has existed for 77 years in the naturalization laws, by which aliens applying for naturalization must prove their residence within the limits and under the jurisdiction of the United States, for five years next preceding, 'by the oath or affirmation of citizens of the United States.' Act March 22, 1816, c. 32, § 2, 3 Stat. 259; Act May 24, 1828, c. 116, § 2, 4 Stat. 311; Rev. Stat. § 2165, cl. 6; 2 Kent, Com. 65."

In United States v. Lee Huen (D. C.) 118 Fed. 442, at pages 463, 464, this court considered the question as to the weight to be given the testimony of Chinese persons, and after years of experience in dealing with them, and in considering the weight to be attached to their testimony, I have found no occasion to change or modify the views there expressed.

[4] When a Chinese person found within the United States is arrested, charged with being unlawfully within the United States, and brought before the court, the burden is placed upon him by statute of establishing by affirmative proof, to the satisfaction of the justice, judge, or commissioner, his lawful right to remain in the United States. Act May 5, 1892, c. 60, § 3, 27 Stat. 25 (U. S. Comp. St. 1913, § 4317), which reads as follows:

"Sec. 3. 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."

The burden is on the United States to prove that the defendant is a Chinese person, or person of Chinese descent, and that he was found within the United States. When this is done, the burden rests on such Chinese person, or person of Chinese descent, to *prove* that he has a lawful right to remain in the United States. He must sustain the burden of proving to the satisfaction of the judge or commissioner, in such a case as this, that he was a merchant as defined in the statute, which says:

"The term 'merchant,' as employed herein and in the acts of which this is amendatory, shall have the following meaning and none other: A merchant is a person engaged in buying and selling merchandise, at a fixed place of business, which business is conducted in his name, and who during the time he claims to be engaged as a merchant, does not engage in the performance of any manual labor, except such as is necessary in the conduct of his business as such merchant."

The evidence in this case, considering it all, fails to show that this defendant was ever a merchant in the United States as thus defined.

[5] The statute plainly reads and declares to the effect stated, and is not, so far as I can see, open to construction or so obscure that it requires to be supplemented by judicial legislation. The right to remain in the United States is to be established by *affirmative proof* and *to the satisfaction* of the justice, judge, or commissioner. If the testimony rises to the dignity of *proof,* and is clear and credible—that is, comes from persons the judge or commissioner is satisfied are entitled to full credit and who know whereof they speak, and is also convinced the witnesses are not mistaken—then it is the duty of such judge or commissioner, as the case may be, to be satisfied, if there is no contradiction. Neither court nor commissioner has the right to arbitrarily disregard such testimony, if there be enough in quantity and quality to convince the judicial mind, and which ought to convince it. But it is not enough that one or two, or even six, Chinese witnesses, or witnesses of any other nationality, merely *say* that the Chinese person was a merchant some 18 or 20 years prior to the time of the giving of his or their testimony. The minds of honest men are not so constituted that they do not either forget or commit errors of memory. Again, such a statement is a mere conclusion. The facts establishing the status of a merchant must be proved. In this case the testimony of Lee Wo Jue and of Jo Kim is far from being satisfactory, or convincing, or conclusive. The testimony of the defendant

himself, standing alone, is not satisfactory. In view of his interest and contradictory statements, it becomes worthless.

[6] It is the duty of the court on appeal to consider and decide the case de novo, either on the evidence adduced before the commissioner, or on entirely new evidence, or on both. As the evidence of these Chinese persons was reduced to typewriting and is before the court, and the appellant has submitted the case thereon, this court may consider it and determine its value; and this the court has done, treating it all as in the case and before the court for consideration. In short, the court reverses the ruling of the commissioner striking out the testimony of the two Chinese witnesses named, Lee Wo Jue and Jo Kim, and admits same, and considers it.

[7] To establish that this defendant was a merchant during the period of registration, it was necessary for him to prove that he was engaged (1) in buying and selling merchandise; (2) at a fixed place of business; (3) that such business was conducted in his name, or that of a firm of which he was in fact a member; and that (4) during the time he was so engaged as a merchant he did not engage in any manual labor, except such as was necessary in the conduct of his business as such merchant. These are the requirements of the statute. It has been decided that membership in a firm is all sufficiently proved if his name appears in the books of such firm and shows that the defendant was a member thereof. Lee Kan v. U. S., 62 Fed. 914, 10 C. C. A. 669; United States v. Wong Ah Gah (D. C.) 94 Fed. 831. See, also, 193 U. S. 517, 521, 24 Sup. Ct. 517, 48 L. Ed. 772.

In this case the witnesses did not attempt to testify that this defendant was actually engaged in buying and selling merchandise, and neither of them testified to facts from which the main fact could properly be inferred. The *fixed* place of business was designated. There was no offer or suggestion of proof or testimony that during the time referred to this defendant did not engage in and perform manual labor, except such as was necessary in the conduct of his business as such merchant. Finally, it is evident, in reading the testimony of these Chinese witnesses, that they spoke from hearsay and were swearing that defendant was a merchant for the reason he told them he was engaged in business. It was not incumbent on the government to prove that this defendant was *not* a merchant as defined in the statute; but it was incumbent on the defendant to prove that *he was* such merchant, or at least, to prove that he was *not* a laborer, and so subject to deportation as such.

In United States v. Quan Wah, 224 Fed. 420, —— C. C. A. ——, decided June 8, 1915, the Circuit Court of Appeals in this circuit decides;

"It is quite evident that Judge Chatfield found this unpersuasive testimony sufficient to call for a reversal of the commissioner's decision, because he held that a Chinese person did not have the burden of showing his right to remain in this country, and that it was for the government to show affirmatively that he was not a merchant, nor a merchant's son, and that he never had a statutory certificate. Since we construe the statute differently, and have held (U. S. v. Hom Lim, 223 Fed. 520, —— C. C. A. ——, May 12, 1915) that the burden of showing his right to remain is on the Chinese person, we reach a different conclusion upon the same proof."

Judge Chatfield, who reversed the commissioner's order directing deportation, was therefore reversed.

[8] If in 1901, 1902, and 1903, and before that, this defendant was a merchant in the United States, he was not required to take out a certificate. If such was the fact, then the further fact that he subsequently became and now is a laborer is no ground for deportation. United States v. Lee Chee, 224 Fed. 447, — C. C. A. — (C. C. A., Second Circuit, Lacombe, Coxe, and Rogers, JJ., decided June 8, 1915). I am assuming that, after 1903, he did not return to China, and later return to and enter the United States contrary to law. It is worthy of note that in both these cases, just cited and recently decided by the Circuit Court of Appeals in this (the Second) circuit, the only witnesses produced in behalf of the defendants were Chinese persons, and that in both cases the defendants claimed they were merchants, etc., as here. No suggestion was made that their right to remain in the United States could not be established by the testimony of Chinese witnesses alone. In the one case the order of deportation was affirmed (reversing the District Court), while in the other case judgment reversing the order of deportation was affirmed.

[9] There were some erroneous rulings in sustaining objections to questions; but the answers, if favorable to the defendant, could not change the result, and such rulings are therefore harmless, and do not call for a reversal of the order of deportation. Courts will not in these days reverse orders or judgments merely to correct erroneous rulings, when same were harmless and the admission of the testimony ruled out would not change the result. If evidence offered by proper questions and ruled out *might* change the result, if answered favorably to the defendant, then there should be either a reversal or an opportunity given on these Chinese appeals to produce it.

[10, 11] The witness Lee Wo Jue said he knew the defendant, Chin Sing Quong, in San Francisco, where he, the witness, was working in a Chinese restaurant on Du Pont street: that defendant—

"was in the Chinese drug store; that is where I met him. * * * Q. Who ran that drug store? A. There was others besides Chin Sing Quong in that store. Q. Was Chin Sing Quong a member of the firm? (Objection, unless he knows—states of his own knowledge. Objection sustained. Exception.)"

Here was no error. Then:

"Q. What was Chin Sing Quong doing in San Francisco? A. He was in a Chinese drug department. Q. Do you know of your own knowledge that he was a member of the firm? (Objected to, and objection sustained.)"

This was error, if harmful; but it was not, for the next question was:

"Q. How do you know that he was connected with the Chinese drug store? A. He was a friend of mine. I have seen him quite often, and *he told me* he was in business."

He then said he went to San Francisco in 1886, and met defendant shortly thereafter. He was not permitted to say whether he knew who composed the firm running the drug business, but said defendant left San Francisco about five years after the witness first met him, which would be about 1891. The witness then said the defendant

went to Boston, and he knew *because he corresponded with him,* and for the same reason he said defendant was in business in Boston, Chinese grocery business, firm of Quong Ark Yuen. All this was hearsay, and based wholly on what defendant told him. The witness then stated that later he lived in New York City and saw defendant there some seven or eight years ago, or about 1906 or 1907. He had no letters from defendant and never saw him in Boston. He was asked:

"How do you know that he [defendant] was in business in San Francisco? A. I had some business dealings with him. Q. Is your knowledge based on what he said? A. Well, I saw him quite often, and we had talked many times, and he told me that he was in business. Q. Is there anything else that leads you to believe that he was in business, except what he said? A. Well, I went in his store, and patronized him, and saw him there."

He did not say he traded with the defendant, or that defendant bought or sold anything, or did anything whatever in the store.

Jo Kim says he knew defendant in China when a little boy, and next saw him in San Francisco, Du Pont street.

"Q. What was he doing? A. Drug store. Q. What drug store was that ? A. Jar Ning Tong. Q. Was he interested in that drug store, do you know?"

If he had been asked whether he knew anything of defendant's connection with that store, and, if so, what, giving facts and transactions within his observation, quite likely no objection would have been interposed; but the question called for a conclusion. This question was objected to, and the objection sustained.

"Q. Yo you know whether the defendant was a member of the firm that conducted that drug store?"

This was objected to, and the objection sustained. The witness was not asked to state facts, what he had seen, etc., but a mere conclusion. He was then asked if he saw defendant in Boston, and answered:

"Yes. Q. What was the defendant's business when you were in Boston? A. Grocery, everything. Q. Do you know the name of his firm? A. Quong Ark Yuen."

No member of such a firm was called as a witness. He then said the store was on Harrison avenue.

"Q. Then you say that you saw him in this grocery store in Boston in 1896 or 1897? A. Yes."

No evidence was given or offered that any one saw defendant doing anything in the store, or in connection with it. For anything that appears he was a mere laborer. The witness did not see him in any place, except China, San Francisco, and Boston. Defendant says the store was at No. 38 Harrison avenue. But what defendant did, his interest in the store, if any, and the essential facts to show he was a merchant, were not proven, nor was there an offer to prove them. Being in a store, or about a store, in the absence of evidence that the person is the proprietor, or one of the firm, if it be a copartnership, does not establish to my satisfaction that such person was a merchant. This evidence is too hazy to convince. The extent of the acquaintance between the defendant and these witnesses does not fully appear, but

it seems to have been slight. When defendant went out of the mercantile business, and why, if he ever was in that business, is not shown.

Then comes in the contradictory statements of the defendant tending to show a made-up case. If this defendant came to the United States in 1895 or 1896, was a merchant in San Francisco until he went to Boston, and was a merchant there, as claimed, there was no occasion for evasion or falsehood. It should be added that long and undisturbed residence in the United States raises no presumption that a Chinese person is lawfully here or entitled to remain. However, it is a circumstance requiring careful consideration, and in a close case should turn the scale in favor of the Chinese person.

[12] Defendant has offered no new or additional evidence on this appeal and hearing. He has made no request so to do, or to produce his witnesses before this court. Given the opportunity, he has not availed himself of it, and it must be assumed that nothing new could be developed, no additional fact placed before this court. He was at liberty to do so. The act contemplates a full hearing de novo, if desired. Liu Hop Fong v. United States, 209 U. S. 453, 461, 28 Sup. Ct. 576, 52 L. Ed. 888.

The judgment of deportation is affirmed.

In re J. BACON & SONS.

(District Court, W. D. Kentucky. June 26, 1915.)

1. BANKRUPTCY ⟸223—COMPENSATION OF REFEREE—COMMISSIONS.
A referee is not entitled to commissions on money paid out by a trustee in conducting the business of the bankrupt.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 888–894; Dec. Dig. ⟸223.]

2. BANKRUPTCY ⟸223—COMMISSIONS OF REFEREE—DISBURSEMENTS FOR RENT.
Where a trustee at the request of the creditors continued the mercantile business of the bankrupt, from that time forward the rent of the business premises was an expense of the business, and the referee is not entitled to commissions on the disbursements therefor; but rent accruing before that time, for which a lien was given by the state statute, was an indebtedness of the estate.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 888–894; Dec. Dig. ⟸223.]

3. BANKRUPTCY ⟸223—COMMISSIONS OF REFEREE—COMPOSITION.
The majority of creditors of a bankrupt joined in acceptance of an offered composition, and in such acceptance waived deposit in court of the amount offered, and only such amount was deposited as necessary to cover costs, disbursements, and claims of creditors who did not join in the waiver. The composition was confirmed, but in the meantime the term of the referee had expired, and a successor had been appointed. *Held*, that under Bankr. Act 1898, c. 541, § 40a, 30 Stat. 556 (Comp. St. 1913, § 9624), which provides that referees shall receive as commissions "one-half of one per centum on the amount to be paid to creditors upon the confirmation of a composition," commissions were allowable only on the amount actually paid in and disbursed in the bankruptcy proceedings, and that such

commissions were payable to the succeeding referee, whose appointment took effect prior to the confirmation or to any disbursement of the fund.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 888–894; Dec. Dig. ⟸223.]

In Bankruptcy. In the matter of J. Bacon & Sons, a corporation, bankrupt. On settlement of compensation of referee.

Herman Nettelroth, of Louisville, Ky., for former referee.

Wm. Marshall Bullitt and Clarence Smith, both of Louisville, Ky., for bankrupt.

EVANS, District Judge. The corporation known as the H. B. Claflin Company, which conducted a vast mercantile business in New York City early in 1914, became embarrassed. Connected with it in various ways were 23 other corporations, located some in New York City and others in different parts of the country. Among these corporations was the bankrupt, J. Bacon & Sons. Against it, on June 26, 1914, certain of its creditors filed a petition in involuntary bankruptcy, and on July 13th it was adjudicated a bankrupt. Its capital stock was owned or controlled by the H. B. Claflin Company, and most of its indebtedness was incurred on account of that corporation. Its indebtedness amounted, approximately, to $2,400,000, very little of which was owing to creditors in this locality. The affairs of the bankrupt were controlled in New York by the owner of its capital stock. Its local manager in Louisville, Ky., was A. H. Morris. Upon the adjudication the case was referred to the then referee, R. C. Kinkead, Esq., who on July 14, 1914, in the absence of the judge, appointed said Morris receiver of the bankrupt. On August 3d the first meeting of creditors was held, and thereat Morris was elected trustee, and upon his qualification was, at the request of creditors, authorized to continue the business of the corporation as a going concern, and this was done until April 26, 1915, when it terminated under the circumstances presently to be stated. The indebtedness of the 23 corporations associated with the H. B. Claflin Company was enormous, amounting to scores of millions of dollars, and the creditors of the allied 24 corporations appointed what was called a noteholders' committee in New York City, where the greater part of the entire indebtedness was held or controlled; the functions of the committee being to effect, if possible, a general settlement for all. While this was being done, the business of the bankrupt was conducted by the trustee, and Mr. Kinkead, in his petition for compensation filed May 19, 1915, says that during the entire period between July 13, 1914, and March 30, 1915, when his term of office expired, he—

"was required to and did perform services as referee in said matter almost daily, with the exception of Sundays and a few days when the undersigned was absent from said district; that the aforesaid services by the undersigned, as referee, were required by reason of the fact that the conduct of the business of said bankrupt was being continued pursuant to the request of the creditors of the bankrupt; that matters were continually arising in said proceeding which required action by the undersigned as referee; and that the undersigned, as referee, examined and countersigned approximately 6,000 checks, aggregating in amount about $900,000, which were drawn by said receiver or trus-

tee to pay the expenses of the conduct of said business during the aforesaid period."

The bankrupt's business was conducted by the trustee, and not by the referee, and the labors of the referee, as he has described them in his petition, while possibly necessary under the rule even while the business was being conducted as in this case, were not such as entitled him to any compensation. All the vast amount for which he signed checks was, as he shows, "to pay the expenses of the conduct of the business." This work was probably done in the hope that it would represent such a "distribution to creditors" as would entitle the referee to 1 per cent. upon the amount disbursed, but examining and countersigning the checks of the trustee is not such work as entitles the referee to compensation, as the act makes no provision for it in cases like this.

[1] Mr. Loveland, in his work on Bankruptcy (4th Ed.) on page 232, says:

"The referee is not entitled to commissions on moneys paid out by the trustee while carrying on the business of the bankrupt."

The text is supported by Bray v. Johnson, 166 Fed. 57, 91 C. C. A. 643, and by In re Rourke Co. (D. C.) 209 Fed. 877. Indeed, so definitely has this proposition been settled that no contention was made at the argument in support of the view that any compensation could be allowed for those services.

The schedules of the bankrupt, as amended, showed its total indebtedness to some 448 creditors to have been $2,356,441.27. Much of this indebtedness was upon the paper of the H. B. Claflin Company, and almost the entire amount was proved against the bankrupt's estate and allowed by the referee. Meantime, the noteholders' committee had progressed with its work, and on March 5, 1915, the bankrupt filed with the referee an offer of composition in the following language:

"The undersigned, which was adjudicated a bankrupt herein on the 13th day of July, 1914, and whose schedules of creditors and property have been previously filed at Louisville, Ky., with Hon. Robert C. Kinkead, Esquire, the referee in bankruptcy in charge, and who was examined herein on the 3d day of August, 1914, does hereby offer a composition at thirty-five per cent. (35%) of the claims of its creditors allowed, or to be allowed, except those entitled to priority in this proceeding. J. Bacon & Sons,

"By Will A. Jonas, President."

This offer was accepted in due form, and creditors whose claims were proved and allowed to the amount of $2,326,067.67, and who were represented by the noteholders' committee, accompanied their acceptance of the offer with a waiver in writing in this language:

"On behalf of said creditors named in the statement annexed hereto, said committee hereby waives the deposit to the credit of the Judge of the United States District Court for the Western District of Kentucky of the thirty-five per cent. (35%) composition offer made by said bankrupt so far as creditors' claims are concerned. This waiver, however, is absolute with respect to the deposit of money necessary to apply for the confirmation of said composition."

Other general creditors, whose claims had been proved and allowed, did not join in this waiver.

Before his term expired as referee, Mr. Kinkead wrote and signed his report on the offer of composition, in which he said:

"Your referee would respectfully further certify that there has been deposited to the credit of the judge of this court in the Citizens' National Bank of Louisville, Kentucky, the sum of $30,000, which it is estimated by your referee will not be sufficient to pay all costs, charges and expenses of administration, all preferred or prior claims, and the thirty-five per centum composition to all those creditors who have not waived the deposit thereof on their respective claims, but the bankrupt refuses to make further deposit. Your referee herewith hands up all proofs of claim mentioned in the various schedules attached hereto, together with all powers of attorney filed in connection therewith. Your referee would further certify that so far as he is advised, there is no reason appearing herein as to why said composition should not be confirmed."

Notwithstanding the suggestion of the referee as to the inadequacy of the $30,000 deposit, it was found to be quite sufficient.

The business of the bankrupt was conducted upon premises partly on Market street and partly on Fourth street, in this city. That part on Market street was owned by the Bacon Realty Company, and was leased by the bankrupt at a rental of $27,000 per annum, payable in monthly installments of $2,250 each, and that part of the premises located on Fourth street was owned by Miss Maggie Judge and was leased to the bankrupt at a rental of $3,600 per year, payable in monthly installments of $300 each. Morris, during his incumbency as receiver and trustee, paid all the rent accruing to each landlord from July 31, 1914, up to and including March 31, 1915. How, if ever, the rent was paid to the two landlords from July 13, 1914, when the adjudication was made, until July 31, 1914, is not clearly shown, nor is it clearly shown how the rent was paid from July 1 to July 12, 1914, inclusive, but we may assume that it was paid by the receiver, who, except for the first 12 days in July, was in charge of the bankrupt's affairs. Of course, the landlords respectively, under section 2317 of the Kentucky Statutes (construed in the case of Sapinsky & Son, 219 Fed. 57, 134 C. C. A. 595), had a lien upon the bankrupt's property on the premises to secure payment of the rent due and to become due for one year from the adjudication on July 13, 1914. As we have seen, the receiver and trustee paid the rent from July 31, 1914, to March 31, 1915, but the record shows that both of the landlords, in writing, waived any deposit to secure any balance accruing to them respectively from April 1, 1915, to July 13, 1915. That is to say, knowing, if the composition were confirmed, the business would be continued by the bankrupt, they deemed it good judgment to facilitate that result by the waiver. On March 29, 1915, the term of office of Referee R. C. Kinkead expired, and on the next day, March 30th, the appointment of George Du Relle, Esq., as his successor, became effective. On April 1st the case was referred to the latter referee. On the same day the court entered an order as follows:

"The bankrupt, J. Bacon & Sons, having been examined at a meeting of creditors, and having filed in court the schedules of its property and lists of its creditors required, offered terms of composition to its creditors, and this day came by counsel and made application for the confirmation of such composition; it is now ordered that said application be filed, it appearing that said proposition has been accepted in writing by a majority in number and value

of all creditors whose claims have been allowed, and it further appearing that the money to pay the consideration to be paid by the bankrupt to his creditors, and the costs of the proceeding has been deposited, pursuant to the order of the court now made, in the Citizens' National Bank of Louisville, Ky., subject to the order of the judge of this court. The court now fixes April 24, 1915, as the time, and Louisville, Ky., as the place, for hearing said application, and directs the clerk to give notice thereof at least ten days before said time to each creditor by mail."

On April 26th the court entered another order in this language:

"An application for the confirmation of the composition of the bankrupt having been filed in court, and it appearing that the composition has been accepted by a majority in number of creditors whose claims have been allowed, and also by a majority in amount and value of such allowed claims, and the consideration and the money required by law to be deposited having been deposited as ordered in such place as was designated by the judge of said court, and subject to his order, and it also appearing that it is for the best interest of the creditors and that the bankrupt has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to its discharge, and its offer and its acceptance are in good faith, and have not been made or produced by any means, promises, or acts contrary to the acts of Congress relating to bankruptcy, it is therefore hereby ordered that the composition be, and it is hereby, confirmed. That orders should be made for the proper distribution of the fund so deposited will be considered at some future time."

Accompanying the report of Referee Kinkead on the offer of composition was the following:

Statement of Referee's Charges.

Expenses necessarily incurred and paid by referee for mailing notices to creditors, printing notices, clerical aid in certifying composition, etc., office accommodation and stationery, 9 months	$ 186 55
Examining, filing and registering 607 claims of creditors at 25 cents	151 75
To 1 per cent. on taxes paid, not covered by composition	7 10
To 1 per cent. on $27,000 paid and to be paid on Market Street house, rent for one year due and to become due	270 00
To 1 per cent. on $3,600 paid and to be paid on Fourth Avenue annex, rent for one year due and to become due	36 00
To 1 per cent. on claim (secured of Monarch Tag Co.)	2 00
To 1 per cent. on wage claims (secured) to be paid	8 58
To one half of 1 per cent. upon the amount to be paid creditors on confirmation of composition, being $831,870.40	4,159 35
	$4,821 33
Credit by amount paid by Trustee on account	500 00
Balance	$4,321 33

None of those charges were objected to, except those which will be repeated, and which are as respectively stated, thus:

To 1 per cent. on $27,000 paid and to be paid on Market Street house, rent for one year due and to become due	$ 270 00
To 1 per cent. on $3,600 paid and to be paid on Fourth Avenue annex, rent for one year due and to become due	36 00
To one half of 1 per cent. upon the amount to be paid creditors on confirmation of composition, being $831,870.40	4,159 35

The five items in the referee's "Statement of Charges," to which no objection has been made, were for fees earned upon the work done during the period from July 13, 1914, to March 29, 1915, both inclusive,

and in the aggregate amounted to $355.98. On some date not shown, the trustee paid Mr. Kinkead $500, which was an excess over the undisputed items of $144.02. This payment, to the extent of fees not then earned, was not warranted.

[2] The rent of the premises upon which the bankrupt's business was carried on was at the rate of $2,550 per month. The trustee, at the request of creditors, was ordered by the referee to continue the business of the bankrupt. This appears to have been done on August 3, 1914. On and after that date we think the rent of the premises must be regarded as part of the expense of carrying on the business (In re Grignard Lithographic Co. [D. C.] 155 Fed. 699), and upon disbursements for such expenses the referee was not entitled to compensation, as shown by the authorities already cited. But for the month of July, 1914, and for the first two days of August following, we think the rent was an "indebtedness," and that, upon the amount disbursed for its payment, the referee was entitled to 1 per cent. In re Youdelman, etc., Co. (D. C.) 166 Fed. 381. The amount of the rent for this period of one month and two days was $2,715, and upon the disbursement of that sum the referee was entitled to $27.15. This will reduce the excess payment to $116.87.

[3] So far as applicable to the questions now involved, section 40a of the Bankruptcy Act is as follows:

"Referees shall receive as full compensation for their services, payable after they are rendered, * * * from estates which have been administered before them one per centum commissions on all moneys disbursed to creditors by the Trustee, or one-half of one per centum on the amount to be paid to creditors upon the confirmation of a composition."

Section 72 (Comp. St. 1913, § 9656) is expressed in these unmistakable terms, to wit:

"Neither the referee, receiver, marshal, 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 language is too plain and unambiguous to admit of construction. Bearing that in mind, then, in order to ascertain precisely what the two referees in this case are entitled to receive on the percentage basis, we must look to that clause of section 40a, which allows referees one-half of 1 per cent. "on the amount to be paid to creditors upon the confirmation of a composition." When this language is analyzed, two elements are prominent and unmistakable. They are: First, that the one-half of 1 per cent. is to be calculated "on the amount to be paid to creditors"; and, second, that the payments contemplated are those to be made "upon the confirmation of a composition." The language used is, on its face, plain enough, but the record develops a latent ambiguity which may be stated thus: Does the phrase "to be paid to creditors" refer to what was "offered" in composition, disregarding all ad interim happenings, or does it refer to what is actually to be paid to creditors as the status of the case is fixed when the composition is confirmed? In this case the creditors accepted the terms of composition offered, but a great majority of them voluntarily waived the pay-

ment of the 35 per cent. through this proceeding, and, with these facts in the record, the referee reported favorably and the court confirmed the composition with the waivers referred to standing against the creditors who had accepted the terms offered with the waiver voluntarily annexed thereto by themselves. In this situation we do not doubt that section 40a must be so construed in this case as to limit the phrase "to be paid to creditors" to those who had the right, upon the confirmation of the composition, to claim payment out of the money provided for that purpose through the deposit of the $30,000. The record inexorably fixed that sum as the amount to be paid to creditors through this proceeding, and we can have no concern with and cannot control what, if anything, may be done outside. The exact question, therefore, is: What amount was to be "paid to creditors" in this case on April 26, 1915, when the composition was confirmed? Can there be any doubt upon the record as to the exact amount to be then so paid? The facts are clear and indisputable that upon the confirmation of the composition in this case on April 26, 1915, no more than $30,000 was to be then paid to creditors. Certainly nothing else was to be paid through or in this proceeding, because of the waivers referred to. There can, we think, be no doubt of the right of the creditors to make the waiver, and there can be as little doubt that their doing so was a question with which the referee had no concern. We cannot doubt that it was the intention of Congress that the compensation of the referee was to be based upon certain work to be done by him. The late referee did no work, was not properly called upon to do any, and could not have done any in respect to paying creditors even to the extent of the $30,000 deposited, which was not to be paid until after he went out of office. For paying out the $30,000 the present referee is entitled to the one-half of 1 per cent. prescribed in the statute. But it does not, and, in our opinion, cannot, follow, because he is entitled to one-half of 1 per cent. on that sum, that either he or his predecessor is entitled to a like percentage upon 35 per cent. of $2,326,067.67, not one cent of which was to be paid to the creditors holding those claims either upon the confirmation of the composition, or at all, so far as we know. They took charge themselves of that part of what concerned them alone. Certainly no payment is to be made to them in this proceeding which closed when the composition was confirmed. Under the statute the referee's compensation is to be measured by work actually done, though Congress probably considered as a meritorious factor the responsibility attaching to the custody, for a time, of the money as well as the work of paying it out, but the referee has no just or lawful claim to be paid any percentage upon purely imaginary disbursements. Section 40a seems to us not to admit of any other construction, unless we interpolate words into it and entirely disregard the remarkably positive and explicit prohibitions of section 72. We disclaim the right to do either of those things.

Though the question before us has never, so far as we can find, been adjudicated, the case of In re Philips, 210 Fed. 889, 127 C. C. A. 499, is quite instructive. See, also, In re Meadows, 211 Fed. 948, 128 C. C. A. 446.

Counsel for the late referee seems to attach some importance to the proposition that the offer of composition was absolute in its terms; that it was to pay 35 per cent. upon the general indebtedness; and that the composition, though confirmed, cannot release the bankrupt from its debts, unless that payment is actually made; and hence he claims that the full amount of the percentage on the debts proved should be allowed. He quotes section 14c of the act (Comp. St. 1913, § 9598) to the effect that:

"Confirmation of a composition shall discharge the bankrupt from his debts, other than those agreed to be paid by the terms of the composition and those not affected by a discharge."

As between the bankrupt and its creditors, these matters might have more or less importance in certain contingencies, but, as already stated, we cannot see how they in any way entitle the referee to charge fees assessed at one-half of 1 per cent. upon sums which the creditors possibly might claim from the bankrupt, but which they are not doing in fact. What they may do hereafter is their concern, not ours. But if, under the specious guise of speculation as to the possibilities of payment in the future, the court were to allow the items here in contest, it would disregard section 72, which contains one of the most positively expressed provisions found in the Bankruptcy Act.

After very careful consideration, we are constrained to hold that the former referee, Mr. Kinkead, is entitled only to $27.15 in excess of the amount of the five items on his "statement of charges" which are not disputed. This $27.15 has already been paid to him; that is to say, the fees he has earned in the case, including the $27.15, amount to the aggregate of only $383.13, while he has been paid $500 by the trustee out of the assets of the bankrupt. Referee Du Relle, however, who has made or will make the distribution of the entire $30,000 deposited by the bankrupt, is entitled to one-half of 1 per cent. on that sum, inasmuch as it is to be paid "on the confirmation of the composition." The former referee is not entitled to any of the percentage thus to be paid, unless, as stated at the hearing, there has been some arrangement between the two referees whereby they have apportioned the fees in the case without calling on the court to do so under section 40b of the act.

Because of what occurred at the hearing, and what appeared to be the desire of all concerned, we have once for all considered and determined the questions involved, though, if Referee Du Relle desires a further hearing upon the main question in issue, he will be accorded the opportunity. Otherwise orders will be entered in conformity with the views herein expressed.

LYONS v. LYONS.

(District Court, N. D. West Virginia. July 29, 1915.)

1. WILLS ⟸566—CONSTRUCTION—PROPERTY DEVISED—"MONEY IN BANK."
A testator devised real estate appraised at a specified value to a nephew, bequeathed to his wife all his shares of capital stock of a bank amounting to 20 shares, made small cash bequests, gave to a brother the residue "of my money in bank" remaining after payment of debts, expenses of administration, and legacies, and gave his residuary estate to his wife. Testator was, at the time of the making of the will, past 60 years of age and childless, and had retired from business. Testator and his wife had talked over the matter of the disposition of his estate, and had agreed thereon when he sent for a lawyer who drew the will according to instructions. *Held*, that the term "money in bank" in the will included, not only a checking account, but also time and savings deposits of testator.
[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1238½, 1239; Dec. Dig. ⟸566.]

2. WILLS ⟸439—CONSTRUCTION—INTENTION OF TESTATOR.
The court in construing a will must ascertain the intention of testator which, when ascertained, governs.
[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 952, 955, 957; Dec. Dig. ⟸439.]

3. WILLS ⟸765—CONSTRUCTION—RIGHTS OF BENEFICIARIES.
Testator gave his money in bank to a brother, and gave to his wife all his stock in a bank "amounting in all to twenty shares." He also gave her his residuary estate. Testator at the time of his death owned but 12 shares of stock, and it did not appear whether he was mistaken as to the amount of his holdings at the time he made his will, or whether he subsequently disposed of the 8 shares. When testator and his wife and the lawyer who drew the will talked over the disposition to be made, it was understood that the wife was to have 20 shares of bank stock as her portion. *Held*, that the wife was entitled to 20 shares of stock, or their equivalent in value.
[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1979; Dec. Dig. ⟸765.]

In Equity. Suit by Michael Lyons against Mary E. Lyons, administratrix, and in her own name. Decree ordered.

Walter F. Carter and Davis, Swartz & Templeman, all of Clarksburg, W. Va., for complainant.

Smith & Jackson, of Clarksburg, W. Va., for defendant.

DAYTON, District Judge. John Lyons, born in Ireland, came to America about the year 1864. He settled in Clarksburg and married Mary E. Shiel. He was a miner, suffered an accident in the mines, whereby he lost a leg, went into the saloon business, and died at the age of 64, testate, at Clarksburg, December 31, 1910, leaving an estate, real and personal, of the value of something like $16,000. His widow survived him and qualified as his administratrix cum testamento annexo. He had no children. Two brothers survived him, Patrick F. Lyons, resident in Pennsylvania, and Michael Lyons who had remained and lived his life in Ireland and for 40 years had been superintendent of the estate of Capt. A. B. Pollock known as "Ganaveen" in County Galway. This last-named brother had 10 children living one of whom, Thomas Roger Lyons, had come to America, settled in Clarksburg, en-

gaged in the grocery business, and married the niece by blood of testator's wife. The personal estate that passed into the hands of Mary E. Lyons, the widow and administratrix, as shown by the appraisement, included a cash deposit, subject to check, in the Home Bank of Savings of $854.14; three certificates of time deposits, interest-bearing, with this same bank, aggregating in value, principal, and accrued interest $2,799.58; a similar time certificate with the West Virginia Bank of the value of $1,236.86; a like time certificate of deposit with the Union National Bank of the value of $865.94; and a time savings deposit with the Lowndes Savings Bank & Trust Company of $3,866.45. All of these sums have been collected by the administratrix from these banks. Decedent, Lyons, also owned 12 shares of the capital stock of this Home Bank of Savings. His will was executed on February 26, 1907, nearly 4 years before his death. It was prepared for him by Attorney Johnson, upon information and directions given him, as he testifies, by decedent and his wife, or, at least, by decedent in the presence and with knowledge of his wife. By its terms he provided (clauses 1 and 2) for payment of burial and funeral expenses and his debts "out of my money in bank"; devised (clause 3) to his nephew (who had married his wife's niece) Thomas Rogers Lyons his house and lot on Oak and Pike street in Clarksburg (appraised at a value of $5,000); by clause 4 he bequeathed to his wife "all my shares, of the capital stock of the Home Bank for Savings of Clarksburg, West Virginia, amounting in all to twenty (20) shares"; and by clauses 5, 6, and 7, he made certain small cash bequests, aggregating $201, which are not in controversy here, and are therefore immaterial. Clauses 8 and 9 of this will read as follows:

"8. I give and bequeath to my brother, Michael Lyons of Ganaveen, Ireland, the residue of my money in bank, remaining after the payment of my aforesaid funeral expenses, debts, costs and expenses of administration of my estate, and the legacies aforesaid, and in the event that said Michael Lyons shall have died heretofore or shall die before my death leaving children living at my death, then I give and bequeath said money, in this present paragraph bequeathed to said Michael Lyons, to said children of Michael Lyons then living in equal shares per capita, it being my intention that the issue of any deceased child of said Michael Lyons shall not represent such deceased child.

"9. All the rest and residue of my property and estate, real, personal and mixed, of every kind or nature whatsoever, not hereinbefore given, devised and bequeathed, I do hereby give, devise and bequeath to my wife, Mary E. Lyons."

[1] The whole controversy here turns upon what construction is to be given to the words: "my money in bank." The complainant, Michael Lyons, insists it includes the cash checking deposit of $854.14 with the Home Bank of Savings, the five time certificates of deposits with the Home, Union National, and the West Virginia banks, and the time savings deposit with the Lowndes Savings Bank & Trust Company. On the other hand, it is insisted by the defendant widow that these words, "money in bank," must be restricted to the cash-checking deposit of $854.14, that the time certificates of deposit must be held to be, in effect, loans made by the testator to these banks, payable in futuro for the consideration of an agreed rate of interest, and that all interest in them vested in her under the residuary ninth clause of the

will, and that the cash-checking deposit, being subject to payment of administration costs and legacies, has been more than consumed in the payment of these, wherefore plaintiff is entitled to take nothing. Counsel for the widow, to sustain this contention on her part, have filed with me an able and exhaustive brief, wherein they cite many text-books and decided cases to the effect that these time deposits and savings accounts are choses in action, and not "money in bank." They rely especially upon the state statute (section 946 [chapter 29, § 62] Code 1906), wherein, in relation to the subject of taxation, "money" is defined.

Webster and Century Dictionaries, Burrill's Law Dict., 3 Minor's Ins. 27, 28, 2 Words and Phrases, 1144, 2 Daniel on Negotiable Instruments, §§ 1702, 1703, 1705, Zane on Banks and Banking, §§ 161, 362, Page on Wills, § 496, p. 583, and Gardner on Wills, § 112, c. 14, p. 414—are cited, Mr. Justice Matthews in Basket v. Hassell, 107 U. S. 602, 2 Sup. Ct. 415, 27 L. Ed. 500, says:

"A certificate of deposit is a subsisting chose in action and represents the fund it describes, as in cases of notes, bonds, and other securities, so that a delivery of it, as a gift, constitutes an equitable assignment of the money for which it calls."

This case involved the question as to what constituted a donatio mortis causa, and was decided in 1883. The cases of Commonwealth v. Compton, 137 Pa. 138, 20 Atl. 417, 418; State v. Patch, 21 Mont. 534, 55 Pac. 108; City of Lansing v. Wood, 57 Mich. 201, 23 N. W. 769; Dabney v. Cottrill, 9 Grat. (Va.) 572, 579; Dillard v. Dillard, 97 Va. 434, 34 S. E. 60; Beatty v. Lalor, 15 N. J. Eq. 108; Hancock v. Lyon, 67 N. H. 216, 29 Atl. 638; Commonwealth v. Howe, 132 Mass. 250; State v. Hill, 47 Neb. 456, 66 N. W. 541—are cited and relied on as fully establishing this construction contended for.

On the other hand it is very earnestly contended that:

First. The authorities cited by defendant's counsel define the technical meaning of money and certificates of time and savings deposits, while "money" is also a generic term, and may mean, not only coin and currency, but any instrument or token representing value, citing State v. McFetridge, 84 Wis. 473, 54 N. W. 1, 998, 20 L. R. A. 223; In re Levy's Estate, 161 Pa. 189, 20 Atl. 1068; In re Miller's Estate, 48 Cal. 165, 22 Am. Rep. 422; Fry v. Feamster, 36 W. Va. 454, 15 S. E. 253.

Second. That the obligation upon this court is not to define the technical meaning of "money in bank," but to ascertain in what sense and to accomplish what purpose testator used these words in his will; that such intention must be controlling over any and all technical meanings of the words used, and such intention is to be ascertained by allowing for the unskillfulness and negligence of the testator, disregarding technical informalities, by tracing this intention diligently in every part of the instrument and in the whole of it taken together, aided by extrinsic evidence of the state of facts and surrounding circumstances under which the will was made, such as testator's situation at the time, the state of his family, the condition of his property, and generally any facts, known to him, which may reasonably be supposed to have in-

fluenced him in its disposition, all to the end that the court may place itself in his situation and better interpret his language and meaning, as set forth in Wootton v. Redd's Ex'r, 12 Grat. (Va.) 205, and authorities there cited.

In opposition to the contention that time and saving deposit certificates are not to be held money in bank, but choses in action negotiable in character, counsel for plaintiff cite: In the Matter of Stone, 15 Misc. Rep. 317, 37 N. Y. Supp. 583; Boyd v. Satterwhite, 12 Rich. Eq. (S. C.) 487; In the Matter of Blackstone, 47 Misc. Rep. 538, 95 N. Y. Supp. 977; In the Matter of Hendrickson, 140 App. Div. 393, 125 N. Y. Supp. 309; In re Caldwell's Estate, 8 Del. Ch. 358, 68 Atl. 525; Vaisey v. Reynolds, 6 L. J. Ch. (O. S.) 172; Jenkins v. Fowler, 63 N. H. 244; Leaphart v. Bank, 45 S. C. 563, 23 S. E. 939, 33 L. R. A. 700, 55 Am. St. Rep. 800; State v. Shove, 96 Wis. 1, 70 N. W. 312, 37 L. R. A. 142, 65 Am. St. Rep. 17; Shute v. Pacific National Bank, 136 Mass. 487; Lebanon v. Mangan, 28 Pa. 452; Loudon Savings Fund Society v. Hagerstown, etc., Bank, 36 Pa. 498, 78 Am. Dec. 390; Patterson v. Poindexter, 6 Watts & S. (Pa.) 227, 40 Am. Dec. 554; Hotchkiss v. Mosher, 48 N. Y. 482; In the Matter of Hewitt, 181 N. Y. 547, 74 N. E. 1118; Magee on Banks and Banking, § 152, 3 R. C. L. § 198; and the case of Dabney v. Cottrell, 9 Grat. (Va.) 572, is especially relied upon as a case in point, decided by the Supreme Court of Virginia before the division of the state, and therefore binding authority upon the lower West Virginia courts until reversed. Most of the authorities thus cited pro and con, I have examined; and, without entering into a discussion of them in detail, it is sufficient for me to state that, while recognizing the apparent and to some extent real conflict that exists between them, my study of them leads me to the conclusion that, so far as this case is concerned, the plaintiff's contentions must be sustained and this for these reasons:

First. I am convinced that the technical definition of "money in bank," which excludes time and savings deposits and is held to apply only to checking accounts, is contrary to all common understanding. I believe that a vast majority of bank depositors, if asked the question whether "money in bank" included such certificates, would at once answer, "Yes." The very nature of these deposits in most instances precludes the idea of their being considered loans. In this day of intense competition among banks to secure deposits, some are paying interest upon daily balances disclosed in checking accounts, very many upon time deposits for periods from 1 to 12 months, and almost all such do so with a well-defined understanding that the depositor may, at any time, withdraw without notice or forfeiture even of interest, unless the withdrawal be made within 30 days after the deposit is made. Under such conditions technical constructions of words by the courts should yield to common use and understanding of such words. Many thousands of dollars are constantly deposited in banks because the depositors expect to call for and use the money for specifically planned purposes within too short a time to warrant them to make a loan thereof to individuals or other corporations. The farmer, for instance, sells his cattle in the spring and summer, receives his pay therefor, but out

of it, in from 1 to 4 months, he expects to pay for his fall and winter stock to feed over for sale the following year. If he can deposit his money in a bank and get a small rate of interest for it for the intervening time, he does so as a matter of good business, but with no thought that he has "loaned" the money to the bank. The banks, whether it be good business or not on their part, have very generally yielded to the insistent demand upon them, in this section of country at least, to receive such deposits upon such conditions. In the language of Judge Allen in Dabney v. Cottrell, 9 Grat. (Va.) 572:

"In the ordinary transactions of life we know that such deposits are not regarded as investments in the common acceptation of the term. The depositor consents to accept of a low rate of interest, because he regards it as a fund upon which he can always rely"

—to draw upon, and in this section even without giving the short notice to which Judge Allen refers. In my judgment the author of Magee on Banks and Banking, at page 370, is entirely justified in saying:

"A depositor never treats the transaction as a loan to the bank. He does not understand the certificate to be a promissory note, and the bank issuing the instrument does not regard it as such. A bank usually, in borrowing money, does so by resolution, duly passed by the board of directors, authorizing the same to be made, and a promissory note in form is issued."

And the writer in 3 R. C. L., in section 198, in saying:

"While money for which a certificate of deposit is given by a bank is, in legal effect, in the nature of a loan, yet it is not a loan in the ordinary sense of the term, but a real deposit, within the meaning of those statutes which prohibit an insolvent bank from receiving deposits."

[2] Second. I agree with counsel for complainant that the real question involved here is not the ascertainment of the technical definition to be applied to the words "money in bank," but the determination of the intent of the testator in his use of them in this will, and that such intent, if ascertainable, must govern. All the surroundings of this man at the time he made this will seem to me to indicate the scheme and purpose of it to be that contended for by complainant. He was past 60 years of age, childless, a cripple, and because of physical infirmity had retired from active business; the age of his wife is not disclosed but it is fair to presume it was near his own, for they had lived together many years in the marital relation; they had talked the matter over, and I think had substantially agreed upon the disposition of the property, as indicated by the undisputed fact that he sent for the lawyer, with whom they had, so far as disclosed, little or no intimate acquaintance, and in each others presence this lawyer was instructed as to how and to whom the property was to go. One of the two letters filed, written by testator to complainant, under date of December 5, 1907, is written upon a business letter head of T. R. Lyons, and this letter head indicates that the latter was conducting a grocery business at the "corner of Pike and Oak streets," the same description given in the will for the house and lot owned by decedent. This T. R. Lyons is the son of complainant and the nephew by blood of testator and also, by marriage, of his wife. He speaks of this nephew in this letter in a way indicating both interest and confidence in him. Very naturally, when making

his will, he decides to provide for this nephew, and he devises to him this house and lot, appraised at a value of $5,000. This letter discloses another thing; that, so far as his brother Patrick is concerned, he regards him so situated in Pennsylvania as bookkeeper for a large and well-known manufacturing company, receiving a salary of $75 per month, as to make him able to send to complainant "a nice Christmas present," as he, testator, had been doing for years agone, and was then doing in the way of a £5 note. This brother Patrick, in the will is remembered with the bequest of $1. For provision for his wife he turns, not to his "money in bank," but to his bank stock, of which he conceived himself to own 20 shares. The significance of this distinct and positive discrimination between his bank stock and his money in bank cannot be either overlooked or discounted. Many illiterate people would hardly draw such distinction; to them, money invested in bank stock would be nothing more than money in the bank. The value of these shares of bank stock is unfortunately not disclosed, but it may be assumed by me, from general knowledge of the bank's reputation and financial standing, that its shares were worth at least par, and were of the par value of $100 each. If this be true, testator was providing his wife with this presumably dividend-paying stock of the value of $2,000. Whether this and his property other than his house and lot and money in bank given to her by the residuary clause were sufficient for her needs and requirements for the remainder of her life is not the question; that he thought so I have no doubt. It is not to be forgotten that he had six different certificates of time and savings deposit in four different banks. If he had not deemed the bank stock sufficient for her, what more easy for him than to have directed payment to her of one or more of these certificates in addition? Why should he specifically bequeath to her the bank stock, stating the exact number of shares of it, if he designed the bulk of his estate, including the bank time certificates, to pass by the general residuary bequest to her? But it is said he had $854.14 of money in bank subject to instant withdrawal by check, and this alone is what should be held to have been his purpose to give to his brother Michael under the eighth clause. If so, such provision was nothing more than a hollow pretense, for he charged it with $201 of specific legacies, with his funeral expenses, debts, and costs of administration that would, and necessarily did, exceed by several hundred dollars the whole amount of this checking deposit. It therefore seems to me inevitable that by the use of the words "money in bank" he included all these deposits, both checking, time and savings ones, and that he carried out the inclination, natural to childless men, of seeing to it that his property should go, after a reasonable provision for his wife, to those of his own blood rather than through her to strangers. With this view before him, it was very natural that he should remember first the favorite nephew associated with him in daily life, should pass over his brother Patrick who, so far as the record discloses, had no family and was prosperous enough to take care of himself, and turn to his other brother, older than himself, who had remained in the old home in Ireland, cared for and buried the parents of both, who had a large family of 10 living

children, and whose financial condition was such that he had beforetime felt it incumbent upon him to aid by money contributions.

[3] Perhaps I should stop here, and it may be a doubtful proposition that I feel in conscience bound to interpose in conclusion. The bequest to the wife was of all his bank stock, amounting to 20 shares. It turns out he had but 12. Whether he was mistaken as to his holdings of stock at the time he made this will, or whether he subsequently sold or disposed of 8 shares of it, I know not; however, the conviction is strong in my mind that when he and his wife and the lawyer who drew the will talked it over, there was no question but what his wife was to have 20 shares of the capital stock of this bank as her portion, and I think she ought to have it, or its equivalent in value. I also do not think, under all the circumstances, she should be, in this purely family settlement, where no rights of creditors or legatees are involved, chargeable with interest upon the funds in her hands as administratrix, save and except from the present date of the decree to be entered herein, nor should she be charged with costs of suit

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In re PLACE.

(District Court, N. D. New York. July 23, 1915.)

1. LANDLORD AND TENANT ⊂=139—RESERVATION BY LANDLORD OF TITLE TO GROWING CROPS.

An owner of a farm and live stock thereon may, in leasing the same, retain title to the hay and crops either absolutely for the preservation of the stock, or as payment of rent, or as security for the payment of rent, but in the absence of a provision in the lease that the crops shall be the property of the landlord, the crops, as between the landlord and tenant, are, when severed, the personal property of the tenant.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 488, 492–506; Dec. Dig. ⊂=139.]

2. LANDLORD AND TENANT ⊂=139—RESERVATION BY LANDLORD OF TITLE TO GROWING CROPS.

A lease of a farm and cows and other live stock for a term of years, stipulating for cash rent, payable in monthly installments, and declaring that the cows are to be kept on the farm as a dairy and not to be removed therefrom, and that if the milk is sold the checks are to come to the landlord, who may take out his rent and pay the balance to the tenant, and the milk, if made into other substance, shall be sold and the proceeds paid to the landlord, who shall retain his rent and pay the balance to the tenant, that the title to the milk or other produce of the dairy shall remain in the landlord, and that hay and fodder raised on the farm shall be fed out on the farm to the stock, and the title to the hay and fodder shall, at all times, remain in the landlord, and which binds the tenant to insure the personal property including crops and the buildings for the benefit of the landlord, and in his name, and that the tenant shall keep the dairy and stock up to its present standard, reserves in the landlord title to the hay and fodder, not as security for rent, except indirectly based on payment of rent from the produce of the dairy, but to insure the preservation of the live stock and to prevent the hay and fodder from being sold by the tenant and removed from the premises or levied on and sold by his creditors.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 488, 492–506; Dec. Dig. ⊂=139.]

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3. BANKRUPTCY ⊂⊃444—PROCEEDINGS TO COMPEL PAYMENT TO TRUSTEE IN BANKRUPTCY—PETITION OF REVIEW.

Where a decision of the referee was made, authorizing an order directing a third person to pay to a trustee in bankruptcy certain money, but the order authorized was not entered until the entry of an order denying the application of the third person to open the case for additional testimony, the time to file a petition of review commenced to run from the entry of the orders.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 920–927; Dec. Dig. ⊂⊃444.]

4. BANKRUPTCY ⊂⊃151—TRUSTEE IN BANKRUPTCY—TITLE.

A trustee in bankruptcy has no better title or right in property than the bankrupt himself, except that the trustee may set aside transfers made by the bankrupt in fraud of creditors and recover preferences.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 193, 239; Dec. Dig. ⊂⊃151.]

5. BANKRUPTCY ⊂⊃140—TRUSTEE IN BANKRUPTCY—TITLE.

A landlord of a farm and stock for 12 years from March 1, 1911, for a cash rent, reserved title to hay and fodder to insure the preservation of the stock. The tenant went into bankruptcy in October, 1912, and he surrendered possession of the farm and the stock and hay and fodder thereon to the landlord. The landlord sold the stock and hay and fodder and received the proceeds. The cash rent up to the time of bankruptcy was paid, but the rent for the balance of the term or for the balance of the year was not paid, and the trustee in bankruptcy did not assume the lease, or sell the same, or claim the right so to do. *Held*, that the landlord had not, as against the trustee, surrendered his title to the hay and fodder, and the trustee could not compel him to pay over the proceeds thereof.

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

In Bankruptcy. In the matter of C. Dumond Place, bankrupt. On petition of review filed April 5, 1915, of two orders made by the referee in bankruptcy and each of which was made and filed March 25, 1915, and one of which adjudges the rights of the parties in certain property claimed by the trustee in bankruptcy, and directs the payment of certain sums of money by George H. Austin to said trustee, and the other of which denies an application by the said Austin, made after the decision of the referee but before the entry of any order thereon, that the proceeding be opened and he be allowed to introduce further evidence as to damages, etc. Reversed and set aside in part, and affirmed in part.

L. F. Raymond, of Franklin, N. Y., for petitioner.
Sewall & France, of Sidney, N. Y., for trustee.

RAY, District Judge. The main and important questions grow out of a farm lease and its provisions entered into January 17, 1911, between George H. Austin of Walton, Delaware Co., N. Y., the owner of a certain farm of about 233 acres of land and 34 cows, 2 heifers, and 1 bull, all Holsteins, and certain farm implements thereon, and whereby the said owner and lessor, George H. Austin, demised and leased to said C. Dumond Place, later bankrupt, and Stephen D. Place the said farm, stock, and implements for the term of 12 years

from March 1, 1911, and which lease by express provision was to terminate March 1, 1923. As to the said cows the lease provides:

"Said cows are leased to be kept and used on said farm as a dairy and not to be removed therefrom except as herein provided."

The lease then provides that as rent for said real and personal property and for the use of same under the agreement, in addition to the other things which the lessee agrees to perform, and in addition to the taxes and insurance which he agrees to pay, the lessee will pay for the first year $750, viz., $150 down and the remainder in monthly payments as provided for the other years; the rent for the other years to be $600 per annum and paid in monthly payments, viz., April 25th, $40; May 25th, $50; June 25th, $65; July 25th, $80; August 25th, $80; September 25th, $80; October 25th, $80; November 25th, $70; December 25th, $55. If the milk is sold the checks are to come to the landlord and he take out his rent and pay the balance, if any, to the lessee. If made into other substance, then same to be sold, the proceeds to be paid to the landlord, who retains his rent and pays the balance, if any, to the tenant. Then follows this provision:

"It is agreed that title to the milk or other products of the dairy shall at all times be and remain in the parties of the first part [landlord], subject however to the provisions of this agreement."

That is, any surplus after paying the rent to go to the lessee. Then follows this provision:

"It is also provided that the hay and fodder raised on the place shall be fed out on the farm to the leased property, and the title to the same (the hay and fodder) shall at all times be and remain in the parties of the first part [landlord], subject to the provisions of this lease."

The second parties were to pay the taxes. Then came the following:

"It is further agreed that the parties of the second part will keep the said personal property and the buildings on the real property insured in the name of the first party in a sum approved by him and not less than three thousand dollars on the buildings and fifteen hundred dollars on the stock and five hundred dollars on the hay and farm products and shall pay the insurance premiums thereon, but it is agreed that in case of loss by fire to either the buildings or the personal property the insurance money when received by first party shall be used to replace or repair the buildings lost or injured and to replace the personal property lost or injured, so far as the insurance money will repair, or replace the said buildings or personal property, but the first party shall be under no obligation to use or furnish any more than the insurance money received by him, for said purpose.

"It is further provided that the parties of the second part shall at all times keep the dairy and stock good and up to its present standard as far as possible, they to stand all loss and depreciation in or to the same, and to that end whenever any of the cows become unfit or undesirable for dairy use the second parties may with the consent and approval of first party exchange the same for other animals suitable for dairy use, and in such case the new cows put into the dairy shall become the property of first party and the cows taken out shall become the property of second parties. It is understood and agreed that the title to the personal property leased hereby shall at all times be and remain the property of the party of the first part and also such animals as shall be put in place of any lost or injured.

"It is further agreed that second parties shall at all times keep the number

of the dairy good by replacing any which may die with others which are good dairy cows and as nearly up to the standard of those lost as practical."

Then came provisions that the lessee should properly till the farm, care for and feed the stock, etc. If rent was not paid as agreed, then the lessor could re-enter, etc. The lease then contained an option to purchase, not only the land, but personal property so leased. The lessor was careful to expressly retain title to the live stock, cows, etc., which he owned and leased to Place and to any purchased or raised to take the place of any sold, and no change or sale could be made without the express consent of the lessor as owner. He was also careful and particular to retain and reserve the absolute title to all the hay and fodder produced on the place, and provide that it be fed to the live stock on the place and insured in his name. As the rent was coming from the proceeds of the milk or dairy, into whatever form it was converted by manufacture, and as the landlord owned the live stock and farm, it was essential that the stock be fed. Title to the milk evidently was retained to insure payment of the rent. As the tenant was to have the surplus of the proceeds of the dairy products, milk, butter, or cheese, there was a sort of joint ownership in such proceeds, but as to the hay and fodder there was no such clause or condition. Remotely and in a roundabout way title to the hay would insure the payment of rent, for if the cows were not fed in winter, they would not live or give milk either winter or summer, but the retention and reservation of the title to the hay and fodder raised and growing, or raised and cut, on the farm was not in any legal sense security for the payment of the rent, which was secured to be paid from the proceeds of the dairy, and was not to be applied to the payment of rent. The retention and reservation of the title to such hay was security for the preservation of the lives of the owner's cattle. The landlord, the owner of the farm and live stock, had the right to reserve the hay and retain the title thereto, which he did in unequivocal language.

Under the terms and provisions and conditions of the lease the tenant had no ownership or title whatever in the hay. He did have the right, under the agreement to have it retained on the farm, to feed the live stock so long as he remained thereon under the lease. The title was in the lessor whether the rent was paid or not. The lessee had no right at any time to remove it from the premises or to sell any part of it. If title had not been reserved, it was a natural product of the land, title to which would have been in the lessee. It was logical that the lessor should reserve the title to the hay and fodder (emblements). There is no provision in the lease for purchasing hay or fodder, and can it be supposed, in face of the provisions of this lease, that this tenant at the end of August or September, on paying the rent for the month, or at the end of the first year, on paying the December rent (all prior rent having been paid), could have lawfully sold off the hay and put the proceeds in his pocket as his own and left the owner of the farm, the farm, and the live stock thereon, without hay for feeding the balance of the winter and leaving the owner to purchase hay and feed in the market and sue to recover damages

for a breach of contract? The very explicit terms of the lease and the circumstances of the case, including ownership by the landlord of both farm and cattle, forbid such a conclusion or such a construction of the terms of this lease. Such a contingency was guarded against by the reservation of title. Some considerable time prior to the bankruptcy of C. Dumond Place the said Stephen D. Place sold out or transferred his rights and interests under this lease to C. Dumond Place and left the farm. C. Dumond Place remained on the farm until about October 1, 1912, when he went into bankruptcy and gave up and surrendered possession of the farm to the landlord, including possession of the stock and hay and fodder. Mr. Austin, not living on the farm but at a distance, in the fall of the year, with winter coming on and without tenant or help, sold off the cattle and hay and fodder and received the proceeds. There was no transfer or sale by Mr. Austin of any of the cattle or hay or fodder to Place at any time. The trustee in bankruptcy claimed the hay and fodder on the place, and Mr. Austin became a party to the bankruptcy proceedings for the purpose of testing or trying out the title to this hay and fodder, with other questions not of consequence here, and the referee found and held by order made and filed March 25, 1915, as follows:

"Further ordered that, it being conceded that the said George H. Austin had and used the emblements upon said farm as inventoried herein, to wit: 32½ tons of hay of the value of $10 per ton and 4⅘ tons of green fodder, millet and oats at $10 per ton, amounting in all to $373, the said George H. Austin is hereby directed to pay said sum of $373, the value thereof to said Chester B. Teed, the trustee herein."

It appears from the memorandum of decision made by the referee that he based this finding and holding on the fact that as the hay and green fodder, millet, and oats were emblements, raised and produced on the farm, they belonged to the tenant and so passed to the trustee in bankruptcy, and that Austin is liable to pay to such trustee the value of same, notwithstanding the terms of the lease and reservations of title therein expressed. The cash rent, up to the time of the bankruptcy, was paid, but the rent for the balance of the term, or even the balance of the year, was not paid, and has not been paid, and the trustee in bankruptcy did not assume the lease or sell same, or claim the right so to do, or offer to perform it.

[1] With the holdings and decisions of the learned referee this court is unable to agree, and the decided cases are against them. The owner of a farm and of the cows and other live stock thereon in leasing same is not bound to part with the title to the grass when made into hay or with the crops grown thereon. He would part with title thereto, and they would belong to the tenant under an out and out lease for a money rent in case he did not clearly reserve and retain title, either absolutely for the preservation of the stock, or as payment of rent, or as security for the payment of rent. Either of these things he may do. There is no statute or public policy which forbids it. It is always a question whether or not he has lawfully done so. When, as here, the language is clear and unequivocal, there is no chance for construction by the courts, and when, as here, the language is made

clear and express that the hay and fodder is to be insured in the name of the landlord, we have an interpretation of the meaning and intent of the parties as to ownership expressed by themselves in writing, if any is needed.

"As between the landlord and the tenant, the annual crop raised on the leased property constitutes no part of the freehold, and, when matured or severed from the soil during the term of the tenant's lease, it becomes his personal property which he may dispose of as he sees fit, in the absence of a provision in the contract for the rental that the crop shall be the property of the landlord until rent is paid or secured." 24 Cyc. 1067; Andrew v. Newcomb, 32 N. Y. 417; McCombs v. Becker, 3 Hun (N. Y.) 342; 5 Thompson & C. 550; Crotty v. Collins, 13 Ill. 567; Fox v. McKinney, 9 Or. 493; Young v. Watters, 5 Pa. Co. Ct. R. 127; Hunt v. Scott, 3 Pa. Co. Ct. R. 411.

"The ownership of realty carries with it, as an incident thereto, the prima facie presumption of the ownership of both the natural products of the land, such as grass and trees, and the emblements, or annually sown crops. The owner of land, however, may, in parting with the use of it to another, make such conditions and reservations in relation to the land itself, or the products growing from it, as he chooses, instead of parting with the full right." 12 Cyc. 976; Andrew v. Newcomb, 32 N. Y. 417; Howell v. Foster, 65 Cal. 169, 3 Pac. 647; Moulton v. Robinson, 27 N. H. 550; Angell v. Egger, 6 N. D. 391, 71 N. W. 547; Fox v. McKinney, 9 Or. 493; Cons. Land, etc., v. Hawley, 7 S. D. 229, 63 N. W. 904; Bellows v. Wells, 36 Vt. 599; Esdon v. Colburn, 28 Vt. 631, 67 Am. Dec. 730; Smith v. Atkins, 18 Vt. 461; Ponder v. Rhea, 32 Ark. 435; Wesley v. Beakes Dairy Co., 72 Misc. Rep. 260, 266, 131 N. Y. Supp. 212; McCombs v. Becker, 3 Hun (N. Y.) 343.

In Andrew v. Newcomb, supra, it was expressly held:

"The owner of land may lawfully contract for its cultivation, and may provide, by such contract, in whom the ownership of the product shall vest. In such contract the parties may provide that upon the performance of a condition, or the happening of an event, the ownership shall be changed. Such an arrangement is not a conditional sale, as the subject-matter was not in existence at the time of the contract. Under such contract, the property vests in the proper party as soon as it comes into existence. Crops to be raised are an exception to the general rule 'that title to property not in existence cannot be affected so as to vest the title when it comes into existence.' In case of crops to be sown, it vests potentially from the time of the bargain, actually, as soon as the subject arises."

In Wesley v. Beakes Dairy Co., 72 Misc. Rep. 260, 131 N. Y. Supp. 212, the lease provided that the lessor should furnish 10 cows with the premises. The annual rent was $425. The rent was to be paid as follows:

"First party is hereby authorized to collect all cheese checks from the factory whenever due from the 1st day of July, 1910, until he shall have collected the amount of $425. If however the said cheese checks are not sufficient to pay all of said rent, then said first party is hereby empowered to collect the canning factory checks for any remainder of unpaid rent."

If rent was not paid, the landlord could sue or re-enter. Judge Hazard said:

"We start out with the fact that the farm in question belonged to Dodge, the incompetent person, and that 7 of the 10 cows (as shown by the evidence) were Dodge's. It seems to me that the provision quoted amounts to a reservation of title in the landlord to the proceeds of the dairy. It is doubtless true that, in the ordinary relation of landlord and tenant, the products of the farm belong to the tenant; but it is also true as a legal proposition that the landlord may reserve title to those products, either as security for the payment of the rent, or as the rent itself."

That learned judge cited and quoted from Andrew v. Newcomb, supra, and McCombs v. Becker, 3 Hun (N. Y.) 343. In McCombs v. Becker, supra, the court said:

"It was entirely competent for the defendant and his tenant to agree that the hay to be raised upon the demised premises should be and remain the property of the defendant until the rent should be paid, and the conditions of the lease satisfied by the tenant. Instead of the tenant mortgaging the crop to be grown, as security for the rent, he may agree that the crop shall be the landlord's until the rent be paid. In the one case the agreement is that the crop shall be the landlord's if the tenant does not pay the rent; in the other that it shall not be the tenant's until he does pay it."

[2] In the case now before this court it is evident that the purpose of the retention or reservation of title to the hay and fodder was not as security for rent, except in a very indirect manner, which was, as stated, to be paid from the products of the dairy, but to insure the presence of cows and the preservation of the lives of the cows and other cattle, the property of the landlord, and insure their being able to produce milk, and to prevent the hay from being sold by the tenant and removed from the premises, or levied on and sold by his creditors. The hay and fodder were not to belong to the tenant at any time, and as the lease was to expire in the latter part of the winter, 1923, it would be necessary that in the meantime the hay and fodder be on the place for feeding, and the remainder, if there was a remainder, on hand to "carry the cattle out to grass," as the expression goes. The work and labor put into the production of the hay and fodder on the farm was a part of the consideration for the use of the farm, cows, bull, and farming tools leased. See Booher v. Stewart, 75 Hun, 214, 27 N. Y. Supp. 114, for confirmation of this principle. Coville v. Miles, 127 N. Y. 159, 27 N. E. 809, 12 L. R. A. 848, 24 Am. St. Rep. 433—and there are many similar cases—is a case where there was no reservation of title to hay or fodder, or provision that the title to such products should be and remain at all times in the lessor and owner of the leased premises and stock. Such a reservation of title was sought to be spelled out of the facts that the tenant agreed to take charge of the live stock, in which both landlord and tenant had a joint interest, to raise enough hay and fodder to feed it, and if there was a deficiency purchase so much as was required. This the Court of Appeals in New York held did not establish a reservation of title. In Heald v. Builders' Mut. Fire Ins. Co., 111 Mass. 38–40, the opinion states the facts, and the court held:

"The plaintiff had no insurable interest in the hay and straw named in the policy of insurance. He claims title by bill of sale from Benjamin B. Roberts and Daniel R. Heald, who harvested the same under a lease from the Hubbards. The lease was in writing, and contained a clause in these words: 'The lessees agree that they will carefully tend and fodder the stock kept on said premises, with the hay and other fodder which shall grow or be raised on said premises; and that they will not sell, dispose of, or carry away, or suffer to be carried away from said farm any of the hay or fodder of any kind, or any of the manure which shall be made on said premises, except by written agreement of the lessors.' The principal part of the stock on the farm was the property of the lessors. The plaintiff knew of this provision in the lease, and the bill of sale to him was made without the written agreement of the lessors. Whatever remote interest the tenants had in the

produce of the farm, they had no property in it which they could dispose of by sale. The lessors had the right to reserve the crops, or any interest in them, in advance. It was in the nature of a reservation of rent. Taylor, Land. & Ten. § 152. It is not simply an agreement or covenant that none of the productions named should be carried away, for breach of which they would be liable in damages; but it was an agreement that it should not be sold. It was a limitation on the title, which was to remain in the landlord subject to the tenants' right to use it in the cultivation of the farm. It is an evasion to say that the interest which the tenants had in the possession and use of the property, and in the profits which might accrue from its use upon the farm, passed by the bill of sale to the plaintiffs and was an insurable interest. This would defeat the plain words of the agreement, one purpose of which, no doubt, was to avoid conflicting claims of other parties, which might arise under a sale. Lewis v. Lyman, 22 Pick. 437; Briggs v. Oaks, 26 Vt. 138."

It will be noted that in the case just referred to the principal part of the live stock belonged to the lessors. In the case at bar the title to the hay and fodder raised on the leased farm was reserved—it was expressly provided and agreed that such title should be and remain in the lessor at all times. There is no suggestion in the lease it was to remain there as security for the payment of rent, and if the lease did so provide, or if such were the correct construction of the contract, the retention of title was not as security for the payment of rent for one month or one year, the year the crop was produced, but for many years, and there is no pretense the balance of the rent for 1912 was paid or released, or that the rent for the remaining years was paid or released. The referee found that this was not a chattel mortgage requiring filing, and in that this court fully concurs. Hence, the lessor having taken possession of the hay and fodder, the burden was on the trustee, before he could recover anything, to show that, aside from damages sustained by the lessor, he was entitled to recover. But it is useless to discuss that proposition, as the title was not retained as security for the payment of the rent. To so hold would be importing into the lease provisions not found there, and the terms of which would be conjectural. In short the court would be attempting to make an agreement of lease different from the one drawn and signed, and under which the parties operated for about 1 year and 6 months.

[3] Mr. Austin did not waive or abandon any of his rights by moving before the referee to open the hearing and produce further evidence. No order had been signed or entered; no judgment pronounced. No order was entered until March 25, 1915, when the order denying the application to open the case and produce additional testimony was also entered, and the time to file a petition of review then commenced to run. Such petition was filed in time.

[4, 5] It is unnecessary to recite the now familiar doctrine of the bankrupcy law that the trustee in bankruptcy has no more extensive and no better title or right in property than did the bankrupt himself, except he may set aside transfers of property made by the bankrupt in fraud of his creditors and recover preferences. The proposition is hardly susceptible of argument that Place, at the time the petition in bankruptcy was filed, or at any time before, on paying the rent due and payable up to that time, could have taken and removed from the farm or sold the hay or fodder in question. His bankruptcy con-

ferred on him no greater right to the hay and fodder than he would have had remaining solvent. The landlord, Mr. Austin, did nothing to surrender, release, or impair his own title, and there is no evidence whatever that he did. He asserted his title and disposed of his own—that which under the lease he was entitled to.

The order under review made by the referee and filed in his office March 25, 1915, in so far as it adjudges that "the reservations contained therein (of title to hay and fodder) were security for the performance of the agreement on the part of the bankrupt" as applied to the payment of rent, and that the hay and fodder, "emblements of the farm, belonged to the bankrupt when the rent was paid in full, and passed to the trustee herein," and, in so far as it adjudges and directs that George H. Austin pay to Chester B. Teed, the trustee in bankruptcy of C. Dumond Place, the sum of $373, the value of 32½ tons of hay and 4⅘ tons of green fodder, millet, and oats, is reversed and set aside. Otherwise same is affirmed. There will be an order accordingly.

In re READING HAT MFG. CO.

(District Court, E. D. Pennsylvania. July 22, 1915.)

No. 4982.

1. BANKRUPTCY ⊜268—PURCHASER OF BANKRUPT'S REAL ESTATE—LIABILITY FOR TAXES.

The liability of a purchaser of a bankrupt's real estate for taxes thereon, constituting under the law of the state a lien from the date of the levy of the taxes, depends on contract, and a purchaser agreeing to pay the taxes in addition to his bid must do so; but where he buys the property for the bid, the trustee may not compel him to pay taxes.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 372–379; Dec. Dig. ⊜268.]

2. BANKRUPTCY ⊜151—TITLE OF TRUSTEE.

A trustee in bankruptcy succeeds by operation of law to the title of the bankrupt; but liens and incumbrances, not avoided by the bankruptcy law (Act July 1, 1898, c. 541, 30 Stat. 544), remain unaffected, except so far as the remedy of enforcement is limited by the property having passed into the custody of the court.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 193, 239; Dec. Dig. ⊜151.]

3. BANKRUPTCY ⊜88—TITLE OF TRUSTEE—LIENS OF THIRD PERSONS.

Persons having liens on the property of a bankrupt passing by operation of law to his trustee, or persons with rights in the property, are not parties to the bankruptcy proceeding, unless they come into the bankruptcy court to enforce their rights, or are brought in to have the rights of the trustee asserted as against them.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 58, 98, 104, 109–112; Dec. Dig. ⊜88.]

4. BANKRUPTCY ⊜268—SALE OF PROPERTY SUBJECT TO LIENS AND INCUMBRANCES—GENERAL EQUITY PRACTICE.

The practice in the bankruptcy court in sales of property, subject to liens and incumbrances in favor of third persons, follows the general equity practice, and where an order of sale does not direct the divestiture of

a lien, the purchaser takes title subject to existing liens, and must pay them or otherwise arrange with the lien creditors to retain the property.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 372–379; Dec. Dig. ⊂⊃268.]

5. BANKRUPTCY ⊂⊃261—ORDER OF SALE—DIVESTING LIENS—PARTIES.

An order by the bankruptcy court for a sale of property, divesting liens and incumbrances, will not be made without notice to the lien creditors whose status will be affected thereby, or without giving them an opportunity to assert their rights.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 361, 362; Dec. Dig. ⊂⊃261.]

6. BANKRUPTCY ⊂⊃268—SALE OF INCUMBERED PROPERTY—TAXES.

A petition for an order of sale of real estate of a bankrupt alleged that the property was subject only to the lien of a mortgage and a claim for water rent. The order of sale directed a sale "free and discharged from all liens and incumbrances on said real estate described in the foregoing petition," and that the fund should be subject to the same liens as the real estate itself was subject. The return of sale set forth the order to sell clear of liens and incumbrances, reported a sale in pursuance thereof, and prayed for confirmation, and for authority to execute and deliver a deed free from liens and incumbrances on payment of the bid. The order of confirmation was that the real estate was sold for the amount of the bid, free of liens. At the time of filing the petition, taxes on the property had not been levied; but at the time of sale a lien for taxes existed. *Held*, that the purchaser took a clear title, freed from liability for taxes, which the trustee must pay out of the proceeds.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 372–379; Dec. Dig. ⊂⊃268.]

In Bankruptcy. In the matter of the Reading Hat Manufacturing Company. Petition for review of an order of the referee dismissing the petition of a purchaser at a trustee's sale to recover a deposit in the hands of the trustee as stakeholder. Order revoked, petition reinstated, and cause remanded for further proceedings.

Thomas O. Peirce, of Philadelphia, Pa., for petitioners.
Rearick & Illoway, of Philadelphia, Pa., for trustee.

DICKINSON, District Judge. The controversy here is over the sum of $130.44 in the hands of the trustee as a stakeholder, to be paid to the person to whom the money should be adjudged to belong. The money was deposited under these circumstances: The bankrupt was the owner of certain real estate, against which was a mortgage. The mortgage was asserted by the mortgagee to be a lien, not only upon the land and building, but also upon certain machinery therein, constituting in part the manufacturing plant of the bankrupt. This machinery was sold by the trustee as personalty; the purchaser agreeing that the land and buildings would bring at least the sum of $7,000. A sale was made of the latter property, and it brought $7,200. When settlement came to be made, a dispute arose over the question of the apportionment of the taxes for the then current year. The purchaser demanded a deed upon payment of the amount of his bid. The trustee demanded in addition the sum of $130.44, representing the apportioned taxes for the unexpired part of the tax year. The question of the conveyance of the title was adjusted by the payment of the money to

the trustee, and the dispute was by agreement transferred to the fund.

[1] It would seem to be clear that the answer to the question raised is wholly dependent upon the terms of sale; in other words, it is a matter of contract. If the purchaser agreed to pay the taxes in addition to his $7,200 bid, he should pay. By the same token, however, if he bought the property for that sum, the trustee should not have exacted more. If authority is required for so plain a proposition, it may be found in the emphatic language of Judge McPherson, in the opinion in the Case of Gerry (D. C.) 112 Fed. 958. The question of what lien incumbrances were against the property, and which of them were divested by the sale, arises only incidentally. It would arise directly only between the lien creditor and the purchaser, if the lien continued and came to be enforced, or between the lien creditor and the fund, if the lien had been divested by the sale. Taxes by the Pennsylvania statutes are a personal claim against the person against whom assessed, and a lien upon the real estate on which assessed. This lien begins when the tax is levied by the authoritative fixing of the tax rate for the year, which, together with the last previous assessment (triennial or otherwise), determines the amount of the tax. Moreover, taxes possess, in the expressive phrase of the French law, the characteristic of solidarité. The claim is for the whole tax as assessed and levied, and is not apportioned to different parts of the year, nor among successive owners during the year. The general principle of the law of divestiture of liens in Pennsylvania is that a judicial sale divests all liens, and those liens only are preserved which are saved by statute. The lien of taxes may be preserved by statute to the extent to which the sale fund is insufficient to pay them. They may be given priority of payment over other incumbrances which are ahead of them in lien, but this should not be confounded with priority of lien. These taxes were liens at the time of the sale. If the sale had been a state judicial sale, such as under the laws of Pennsylvania would have divested the lien of the first mortgage, the lien of the taxes would have been also divested. If the purchaser's bid had been free from other complications, he would have taken title to the property clear of the lien of the taxes, and the tax claim would have been transferred to the purchase money. It only remains to consider how far the question before us is affected by the fact that the sale was in pursuance of proceedings in bankruptcy.

[2, 3] It is settled beyond the need of the citation of authorities to support the proposition that the title to which the trustee succeeds is the title of the bankrupt, in the sense of over what he had the power of disposition and what might have been levied upon and sold as his property. Bankruptcy proceedings do not of themselves operate as an attachment or sequestration in the sense of a judgment or the conferring of a lien, but are a mere passing by operation of law of the title of the bankrupt to the trustee. Liens and incumbrances against the property not avoided by the Bankrupt Law remain unaffected by the proceedings, except to the extent to which the remedy of enforcement is limited by the property having passed into the custody of the court. Until such lien creditors or other third persons with rights in the property of the bankrupt come into the bankrupt court to enforce

their rights, or are brought in to have the rights of the trustee asserted as against them, they are in no proper sense parties to the bankruptcy proceedings. York Co. v. Cassell, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782.

[4, 5] The practice in the bankruptcy court, as the learned referee has correctly held, in sales of property subject to lien and incumbrances in favor of third parties, follows the general equity practice. If the order of sale does not direct the divestiture of the lien, by providing that the property shall be sold, the purchaser takes title subject to all existing liens, and must, of course, pay the liens or otherwise arrange with the lien creditor in order to retain the property. No order of sale divesting liens will be made without notice to the lien creditor whose status will be affected thereby, or without giving him an opportunity to assert his rights. Whatever order is made, of course, controls, and, if the lien is divested, it is transferred to the purchase money, which stands in lieu of the property. Proceedings for the sale of real estate are made up of petition, order, sale, return, and confirmation.

[6] When the petition was filed in this case, these taxes had not been levied, and as a consequence were then no liens. Of necessity they did not appear in the statement of the liens. The order was to sell the property clear. The terms and conditions of sale (with the possible modification later referred to) followed the order, and the sale was confirmed as a sale clear of all liens and incumbrances. At the time of sale, as well as of confirmation, the lien of the taxes had fastened upon the property. Under section 64 of the Bankruptcy Act (Comp. St. 1913, § 9648) it is the duty of the trustee to pay taxes. Indeed, the obligation in this case followed the then ownership of the property by the trustee.

The thought that the order of sale limited the divestiture to the liens and incumbrances set forth in the petition seems to have found a lodgment in the mind of the referee. The language of the petition is that the real estate was subject only to the lien of a mortgage and a claim for water rent, and that there were no other liens or incumbrances known to the trustee. The order of sale was that the property should be sold "free and discharged from all liens and incumbrances on said real estate described in the foregoing petition," and that "the fund realized from the sale thereof shall be subject to the same liens and incumbrances as the real estate itself is subject." The return of sale sets forth the order to sell clear "of all liens and incumbrances," and reports a sale in pursuance of the order. This is followed with a prayer for confirmation, and for authority "to execute and deliver a deed for said real estate free and discharged from all liens and incumbrances" upon the payment of the $7,200 therefor. The order of confirmation is that the described real estate sold "for the sum of $7,200 free and discharged of all liens and incumbrances," and the trustee is directed to make conveyance upon receipt of said sum.

The order of sale was apparently construed by the trustee as meaning that the real estate should be sold clear of liens and incumbrances set forth in the petition. This meaning he gathers from the expres-

sion "described in the foregoing petition." The phrase, however, is that the "said sale shall be free and discharged from all liens and incumbrances on said real estate described in the foregoing petition." The quoted phrase therefore may, and we think should, be taken as referring to the real estate—its nearest antecedent—rather than to the liens and incumbrances. Moreover, the logical effect and the legal intendment of an order of sale clear of a mentioned lien is to divest all junior or later liens. Furthermore, an order of confirmation of sale may operate as a prior authorization, and both the return of sale and the order of confirmation here are free from ambiguity, and were intended to pass a title clear of all liens.

If, therefore, the present question is to be determined in the light of findings as made by the referee, the purchaser took a clear title, and was under no obligation to pay anything beyond the amount of his bid, and it was the place of the trustee, both because the taxes were assessed during his ownership, and because of the order of the court transferring all liens against the real estate to the purchase money, to pay the taxes, and the petition of the purchaser for the return of the $130.44 deposited by him should have been granted by the referee. Inasmuch, however, as there is at least the intimation in the record, and there was the assertion at the bar of the court at the argument, that this purchaser had agreed with the trustee that, in the event of his becoming the purchaser of the real estate, he would pay the taxes apportioned to the part of the tax year succeeding his purchase, we do not feel free to make this order, as the referee has returned no finding of this fact.

The disposition made of the present petition for a review is to revoke the order of the referee dismissing the purchaser's petition, reinstate the same, and to remit the cause to the referee for further proceedings therein. We would add for the guidance of the referee that, if the case is free from any element of contract on the part of the purchaser to pay the apportioned taxes, he is entitled to a return of the money deposited to cover this item. Whatever effect the agreement which he may have entered into has upon the situation, if it has any, can only be determined after the terms of the agreement are found and become facts of record.

In re ANDERSON.

(District Court, N. D. Georgia, N. W. D. May 29, 1915. On Rehearing on Objections to Homestead Exemption, July 10, 1915.)

No. 576.

1. BANKRUPTCY ⇐399—HOMESTEAD EXEMPTIONS—RIGHT TO.

Under Code Ga. 1910, § 3380, declaring that it shall be the duty of every person claiming the benefit of the exemption allowed in the article to act in perfect good faith and to make a full and fair disclosure of all personal property which he may possess, a bankrupt who conceals personal property, omitting it from the schedule is not entitled to claim the exemption.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 657, 669; Dec. Dig. ⇐399.]

2. APPEAL AND ERROR ⊂⊃1017—FINDINGS BY REFEREE—CONCLUSIVENESS.
Findings by a referee on questions of fact will not be lightly disturbed.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3911, 3961, 3996–4005; Dec. Dig. ⊂⊃1017.]

3. BANKRUPTCY ⊂⊃398—EXEMPTIONS—HOMESTEAD EXEMPTIONS.
Where a bankrupt claimed a homestead exemption, there was not complete exemption which could be transferred until approval by the referee of the exemptions set apart by the trustee, or the lapse of 20 days without any objections of creditors being filed to the allowance.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 676, 677; Dec. Dig. ⊂⊃398.]

4. BANKRUPTCY ⊂⊃400—HOMESTEAD EXEMPTIONS—POWER OF COURTS.
The bankruptcy court has no control over the bankrupt's exemptions for the purpose of distributing them among creditors holding notes waiving the exemptions, and will pay over the fund claimed as exempt to the bankrupt or some one duly constituted and appointed to receive it.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 670–675; Dec. Dig. ⊂⊃400.]

On Rehearing on Objections to Homestead Exemption.

5. BANKRUPTCY ⊂⊃395—HOMESTEAD EXEMPTIONS—RIGHT TO.
A bankrupt, who had given several creditors notes waiving his statutory homestead exemptions, claimed the exemption for the avowed purpose of preferring one of such creditors. *Held*, that the court of bankruptcy would not, under the circumstances, sustain the claim of homestead exemption, for that would be subverting the statute which was for the benefit of the bankrupt's dependents to enable him to give a preference.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 658; Dec. Dig. ⊂⊃395.]

In the matter of the bankruptcy of G. R. Anderson. Exceptions to homestead exemption. Sustained.

F. W. Copeland, of Rome, Ga., and Jas. P. Shattuck, of Lafayette, Ga., for bankrupt.

Lipscomb & Willingham and Nathan Harris, all of Rome, Ga., and J. M. Bellah, of Summerville, Ga., for objecting creditors.

NEWMAN, District Judge. The opinion of the referee in this case is as follows:

"A report was filed by the trustee, setting apart as a homestead to the bankrupt $1,575 in money, the proceeds of the sale of stock of goods at Lyerly, Ga., as asked for by the bankrupt. Objections to said report were filed by creditors, within 20 days from the filing of said report, as required by law.

"The objections were based on three grounds: (1) That the bankrupt did not make a full and fair disclosure of his assets, because of not having incorporated in his schedule a piano and household furniture, alleged by objecting creditors to have been the property of the bankrupt. (2) That the bankrupt had failed to account for certain moneys collected by him during the months preceding the filing of bankruptcy proceedings, and was consequently guilty of unfair dealing. (3) That the bankrupt, immediately upon the setting aside of the homestead, transferred it to Davenport Bros., thereby preferring Davenport Bros. over other creditors. These are the grounds of objection alleged in the argument of objecting creditors, although not exactly as they are set out in the objections to the homestead.

"The evidence in regard to ownership of the furniture is conflicting. It seems that the bankrupt gave it in for taxes, in his own name, in 1914, but

claims that this was a mistake, that the property belonged to his wife. It is apparent, however, that the piano was paid for by the bankrupt, with funds taken out of his business. This is not disputed. It would also seem that the furniture was paid for by funds of the bankrupt, but this is not so clear. The bankrupt claims that he gave this property to his wife for services rendered him by her; but there is no express contract to this effect, as required by the laws of Georgia, to make such a contract valid.

"The affairs of the bankrupt, the management of his business for perhaps a year prior to the bankruptcy, seems to be involved in some obscurity. He does not make a very clear explanation of what he did with moneys collected, and what became of the funds arising from the business. His explanation is not sufficient, in the opinion of the referee, to acquit him of the charge of unfair dealing. For a number of months prior to the bankruptcy, he had bought large amounts of goods; and he does not clearly explain what became of the proceeds.

"Immediately upon the setting apart of exemption by the trustee, on the 1st day of December, 1914, the bankrupt transferred all of the property included in the exemption, to wit, $1,575 in money, to Davenport Bros., of Chattanooga, Tenn., with the express intention, in said transfer, of preferring said Davenport Bros. over his other creditors. This was done, although, under the rules of court, the creditors have 20 days within which to file objections to the homestead.

"I do not believe, under the ruling in Moran v. King, 7 Am. Bankr. Rep. 179, 111 Fed. 730, 49 C. C. A. 578, that the bankrupt could legally do this. This same point is also ruled in 12 American & English Encyclopedia of Law (2d Ed.) p. 77; also, in Re Garner (D. C.) 8 Am. Bankr. Rep. 263, 115 Fed. 200.

"It seems that the action of the bankrupt in this instance was for the benefit of a creditor instead of himself; that is, that the homestead which the law provides for the benefit of himself and family, would, in this instance, have been set apart for the benefit of Davenport Bros., one of the bankrupt's creditors. I am of distinct opinion that the piano, in this case, should have been included in the bankrupt's schedule, as a part of his assets, and that the failure to so include was a distinct violation of the intent of the Bankruptcy Act, and that said failure, in itself, is sufficient to defeat the bankrupt's homestead. I am of opinion that under all the circumstances in this case the homestead should be denied, and it is therefore ordered."

[1, 2] Taking the conclusions of the referee in inverse order, he finds that the piano should have been included in the bankrupt's schedule as a part of his assets, and the failure to so schedule it would defeat the exemption.

I have discussed this question in a number of cases, but I think the most of them are cited and referred to, and extracts from them given, in the case of In re Cochran (D. C.) 185 Fed. 913, and reference is also made to decisions of the Supreme Court of the state, and quotations from them given. All these decisions are based upon and refer to section 3380 of the Code of Georgia of 1910. That section provides that:

"It shall be the duty of each and every person who claims the benefit of the exemption allowed in this article, as the allowance is a liberal one, to act in perfect good faith; and as it is in the power of the debtor, claiming the exemption of personal property, to conceal part of his property or money, and to claim the balance as exempt, it shall be the duty of such debtor, when he takes steps in the court of ordinary to have said exemption of personal property set off to him, to make a full and fair disclosure of all the personal property, including money, stocks, and bonds, of which he may be possessed at the time, and all such money or property which he may hold in excess of the said exemption shall be subject to levy and sale for the payment of his just debts, and if the money or other personal property of which he is possess-

ed at the time of his said application, or at the time he obtains the order of court setting off the property exempt, is fraudulently concealed, or is not delivered up to the benefit of his creditors, no exemption shall be made in his favor till it is so delivered up. * * * The debtor guilty of willful fraud in the concealment of his property from his creditors, or which he is possessed when he seeks the benefit of the exemption, shall, on account of his fraud, lose the benefit of such exemption, and his property shall be subject to the payment of all just debts which he owed at the time such fraud was committed."

The second headnote in the Cochran Case, just cited, is as follows:

"Under Civil Code of Georgia 1895, § 2830 (section 3380, Code of 1910), declaring that a debtor shall forfeit his right to the exemption allowed by law if he is guilty of fraud in concealing from his creditors any part of his property at the time he seeks the benefit of the exemption, construed by the state Supreme Court to require the utmost good faith of an applicant for the exemption, and a full disclosure of all personal property owned by him at the time he seeks the exemption, a bankrupt seeking an exemption must deal with perfect frankness with his creditors and disclose and deliver all his property except the exemption and a failure to do so defeats his application, and a bankrupt, who just before and at the time of his bankruptcy sought to get his property out of the reach of his creditors, was not entitled to the exemption."

The section of the Code referred to deals with the $1,600 exemption, which is called "the constitutional homestead." The referee finds as a fact that the property he mentions was not included in the schedules as it should have been, and holds this sufficient to defeat the bankrupt's homestead. Findings of a referee on questions of fact will not be lightly disturbed, and the evidence here is, I think, sufficient to support the finding of the referee on this point, so that upon that ground alone the homestead would be defeated.

[3, 4] The referee further finds that:

"Immediately upon the setting apart of exemption by the trustee, on the 1st day of December, 1914, the bankrupt transferred all of the property included in the exemption, to wit, $1,575 in money, to Davenport Bros., of Chattanooga, Tenn., with the express intention, in said transfer, of preferring said Davenport Bros., over his other creditors. This was done, although, under the rule of court, the creditors have 20 days within which to file objections to the homestead."

In the case of Herrin & West (D. C.) 215 Fed. 250, a ruling was made by this court on this question of transfer of homestead exemption by the bankrupt prior to its approval by the referee. In the opinion in the Herrin & West Case, this was said (215 Fed. page 252):

"I think, and so hold, that to make a complete exemption, which would be transferable and title conveyed, there must be an approval by the referee of the exemption set apart by the trustee, or at least 20 days must elapse without any objections being filed to the allowance of the homestead. Whether in the latter case that is, where 20 days elapse without objections being filed, the title in the bankrupt would be complete it is unnecessary now to determine."

It appears from this record, and is conceded to be true, as I understand it, that G. R. Anderson, the bankrupt in this case, immediately upon the setting apart of cash to the amount of $1,575 to him as an exemption, transferred it to Davenport Bros., one of his creditors. As to that the referee says:

"This exemption was transferred to Davenport Bros. with the express intention, by said transfer, of preferring said Davenport Bros. .over his other creditors."

The answer of the bankrupt in this case to the objections to the approval of the homestead by the referee contains the following:

"The bankrupt further shows that after said homestead had been so set apart to the bankrupt, to wit, on the 2d day of December, 1914, the bankrupt, in the exercise of the right conferred on him by law, transferred and assigned his said homestead to Davenport Bros., of Chattanooga, Tenn., preferring them as creditors, and he here attaches a copy of said transfer of said homestead as a part of his answer to said objections and sets up all the facts stated in said transfer as a part of his response to said objections."

A copy of the paper constituting this transfer from Anderson to Davenport Bros. is attached, and is as follows:

"Chattanooga, Hamilton Co., Tenn., Dec. 2, 1914.

"For and in consideration of the fact that I am indebted to Davenport Bros., a firm engaged in the mercantile business, located in Chattanooga, Tenn., to wit: One note due October 15, 1914, for $250.00; one note due November 1, 1914, for $250.00; one note due November 15, 1914, for $250.00; one note due December 1, 1914, for $250.00; one note due December 25, 1914, for $351.93—amounting to $1,351.93, besides an amount of $107.12.

"Said notes containing a waiver of my rights to homestead under the laws of Georgia, and whereas, under the laws of Georgia, an insolvent debtor may prefer and pay, or secure one creditor in exclusion of another, I hereby transfer, sell, convey, transfer and turn over to the said Davenport Bros., preferring them over my other creditors, my homestead, which has been set apart to me by the Trustee and Bankrupt court, in money, the same being the proceeds of my stock of goods out of which I asked my homestead to be set apart, and by consent and approval of the bankrupt court was sold, the money to be set apart as homestead instead of the goods, and the same set apart—$1,575.00.

"The trustee, R. H. Crawford, is directed and instructed to pay over said money to the said Davenport Bros.

"In witness whereof, I have hereunto set my hand and signature, this December 2, 1914. G. R. Anderson.

"Witnessed J. D. Trotter."

The effort in this paper clearly is to transfer this money constituting the homestead exemption to Davenport Bros. because they held notes containing waiver of homestead exemption. It has been so often held that this court has no control over the bankrupt's exemption for the purpose of distributing it among creditors holding waiver notes that it is unnecessary to discuss that now. A practice has grown up, which is fully recognized by the Supreme Court of the state in Bell v. Dawson Grocery Co., 120 Ga. 628, 48 S. E. 150, that when the homestead exemption here in this court is in money, and there is a claim to the fund by waiver note creditors, of paying the same over to a receiver appointed by the state court for the purpose of distributing the same among creditors of that class.

Under all the decisions, including Lockwood v. Exchange National Bank, 190 U. S. 294, 23 Sup. Ct. 751, 47 L. Ed. 1061, this court cannot do any more than set apart the exemption and turn it over to the bankrupt, or some one duly constituted and appointed to receive it. Therefore I shall not attempt to decide in this case anything further than that: (1) By failure to make a full and fair disclosure of

his property in his schedules the bankrupt has deprived himself of the right to claim a homestead exemption; (2) that the bankrupt's exemption when set apart by the trustee is inchoate and not fully fixed in him until approved by the referee in bankruptcy. So, reversing the order of these findings, it is determined, first, that the bankrupt's exemption was not fully and completely set apart to him, that his right to the exemption was inchoate at the time he attempted to transfer it, and, second, that on account of his willful withholding of part of his property in the schedules, he should not be allowed an exemption.

The finding of the referee is therefore approved and confirmed.

Rehearing on Objections to Homestead Exemption.

I have gone over the evidence taken in this case on July 5, 1915, and it does not change my opinion as to what should be done in the matter. The referee found, in addition to his finding on the piano, that the bankrupt failed to show satisfactorily what became of his other property and what he had done with what he had received from his business, and the only explanation of this in this latter testimony is that he turned over all of the property he had to his trustee.

The second objection, before the referee, to the allowance of the homestead, was that the bankrupt had failed to account for certain moneys collected by him during the months preceding the filing of the petition in bankruptcy, and was consequently guilty of unfair dealing. As to that the referee finds that:

"The affairs of the bankrupt, the management of his business for perhaps a year prior to the bankruptcy, seems to be involved in some obscurity. He does not make a very clear explanation of what he did with moneys collected, and what became of funds arising from the business. His explanation is not sufficient, in the opinion of the referee, to acquit him of the charge of unfair dealing. For a number of months prior to the bankruptcy he had bought large amounts of goods, and he does not clearly explain what became of the proceeds."

This I did not refer to in my former opinion. The failure to return the piano, which the referee found to be true, being sufficient without going into the other matters. But the finding of the referee on this second ground of objection to the exemption is sufficient, even if the testimony last taken, of the bankrupt and his wife, was sufficient to remove the difficulty about the piano, which seems to be doubtful.

[5] The great trouble here is this man's use of a beneficent statute, allowing an exemption to him for the benefit of his wife and children, to enable him to pay a debt and thereby prefer one of his creditors over his other creditors. True, the creditor thus sought to be preferred had a note for his debt with a waiver of homestead attached; but so, according to uncontradicted statements made here, did several other creditors. There was a considerable amount due, outside of the debt to Davenport Bros., for which there were waiver notes, and for the court to sit here and permit a statute, passed for the benefit of the bankrupt's family, to allow him enough after his bankruptcy to

support and care for them, to be used by the bankrupt for the benefit of one of his creditors in preference to all of the others, would not be right, and such practice should not be recognized and sanctioned by the courts.

In addition to this, when he attempted to transfer the homestead exemption, as I said before, the exemption was inchoate, and, the referee not having approved the exemption, it was not in such shape that the homestead was completed and made final as to the bankrupt and he had no right to transfer it in that situation.

Again, I am not overlooking the fact that all the bankrupt court has to do with the homestead exemption is to cut it out of the estate, set it apart, and turn it over to the bankrupt; but in this case the application for the exemption is accompanied with a showing that the bankrupt intends, and had already, for that matter, transferred his homestead to one of his creditors thereby preferring them. The fact that the transferee had a waiver note would cut no figure in this; for, if the court is to consider at all the question of waiver notes in connection with homesteads, it would turn them over to some person appointed by the state courts to distribute the same to all waiver note creditors equitably. I do not see how a proceeding like this and giving to a man a homestead exemption for the purpose of preferring a creditor with it can be entertained at all by the courts.

I must decline to reconsider in any way my action in confirming the referee's decision denying the exemption.

In re HULL.

(District Court, N. D. Ohio, E. D. April, 1915.)

1. BANKRUPTCY ⟸354—CREDITOR OF INSOLVENT PARTNERSHIP—RIGHT TO SHARE IN INSOLVENT ESTATE OF PARTNER.

Under Bankr. Act July 1, 1898, c. 541, § 5f, 30 Stat. 547 (Comp. St. 1913, § 9589), providing that the proceeds of partnership property shall be appropriated to the partnership debts and the proceeds of the individual estate of each partner to his individual debts, and that any surplus of the property of a partner after paying his individual debts shall be applied to the partnership debts, and any surplus of the partnership property shall be applied to individual debts, a creditor of a firm was not entitled to share ratably with an insolvent partner's creditors in the settlement of such partner's individual estate, although there were no partnership assets available for partnership creditors.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 555–564; Dec. Dig. ⟸354.]

2. BANKRUPTCY ⟸340—PREFERENCE—BURDEN OF PROOF.

The burden to show reasonable cause on the part of a creditor to believe that an estate is insolvent is upon those seeking to avoid a claim on the ground of preference.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 527; Dec. Dig. ⟸340.]

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3. BANKRUPTCY ⟸166—PREFERENCES—KNOWLEDGE OF INSOLVENCY OF PARTNER.

Knowledge of a partnership creditor that the partnership is insolvent does not charge the creditor with knowledge that an individual partner is insolvent.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 250–253, 255–258; Dec. Dig. ⟸166.]

4. BANKRUPTCY ⟸340—PREFERENCES—SUFFICIENCY OF EVIDENCE.

Evidence *held* insufficient to charge the creditor of a partnership, taking individual notes of the partners after dissolution for the firm debt, with knowledge that one partner was insolvent and unable to pay both his individual and partnership liabilities.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 527; Dec. Dig. ⟸340.]

In Bankruptcy. In the matter of Robert B. Hull, bankrupt. On petition of the Canton Buggy Company for review of decision of W. F. Kean, referee, denying the petitioner participation in distribution of the bankrupt's estate. Decision reversed.

Fisher & McCusky and Pomerene, Ambler & Pomerene, all of Canton, Ohio, for petitioner.

John Huston and C. R. Cary, of Millersburgh, Ohio, for trustee.

KILLITS, District Judge. This matter is before the court on the petition of the Canton Buggy Company, a creditor of the firm of Kyser-Hull Company, for a review of the order of distribution declared by the referee, denying petitioner participation in the distribution of the estate of Robert B. Hull, bankrupt, a former member of the dissolved partnership.

The facts are these: An order of buggies was sold by the petitioner to one Kyser, doing business in his own name. Pending the delivery of the order, Kyser effected a partnership with Hull under the firm name of the Kyser-Hull Company, and the goods in the order were delivered to the partnership. In a few months the partnership was dissolved, Kyser retaining all the assets. Subsequently Kyser went into bankruptcy, and neither his personal estate nor the partnership assets by him retained permitted a dividend to be paid to either his personal or partnership creditors. Hull also went into bankruptcy.

[1] The first question before the court is whether the petitioner, the Canton Buggy Company, as a creditor of the late partnership, is entitled to share ratably with Hull's creditors in the settlement of his estate. The question is whether, because of the fact that there were no partnership assets available for distribution to partnership creditors, the rule of distribution in paragraph "f"of section 5 of the Bankruptcy Act is subject to the exception recognized in some states, Ohio for one, as applicable in such cases. Grosvenor & Co. v. Austin's Adm'rs, 6 Ohio, 104, 25 Am. Dec. 743; Rodgers v. Meranda, 7 Ohio St. 180; Brock v. Bateman, 25 Ohio St. 609.

Under section 36 of the old Bankruptcy Act (section 5121, R. S. 1878) the current of opinion was somewhat strongly to the point that where there is no partnership estate, and no solvent partner, partnership creditors are entitled to share ratably with individual creditors

in the individual assets of the bankrupt partner. In re Downing, Fed. Cas. No. 4,044; In re Jewett, Fed. Cas. No. 7,304; In re Knight, Fed. Cas. No. 7,880; In re McEwen, Fed. Cas. No. 8,783; In re Pease, Fed. Cas. No. 10,881; In re Slocum, Fed. Cas. No. 12,950; In re Litchfield (D. C.) 5 Fed. 47; In re Blumer (D. C.) 12 Fed. 489; In re Lloyd (D. C.) 22 Fed. 88; In re West (D. C.) 39 Fed. 203. But upon the present law the greater authority is to the point that no such exception should be recognized, but that the distribution should follow strictly the language of the act.

In favor of the exception are: In re Green (D. C., Iowa) 8 Am. Bankr. Rep. 553, 116 Fed. 118; In re Conrader (D. C., Pa.) 9 Am. Bankr. Rep. 85, 118 Fed. 676, affirmed as Conrader v. Cohen (C. C. A., 3d Cir.) 9 Am. Bankr. Rep. 619, 121 Fed. 801, 58 C. C. A. 249. To the contrary, however, are: In re Wilcox (D. C., Mass.) 2 Am. Bankr. Rep. 117, 94 Fed. 84; In re Janes (D. C.) 128 Fed. 527; Id. (C. C. A., 2d Cir.) 13 Am. Bankr. Rep. 341, 133 Fed. 913, 67 C. C. A. 216; In re Henderson (D. C., W. Va.) 16 Am. Bankr. Rep. 91, 142 Fed. 588, affirmed (C. C. A., 4th Cir.) 17 Am. Bankr. Rep. 834, 149 Fed. 975, 79 C. C. A. 485.

In the Wilcox Case, Judge Lowell, in an elaborate review of the development and practice of the exception in equity procedure, points out the difficulties in the application, while, in the Henderson Case, Judge Dayton discusses the frequent inequity resultant from its employment, and the absurdities involved in giving it any force whatever, as in Marwick's Case, Fed. Cas. No. 9,181, where, the partnership estate not otherwise yielding anything for distribution, a creditor of one of the partners purchased a perfectly worthless partnership asset for $40, that he might put a fund into the hands of the assignee of the partnership and thereby prevent its creditors from sharing pari passu with individual creditors in individual assets. It is well observed by Judge Dayton that the present law received such careful consideration in its passage by a committee entirely familiar with the act of 1867 that it is impossible not to assume that its draft, which passed without amendment, was so worded as to exclude the possibility of any other distribution than that pointed out by the section.

Reviewing the Janes Case, Judge Lacombe uses this language (13 Am. Bankr. Rep. 342, 133 Fed. 913, 67 C. C. A. 217):

> "It was within the discretion of Congress to leave this subject of the marshaling of assets to the courts, to be disposed of in accordance with equity principles and practice, or to provide that the general rule should be modified in particular cases. It has done neither. On the contrary, it has itself directed how the assets shall be marshaled, and it has done so in language broadly covering this case as well as all the others. The language is plain, explicit, and unambiguous; it names no 'exception'; its phraseology conveys no intimation that any 'exception' is contemplated. To inject into the act an excepting clause, where none has been enacted, would seem to be judicial legislation."

An able opinion by a referee of the Southern district of this state, denying the application of the exception, and reported in 12 Am. Bankr. Rep. 283, calls attention to the "material change effected by the present law" from the act of 1867, "in the manner in which a partnership is now regarded as a separate entity instead of a joint enterprise," cit-

ing, to show "that other courts have recognized material changes made by the present Bankruptcy Law," Vaccaro v. Security Bank (C. C. A., 6th Cir.) 4 Am. Bankr. Rep. 474, 103 Fed. 436, 43 C. C. A. 279; In re Meyer (C. C. A., 2d Cir.) 3 Am. Bankr. Rep. 559, 98 Fed. 976, 39 C. C. A. 368; In re Stein & Co. (C. C. A., 7th Cir.) 11 Am. Bankr. Rep. 536, 127 Fed. 547, 62 C. C. A. 272—all to the point that, as distinguished from the law of 1867, the present act "deals with the copartnership as a person for the purpose of subjecting the partnership property to the satisfaction of the copartnership liabilities."

This significant change in phraseology from that of the former acts may be sufficient to deprive the cases decided under the act of 1867 of persuasiveness. Indeed, it is difficult to see wherein the language of paragraph "f" of section 5 permits the grafting of an exception. The first sentence so definitely provides how various classes of debts shall be paid as to seem to leave no room for any variation. It reads:

"The net proceeds of the partnership property shall be appropriated for the payment of the partnership debts, and the net proceeds of the individual estate of each partner to the payment of his individual debts."

This language, read literally, excludes opportunity for the partnership debts to participate in the fund derived from the individual estate of a partner, except as provided in the subsequent sentence of the paragraph; that is, only when the individual estate yields a surplus above the individual liabilities. In the absence of an authoritative holding in this circuit, it seems to us that the better course is to follow the Second and Fourth circuits, already cited, and to hold that the statute is so definite as to provide a uniform rule of distribution, against which there can be no exception introduced by judicial construction. The conclusion of the referee is in this particular therefore approved.

[2-4] After the dissolution of the partnership the petitioner, the Canton Buggy Company, took notes for the claim signed by Kyser and Hull individually. The referee held against the claim based on these notes for participation in the distribution of the assets of Hull's individual estate, on the theory that a preference was effected by that transaction, under circumstances which involved the petitioner in a reasonable cause to believe that insolvency existed, that the taking of the notes constituted a novation, and to give them participation in the distribution of Hull's estate on a parity with individual claims against Hull is to create a preference in the Canton Buggy Company over other partnership creditors. The evidence clearly charges the Canton Buggy Company with a reasonable cause to believe, at the time it took the individual note, that the partnership estate, retained by Kyser, was insufficient to liquidate the partnership debts. The referee seemed to think that this knowledge, with which petitioner was undoubtedly chargeable, was sufficient to avoid a special claim against the individual estate.

It seems very clear, however, that the inquiry goes further. The preference obtained by petitioner discriminates against other partnership creditors in their recourse on the possible surplus of Hull's estate after his individual debts are satisfied, wherefore the inquiry is rather

as to a reasonable cause to believe Hull to be insolvent at the time the notes were made. Both from Hull's petition, filed less than three weeks after the date of the notes, and from the referee's finding of the conditions of this estate after its reduction to money by his trustee, we note that, had not Hull been burdened with responsibility for the firm's debts, he was unquestionably solvent. To hold against petitioner, therefore, is to determine, from the facts of the case, a reasonable cause to it to believe, not only that the partnership was insolvent, but that dividends on its debts would be so small that the resultant claims against Hull's estate would be to exhaust the surplus thereof after his individual creditors were paid, and still leave the partnership debts unsatisfied in part. This means that we must find that petitioner had reasonable cause to know the extent of the partnership liabilities, without which information, to be charged to it, it could not be held to bear the duty of inquiry into the condition of Hull's estate. Bearing in mind that the burden to show reasonable cause to believe that an estate is insolvent is upon those seeking to avoid a claim on the ground of preference, and allowing full effect for the doctrine imposing a duty of inquiry, still there is nothing in the record here which tends to charge the Canton Buggy Company with knowledge of the conditions of the partnership estate other than that it was insolvent. That knowledge, even if admitted by petitioner, would not be enough to charge it with knowledge, or even a reason to believe, that Hull was insolvent. There is nothing to indicate that petitioner knew, or should have known, the extent of the partnership indebtedness, which knowledge was indispensable to a well-founded suspicion of Hull's financial condition.

We are compelled, therefore, to disagree with the referee, and hold that petitioner's claim should share in the distribution of Hull's estate as a personal liability.

PHILADELPHIA TRACTION CO. v. McCOACH, Collector of Internal Revenue.

(District Court, E. D. Pennsylvania. August 2, 1915.)

No. 2020.

1. INTERNAL REVENUE ⟸9—SPECIAL TAX ON BUSINESS—STATUTES—CONSTRUCTION.

   Act Aug. 5, 1909, c. 6, 36 Stat. 112 (Comp. St. 1913, §§ 6300–6307), imposing a tax on corporations doing business, must be construed as imposing an excise tax, and not a franchise, property, or other direct tax.

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

2. INTERNAL REVENUE ⟸9—SPECIAL EXCISE TAX ON CORPORATIONS—"DOING BUSINESS."

   A street railway company, which surrenders to another company the management and control of its physical possessions, and which transfers to the latter company its rights and franchises to operate its railway, reserving only its corporate existence and the right to receive and disburse its income, and which subsequently does nothing more than is necessary to its existence as a corporation and the distribution of its annual income,

such as the retiring of bonds under a sinking fund provision of a mortgage under which they were issued, joining as a party to extension agreements for the payment of bond issues of underlying railway companies, or some of them, and the receipt of sums as compensation for the transfer of its rights, for organization expenses, and for money which it paid out to and for the underlying companies, is not "doing business," within Act Aug. 5, 1909, imposing a special excise tax on corporations doing business.

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

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

At Law. Action by the Philadelphia Traction Company against William McCoach, Collector of Internal Revenue. Judgment for plaintiff.

Boyd Lee Spahr and Ellis Ames Ballard, both of Philadelphia, Pa., for plaintiff.

Edward S. Kremp, Asst. U. S. Atty., of Reading, Pa., and Francis Fisher Kane, U. S. Atty., of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. This case was tried before the court, instead of before the court and a jury, by agreement of the parties, under the provisions of the acts of Congress dispensing with jury trials.

The basic facts are not in dispute. So far as there is a question of fact involved, it is a question of the ultimate fact to be found by inference from certain, in this respect, minor facts which are not in controversy. In a very substantial sense, however, the case comes before us with the effect of a case stated to have the law of the case determined. The proper conclusion to be reached involves commingled findings of fact and conclusions of law. There is both the fact of doing business and the meaning of the act of Congress to be found. We have met whatever technical formal difficulties this may present by stating our conclusions both in the form of findings of fact and of conclusions of law.

The skeleton facts are these: The United States authorities levied upon each of plaintiffs an excise tax by color of the authority of the act of Congress of 1909. The plaintiffs each paid the tax under protest and demanded its return. The defendant refused to refund on the ground that the tax had been lawfully collected. The plaintiffs deny liability for the tax. All the formal requirements of the law have been complied with, and the sole question is the one indicated.

The beginnings of the controversy lie in that effort which is everywhere being made to transmute a mental apperception, a mere concept of the mind, into something sufficiently concrete to be offered for sale as a thing having commercial value. A number of different street railway companies are organized; they receive the grant of franchises and engage in the business for which they were incorporated. They are separate entities, each independently "doing business." Some one sees that there would be an economy in operation if all these different

companies could be brought under one management, and probably an increase of revenue would result as well. He thereupon conceives the idea of organizing another company, to take over the control of what then becomes a number of underlying companies, so as to subject them all to one management. When this is done there will have been an increase in the combined net income. The expectation of this net income is then capitalized through the form of an issue of stock by the operating company, and at once you have a concrete thing which may be sold. This is "making money" in a very practical sense. From the viewpoint of the exciseman this works a hardship, which in his eyes is an injustice, because the consequence may be that what would otherwise be net income and measure the tax levy becomes an expense item which causes net income to vanish. The combination, which is the foundation of the scheme, may be effective through operating agreements, leases, ownership of stock, or other means of control of the subsidiary company, or may be accomplished by a commingling of these methods.

[1] Such a scheme was adopted here and raises the question propounded in this case. This arises out of the circumstance that Congress has imposed an excise tax on corporations "doing business," and at once the inquiry arises: Are these companies "doing business" within the meaning of the act of Congress? If they are, they are admittedly liable to the payment of the tax imposed. The converse must likewise be admitted. The act must be interpreted in the light of the constitutional limitations imposed upon Congress. The constitutionality of the act has been determined and is, of course, not open to question. This has been upheld, however, by the finding that the tax imposed is an excise tax, and not a franchise, property, or other direct tax. This requires us to construe the act as imposing an excise tax. To sustain the tax power as an excise, and then levy under it a direct tax, would be approaching too closely the line of intellectual dishonesty.

[2] In this case there are five underlying companies. The principles of law, which apply, apply to all the cases. They were therefore heard together, and by stipulation the same testimony and evidence is to be taken as given and introduced in each case. They differ only in the respects which will be noted. The discussion of one case will therefore suffice for all, although each case will in form be separately disposed of.

In its legal aspects the street railway system of Philadelphia is so complex that a mere statement of the different parts of the entire structure would give undue length to this opinion. We will confine ourselves to a statement of the special features upon which the decision of the question before us turns.

The history of the origin and evolution of the rights of the corporate owners of these street railway systems begins with the grant of franchises to lay tracks upon the public streets, own a railway system, and operate it. The motive power permitted to be employed has been from time to time extended to include cables and other means for the propulsion of cars, the latest development being electrical power applied by a trolley or other means. Coincidentally with the expansion of

what may be called the physical powers of these railways there was a like enlargement of other powers. The original conception of such companies was that they would own railways and operate them. There was then authorized the incorporation of so-called traction companies, the essential conception of which was that they were to furnish the power and the organization to operate the lines owned by other companies. There was a like expansion of the powers given to these various companies, through which they could accomplish the purpose of their incorporation, such as the power to issue bonds, to purchase the stock of other companies, to lease the property and franchises of other companies, and the like. Some of them might be mere holding companies. In the end the broad question with which we are concerned resolves itself into this: Does a street railway company cease to do business when it surrenders to another company the management and control of its physical possessions and transfers to the second company its right and franchise to operate its railway, reserving only its corporate existence and the right to receive and disburse its income.

An analogue may be found in the situation of an individual, who gives up active participation in the business in which he was formerly engaged, but retains in some form or other a share in the money results. It is obvious that the answer to this question involves a finding of fact, and it soon becomes apparent that the line drawn through the point at which a person has ceased to do business is a line which is sometimes difficult to draw. A little further reflection discloses that the answer to the question will depend largely upon the form which the change takes. Take the simple case of a street railway, which owns and operates its railway, receiving fares, and out of its gross receipts are paid its operating expenses, and out of the net income thus determined, or a portion of it are paid dividends to its stockholders. It would be clear to every mind that as long as it was operating its own road, collecting fares and paying the operating expenses incurred, it was engaged in the street railway business. The receipt and division of income among its stockholders of itself would, to some minds, be part of the business it was doing. To other minds, this would be a distinct and separate thing, not the carrying on of the business, but the sharing of the profits from the business.

The distinction may be brought out by calling to mind the somewhat analogous distinction between the purposes for which a corporation is formed, or the business it is to conduct, and the incidental powers conferred upon it as necessary or helpful to the carrying out of its corporate purposes. The purpose of its incorporation, in the sense of its business purpose, may be to transport passengers from one point to another. It may be given the right restricted or unrestricted, or be granted the power to charge for this service by established rates of fare. It might have the power to borrow money and to secure its repayment by an issue of bonds to an amount legally limited or unlimited. It might be given authority to build railroads anywhere, or be limited to railways upon city streets, or only on designated streets. The power might be extended to acquire by lease or to lease its own.

It might possess or have withheld from it the power of eminent domain. Its business purposes and its powers might be few or many, but the distinction between powers and purposes would still be clear. This is true, notwithstanding that the two things overlap in the sense that among the rights given and the powers conferred is that to engage in the designated business.

The same line of difference runs through the exercise of these powers or the carrying out of these business purposes. A corporation or individual might be doing business, no matter how small the volume; but a corporation which borrowed money and issued bonds, which it had the power to do, could not be truly said to be engaged in that business, unless that was the purpose of its incorporation. The mere fact of the receipt of moneys from the income of a business is not the test. It would be forcing the meaning of the phrase to say that one was engaged in railroad business simply because his income was derived wholly from railroad investments. The distinction adverted to has been recognized and made clear in the adjudged cases, of which McCoach v. Minehill & Schuylkill Haven Co., 228 U. S. 295, 33 Sup. Ct. 419, 57 L. Ed. 842, is one. The answer to the question of doing business is to be found in the facts of each case.

As has already been stated, the Philadelphia Traction Company was incorporated under the Traction Company Act. This was the act of June 13, 1883 (P. L. 122). The act was in form supplemental to existing legislation. It conferred upon corporations incorporated under it authority to enter into contracts with railway companies owing lines to construct and operate motor appliances for the traction of the cars of the railway company. It may be observed in passing that the act conferred no power to acquire property of railway companies by lease, and because of this omission, and of a consequent doubt of its corporate power, no leases of railway properties were made, but operating contracts were entered into by each under date of April 30, 1884. The Traction Company agreed with the West Philadelphia Passenger Railway Company to construct the necessary traction apparatus and to act as operator of the cars of the railway company, and a like agreement was entered into on June 30, 1884, with the Union Passenger Railway Company.

Following this, on November 28, 1888, the Traction Company surrendered the charter above granted it and took out letters patent under the act approved March 22, 1887 (P. L. 8). This act conferred power to construct and operate motor appliances and to enter into agreements with railway companies for the traction of their cars. Plaintiff, as a corporation incorporated under the latter act, could enter into leases, and did establish relations with the Thirteenth & Fifteenth Street Passenger Railway Company on January 15, 1892. The agreement was called an "agreement of lease," but its intendment was that the Traction Company should take over the street railway lines of the lessor for the purpose of operating. The Continental Passenger Railway Company of Philadelphia was a street railway company incorporated for like purposes as that of the other railway companies. The control and operation of its properties likewise passed to the Philadelphia

Traction Company through the medium of first passing into the control of the Union Passenger Railway Company by means of a lease, and thus becoming included among the possessions of the Union Passenger Railway Company which passed to the Philadelphia Traction. The position of the Philadelphia Traction Company thus acquired was passed over to the Union Traction Company, and by it in turn to the Philadelphia Rapid Transit Company. These transfers are designated as leases, and the conveying clause is expressed as "let and demise." The legal intendment, however, and effect, is an assignment of all rights held by the Philadelphia Traction Company, including the agreements and leases, etc., above referred to.

Subsequently to the passing of the possession and control of what each of these companies had previously possessed, each of the companies did certain things which are referred to in connection with the disposition of each case, based upon which the United States asks for a finding that they are still doing business within the meaning of the act of Congress of 1909. The position of counsel for the United States is that as each of these railway companies was incorporated for the purpose of operating its line of road, and for a time did operate it, when it entered into the agreement with the Traction Company to operate for it, it was still operating its railway by its operating agent, the Traction Company, and was therefore still doing business. The Traction Company was likewise doing business, because it was incorporated for the purpose of operating railway systems for other companies, and was therefore doing the very business for the purpose of doing which it had been incorporated, and that it did not cease to be doing the same business when it secured the services of the Union Traction Company to perform the required service for it, nor when the same obligation was passed on to the Rapid Transit Company. Moreover, each of these companies never ceased entirely to do business, because from time to time they did things in furtherance of their corporate purposes.

With respect to the first proposition, this is nothing more than a statement of the "facit per alium facit per se" maxim. It is, of course, true in a sense that when a man enters into a contract with a builder to erect a house for him (the owner) that the owner may be said to be building a house; but if the real builder has such relations with the owner that the term "independent contractor" applies to him, such contractor is engaged in the building business, but it would be an abuse of the common use of language to say that the owner was so engaged.

The special things which the Traction Company did subsequently to the cessation of its activities as a traction company may be summarized as the retiring of bonds under the sinking fund provision of the mortgage under which they were issued, joining as a party to extension agreements for the payment of bond issues of the underlying railway companies, or some of them, and the receipt of large sums of money as compensation for the assignment of its rights, for organization expenses, and for moneys which it paid out to and for the underlying companies.

With respect to these acts, they are nothing more than acts necessary to the existence of the corporation, and the distribution of its

annual income. They do not necessarily indicate, nor indeed throw any light upon, the question of whether or not the company was doing business, and do not justify such a finding.

The views of the court and the conclusions reached are voiced in the following finding of facts and conclusions of law:

Finding of Fact.

1. So far as it is a question of fact, the Philadelphia Traction Company was not carrying on or doing business in the year 1909, within the meaning of the act of Congress of August 5, 1909.

Conclusions of Law.

1. So far as it is a question of law, the Philadelphia Traction Company was not engaged in or doing business in the year 1909, within the meaning of the act of Congress of August 5, 1909.
2. The Philadelphia Traction Company was not subject to the excise tax imposed by the said act of Congress for the year 1909.
3. The plaintiff company is entitled to judgment for the amount of its claim, with interest.
4. The plaintiff company is entitled to costs.

The plaintiff may move for formal judgment in its favor and against the defendant in accordance with the foregoing opinion.

The requests of the defendant for findings of conclusions of law, as prayed for, are denied

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BAILEY v. MANUFACTURERS' LUMBER CO.

(District Court, S. D. New York. June 22, 1915.)

1. SHIPPING ⟸171—DEMURRAGE—LAY DAYS FOR LOADING AND DISCHARGING.
Under a charter party which fixes the same rate of speed for loading and discharging, the time for loading and discharging is not to be brought into hotchpot, but each period is to be reckoned separately.
[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 568; Dec. Dig. ⟸171.]

2. EVIDENCE ⟸21—JUDICIAL NOTICE—DEMURRAGE—CUSTOM OF PORT.
Where a charter party provides that discharge shall be according to the custom of the port of discharge, the court cannot take judicial notice of such custom, but the same must be proved.
[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 25; Dec. Dig. ⟸21.]

3. SHIPPING ⟸177—DEMURRAGE—DELAY IN OBTAINING DISCHARGING BERTH.
In the absence of provision to the contrary in a charter party, delay in obtaining a berth for discharging is at the charterer's charge.
[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 576–582, 584; Dec. Dig. ⟸177.]

4. SHIPPING ⟸177—DEMURRAGE—DELAY IN OBTAINING PAPERS.
Delay in obtaining the necessary papers from the customhouse for discharging a vessel, if through the fault of the authorities, and not of the ship, is at the charterer's charge.
[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 576–582, 584; Dec. Dig. ⟸177.]

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5. SHIPPING ⇐183—DEMURRAGE—RATE FIXED BY CHARTER PARTY.

Where the rate of demurrage is agreed upon in a charter party, the agreement will be given effect as for liquidated damages, unless it clearly appears that the real intent was to provide for a penalty.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 593; Dec. Dig. ⇐183.]

In Admiralty. Suit by George Bailey against the Manufacturers' Lumber Company. Decree for libelant.

Arthur Lovell, of New York City, for libelant.

Roscoe H. Hupper, of New York City, for respondent.

LEARNED HAND, District Judge. [1] The charter party contains the clause:

"It is agreed that the lay days for loading and discharging shall be as follows: At an average rate of not less than forty thousand superficial feet of lumber or equivalent of laths, per weather working day."

The first point is whether the time taken in loading and discharging shall all be brought into hotchpot, or whether each period must be reckoned separately. The authorities are not very helpful. Judge Brown's decision in The Ocean Prince (D. C.) 50 Fed. 115, does not raise the question at all, because the ship earned dispatch money on both loading and discharging; it was not, therefore, necessary to bring both periods into hotchpot. In Marshall v. Bolckow, Vaughan & Co., L. R. 6 Q. B. D. 231, the rate was different for loading and for discharging, unless "loaded at other than Portugalette or Lucana shipping staithes," when it was to be the same. The loading did not take place at either of the ports mentioned, and was therefore in fact subject to the same rate as discharge. The ship claimed the right to separate the periods, as here, and the court decided with the ship; but it is not clear that the decision would have been the same, had the main body of the charter party not distinguished between the rates.

Avon S. S. Co. v. Leask, 18 Session Cases (4th Series) 280, is a stronger case for the libelant. There the charter read:

"Cargo to be loaded and discharged as fast as steamer can receive and deliver during usual working hours."

The court by a vote of three to one decided that each period must be reckoned separately, because otherwise the ship's lien for demurrage could not exist, and because customarily the intent to merge the whole period into one appears if intended. The first consideration applies to the case at bar, the clause of the charter party at bar being:

"Vessel to have an absolute lien on cargo for freight, dead freight, and demurrage."

If the charter brings the whole period into hotchpot, no lien arises for demurrage in loading, until it appears during the period of discharging that with the utmost expedition the average rate for both periods would be less than the charter requires. Even then the lien could not be measured until all had been delivered and the lien lost. Such an interpretation would make the provision for a lien wholly im-

practicable, as well as any right to recover at once for any demurrage arising in loading. This, as usual, is recoverable de die in diem, which, while it cannot in any case be construed literally, has possible meaning if the periods are kept separate. Had it been shown that the probable speed of loading and of discharge were different, I should feel greater force in the respondent's argument; but in the absence of such proof I am entitled to assume that the lumber was expected to go aboard no faster than it went ashore; if so, I regard the average as meaning the rate at which each operation should be completed, making allowance for variations while it went on, rather than to permit what at its completion turned out to be an expeditious loading, to make amends for a dilatory discharge. No doubt the question is somewhat casuistical, but I shall follow the Scotch case for the reasons stated.

[2, 3] The next point is the delay in obtaining a berth. The charter party provides that discharge shall be according to the custom of the port of discharge. No custom of the port was shown, and I cannot take judicial notice of any; in Gates v. Ryan (D. C.) 37 Fed. 154, a custom was proved. This case is like Swan v. Wiley, Harker & Camp Co., 161 Fed. 905, 88 C. C. A. 510, where no custom was proved and the delay in obtaining a berth was at the charterer's charge. Similarly in Leary v. Talbot, 160 Fed. 914, 88 C. C. A. 96, delay in finding berths after the first was at the charterer's charge, though the fault was that of a customs inspector. Finally, any delays at the wharves are at the charterer's charge, whether because they were too crowded for discharging at full capacity, or because the consignee wrongfully refused to receive the cargo. Donnell v. Amoskeag Mfg. Co., 118 Fed. 10, 55 C. C. A. 178; Peck v. U. S. (C. C.) 152 Fed. 524. These were cases of default in loading by the charterer's consignee, but the question is no different when the fault is the consignee's in failing to make a prompt discharge. Hinckley v. Wilson Lumber Co. (D. C.) 205 Fed. 974. Such undertakings are made by the charterer. Carver, Carr. by Sea, 610; Leary v. Talbot, supra. It makes no difference that the employment and pay of stevedores is an obligation of the master; the charterer must see to it that the agreed rate of loading or discharge is continued, unless the master interfere. In West Hartlepool Steam Nav. Co. v. Va.-Car. Chem. Co., 164 Fed. 836, 90 C. C. A. 288, the relief sought was against the cargo and consignee, not the charterer; there was not enough proof to hold the cargo under the bill of lading. If the language of the Circuit Court of Appeals means that it is only when the charterer has actively contributed to the delay that he is responsible, I cannot follow the decision. If it means that a strike will excuse the charterer from his obligation to discharge the ship, it is not apposite.

The cesser clause has no application. Crossman v. Burrill, 179 U. S. 100, 21 Sup. Ct. 38, 45 L. Ed. 106. The bill of lading, signed by the master, did not incorporate the charter party, and gave no lien upon the cargo and no obligation against the consignee for demurrage. Dayton v. Parke, 142 N. Y. 391, 37 N. E. 642. In such case, if the cesser clause relieved the charterer, there would be no obligation for

demurrage at all; hence it does not operate. Its effect is only upon those liabilities which are capable of transference to cargo or consignee under the bill of lading.

[4] Next is the delay at Black Tom and at Newark in getting the necessary papers from the customhouse. All usual and necessary delays for that purpose are at the charterer's charge, since it rests with him to say how often and when the ship shall be moved, and at how many places cargo shall be discharged. Any delay in getting the papers at a given place, caused by the ship's failure to have on hand or keep proper tally sheets or other documents, is at the ship's charge; but if it is the authorities who are at fault, then under Leary v. Talbot, supra, it is at the charterer's. The only deduction of demurrage from the morning of July 29th will be for delays due to the failure of the ship to have the proper papers ready for customhouse officials.

[5] Finally comes the question of the agreed demurrage. If parties agree in words upon stipulated damages, it should abundantly appear that they did not mean what they say, and that what they really were doing was providing for a penalty. If that does appear, then, of course, the penalty will not be enforced. To agree upon a fixed sum for demurrage in a charter party is to say in the most positive way that the sum is liquidated damages for detention. Unless it pretty clearly appears that the real intent was otherwise, no court ought to interfere. New York & N. E. R. R. Co. v. Church, 58 Fed. 600, 7 C. C. A. 384. The respondent has not cited any case which in the least affects this principle, unless it be The Colombia (D. C.) 197 Fed. 661, affirmed 199 Fed. 990, 117 C. C. A. 666; but even that case proceeded upon the theory that the stipulated demurrage would be allowed, unless the actual damages were shown to be less, though the court decided upon the facts that there was no damage shown. I think the pertinent point of time is when the contract is made. If, then, the parties are honestly trying to arrange in advance a fair basis for actual damages, it makes no difference whether it turns out too much or too little. Such agreements are most desirable when the parties act upon an equality, and courts should encourage them to the utmost, instead of being "disposed to lean against" them, as suggested in Keeble v. Keeble, 85 Ala. 552, 5 South. 149.

In the case at bar there is absolutely nothing to lead one to suppose that the sum was not put in in good faith. The charterers called no one to show how it was arrived at, or to show that it was not what it purports to be. They rest upon the earnings of this voyage, and even those are not conclusive, since we do not know whether the parties contemplated a larger cargo, or how long they thought it would take to load and discharge. The lay days are the outside limit, after which the charterer must pay; they are not necessarily the expected period. The voyage from Bathurst to New York took 20 days; the loading at Bathurst 10 days; the voyage to Bathurst probably a week more. This period, at $76, would, it is true, amount to all the freight earned upon the voyage, with no allowance for the time of discharge at New York. However, we cannot tell whether voyages west were as prof-

itable as voyages east at that time, nor what hire the parties thought the ship could earn in New York. This all rests with the charterer to show, and until he shows that the contract is illegal the actual damages are irrelevant. The almost, if not quite, universal practice of this port is to follow such provisions. I should be unwilling to upset that practice without the clearest proof that the practice did not intend as it reads.

A decree will pass for demurrage from July 29th, with the possible exception of delays due to the ship's default as noted. It will hardly be necessary to have a reference.

FORDHAM v. HICKS.

(District Court, S. D. Georgia, W. D. August 7, 1915.)

1. EQUITY ⟸239—DEMURRER—ADMISSIONS.
   The averments of a bill, for the purposes of a demurrer to the bill as amended, in the form of a motion to dismiss, are admitted as true.
   [Ed. Note.—For other cases, see Equity, Cent. Dig. § 494; Dec. Dig. ⟸239.]

2. SPECIFIC PERFORMANCE ⟸105—TIME TO SUE—LACHES—"STALE CLAIM."
   Complainant, who in 1897 entered into a parol contract for the purchase of land providing for nine annual installments, and whose payments were not claimed to be in default by defendant until demand for the deed, when the disputed balance was promptly tendered, and who, on defendant's refusal of a deed in 1908, made a final demand and renewed the tender, and who in 1909 brought a bill in the state court, was not guilty of laches, or of insisting on a "stale claim," which arises when one slumbers over his rights, with no impediment to his assertion of them, until the evidence upon which a counterclaim is founded may, from lapse of time, be presumed to be lost, in which case the law presumes it to be unjust that a complainant should be heard.
   [Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 325–341; Dec. Dig. ⟸105.
   For other definitions, see Words and Phrases, First and Second Series, Stale.]

3. COURTS ⟸375—UNITED STATES COURTS—STATE LIMITATION LAWS.
   The courts of the United States, in the absence of legislation upon the subject by Congress, recognize the statutes of limitations of the several states, and give them the same construction and effect as are given by the state tribunals.
   [Ed. Note.—For other cases, see Courts, Cent. Dig. § 983; Dec. Dig. ⟸375.]

4. COURTS ⟸366—NEW ACTION AFTER DISMISSAL OF FORMER ACTION—GEORGIA STATUTE.
   Civ. Code Ga. 1910, § 4362, fixes the time for bringing a suit for specific performance of a contract for the sale of land, and section 4381 provides that if a plaintiff is nonsuited or dismisses his case, and recommences it within six months, the renewed case shall stand on the same footing as to limitations with the original case. Plaintiff began a suit in the state court for the specific performance of a parol contract for the sale of land within the time fixed by the statute, and after judgment against him, and the granting of his motion for a new trial, dismissed his bill, and within six months filed it anew in the federal District Court. *Held*, that the order granting a new trial restored the status of the parties antecedently to

the verdict, so that it was then a pending case, and that, notwithstanding decisions of the state court that after removal to and nonsuit in the federal Circuit Court, or after dismissal of an action brought in such court, it cannot be renewed in a state court within six months after such dismissal, the suit might be renewed in the United States court.

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

In Equity. Bill by J. H. Fordham against T. B. Hicks. On demurrer to bill, as amended, in form of motion to dismiss. Motion denied.

R. L. Berner, of Macon, Ga., for complainant.
Alexander Akerman, of Macon, Ga., for defendant.

SPEER, District Judge. [1, 2] This is a motion to dismiss a bill in equity filed by J. H. Fordham, a citizen of Arkansas, against T. B. Hicks, a citizen of Laurens county, in this district, for the specific performance of a parol contract for the sale of 100 acres of land in that county. The averments of the bill, which for the purposes of the motion must, of course, be admitted as true, are that in December, 1897, the complainant, who is a negro, entered into a contract with the defendant to buy the land for $1,000, payable at the rate of $120 a year, without interest, that he paid various installments from year to year, and that in 1905 the defendant claimed there was a balance due of $104. Although disputed by the complainant, this was tendered to the vendor, who refused to give a deed to the property as agreed. The installments had been regularly paid, and the tender was continuous. In 1908 the plaintiff again demanded the deed. This was again refused. In 1909, on March 24th, he filed a bill for specific performance in Laurens superior court against the defendant, and at the July term, 1910, the case was tried by a jury, and a verdict rendered against the plaintiff, and judgment entered thereon. Thereupon the plaintiff filed a motion for new trial. This was granted by the court on December 31, 1912. It does not appear that there was any appeal from the order granting the new trial. Thereafter, at the July term, 1913, of the state court, the bill was dismissed by the plaintiff, and it was filed anew in this court. A demurrer was filed to this bill, which was overruled, and the bill amended. The motion to dismiss relates to the amended bill. Its grounds are that the bill is barred by the statute of limitations, that the claim is a stale one, unenforceable in a court of equity, and that the tender alleged in the bill is not in cash, and has not been paid into court.

Counsel for the opposing parties have been fully heard, and the court has taken time for advisement. The date of the contract being December, 1897, it provided for the payment of nine annual installments. It does not appear that at any time, until after the deed was refused, the vendor, who is the defendant, claimed that there was a default in payment. Even then the disputed balance of $104 was promptly tendered. The deed, however, was refused. The plaintiff insisted on his alleged rights, and the defendant still refusing to give

the deed three years later, namely, in 1908, a final demand was made by the plaintiff for his deed, the money in dispute offered, and finally, in 1909, the bill in the state court was brought. These facts show no laches by the plaintiff. The claim is therefore not stale. One is said to make a stale claim when he "slumbers over his rights, with no impediment to his asserting them, until the evidence upon which a counterclaim is founded may, from lapse of time, be presumed to be lost, until the generation cognizant of the transactions between the parties, has passed away and until the original actors are in their graves and their affairs left to representatives." In such a case "the law, in the exercise of an equitable sovereignty, presumes it to be unjust that under such circumstances a complainant should be heard; and in nine cases out of ten it is unjust in fact, as well as in theory. It is presumed, and the presumption grows out of the principles of human nature, developed in universal experience, that men will use reasonable diligence to get what rightfully belongs to them." Akins et al. v. Hill et al., 7 Ga. 577, 578.

[3, 4] It is not difficult to see how variant, from the facts here alleged, is this elaborate definition of a stale claim by the Supreme Court of the state. The suit in the state court was indeed brought within the time fixed by the statute. Code, § 4362. The order of the judge granting the new trial restored the status of the parties antecedently to the verdict. It was then a pending case. The plaintiff dismissed it, and within six months renewed it here. Now the Code also provides (section 4381):

"If a plaintiff shall be nonsuited, or shall discontinue or dismiss his case, and shall recommence within six months, such renewed case shall stand upon the same footing, as to limitation, with the original case."

This is also a statute of limitations, and the courts of the United States, in the absence of legislation upon the subject by Congress, recognize the statutes of limitation of the several states, and give them the same construction and effect which are given by the local tribunals.

It is however, contended for the defendant that the six months' permission for renewal of a dismissed case applies only to cases pending in the state courts, and Cox v. East Tennessee & C. R. R., 68 Ga. 446, Webb v. Southern Cotton Oil Co., 131 Ga. 682, 63 S. E. 135, and Constitution Publishing Co. v. De Laughter, 95 Ga. 17, 21 S. E. 1000, are cited in support of this contention. It is true that the Supreme Court of the state has explicitly held that:

"When a case has been removed from a state court to the Circuit Court of the United States, the jurisdiction of the former ceases, and after nonsuit in the federal court the case cannot be renewed in the state court within six months, so as to avoid the statute of limitations." Cox v. East Tenn., etc., R. R., 68 Ga. 446.

The same learned tribunal has held that:

"An action brought in the United States Circuit Court for the Northern District of Georgia, and dismissed by the plaintiff, cannot, under the provisions of section [4381] of the Code, be renewed in [a state court] within six months after such dismissal, so as to avoid the bar of the statute of limita-

tions which had attached before the second action was brought." Constitution Publishing Co. v. De Laughter, supra.

It is urged here that the converse of this proposition is true, and that a suit in the state court, if dismissed, cannot be renewed in the United States court. It is, however, true that the remedies and rights granted by state law may be utilized in the United States courts, where the latter otherwise have jurisdiction. The rulings of the Supreme Court of the state, above cited, while doubtless controlling in the state courts, are not necessarily controlling here. It is a familiar principle that each court determines for itself its jurisdiction of the cause, the parties, and the subject-matter. It is not essential that we should contravene the reasoning of the state court as to its jurisdiction, but in the suit of a citizen of another state the United States court may for itself determine a right or privilege of this class claimed by such plaintiff. This court would ordinarily not presume to determine whether a case had been properly brought in the state court. By a parity of reasoning we may claim that a ruling of the state court is not conclusive as to whether a suit is properly brought here.

National courts of high authority have in effect taken this view. The right insisted upon by the plaintiff was sustained in McCormick v. Eliot (C. C.) 43 Fed. 469 et seq. There the decision was pronounced by so learned and careful a jurist as the late Associate Justice Gray, sitting at circuit. This was under a Massachusetts statute, where a suit commenced in the state court might be renewed in 12 months, and was renewed in the United States court. See, also, Harrison v. Remington Paper Co., 140 Fed. 386, 72 C. C. A. 405, 3 L. R. A. (N. S.) 954, 5 Ann. Cas. 314; Kansas City Hydraulic Press Brick Co. v. National Surety Co., 167 Fed. 496, 93 C. C. A. 132. In both cases, under the renewal statute of Kansas, jurisdiction was maintained in the national court, where the cases had been originally brought and dismissed in the state court. In Brown v. Erie Railroad Co., 176 Fed. 544, 100 C. C. A. 132, a similar ruling was made as to the Iowa statute, and in Alexander et al. v. Gordon et al., 101 Fed. 91, 41 C. C. A. 228, the Arkansas renewal statute of limitations was sustained, although both the original suit and that renewed had been brought in the United States court.

In the present state of the record, the suit of the plaintiff on the admitted allegations of his bill is seen to be meritorious, and the motion to dismiss, on all grounds, is denied.

In re SCHMIDT.

(District Court, D. New Jersey. July 20, 1915.)

BANKRUPTCY ⊂⊃20 — JURISDICTION OVER PROPERTY — POSSESSION OF STATE COURT.

A sale of property of a bankrupt, proposed to be made by a state officer, pursuant to a decree of a state court, entered before the petition in bankruptcy was filed, in proceedings to foreclose a valid mortgage, which was executed more than four months prior to the adjudication in bankruptcy, could not be temporarily enjoined by the United States court of bankruptcy to permit the trustee to attempt to secure a purchaser and to advertise the proposed sale more than the state officer had done, thus to realize more for creditors, since the general rule that possession of the res vests the court thus acquiring jurisdiction with power to determine all controversies relating thereto, and for the time being disables a court of co-ordinate jurisdiction from exercising like power, and from interfering with the former court, is applicable to courts of bankruptcy, and is not restricted to cases where property has been actually seized under judicial process before the proceedings are instituted in another court, but applies also where suits are brought to enforce liens against specific property.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 23; Dec. Dig. ⊂⊃20.]

In Bankruptcy. In the matter of Herman H. A. Schmidt, bankrupt. On review of an order of the referee to show cause why a sale proposed to be made by a sheriff, pursuant to writ of fieri facias issued out of the Court of Chancery of New Jersey, in a proceeding to foreclose a valid mortgage covering property of the alleged bankrupt, should not be enjoined for a sufficient length of time to enable the trustee to take steps to secure a purchaser for the property and to extensively advertise the proposed sale. Order vacated and petition dismissed.

Jacob L. Newman and Nathan Bilder, both of Newark, N. J., for the rule.

Robert D. Reynolds and Charles C. Pilgrim, both of Newark, N. J., opposed.

HAIGHT, District Judge. The sole question to be decided is whether a court of bankruptcy has power to temporarily enjoin a sale of certain property of the bankrupt, proposed to be made by a state officer pursuant to a decree of a state court entered, before the petition in bankruptcy was filed, in proceedings to foreclose a valid mortgage, which was executed more than four months prior to the adjudication in bankruptcy, when the only reason why the stay is sought is to permit the trustee to attempt to secure a purchaser and to advertise the proposed sale more extensively than has been done by the state officer, and thus possibly realize more for the general creditors.

It is well settled that the general rule, that possession of the res vests the court which has first acquired jurisdiction with power to hear and determine all controversies relating thereto, and for the time being disables other courts of co-ordinate jurisdiction from exercising

a like power, and from interfering with the former court, is applicable to courts of bankruptcy. Metcalf v. Barker, 187 U. S. 165, 23 Sup. Ct. 67, 47 L. Ed. 122; Pickens v. Roy, 187 U. S. 177, 23 Sup. Ct. 78, 47 L. Ed. 128. Nor is the general rule restricted in its application to cases where property has been actually seized under judicial process before the proceedings are instituted in another court, but it applies as well where suits are brought to enforce liens against specific property. Farmers' Loan, etc., Company v. Lake St. Rd. Co., 177 U. S. 51, 61, 20 Sup. Ct. 564, 44 L. Ed. 667. The reported cases furnish many instances where this rule has been applied under the present Bankruptcy Law, and in which it has been held that the bankruptcy courts have no power to restrain suits pending in the state courts, at the time of the institution of the bankruptcy proceedings, to enforce liens not invalidated by the bankruptcy act, or to restrain sales to be made pursuant to decrees in such suits. Some of such instances are found in Metcalf v. Barker, supra; Pickens v. Roy, supra; In re Rorer, 177 Fed. 381, 100 C. C. A. 613 (C. C. A. 6th Cir.); Sample v. Beasley, 158 Fed. 607, 85 C. C. A. 429 (C. C. A. 5th Cir.); Tennessee Producer Marble Co. v. Grant, 135 Fed. 322, 67 C. C. A. 676 (C. C. A. 3d Cir.); In re United Wireless Co. (D. C. N. J.) 192 Fed. 238; In re Pennell, (D. C. N. J.) 159 Fed. 500; Frazier v. Southern Loan & Trust Co., 99 Fed. 707, 40 C. C. A. 76 (C. C. A. 4th Cir.). This rule recognizes no exception, such as it is sought to assert in this matter.

It therefore follows that this court is without power to enjoin or stay the proceedings in the state court, even for the limited time sought. The petitioner's remedy is in the state court. The rule to show cause, as well as the temporary restraining order made by the referee, must be vacated, and the petition dismissed.

BACHMAN et al. v. BELASCO.

(District Court, S. D. New York. July 9, 1913.)

COPYRIGHTS ⇐65—INFRINGEMENT—DRAMATIC COMPOSITION.

A producer of a play *held* not chargeable with infringement of the copyright of another play by a different author to some extent similar in plot and treatment; it appearing that he had no knowledge of it and that the two plays, while independently written, were both suggested by the same magazine story dealing with hypnotism.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 62; Dec. Dig. ⇐65.]

In Equity. Suit by Amelia Bachman and George L. McKay against David Belasco. Decree for defendant.

Decree affirmed in 224 Fed. 817.

Charles O. Maas, of New York City, for complainants.

A. J. Dittenhoefer, I. M. Dittenhoefer, and Dudley F. Phelps, all of New York City, for defendant.

MAYER, District Judge. This suit for infringement of copyright exemplifies the practical value of the new Equity Rules—especially in the opportunity to see and hear the witnesses.

Nothing in the briefs submitted has changed the conclusion stated at the close of the trial.

The evidence is complete and satisfactory that Mr. Locke wrote "After Many Days" (subsequently called "The Case of Becky") without any knowledge of the existence of Miss Bachman's "Etelle." The writing of the play by Mr. Locke was the natural outcome of his interest in themes dealing with hypnotic influence and multiple personality, and when he was attracted by "How One Girl Lived Four Lives" by John Corbin, in the Ladies' Home Journal and Dr. Prince's book, he was at work on "The Climax"—a play in which hypnotism or mental suggestion is the predominant feature.

I am also satisfied beyond any doubt that Mr. Belasco never saw, read, or heard of "Etelle" prior to his acceptance of Locke's play.

It is entirely clear that the correspondence and conversations of Mr. Stillman (Mr. Belasco's play reader), with Miss Bachman, constituted a polite method of declining manuscript. Miss Bachman testified that her play had its foundation in the ideas suggested by John Corbin's article. That being so, and the facts found by me being as above stated, it follows that complainants had no case. Harper & Bros. v. Kalem, 169 Fed. 61, 94 C. C. A. 429, affirmed 222 U. S. 55, 32 Sup. Ct. 20, 56 L. Ed. 92, Ann. Cas. 1913A, 1285; Glaser v. St. Elmo Co., Inc. (C. C.) 175 Fed. 276.

It is not necessary to go any further to warrant the dismissal of the bill, but it may be remarked that "The Case of Becky" is in substantial respects different from "Etelle."

It is to be expected that two playwrights working independently from a common source may develop similarities in their plots and in their lines, but "The Case of Becky" displays the skill of the experienced playwright in a number of important particulars and details not to be found in "Etelle." It is unnecessary to set forth these differences at length, but any one interested may find an elaborate analysis in the appendix which forms part of defendant's brief.

The bill is dismissed, but without costs, because the Stillman correspondence undoubtedly led Miss Bachman into the belief that her manuscript had been read by defendant.

Settle decree on notice.

BACHMAN et al. v. BELASCO.

(Circuit Court of Appeals, Second Circuit. May 12, 1915.)

No. 143.

1. COPYRIGHTS ⊂=65—INFRINGEMENT—SIMILARITY.
A dramatic composition, having a dual personality for its motif, *held* not an infringement or plagiarism of complainants' copyrighted play, having the same motif; the material similarities being readily accounted for by reference to the common source, which suggested to both writers the situations presented.
[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 62; Dec. Dig. ⊂=65.]

2. COPYRIGHTS ⊂=65—INFRINGEMENT—SITUATIONS TAKEN FROM COMMON SOURCE.
The person first presenting, in a copyrighted play, situations naturally suggested by a common source, cannot prevent others from also presenting such situations, provided they get the idea from a common source, and not from the copyrighted play.
[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 62; Dec. Dig. ⊂=65.]

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

This cause comes here upon appeal from a decree of the District Court, Southern District of New York, dismissing the bill in a suit to enjoin alleged infringement of copyright. Affirming decree in 224 Fed. 815.

Charles O. Maas, of New York City (Tupper & Kavanagh, of New York City, of counsel), for appellants.

Dittenhoefer, Gerber & James, of New York City (A. J. Dittenhoefer and Dudley F. Phelps, both of New York City, of counsel), for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge. [1] The complainant Bachman wrote and duly copyrighted a dramatic composition entitled "Etelle." The keynote of the play was dual personality, a phenomenon which had been exploited by Dr. Morton Prince in a book detailing his scientific study of the case of a lady, whom he calls Miss Beauchamp (not the real name of his patient), and by John Corbin in a story published in the Ladies Home Journal, entitled "How One Girl Lived Four Lives." Miss Bachman sent her play to defendant; it remained in the possession of his reader for six weeks, and was then returned with a letter stating that defendant had read the play, but regretted that it was not available. The testimony shows that this was what the District Judge describes as "a polite way of declining the manuscript." Defendant and his reader both testified that Mr. Belasco did not read the play.

Mr. Edward Locke wrote a dramatic composition called "After Many Days" with the same motif—a dual personality—which was

accepted by defendant and performed on the stage of his theater, the name being changed to "The Case of Becky." Locke testified that he did not see or know of Miss Bachman's play when he wrote his own. Plaintiff's contention is that the similarities between the two are such as to demonstrate the "Case of Becky" was a plagiarism from "Etelle." Appellant's brief fairly states the issue as follows:

"The paramount question is whether the similarities existing between the two plays are mere coincidences arising because of the development by two playwrights of a central idea taken from a common source, or whether these similarities are such as to overbalance the testimony of the defendant's witnesses and reveal plagiarism, and, further, if there was not piracy, was there such an unintentional infringement of complainant's copyright as to justify the equitable relief which complainants seek?"

We have read Corbin's story, have looked over Dr. Prince's book, and have read both plays, and have reached the conclusion that in the story and the book there is enough to suggest the plot, incidents, situations, and dialogues of both plays, without any mutual assistance, the one from the other. We find no similarities between the two plays sufficient to suggest plagiarism by the author of the later one. The parallel columns in the brief of appellant are not only unpersuasive, but in many parts silly. For instance the statements that the action of both plays begins "in the morning" with "one man on the stage"; that in one play the leading lady says to her fiancé, "I'm so glad to see you," in the other, "I am so pleased to see you"; that in one play a physician says of the heroine, "She is in a highly nervous condition," in the other a similar character says of the villain, "He will probably be in a highly nervous state"; that in the one play a comic character says, "Ain't it awful, sir?" and in the other a serious character says, "Oh, it is awful." The first of these phrases, changing merely the last word to "Mabel," was common property here when both plays were written. There are several pages of these inconsequential similarities.

[2] As to the similarities of any real importance, all of them are readily accounted for by reference to the common source. We see no reason to doubt the testimony of Mr. Locke, the writer of the second play, that he had never seen or heard of plaintiff's play, when he wrote his own. The common source naturally suggests to any one particular situations; for instance, the prominent one in both plays, that an attractive young lady with a dual personality, one serious and conventional, the other frisky and highly unconventional, may find herself placed in situations calculated to injure her reputation. This does not entitle the person who first presents that suggested situation in a copyrighted play from depriving other persons to whom the same situation naturally presents itself, upon perusal of the narrative which is the common source, from also presenting it in a book or a play, provided that the later one gets the idea from the common source, not from the copyrighted play.

The decree is affirmed, with costs.

BETTMAN v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. July 20, 1915.)

No. 2740.

1. POST OFFICE ⊂=35—OFFENSES AGAINST POSTAL LAW—USE OF MAILS TO DEFRAUD—STATUTE.

Criminal Code (Act March 4, 1909, c. 321) § 215, 35 Stat. 1130 (Comp. St. 1913, § 10385), declares that whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money by means of false pretenses, shall, for the purpose of executing such scheme, place any letter, writing, or advertisement in any post office of the United States, to be sent by the post office establishment, or shall take or receive any such therefrom, shall be punished. The statute as first enacted in 1872 (Act June 8, 1872, c. 335, 17 Stat. 283) omitted the words "or for obtaining money or property by means of false and fraudulent pretenses." The statute was amended in 1889 (Act March 2, 1889, c. 393, 25 Stat. 873 [Comp. St. 1913, § 10385]), so as to cover the subject of dealing in counterfeit money, and when incorporated in the Code the words "or obtaining property by means of false or fraudulent pretenses" were added after the words "scheme or artifice to defraud," while the requirement that the intention to use the post office establishment must be an element of the original scheme was eliminated. *Held*, that the statute in its present form applies to the act of one engaged generally in a legitimate business, who, for the purpose of obtaining money or property for financial gain, knowingly makes a false statement of his financial condition, and sends such statement through the mails.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. § 55; Dec. Dig. ⊂=35.]

2. POST OFFICE ⊂=48—POSTAL CRIMES—USE OF MAILS TO DEFRAUD—INDICTMENT.

Defendant, who was president of a corporation, mailed a false statement as to the corporation's financial condition to a company from which the corporation desired to borrow money. The indictment, charging defendant with using the mails to defraud, charged that the list of liabilities, which was part of the financial statement, was intended by defendant to be, and was, false and fraudulent. *Held*, that the indictment was sufficient to charge that defendant knew the falsity of his financial statement.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 67–80; Dec. Dig. ⊂=48.]

3. POST OFFICE ⊂=35—POSTAL CRIMES—USING MAILS TO DEFRAUD.

Accused, the president of a corporation, prepared and sent a false financial statement to one through whom he expected to borrow money. In the statement the liabilities of the corporation were much underestimated, though according to the corporate books the corporation was then solvent. Criminal Code, § 215, declares that whoever, having devised a scheme to defraud, shall send anything through the mails to carry out his plan, shall be punished. *Held* that, though the corporation was then solvent, an intent to injure might still be inferred, for the purchasers of the paper were injured when the possession of their money was obtained by materially false representations of the financial worth of the borrower, and they thereby subjected to substantial risk of failure to recover back their money.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. § 55; Dec. Dig. ⊂=35.]

4. POST OFFICE ⊂=49—OFFENSES—SCHEMES TO DEFRAUD—EVIDENCE.

In a prosecution for sending a false financial statement, through the mails to one from whom defendant expected to borrow money for the

corporation of which he was president, evidence *held* sufficient to warrant a verdict that defendant knew of the falsity of the statement.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 84–86; Dec. Dig. ⊂⊃49.

Nonmailable matter, see notes to Timmons v. United States, 30 C. C. A. 79; McCarthy v. United States, 110 C. C. A. 548.]

5. CRIMINAL LAW ⊂⊃314—KNOWLEDGE OF CORPORATE OFFICERS—PRESUMPTIONS.

There is a presumption that the president of a corporation, who was the chief stockholder and managed its affairs, knew of the falsity of a financial statement which he signed and sent to one through whom he expected to borrow money for the corporation.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 747; Dec. Dig. ⊂⊃314.]

6. CRIMINAL LAW ⊂⊃823—TRIAL—INSTRUCTIONS.

In a prosecution for sending through the mails, to one from whom defendant expected to borrow money, a false statement of a corporation's financial condition, the court charged that there was evidence that defendant knew that the statement was false, if the jury should find it was false. There was another instruction that defendant was not presumed to know the contents of the corporation's books, of which he was president, and for which he was acting, and he could not be charged with knowledge without a showing that he had such connection or familiarity with them as to justify an inference of knowledge. There was sufficient evidence to sustain a finding that defendant knew the falsity of the statement. *Held*, that the instruction was not erroneous, as defendant could not under the charge be convicted without a finding beyond a reasonable doubt of his knowledge that the statement was false.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1992–1995, 3158; Dec. Dig. ⊂⊃823.]

7. POST OFFICE ⊂⊃49—OFFENSES—USE OF MAILS TO DEFRAUD—EVIDENCE.

In a prosecution for using the mails in a scheme to defraud, evidence *held* sufficient to show defendant's knowledge of the purpose of a financial statement which was required by one from whom his company desired to borrow money.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 84–86; Dec. Dig. ⊂⊃49.]

8. CRIMINAL LAW ⊂⊃369—EVIDENCE—OTHER OFFENSES—USE OF MAILS TO DEFRAUD.

Where the president of a corporation was charged with sending through the mails a false financial statement to one from whom the corporation desired to borrow money, evidence of several loans made on the faith of such statement is admissible, for such evidence is at most unnecessary, and is not objectionable as relating to other offenses.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 822–824; Dec. Dig. ⊂⊃369.]

9. POST OFFICE ⊂⊃49—OFFENSES—USE OF MAILS TO DEFRAUD—EVIDENCE.

In such case, evidence that the loans would not have been made, had the falsity of the statement been known, is admissible.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 84–86; Dec. Dig. ⊂⊃49.]

10. CRIMINAL LAW ⊂⊃444—EVIDENCE—ADMISSIBILITY.

In such case, where the prosecution desired to introduce the corporation's books, testimony that they had been in the possession of the witness since his election by corporate creditors as trustee in bankruptcy is ad-

missible, though the corporation's bookkeeper might have identified the books.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1028; Dec. Dig. ⊂⊃444.]

11. Post Office ⊂⊃48—Offenses—Use of Mails to Defraud—Indictment.
Where the indictment, charging the use of mails to defraud, used the language of a false financial statement sent by accused, a letter written by accused, correcting an obvious clerical error, was admissible, not amounting to an amendment of the indictment.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 67-80; Dec. Dig. ⊂⊃48.]

12. Criminal Law ⊂⊃721½—Trial—Remarks of Counsel.
In a prosecution against the president of a corporation for using the mails to defraud, in that he sent a false financial statement to one from whom the corporation expected to borrow money, a witness was asked as to the form of notes given by the corporation. On objections by the defense that the notes were the best evidence, the district attorney, replying to the court's question whether he wished to be heard, stated that he did, but that one of them would force him to state it in the presence of the jury. He continued that the court was well familiar with the law, that accused could not be required to produce anything, and that the notes were in his possession. After exception by the defense, the district attorney withdrew his remarks. *Held*, that the record does not present an invasion of the defendant's privilege against self-incrimination.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1673; Dec. Dig. ⊂⊃721½.]

13. Criminal Law ⊂⊃1169—Appeal—Harmless Error.
In such case, the admission of corporate books, which were not used to show corporate transactions after the false statement was sent, was harmless, though the books contained transactions thereafter.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 754, 3088, 3130, 3137-3143; Dec. Dig. ⊂⊃1169.]

14. Criminal Law ⊂⊃444—Evidence—Corporate Books.
In such case, where the bookkeeper, who was in charge of the corporation's books up to within a few days of the time when the false financial statement was sent, testified to their accuracy up to that time, and his successor testified to the accuracy of subsequent entries and the completion of the postings, the books were sufficiently authenticated to be received.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1028; Dec. Dig. ⊂⊃444.]

In Error to the District Court of the United States for the Southern District of Ohio; Howard C. Hollister, Judge.

Morris L. Bettman was convicted of using the mails to promote a scheme and artifice to defraud and obtain money by false pretenses, and he brings error. Affirmed.

Plaintiff in error was indicted upon two counts, under section 215 of the Criminal Code of the United States, for using the mails to promote a scheme and artifice to defraud and to obtain money and property by means of false and fraudulent pretenses, representations, and promises. There was conviction under both counts, and sentence of imprisonment and to pay the costs of prosecution. To summarize the indictment:

The first count alleges, in substance sufficient for present purposes, that defendant at the time of the transactions in question was the president (and a large stockholder) of the Bettman-Johnson Company, an Ohio corporation, with general supervision and control of its affairs, the corporation being in business in Cincinnati in the manufacture and sale extensively of liquors and

preserved fruits; that defendant on or about a date named desired to obtain large sums of money for the corporation through the services of E. Naumburg & Co., a New York brokerage firm engaged in buying commercial paper and placing the same in the hands of banks and other investors, it being the custom of Naumburg & Co. to obtain from those whose paper they intended to so handle statements regarding the financial condition of the borrowers, upon which those taking the paper relied; that accordingly, in order to obtain the credit necessary to float the proposed paper, the corporation and defendant made a financial statement of the affairs of the corporation; that this statement was intended by defendant to and did show that the assets of the corporation as of March 1, 1913, were $1,252,962.23, and its liabilities $440,581.44, the latter consisting of bills payable in the amount of $384,196.54 and accounts payable amounting to $31,384.90; that the list of liabilities was intended by defendant to be and was false and fraudulent, in that (a) the bills payable of the corporation amounted at the time stated to $326,889.37 in excess of the amount given in said statement, and (b) the accounts payable were at the time $146,862.52 more than the amount shown by the statement, and that the list of liabilities was thus false and fraudulent to the extent of $473,751.94; that in furtherance of the alleged scheme, and for the purpose of so obtaining such money, defendant sent this financial statement to Naumburg & Co., contained in a letter of the corporation, by defendant as its president, dated April 29, 1913, and caused by defendant to be mailed in the United States post office at Cincinnati, Ohio, for transmission and delivery to Naumburg & Co., with the intention that the latter should, in reliance upon the statement, buy the corporation's notes, and should send copies of the statement to various banks and others recommending their purchase of the paper, all of which was done with the intention on the part of defendant and the corporation that such investors should believe in the truthfulness of the financial statement; and that, had defendant correctly given therein the actual amount of the corporation's liabilities, the money and credit sought to be obtained through Naumburg & Co. could not have been secured.

The second count differs from the first principally in the facts that no reference is made to Naumburg & Co., and that the financial statement referred to is alleged to have been sent by mail to the Fifth-Third National Bank of Cincinnati, on May 1, 1913; that bank alone being alleged as intended to be defrauded, and having, in reliance upon the statement, loaned the corporation $15,000 on its notes.

Motion to direct verdict, made by defendant at the close of the government's case, was overruled, defendant offering no proof.

F. F. Dinsmore and Thos. H. Darby, both of Cincinnati, Ohio (Dinsmore & Shohl and Darby & Benedict, all of Cincinnati, Ohio, on the brief), for plaintiff in error.

E. P. Moulinire, Asst. U. S. Atty., of Cincinnati, Ohio.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

KNAPPEN, Circuit Judge (after stating the facts as above). [1] 1. Reversal of the judgment below is asked on several grounds: The first ground is that the facts stated in the indictment do not constitute a "scheme or artifice" within the meaning of section 215 of the Criminal Code, the material portions of which are copied in the margin.[1]

[1] "Sec. 215. Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false and fraudulent pretenses, representations, or promises * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter * * * writing * * * or advertisement * * * in any post office * * * of the United States * * * to be sent or delivered by the post office establishment of the United States, or shall take or receive any such therefrom, * * * shall be fined not more than one thousand dollars, or imprisoned not more than five years, or both."

Defendant's contention, broadly stated, seems to be that the statute does not apply to the act of one engaged generally in a legitimate business otherwise legitimately conducted, but who for the purpose of obtaining money, property or financial credit makes a knowingly false statement of his financial condition, either in a single instance or in a series of similar instances, not joined together, but independent of each other, but is confined to broader and more comprehensive frauds, such as the case of a business *systematically* and designedly so conducted generally that through false representations persons are induced to part with their money or property in the belief that they are getting something different from or better and worth more than what is actually being furnished, and especially to so-called "confidence games" and swindling devices, whereby the mails are resorted to for deceiving the ignorant and credulous generally by appeals to passion for gain by an untruthful and seductive setting forth of the advantage and attractiveness of the scheme exploited. It is urged that a clear distinction exists between "an intent to defraud" and the formation of a "scheme or artifice to defraud"; in other words, that the statute does not apply to the ordinary case of actual or attempted obtaining of money or property by false and fraudulent pretenses and representations, even though the post office establishment of the United States is employed in the execution of such fraudulent design.

We think the language and history of the statute, and the interpretation generally given it by the courts, forbid the narrow construction contended for. The statute as first passed (June 8, 1872, 17 Stat. 323) lacked the words "or for obtaining money or property by means of false and fraudulent pretenses, representations, or promises," found in article 215 of the Criminal Code; it made an original intention to employ the post office establishment a necessary element of the offense, and permitted the indictment to charge offenses to the number of three when committed within the same six calendar months, with provision for a single sentence proportioning the punishment "especially to the degree in which the abuse of the post office establishment enters as an instrument into such fraudulent scheme and device." The statute was later amended in a respect not immediately material, and became section 5480 of the Revised Statutes.

Long before the adoption of the Criminal Code the all-embracing scope of the statute had been affirmed by repeated decisions. In the leading case of Durland v. United States, 161 U. S. 306, 313, 16 Sup. Ct. 508, 511 (40 L. Ed. 709) it was held to include "everything designed to defraud by representations as to the past or present, or suggestions and promises as to the future." Among the decisions of this court which have construed the statute equally broadly may be cited Foster v. United States, 178 Fed. 165, 172, 101 C. C. A. 485. As there, and elsewhere in substance, said, the statute was enacted to protect the public against all intentional efforts to despoil through the medium of the post office establishment.

That, in order to fall within the statute, a scheme need not be designed to defraud the public generally or the credulous especially, is established by Weeber v. United States (C. C.) 62 Fed. 740, decided at the

circuit by Mr. Justice Brewer (Judges Caldwell and Sanborn concurring), and by the decision of this court in Horman v. United States, 116 Fed. 350, 53 C. C. A. 570, in an opinion written by the present Mr. Justice Day, in each of which cases a scheme to blackmail directed solely and specifically against a given individual or group of individuals was held a scheme to defraud within the meaning of the statute. An application for writ of certiorari in the Horman Case was denied by the Supreme Court (187 U. S. 641, 23 Sup. Ct. 841, 47 L. Ed. 345). See, also, Goldman v. United States (C. C. A. 6) 220 Fed. 57, 135 C. C. A. 625. The proposition that the scheme or artifice to defraud contemplated by the statute is limited to such schemes or artifices as are accomplished by deception or trick was expressly rejected in the Horman Case. As there pointed out by Mr. Justice Day (116 Fed. 352, 53 C. C. A. 572), while the term "artifice" signifies deceit or trickery, the word "scheme" itself does "not necessarily involve trickery or cunning. A scheme may include a plan or device for the legitimate accomplishment of an object. But to come within the terms of the statute under consideration the artifice or scheme must be designed to defraud," and the term "defraud" was held to mean only "the wrongful purpose of injuring another." A fraudulent scheme may be within the statute, even though used in the prosecution of an established business, legitimate if honestly conducted. Harris v. Rosenberger (C. C. A. 8) 145 Fed. 449, 455, 76 C. C. A. 225, 13 L. R. A. (N. S.) 762; Foster v. United States, supra; Harrison v. United States (C. C. A. 6) 200 Fed. 662, 119 C. C. A. 78. In the late case of United States v. Stever, 222 U. S. 167, 173, 174, 32 Sup. Ct. 51, 53 (56 L. Ed. 145) Mr. Justice Lurton said:

"A scheme to defraud by means of false pretenses is, as we have seen, 'a scheme or artifice to defraud' within the plain meaning and purpose of this section" (5480).

As to the point that there is a difference between an "intent to defraud" and the formation of a "scheme or artifice to defraud," it was said by Judge Richards, speaking for this court in O'Hara v. United States, 129 Fed. 551, 555, 64 C. C. A. 81, that:

"The intention to make false and fraudulent representations by means of circulars and letters transmitted through the mails, and thus obtain money from the credulous, constituted the scheme itself."

The statute was amended March 2, 1889 (25 Stat. 873), so as expressly to cover the subject of dealing in counterfeit or spurious money and other articles specified, which had previously been held not covered by the original act. The Criminal Code (March 4, 1909) made these changes: (a) It added after the words "scheme or artifice to defraud" the words "or for obtaining money or property by means of false or fraudulent pretenses, representations or promises"; (b) it eliminated the requirement that the intention to use the post office establishment be *an element of the original scheme,* although *the actual use of* the mails in furtherance of the scheme is essential (United States v. Young, 232 U. S. 155, 160, 34 Sup. Ct. 303, 58 L. Ed. 548); and (c) the provision that the punishment be proportioned to the degree in which the abuse of the mails enters into the scheme was naturally eliminated. Since the

adoption of the Criminal Code the United States Circuit Court of Appeals for the Second Circuit has held that the use of the mails for the transmission of a false financial statement to commercial agencies, with the intent that it should be used as a basis for the purchase of goods on credit to which defendant was not entitled, is a "scheme or artifice" within section 215 of the Criminal Code. Scheinberg v. United States, 213 Fed. 757, 759, 130 C. C. A. 271, Ann. Cas. 1914D, 1258. This decision is directly in point and is persuasive.

We are asked to reject the Scheinberg Case upon the authority of Etheredge v. United States (C. C. A. 5) 186 Fed. 434, 108 C. C. A. 356, in which a construction is put upon section 5480 inconsistent with the construction of section 215 of the Code adopted in the Scheinberg Case. We are not satisfied to follow the Etheredge Case, because we think some of the views there expressed are out of harmony with some of the decisions of this court (notably the Horman Case, already cited), and because the case is opposed to the holding of the Circuit Court of Appeals for the Third Circuit in Culp v. United States, 82 Fed. 990, 27 C. C. A. 294 (cited with approval by this court in Milby v. United States, 109 Fed. 642, 48 C. C. A. 574), and with the decision of the Circuit Court of Appeals for the Fourth Circuit in Charles v. United States, 213 Fed. 707, 712, 130 C. C. A. 221, Ann. Cas. 1914D, 1251, decided since the adoption of the Criminal Code. It is, moreover, to be noted that the learned judge who wrote the opinion in the Etheredge Case expressly refrained from deciding whether the conduct involved in that case "would come within the statute, as it appears greatly enlarged in section 215 of the Penal Code."

Defendant urges that the section of the Code referred to has not enlarged the scope of the term "scheme or artifice to defraud," that its only effect is to make it unnecessary that the use of the mails be a part of the original scheme to defraud, and that the Scheinberg Case is based upon a misapprehension that the statute as previously existing was broadened by the Code provision. We cannot accept this contention, for we think the statute has been broadened by each amendment made thereto. It is well settled that the effect of the amendment of 1889 was to expand the statute. Culp v. United States, supra, 82 Fed. at page 990, 27 C. C. A. 294; Milby v. United States (C. C. A. 6) 120 Fed. 1, 4, 57 C. C. A. 21; Lemon v. United States (C. C. A. 8) 164 Fed. 953, 956, 90 C. C. A. 617. And in Charles v. United States, supra, 213 Fed. at page 710, 130 C. C. A. at page 224, Ann. Cas. 1914D, 1251, both the amendment of 1889 and the Criminal Code of 1909 are held to have enlarged the scope of the act, "thereby showing that it is the intention of Congress to reach any and all classes of individuals who may form the intention of using the mails for fraudulent purposes." As already said, the Etheredge Case recognizes the broadened scope of section 215. The natural inference that Congress intended to broaden the statute by adding the words "or for obtaining money or property by means of false and fraudulent pretenses, representations, or promises," is not appreciably weakened by the fact that as construed by the Supreme Court (United States v. Stever, supra) such was already its effect; the amendment at least registered the congressional intent that such should

be its construction. The elimination of the requirement that the use of the mails form part of the original scheme is also more or less significant of an intention to extend the scope of the statute beyond the class of swindling devices which defendant urges where solely within the contemplation of the act as originally passed. Indeed, the language of Mr. Justice McKenna in the Young Case, 232 U. S. 161, 34 Sup. Ct. 303, 58 L. Ed. 548, seems by implication to treat the section of the Code as an enlargement of the statute; and although the specific question whether the indictment charged "a scheme or artifice" under the Code was not presented for determination, nor in terms passed upon, it is perhaps not entirely without pertinency that the scheme involved in the Young Case was similar in nature to that before us.

In view of the interpretation put upon the statute both before and since the amendment effected by the Code, we need not consider the argument based upon either (a) the remarks of the chairman of the congressional committee in presenting the bill which resulted in the original act of 1872, or (b) the fact of the late pendency in Congress of a bill prohibiting the sending through the mails of false financial statements for procuring loans and credits. We may add that the doctrine of the Trinity Church Case, 143 U. S. 457, 12 Sup. Ct. 511, 36 L. Ed. 226, is plainly inapplicable.

In our opinion, each count of the indictment alleged a scheme to defraud within section 215 of the Criminal Code.[2] We see no inconsistency between this conclusion and the remark of Judge Denison, speaking for this court in Harrison v. United States, supra, 200 Fed. at page 666, 119 C. C. A. at page 82, that "the 'schemes' which have been punished have all smacked of the confidence game." That statement was by way of elaboration of the underlying proposition that a scheme to defraud cannot be found in any mere expression of honest opinion as to quality or future performance, nor to mere "puffing" or exaggeration in respect to articles which have substantial merit, if within proper and reasonable bounds. The scheme we are considering, if established, was in a not improper sense a "confidence game."

[2] Upon the suggestion that there is no allegation in the indictment that defendant knew the falsity of the financial statement, especially in reference to the items in which it is alleged to be false, it would seem enough to say that the indictment expressly charges that the "list of liabilities was intended by defendant to be and was false and fraudulent in this, to wit," etc. Defendant could not properly fail to understand from the indictment, taken as a whole, that he was charged with sending a knowingly false statement. The certainty required in an indictment is only such as will fairly inform the defendant of the crime intended to be alleged, so as to enable him to prepare for defense and so as to make the judgment a complete defense to a second prosecution for the same offense. United States v. Hess, 124 U. S. 483, 8 Sup. Ct. 571, 31 L. Ed. 516; Foster v. United States, 178 Fed. at page

[2] See, also, the opinion of this court in Tucker v. United States, 224 Fed. 833, — C. C. A. —, this day decided, in which a similar construction of the statute is adopted.

171, 101 C. C. A. 485; Tyomies Pub. Co. v. United States, 211 Fed. at page 389, 128 C. C. A. 47, and other cases there cited.

[3] 2. It is urged that the indictment does not charge and that the evidence does not show that there was a scheme or artifice *to defraud*. The argument is that the indictment does not charge that the corporation was insolvent, and that there was no evidence that it was a part of the scheme to give notes not worth par; that the scheme, in order to be criminal, must have contemplated the giving of notes not worth the money paid therefor, so that those taking the paper would receive at the most, something unsubstantial, although it is not claimed that it is necessary to prove that the notes were actually worth less than their face.

We are not impressed with this contention. The financial statement showed assets of $1,252,962.23, and liabilities of $440,581.44, leaving a net worth of $812,380.79. Taking into account the items of liabilities omitted, there would still remain a nominal surplus of $338,628.90. But the existence of this nominal or book surplus is not sufficient, as matter of law, to preclude the inference of an intent to defraud in making the alleged false statement. The assets included an inventory (presumably of merchandise, etc.) of $452,251.51 and bills and accounts receivable aggregating $691,262.55. In view of the well known fact that assets of this nature are subject to substantial shrinkage (while listed liabilities at least usually hold their own), and thus the existence of substantial danger that the notes would not be paid in full, it seems clear that an intent to injure may properly be inferred from a scheme to obtain money by means of the false representations alleged. It is not necessary to criminality under the act that nothing whatever is to be given in return for the money received (Harris v. Rosenberger, supra, 145 Fed. at page 459, 76 C. C. A. 225, 13 L. R. A. [N. S.] 762); nor is mere solvency of the borrower or the collectibility in fact of the notes necessarily conclusive against an intent to defraud (Lemon v. United States [C. C. A. 8] 164 Fed. 953, 962, 90 C. C. A. 617). In our opinion the purchasers of the paper in question were defrauded within the meaning of the law; that is to say, they were *injured* when the possession of their money was obtained by materially false representations of the financial worth of the borrower, and such purchasers thereby subjected to substantial risk of failure to recover back their money. Wilson v. United States (C. C. A. 2) 190 Fed. 427, 432, 433, 111 C. C. A. 231. Their money, in such case, was obtained by false and fraudulent representations. Stever v. United States, supra.

[4] 3. The point is made that the evidence does not tend to show that defendant knew of the falsity of the statement.

The principal considerations sustaining the alleged lack of knowledge of the statement's falsity are these: The two statements in evidence were typewritten, except the figures and signatures, which were in ink. There was testimony that the signatures are defendant's. There was no proof as to the handwriting of the figures, and the company's bookkeeper was unable to identify them as in defendant's handwriting; at the date of the statement the ledgers had not been posted for several months; the bills payable account was not so kept as to show at a

glance what its balance was; there was testimony that defendant was not a bookkeeper, and did not understand bookkeeping, and was not in the habit at least of examining the books; that the omitted accounts payable item consisted largely (if not entirely) of the account of the Clifton Springs Distillery Company, which did not appear upon the ledger, it not being the custom to make entries of accounts for goods purchased until paid for, and that the "inventory item" thus did not include the goods represented by this large account payable. It is urged that the statement could not be fraudulent so far as the accounts payable were concerned, as the net balance would be the same, had both the inventory and the accounts payable been increased to the extent in question.

On the other hand, there was testimony that defendant was in active charge and control of the company's affairs, including its finances. Our attention has been called to no evidence, and we have found none, affirmatively showing that the figures on the statement were not in defendant's handwriting. There was testimony that the books, taken together, included all entries necessary to determine the company's financial condition; that the ledger account itself would, when fully posted, contain on its face sufficient information to enable the exact extent of the bills payable account to be ascertained, requiring only sufficient knowledge of bookkeeping to distinguish between credit and debit items and how to add up figures to determine totals and balances; that defendant knew about the distillery company's account, and where the bills were kept, and had himself directed payment from time to time of certain of its bills.

In view of defendant's intimate connection with the business, and the asserted improbability that one so familiar with it, and in the habit of borrowing money for its conduct, would overlook bills payable to the extent of over $300,000, there was room for an inference of fact that defendant knew of the falsity of the statement respecting the bills payable; and even if it could be said that it could not be fraudulent to omit the item of accounts payable, under the circumstances stated, knowledge of the falsity of the item of bills payable was sufficient to sustain the verdict.

[5] Complaint is made that the court charged the jury that, if the statement was signed by defendant, he was presumed to know what was in it. This instruction was not error. The jury was not told that the presumption was conclusive.

[6] We think there was no error in the instruction that there was evidence that defendant had knowledge that the statement was false, if the jury should find it was false. We construe this instruction to mean only that there was evidence tending to show that the defendant knew whether the statement was true or false, for the court charged that the burden was upon the government to prove defendant's *actual knowledge* of its falsity beyond a reasonable doubt; that defendant was not chargeable with such knowledge of falsity merely because he might have been able to ascertain the correct amount of bills payable and accounts payable; but that if defendant's relation to the company's business was such that in order to manage it he must know its liabil-

ities, and he made the statement with the intent of influencing the conduct of those from whom he was seeking to borrow money, the jury would be authorized to believe that the statement was knowingly false.

An instruction was also given that defendant was not presumed to know the contents of the company's books; that he could not be charged with knowledge of such contents, without showing that he had such connection and familiarity with them as to justify an inference of knowledge; and that there was evidence that defendant was not a bookkeeper and paid no attention to the books. Under the charge, defendant could not be convicted without a finding beyond a reasonable doubt of his knowledge that the statement made was false in fact.

[7] 4. We see no merit in the contention that there was no evidence tending to show knowledge by defendant of the course of business of Naumburg & Co. There was testimony that the latter firm had been doing business with the Bettman-Johnson Company for six or seven years, buying their paper or advancing money against it and reselling to the banks, the notes being paid at the bank where the Bettman-Johnson Company had its account; that it was the custom of Naumburg & Co. to require financial statements from the customers whose paper they handled and to send copies to their branch offices, to various salesmen of paper, and to a line of some 14 banks; that three days before the statement in question was sent to Naumburg & Co. the latter wired the Bettman-Johnson Company:

"Banks asking for recent statement. What shall we tell them? Please telegraph."

The company replied that the statement would be sent the following Monday, on defendant's return. Three days later the statement was sent, signed by defendant, and a telegram sent by him to Naumburg & Co.: "Mailed you complete statement to-day." Six days later Naumburg & Co. deposited $48,000 in the Bettman-Johnson Company's bank to its credit and notified the company by wire, and on June 2d made a further deposit of $47,000 in the same bank, to the same credit, and with the same notice. Two days before this second deposit defendant sent Naumburg & Co. "November maturities to the amount of $50,000," with request to "make deposit as usual to our credit with the Mechanics' & Metals' National Bank," etc. In view of defendant's alleged management of the company's business, the correspondence and dealings referred to, and the not unusual commercial custom of requiring financial statements from large borrowers, there was in our opinion ample evidence tending to show defendant's knowledge of the purpose of the statement.

[8] 5. Complaint is made of the admission of several items of evidence, including Naumburg's testimony of the purchase of two installments of $50,000 each of the company's notes following the receipt of the statement in question; the fact of the receipt by the Fifth-Third National Bank of the financial statement mentioned in the second count and the loan of $15,000 to the company; that another bank discounted two notes for that company amounting to $35,000; that another bank

received a copy of the statement, and thereafter bought the company's note for $5,000; that another witness received the company's financial statement in June, 1913, as well as evidence of the telegrams and letter from Naumburg & Co. relating to the loans involved.

It is urged that thereby evidence of the success of the scheme was improperly and prejudicially admitted, and that in effect evidence of other and distinct frauds was improperly let in. We are not impressed with either of these propositions. True, it was unnecessary to show that the alleged fraudulent scheme succeeded (Foster v. United States, supra, at pages 172, 173, 101 C. C. A. 485); but it does not follow that proof of its success is inadmissible. At the most, it was surplusage. Nor did the evidence in a proper sense relate to other and distinct offenses; it concerned the carrying out of the very scheme in issue.

[9] Equally without merit, in our opinion, is the criticism directed to the admission of testimony that neither Naumburg & Co. nor the Fifth-Third National Bank, nor the Mechanics' & Metals' Bank, would have made their purchases of the paper in question with knowledge of the alleged falsity of the financial statement.

[10] 6. The government produced as witnesses the two former bookkeepers of the Bettman-Johnson Company, as well as an outside accountant. Before introducing testimony relating to the books or the bookkeeping, the books were identified by the company's trustee in bankruptcy, who produced them under subpœna at the instance of the government, and who testified that the books had been in his possession since his election by the creditors as trustee on September 19, 1913, and that he was appointed receiver on the 18th day of the preceding August. (The statement as to receivership was volunteered, and was not objected to.) The testimony that the witness was trustee in bankruptcy was objected to as incompetent, immaterial, and prejudicial—the argument being that the jury might well have inferred from the fact of bankruptcy that "defendant is responsible for it, and in that way produce a prejudice against him"; also that the evidence tended to show a fact not alleged in the indictment, viz., that "it was part of the scheme to give notes not worth their face value." We think the question of pleading without merit.

It was proper to identify the books as lawfully in the trustee's possession for more than a year previous to the trial, and such testimony was neither immaterial nor incompetent; nor was it made improper by the fact that the company's former bookkeepers could have made the identification, nor because the proof may have incidentally tended to show that the notes in question were not good when given—no instruction as to the evidential effect of bankruptcy having been given or asked. The possibility of inference (even if prejudicial) that defendant was responsible for the bankruptcy itself is too remote to be substantial.

[11] 7. In the financial statement in question, under the head "Assets," appears the item, "Accounts payable, $564,319.74." The statement appears in this form in the indictment. Four days after the statement was mailed to Naumburg & Co., defendant wrote that firm:

"The words 'Accounts payable' in the assets were a slip of the tongue or a mistake of the stenographer. Please change same to read 'Accounts receivable,' and this letter is your authority for so doing."

The introduction of this letter is objected to as amounting to an amendment of the indictment, which, of course, is not permissible. The point is not well taken. The letter simply called attention to an obvious clerical error; and as defendant not only admitted, but himself voluntarily called attention to, it, he was not prejudiced.

[12] 8. The district attorney asked the witness Naumburg how the notes of the Bettman-Johnson Company which his firm purchased were made out. Defendant's counsel objected, on the ground that the notes would speak for themselves. The district attorney replied to the court's question whether he wished to be heard, that he did:

"But one of them would force me to state it in the presence of the jury. Your honor is well familiar with the rule of law; we are not able to ask the defendant to produce anything; the law makes it error for us to do that. These are not in our possession; they are in the possession of the defendant. We are not permitted to ask the defendant to produce anything."

This statement of the district attorney was excepted to, and the argument is made that thereby defendant's privilege against self-incrimination was invaded, as in effect calling to the attention of the jury the fact that the defendant had a right to testify or produce evidence and failed to do so, and that the case was thus brought within the principle applied in Boyd v. United States, 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746; McKnight v. United States (C. C. A. 6) 115 Fed. 972, 54 C. C. A. 358; Foster v. United States (C. C. A. 6) 178 Fed. 165, 173, 174, 101 C. C. A. 485. We think the case is not brought within the principle referred to. There was no demand upon defendant for the notes, and the statement of the district attorney was simply called out by objection of counsel and inquiry of court. Moreover, there is no suggestion anywhere in the record or in brief that the notes contained or were claimed to contain anything of an incriminating nature. Still further, immediately following the exception, the district attorney disclaimed any purpose of demanding the notes, or of wishing to create any unfavorable impression, by saying:

"I didn't state we were unable to do it. I said we never asked for it. I will withdraw that statement, that we were unable to get them. I withdraw whatever statement I made; whatever it was, I will withdraw it all."

No instruction on the subject was given or asked. We think no error was committed.

[13, 14] 9. The admission in evidence of the books of account of the Bettman-Johnson Company was objected to on several grounds, which may be reduced in substance to three: (1) that the entries were not authenticated; (2) that there was no evidence tending to show any acquaintance or familiarity on the part of defendant with the books; and (3) that the books were not in the same condition as on either March 1, 1913, or May 1, 1913, but that many entries had been made since those dates, including the posting then greatly in arrears.

In view of the considerations heretofore and hereafter stated, we pass by as without merit the criticism that the books were not posted

up on the dates named. So far as the entries since March 1st (the date of the statement) are concerned, no prejudice could possibly have resulted to defendant, as the books were not used to show corporate transactions thereafter. In support of the second ground defendant invokes the decisions of this court in Foster v. United States, 178 Fed. 165, 175, 101 C. C. A. 485; and Worden v. United States, 204 Fed. 1, 6–10, 122 C. C. A. 315. The Worden and Foster Cases differ from the instant case in two respects: First, in neither was there any evidence that the books of account were properly kept, and their admissibility depended wholly upon the defendant's familiarity with the books, under the peculiar circumstances of the case; and, second, in neither was the prosecution based upon the statements of a corporate officer as to the financial condition of the business under his control, made for the purpose of obtaining credit. In this case there was affirmative evidence on the part of the bookkeeper who left the corporation's employ on February 28, 1913 (the day before the date of the financial statement in issue), that the books were correctly kept up to the time he quit, and on the part of the successor bookkeeper (who had been the assistant of her predecessor) that the entries made by her in the journal or cash book (presumably while assistant) were made correctly and recorded transactions occurring at about the time the entries were made, that after her predecessor left she completed the posting, and that the ledgers at the time of the trial contained the state of the business as of March 1, 1913.

In this state of the record, and in view of defendant's actual charge of the business, the books were admissible in evidence for the purpose of showing the falsity of defendant's statement of the corporation's condition, and regardless of the lack of evidence that he actually had personal charge of the bookkeeping or was familiar with the individual entries therein. Wilson v. United States (C. C. A. 2) 190 Fed. 427, 437, 111 C. C. A. 231; Parker v. United States (C. C. A. 2) 203 Fed. 950, 951, 122 C. C. A. 252. See, also, our opinion in the Worden Case, supra, 204 Fed. at page 10, 122 C. C. A. 315. The subject of the effect of the books as evidence against defendant was fully covered by the charge.

10. In conclusion, we have carefully considered defendant's insistence that the testimony, taken as a whole, is as consistent with innocence as with guilt, so as to bring the case within the ruling of this court in Harrison v. United States, supra, and the other cases cited by defendant and, as incidental thereto, the proposition that the only conclusion legitimately to be drawn from the evidence is that while defendant signed the statement some one else made it.

The record is not such as to justify the assertion of either proposition as matter of law. The case was peculiarly one for the jury. The trial court carefully protected the rights of the defendant, not only in the admission of testimony, but in a thorough and well-considered charge. Counsel have with industry and ability represented defendant's interests both in the trial court and here.

We are constrained to hold that no prejudicial (if, indeed, any) error has been shown, and that the judgment of the District Court should be, and it is, affirmed.

TUCKER v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. July 20, 1915.)

No. 2600.

1. POST OFFICE ⊜35—USE OF MAILS TO DEFRAUD—CRIMINAL OFFENSE.
One devising a scheme to defraud by inducing another to send him jewelry on approval, with intention of converting same to his own use without paying therefor, and using the mails in carrying out the scheme by ordering jewelry, violates Criminal Code (Act March 4, 1909, c. 321) § 215, 35 Stat. 1092 (Comp. St. 1913, § 10385), punishing the use of mails to promote frauds.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. § 55; Dec. Dig. ⊜35.]

2. CRIMINAL LAW ⊜1167—APPEAL—HARMLESS ERROR—MISUSE OF MAILS—INDICTMENT— SUFFICIENCY.
That an indictment charging the use of mails to promote fraud, punishable by Criminal Code, § 215, alleged that the use of the mails was an element of the original scheme to defraud, and that the instructions required the jury so to find before convicting, though the fact charged was not an element of the offense, could not have misled accused to his prejudice.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3101, 3103–3106; Dec. Dig. ⊜1167.]

3. CRIMINAL LAW ⊜840—MOTION FOR DIRECTED VERDICT—WAIVER.
An exception to refusal of accused's motion for directed verdict at the close of all the testimony is available, though a similar motion at the close of the government's case is waived by accused introducing evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2021; Dec. Dig. ⊜840.]

4. CRIMINAL LAW ⊜1159—VERDICT—REVERSAL.
Where the court on appeal can say that the testimony, taken together, is as consistent with accused's innocence as with his guilt, a conviction must be reversed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074–3083; Dec. Dig. ⊜1159.]

5. POST OFFICE ⊜35—MISUSE OF MAILS—ELEMENTS OF OFFENSE.
That a scheme to defraud would not have deceived one of ordinary intelligence does not relieve the wrongdoer of liability for using the mails to carry out the deception.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. § 55; Dec. Dig. ⊜35.]

6. POST OFFICE ⊜49—MISUSE OF MAILS—EVIDENCE—SUFFICIENCY.
On a trial for the use of mails to promote fraud, evidence *held* to sustain a conviction.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 84–86; Dec Dig. ⊜49.]

7. CRIMINAL LAW ⊜369—EVIDENCE—ADMISSIBILITY—OTHER OFFENSES.
On a trial for the misuse of mails in furtherance of a scheme to defraud, by inducing prosecutor to send to accused jewelry on approval, under the pretense that, if approved, accused would pay for it, but with intent to convert it to his own use, evidence that accused was committed to jail, and remained in jail for about a month, in default of bail, was admissible as bearing on accused's ability to pay, where one of the letters in further-

ance of the scheme was written while he was in jail, and the other was written after he had furnished bail.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 822–824; Dec. Dig. ⟸369.]

8. Criminal Law ⟸369—Evidence—Admissibility.

Competent and relevant evidence, tending to establish the guilt of accused of the crime charged, is not incompetent because it may also tend to show his guilt of another offense.

[Ed. Note.—For other cases, see Crimnal Law, Cent. Dig. §§ 822–824; Dec. Dig. ⟸369.]

9. Criminal Law ⟸1059—Questions Reviewable—Rulings on Evidence.

Where accused objected to a question put to a witness, but did not state the ground of the objection when taking an exception to the overruling thereof, the ruling was not reviewable.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2671; Dec. Dig. ⟸1059.]

10. Criminal Law ⟸1044—Rulings on Evidence—Unresponsive Answers—Remedy.

Where an improper answer is made to a proper question calling for competent testimony, the matter cannot be considered on writ of error, in the absence of criticism presented to the trial judge, by motion to strike out the answer or otherwise.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2672, 2674, 2675; Dec. Dig. ⟸1044.]

11. Criminal Law ⟸1169—Harmless Error—Erroneous Rulings on Evidence.

Where, on a trial for the misuse of mails in furtherance of a scheme to defraud, by inducing prosecutor to send goods to accused on approval, while he intended to convert them to his own use, there was competent testimony of the value of the property of accused, and the amount of recorded mortgages thereon was definitely shown, error in permitting a witness to testify that accused's property was mortgaged at as much as the witness considered its value, or more, was not prejudicial where the witness subsequently stated that he did not recall the amount of the mortgage, and had no idea of the value of the property, and claimed to have no knowledge of mortgages, except so far as he found them on record.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 754, 3088, 3130, 3137–3143; Dec. Dig. ⟸1169.]

12. Criminal Law ⟸1038, 1059—Instruction—Objections—Review.

Where accused did not present any requested instructions, and did not take any exception to the charge given, except "generally to the charge as given," the instructions were not in the situation presented reviewable on writ of error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2646, 2671; Dec. Dig. ⟸1038, 1059.]

13. Criminal Law ⟸878—Misuse of Mails—Verdict—Separate Counts.

Where an indictment charging the misuse of the mails to promote a fraud charged in one count the mailing of a letter on March 6th, in furtherance of the scheme, and in another count charged the mailing of another letter on the preceding February 20th, for like purposes, an acquittal of an intent to defraud by the mailing of the letter of February 20th was not necessarily inconsistent with the existence of a fraudulent intent when the letter of March 6th was mailed, and an acquittal on the second count did not prevent a conviction on the first count.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2098–2101; Dec. Dig. ⟸878.]

14. POST OFFICE ⊂⊃50—MISUSE OF MAILS—TRIAL.

Where, on a trial for the misuse of mails in furtherance of a scheme to defraud prosecutor, by inducing him to send to accused diamonds on approval, it appeared that accused ordered through the mails one diamond for approval, while prosecutor sent two, and that accused converted them, a charge that, if accused devised the scheme to defraud before sending the order, he was guilty, and that it was immaterial whether accused himself wanted both diamonds sent him in the first instance, was not erroneous, for accused's guilt or innocence depended on his intent when the order was mailed and his ability to pay so far as it related to intent concerned only the one diamond ordered.

[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 Eastern District of Kentucky; A. M. J. Cochran, Judge.

Charles T. Tucker was convicted for using the mails to effect a scheme to defraud, and he brings error. Affirmed.

W. M. Shohl, of Cincinnati, Ohio (James H. Polsgrove, of Frankfort, Ky., on the brief), for plaintiff in error.

Thomas D. Slattery, U. S. Atty., of Covington, Ky.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

KNAPPEN, Circuit Judge. Plaintiff in error (whom we shall call defendant) was indicted under section 215 of the Criminal Code of the United States for using the mails to effect a scheme to defraud. The defendant, who resided at Frankfort, Ky., on February 20, 1911, ordered from one Gill, a retail dealer in jewelry at St. Louis, Mo. (at which place defendant had formerly lived), a described style of wedding ring. The ring was received, and on March 6th following defendant mailed Gill a check for $8 covering the payment, and in a postscript to the letter of remittance said that, if Gill had a "bargain in 1½ or 2 carat diamond," defendant would like to have Gill send it on approval, stating setting and size. Gill accordingly sent two diamonds, one at a price of $235, the other at $265. Defendant received both rings, but returned neither of them, and made no payment on their account. The gist of defendant's alleged scheme to defraud, as tersely stated by the trial judge in his instructions to the jury was "to induce Gill to send him [defendant] two diamonds on approval, under the pretense that, if he approved them, he would pay for them, but with the intention of converting them to his own use and not to pay for them." The indictment contains two counts, each charging the same scheme to defraud, but differing in this: The first count alleges the mailing of the second letter (March 6th) in furtherance of the fraudulent scheme; the second count charges the mailing of the first letter (February 20th) for the like purpose. At the close of the trial defendant asked an instructed verdict in his favor, which was refused. The jury, under the charge of the court, found defendant guilty under the first count only. Defendant was accordingly

sentenced to imprisonment, and to pay a fine and costs. Reversal is asked upon several grounds.

[1] 1. It is urged that the acts charged do not constitute a crime under article 215 of the Criminal Code; the specific proposition being that the ordering of a diamond ring by mail, with intent not to pay for it, does not amount to a scheme or artifice to defraud under that section of the Code. The case was submitted here at the same session as Bettman v. United States (No. 2740, this day decided) 224 Fed. 819, — C. C. A. —, and defendant has had the benefit of the arguments made for plaintiff in error in the Bettman Case. The latter case involved the contention that the Code provision in question did not cover a single case of the obtaining of loans of money through false and fraudulent representations of the borrower's financial condition; and there, as here, it was urged that the statute has no application to the ordinary case of actual or attempted obtaining of money or property by false and fraudulent representations, even though the post office establishment of the United States is employed in the execution of such fraudulent design. In our opinion in the Bettman Case the general proposition referred to is carefully considered and discussed. We there pointed out the all-embracing nature of the statute, and reached the conclusion that the charge in the Bettman Case was within it. That decision logically requires the same conclusion respecting the charge in the instant case, and makes unnecessary here the full discussion perhaps otherwise called for. There are, however, several authorities specially pertinent to the present case (some of which are cited in the Bettman Case) making it additionally clear that the statute applies to transactions such as here charged.

In Evans v. United States, 153 U. S. 584, 592, 14 Sup. Ct. 934, 938 (38 L. Ed. 830), Mr. Justice Brown, in support of the proposition that the action of an officer of a national bank, in procuring a note to be discounted in order to defraud the bank, was within section 5209 of the Revised Statutes (Comp. St. 1913, § 9772), used this pertinent language:

"The case is not unlike that of purchasing goods or obtaining credit. If a person buy goods on credit in good faith, knowing that he is unable to pay for them at the time, but believing that he will be able to pay for them at the maturity of the bill, he is guilty of no offense, even if he be disappointed in making such payment. But if he purchases them, knowing that he will not be able to pay for them, and with an intent to cheat the vendor, this is a plain fraud, and made punishable as such by statutes in many of the states."

In Durland v. United States, 161 U. S. 303, 313, 16 Sup. Ct. 508, 40 L. Ed. 709, Mr. Justice Brewer, in declaring the all-inclusive nature of section 5480 of the Revised Statutes, and in rejecting the contention that a misrepresentation to be within the statute must relate to an existing or a past fact, and cannot consist of a mere intention not to carry out the contract in the future, quoted with approval, and as applicable to the case under discussion the extract from Mr. Justice Brown's opinion in the Evans Case which we have above set out.

In Culp v. United States, 82 Fed. 990, 27 C. C. A. 294, the Circuit Court of Appeals for the Third Circuit, speaking through Judge Acheson, held that a scheme to defraud by sending letters requesting

the persons addressed to sell and ship to defendant articles of merchandise for which he agreed to pay the shippers, but for which in fact he did not intend to pay, was within section 5480. This decision was cited by this court with approval in an opinion by Judge Clark, concurred in by Judges Lurton and Severens. Milby v. United States, 109 Fed. 638, 642, 48 C. C. A. 574. In Charles v. United States, 213 Fed. 707, 711, 712, 130 C. C. A. 221, Ann. Cas. 1914D, 1251, it was held by the Circuit Court of Appeals for the Fourth Circuit, speaking through Judge Pritchard, that the mailing with an order for goods of a check drawn upon a bank in which the sender had no funds, and which he himself did not intend to pay, but intended to defraud the party in whose favor the check was drawn, was within section 215 of the Criminal Code. In both the Culp and Charles Cases the Evans Case was cited. True, in the instant case defendant did not in terms promise to pay for or return the goods, but such promise was plainly open to implication from the request to send the diamonds on approval. It is a familiar principle that false pretenses need not be spoken, but may be acted. 2 Wharton's Criminal Law (11th Ed., 1912) § 1434. The implication of a promise to return or pay for the diamond whose delivery on approval was asked was fully as clear as the implied representation in the Charles Case that the sender had funds in the bank on which the check was drawn, and that he intended thereby to make payment. In Harrison v. United States, 200 Fed. at page 665, 119 C. C. A. 78, it was said by Judge Denison, speaking for this court, that the deception involved in a fraudulent plan to get money or property of others "may, of course, be by implication as well as by express words."

[2] It is immaterial that the indictment charged that the use of the mails was an element of the original scheme to defraud (not necessary under section 215 of the Code—United States v. Young, 232 U. S. 155, 34 Sup. Ct. 303, 58 L. Ed. 548), and that the trial judge made such finding necessary to conviction. Defendant could thereby have been in no way misled to his prejudice. See Sandals v. United States (C. C. A. 6) 213 Fed. 569, 572, 130 C. C. A. 149.

[3, 4] 2. The exception to the refusal of defendant's motion for directed verdict at the close of all the testimony is available, notwithstanding a similar motion at the close of the government's testimony was waived by defendant's introduction of evidence; and if we can say that the testimony, taken together, was as consistent with defendant's innocence as with his guilt it will be our duty to reverse. Harrison v. United States, supra.

[5] Defendant contends that he made no false or fraudulent representations respecting his worthiness for credit or his ability to pay for the diamond asked for, and that the testimony, taken together, was at least as consistent with his innocence as with guilt. We pass by as without merit the suggestion that the deception alleged to have been resorted to would not have deceived a seller of ordinary intelligence. O'Hara v. United States, 129 Fed. at page 555, 64 C. C. A. 81.

[6] The crucial question upon this branch of the case is whether there was evidence from which the jury was justified in finding that

when defendant asked that a diamond be sent him on approval he then intended to convert it to his own use without paying for it. The diamonds were sent by express, accompanied by a memorandum that they remained Gill's property until regular bill should be rendered. There was testimony tending to show that defendant was unable to buy and pay for the diamonds; that his visible property (the contents of a pool and billiard room) was mortgaged, and that he owed all or substantially all the property was worth; that he failed to answer the first two or three letters from Gill asking the return of the diamonds, finally promising to pay for them by April 15th. No remittance, however, was sent. There was testimony that Gill finally went to Frankfort to look after his diamonds, and was there told by defendant that he could do nothing about them, and that defendant's reason for such statement was none of Gill's business; that Gill then employed an attorney to recover the diamonds or payment for them; that defendant refused to return the diamonds on the attorney's demand, saying that they were pawned, that it would take $300 to get them back, and that he could not then pay for them, refusing to tell with whom or where they were in pawn, but agreeing to get them if $300 were paid over to him. It also appeared that four days after defendant acknowledged receipt of the diamonds he executed a mortgage on the pool and billiard room property mentioned to his sister-in-law for $1,000; defendant retaining the mortgage six weeks thereafter before recording it.

Defendant testified that he was able to pay for the diamond described in his letter of March 6th; that he had no thought of getting anything from Gill that he could not pay for or without paying for it; that he was expecting to sell his business and to get about $1,000 in cash therefrom, above the mortgages thereon (which apparently did not include the mortgage to the sister-in-law later given). He denied the alleged interview with Gill (asserting that he was too ill to see the latter when he first visited Frankfort), but admitted telling Gill's attorney that the diamonds were pawned for $300, and that he might consider an offer of $300. He claimed, however, not to have intended to accept any money, but to have been provoked, and to have made up his mind to keep the diamonds and pay for them, and claimed to have had at the time money enough in his pocket to pay for the diamond described in his letter of March 6th; that he was delayed and disappointed in selling his business, and there seems a possible intimation in his testimony that his alleged anxiety to keep the diamonds was caused by a statement, claimed by him to have been made by Gill on a second visit, that "the large diamond was worth a great deal more than the amount he had charged for it," and that defendant thus saw an opportunity for considerable profit in keeping both. He claims he would have paid Gill, but for the fact that the latter had him arrested upon a state court process for conversion.

Defendant's testimony was not necessarily conclusive either of his ability to pay or of honesty of intention. The case depended largely upon his personal credibility. The diamonds were not produced, defendant testifying that he sent them to the sister-in-law mentioned

(at St. Louis), with instructions to have them weighed and learn their value, and he would then "advise her of the disposition of them." The sister-in-law testified to receiving a box by express (a box at least was sent), but that it contained nothing when it reached her, and there is no direct evidence that the box had been tampered with. It is the government's contention that defendant did not express the diamonds to St. Louis, but only pretended to do so in order to conceal their whereabouts. The testimony left room for this theory.

We have not attempted to set out all the testimony in the case, but only enough to show that it presented a question of fact for the jury respecting defendant's intent in asking that the diamond be sent on approval. Defendant's conduct after he received the diamonds is naturally relied upon to a considerable extent by the government as indicating an intent to defraud Gill; but in view of all the testimony in the case, and the fact that the District Judge, who saw and heard all the witnesses, including defendant, refused the motion for a new trial, one of whose grounds was the denial of motion to direct verdict, we cannot say, as matter of law, that the jury was not justified in finding beyond a reasonable doubt that the alleged intent to defraud existed at the time the letter of March 6th was mailed. The motion to direct verdict for defendant was thus properly overruled.

[7] 3. The government introduced evidence from the court records that defendant was committed to jail on January 23, 1911, upon bench warrant issued upon indictment (the charge does not appear, nor what became of it), and was discharged February 25th thereafter on giving bond. It is inferable from defendant's testimony that he was committed in default of $2,400 bail, and that the delay in procuring release was due to difficulty, or at least inconvenience, in readily getting bondsmen. The admission of this evidence is assailed as violating the well-settled rule which (subject to exceptions not here important) forbids proof that a defendant in a criminal case has committed other offenses having no relation to the offense charged. The testimony was not objected to when offered. After defendant's counsel had shown upon cross-examination that the release was upon bond, plaintiff's counsel said he thought it proper to explain that the testimony was not offered as affecting defendant's character, but simply his ability to pay. Counsel for defendant thereupon said "he so understood." The court then upon its own motion instructed the jury that the sole object of the testimony was not as affecting defendant's character in any particular, but as bearing upon his ability to pay for the diamonds. "That is the only relevancy of that fact." Defendant then moved to exclude the testimony for all purposes, reserving exception to the overruling of the motion.

[8] Defendant urges that the criticized testimony had no tendency to show defendant's inability to pay for the diamond in question. While it is not strongly persuasive on that point, we are not prepared to say that it had no tendency in that direction, especially when considered in connection with the other testimony in the case to which we have referred, and its nearness in point of time to the ordering of the ring in question. (The letter of February 20th, ordering the wed-

ding ring, was written while defendant was in jail.) Defendant explains his delay in giving bail by saying that he was practically a stranger in Frankfort and could not "expect anybody to go on my bond." According to his testimony, however, he must have been a resident of Frankfort for about four years and was then in business at that place. If competent and relevant as tending to establish guilt of the crime charged, it is not incompetent because it may also tend to show defendant guilty of another offense. Jones v. United States (C. C. A. 9) 179 Fed. 584, 604, 103 C. C. A. 142; State v. Adams, 20 Kan. 311, 319 (opinion by Mr. Justice Brewer). Taking the record together, we are not convinced that the testimony was offered in bad faith, and are of opinion that reversible error was not committed in its admission.

[9, 10] 4. By way of proving defendant's inability to pay for the diamond ring (presumably as bearing upon his intention to pay), the government showed, by the attorney who represented Gill in his attempt to get the rings from defendant or the pay for them, that before he saw defendant he looked into the latter's financial standing and ability to pay "so far as visible property was concerned;" and in answer to the question, "What was the result of these investigations?" said he found that the only property defendant had in Frankfort was "the pool room, pool tables and billiard tables and furniture," all stored in a place stated, adding "and that was mortgaged at as much as I considered its value, or more." The criticism is that the ultimate question of defendant's financial ability was for the jury; also that, if opinions were proper, the witness was not shown to be qualified "as an expert on the values of the property involved." The question itself was proper, and admitted of a competent and material answer, although defendant is not entitled, as of right, to raise even that question here; for the record shows only that, following the putting of the question above quoted, "defendant objects" to it, but the ground of the objection is not stated and no exception is taken to its overruling. Pennsylvania Co. v. Whitney (C. C. A. 6) 169 Fed. 572, 575, 577, 95 C. C. A. 70; Robinson v. Van Hooser (C. C. A. 6) 196 Fed. 620, 624, 116 C. C. A. 294.

[11] The only criticism, if any, which could be made is to the witness' opinion contained in the last clause of his answer; but no criticism of this opinion was presented to the trial judge by way of motion to strike out the answer or otherwise, and defendant is thus not entitled to have the question considered here. We may add that defendant has apparently not been substantially prejudiced by the opinion, for the witness stated on cross-examination that he did not recall the amount of the mortgages upon the property and that he had no idea of the value of the property and fixtures. The gist of the basis of his conclusion seemed to be that "at the time I inquired the value of the property from people in that business, and it seemed to me it was mortgaged for more than it was worth." There was, however, testimony of the value of the property from other sources, and the amount of the mortgages of record was definitely shown, and the witness claimed to have no knowledge of mortgages except so far as he found them on record.

[12-14] 5. The jury was instructed that, if they found that defendant devised the alleged scheme to defraud "before the first letter was written, then you would have to find the defendant guilty on both counts. If, however, you should determine that the scheme to defraud was not devised before the first letter was written, but was devised after the first letter was written, and before the second letter —the letter of March 6th—was written, then you should find him guilty only under the first count"; also "as to Tucker's ordering two diamonds, or inducing Gill to send him two diamonds, by his letter of March 6th, it is claimed that Tucker did not expect him to send but one, and that Gill sent him two, so that he might choose between them. The charge in the indictment is answered by the fact that he induced him to send him one; so it is immaterial whether Tucker himself wanted both diamonds sent him in the first instance." The paragraph first quoted is criticized on the ground that defendant could not be convicted unless the fraudulent scheme was devised before the first letter (of February 20th) was mailed. The criticism upon the second paragraph is that, as defendant's intent when the diamond was actually ordered is alone material, his ability or inability to pay must be limited to the one diamond asked for, and that the fact that defendant might be better able to pay for one diamond than for two was not clearly brought to the jury's attention.

Defendant, however, presented no request to charge (except the motion to direct verdict in his favor), and took no exception to the charge except "generally to the charge as given," which is not a sufficient exception to a charge containing any correct proposition. Pennsylvania Co. v. Whitney (C. C. A. 6) 169 Fed. 572, 577, 95 C. C. A. 70, and cases there cited; P., C., C. & St. L. Ry. Co. v. Scherer (C. C. A. 6) 205 Fed. 356, 359, 123 C. C. A. 484. We are asked to exercise the authority existing in criminal cases to consider, in the absence of objection and exception, a case where plain error has been committed in a matter vital to defendant. Wiborg v. United States, 163 U. S. 632, 658, 16 Sup. Ct. 1127, 1197, 41 L. Ed. 289; Clyatt v. United States, 197 U. S. 207, 221, 25 Sup. Ct. 429, 49 L. Ed. 726; Crawford v. United States, 212 U. S. 183, 194, 29 Sup. Ct. 260, 53 L. Ed. 465, 15 Ann. Cas. 392; Morse v. United States (C. C. A. 2) 174 Fed. 539, 544, 98 C. C. A. 321. We do not think such situation is presented.

The fact, however, that the jury acquitted defendant of an intent to defraud when the letter of February 20th was sent, is not necessarily inconsistent with the existence of such intent when the later letter of March 6th was mailed; and the *charge in the indictment* would be satisfied by the use of the mails to further a scheme to obtain one diamond, notwithstanding two were sent. Of course, defendant's guilt or innocence depends upon his intent when the letter of March 6th was mailed, and his ability to pay, so far as it relates to such intent, concerns only the diamond ordered; but we see nothing in the charge inconsistent with this proposition. We find nothing in the charge reasonably prejudicial to defendant's rights.

So far as any criticism may have been intended to be made upon the action of the government's counsel in calling upon defendant for the originals of certain letters, we content ourselves with saying that

we think the subject-matter is, upon the record presented, entirely without merit.

We find no error in the record, and the judgment of the District Court is affirmed.

BARBER ASPHALT PAVING CO. v. CITY OF ST. PAUL, MINN. †

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

No. 4398.

1. MUNICIPAL CORPORATIONS ⇐368—STREETS—PAVING CONTRACTS.

A paving contract declared that the contractor guaranteed the pavement for a term of ten years, and for the purpose of effectuating the guaranty would keep the pavement in good and sufficient repair, and at the end of ten years deliver it in good order, reasonable wear and tear excepted. The contract further provided that if during the ten-year term it should be found that the work was defective from overburning or improper mixing or any other preventable cause, or that the work had been done in an unskillful manner, the contractor should, at its own cost, entirely replace the defective portion of the pavement to the satisfaction of the city's commissioner of public works, who should be the sole and only judge as to whether the pavement was in good order and condition during the continuance of and at the end of the term of ten years. It was provided that the contractor should receive compensation for making repairs necessitated by the tearing up of the pavement by public service corporations. *Held*, that the contractor was bound to maintain the pavement in good repair during the ten-year period free of charge.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 901; Dec. Dig. ⇐368.]

2. MUNICIPAL CORPORATIONS ⇐368—PUBLIC IMPROVEMENTS—PAVING CONTRACTS.

Where a paving contract expressly required the contractor to take notice of the condition of the soil and declared that he did the work at his own risk, the contractor having guaranteed the pavement for ten years cannot recover from the city for repairs occasioned by the nature of the subsoil, by the insufficient crown on the streets, or by the presence of street car tracks; the contractor being bound to notice those conditions before entering into the agreement.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 901; Dec. Dig. ⇐368.]

3. MUNICIPAL CORPORATIONS ⇐368—PUBLIC IMPROVEMENTS—PAVING CONTRACTS.

Where repairs to a pavement were necessitated because of the escape of gas, that does not entitle the contractor to compensation from the city; it having guaranteed the pavement for ten years, even though the gas company might be liable.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 901; Dec. Dig. ⇐368.]

4. MUNICIPAL CORPORATIONS ⇐368—PUBLIC IMPROVEMENTS—PAVING CONTRACTS—CONSTRUCTION.

Where the parties to paving contracts for over ten years construed such contracts as obligating the contractor to make repairs without compensation, the courts will give effect to that construction, though there was some ambiguity in the contracts.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 901; Dec. Dig. ⇐368.]

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

† Rehearing denied September 4, 1915.

In Error to the District Court of the United States for the District of Minnesota; Wilbur F. Booth, Judge.

Action by the Barber Asphalt Paving Company against the City of St. Paul, Minnesota. There was a judgment for defendant, and plaintiff brings error. Affirmed.

This is a writ of error to reverse a judgment entered on the verdict of a jury in favor of the defendant in error, defendant in the court below, by direction of the court. The only question involved is upon the construction of the contracts entered into between the plaintiff paving company, and the city of St. Paul, hereafter referred to as the "city." There were twelve contracts entered into between the parties for the paving of streets. The first contract was entered into in 1901 and the last in 1907. The provisions of the contracts are practically identical so far as they affect the issues involved in this case. These provisions were:

"It is further agreed between the parties hereto, that the party of the first part shall, and does hereby guarantee the pavement by it to be constructed under the terms of this contract, and of the specifications hereto annexed and made a part hereof, for the term of ten years from the date of the completion of the work herein and hereby required to be done and performed, and its acceptance and approval by the board of public works of the party of the second part; and that, for the purpose of effectuating the foregoing guaranty, the said party of the first part shall and will keep said pavement in good and sufficient repair during the term of ten years aforesaid, repairing the same whenever settlements or irregularities causing a variation in the surface of three-eighths of an inch or over, measured within the length of a four foot straight edge, or any cracks of three-eighths of an inch or over in width, either of which show disintegration from any cause whatever occur, and at the end of said term of ten years shall and will turn said pavement over to the party of the second part hereto, in good order and condition, reasonable wear and tear excepted, making all the necessary repairs therein as specified above; and if during said term of ten years it shall be found that the pavement is defective from overburning or improper mixing, or any other preventable cause, or that the work has been done in an unskillful manner, the party of the first part hereto, shall, at its own proper cost and expense, upon the order of the commissioner of public works of the party of the second part, entirely remove any such defective portion of the pavement and replace the same to the satisfaction of the said commissioner of public works, who shall be the sole and final judge as to whether or not the pavement is in good and sufficient order and condition during the continuance of and at the end of the said term of ten years; and if at any time within the period for which the pavement is herein and hereby guaranteed by the said party of the first part, as above specified, it shall, in the judgment of the said commissioner of public works require to be repaired as further specified above, the said commissioner shall notify the party of the first part to make the repairs so required, and if the party of the first part shall fail and neglect to make such repairs within six days of the date of the service of such notice, then said commissioner shall have the right to cause such repairs to be made in such a manner as may be deemed best by him, pursuant to law, and the cost and expense thereof shall be paid by and recoverable from the said party of the first part hereto, or may be deducted from any balance remaining in the special fund hereinafter provided.

"It is further agreed between the parties hereto that for the purpose of further assuring the performance of the work to be done under this contract and for the purpose of assuring the performance of the guarantee hereinbefore set forth, during the period of ten years above mentioned, the party of the first part hereto will execute a bond conditioned therefor in an amount equal to twenty-five per cent. of the entire cost of the improvement, which said bond just above mentioned shall be executed and delivered to the said party of the second part, in a form to be approved by its corporation attorney, and placed on file with its city comptroller before any final audit or estimate shall be al-

lowed to the said party of the first part hereto as above mentioned, and further for the purpose of assuring the performance of the guarantee hereinbefore set forth, during the period of ten years above mentioned, the party of the second part hereto will retain ten per cent. of the entire cost of the improvement for the period of ten years from the date of the completion and acceptance of the pavement herein and hereby required to be laid and constructed, which said amount so retained shall constitute the special fund hereinbefore referred to, and the party of the first part hereto shall be entitled to interest at the rate of three per cent. per annum upon the balance remaining in said fund so retained, from time to time, subject however to the following conditions, to wit:

"If the party of the first part hereto, at the end of each six months from said completion and acceptance, shall have fully complied with all the terms and requirements of this agreement in the matter of guaranty repairs and of keeping the pavement in good and sufficient and proper condition, then, upon the order of the commissioner of public works, the said party of the first part shall be entitled to the interest on the said retained amount of ten per cent. of the contract price for such period of six months, but if the party of the first part shall have failed to make the necessary and proper repairs as directed by said commissioner at any time within said period of ten years from and after the date of the completion and acceptance of said work, then the said commissioner shall have the power to apply any interest then earned and unpaid, and if necessary, any part or all of said fund of ten per cent. so retained, to the making of such necessary and proper repairs as may be included within the terms of said guaranty."

The plans, profiles, and specifications for the letting of the contracts were expressly made a part of the contracts, containing in addition to the provisions hereinbefore quoted, the following:

"Bidders must examine and judge for themselves as to the location of the proposed work, the nature of the excavation to be made, and the work to be done. It is understood that the whole of the work under this contract is to be done at the contractor's risk, and he is to assume the responsibility and risk of all damage to the work or the property on the line of said work, which may be occasioned by floods, backwater, caving of the street, settling of the foundations of buildings or from any other cause whatever; and he shall remove from the street all surplus material, earth, rubbish, etc., immediately after the completion of the work."

From the time the work had been completed under the different contracts until October, 1912, the paving company made all the repairs necessary to keep the streets in good condition in conformity with the guaranty provision of the several contracts, without making any claim for compensation therefor, and, as was admitted by counsel at the hearing, without expectation of receiving any consideration therefor, the company being under the impression, which it is now claimed was a mistake, that it was obliged to do so under the terms of the contracts. These repairs were made without any direction from the city; the yardage of the repairs was measured daily and reported to the main officers of the company. The only charges which were made were for repairs on the streets made after the expiration of the ten years' guaranty, and such repairs as were made necessary by reason of the tearing up of the pavement by the public service companies. The bills for these last-mentioned repairs were sent to and collected from the public service companies, whose operations had necessitated the repairs.

Upon the conclusion of the testimony the court sustained a motion of the city for a directed verdict in its favor, upon the ground that under the contract between the parties the repairs sued for had to be made by the paving company at its own expense during the guaranty period of ten years.

The undisputed evidence shows that, at the time the plaintiff made its bids for the work and entered into the several contracts, it had knowledge of the gas mains and the street railway tracks, and was, under the specifications, required to take notice of the subsoil of the streets, and made its bids with such knowledge.

Morris M. Townley, of Chicago, Ill., for plaintiff in error.

Owen H. O'Neill and John P. Kyle, both of St. Paul, Minn., for defendant in error.

Before ADAMS, Circuit Judge, and TRIEBER and REED, District Judges.

TRIEBER, District Judge (after stating the facts as above). On behalf of the paving company, it is insisted that by reason of that provision of the contracts which reads, "if during the said term of ten years it shall be found that the pavement is defective from overburning or improper mixing, or any other preventable cause, or that the work has been done in an unskillful manner, the party of the first part hereto (the paving company) shall at its own proper cost and expense, upon the order of the commissioner of public works of the party of the second part (the city) entirely remove any such defective portion of the pavement, and replace the same to the satisfaction of said commissioner of public works, who shall be the sole and final judge as to whether or not the pavement is in good and sufficient order and condition during the continuance of and at the end of the said term of ten years," the paving company was only required to repair them at its own expense for these causes and none other, and it is now claimed that the repairs for which this action has been instituted were made necessary by reason of: (1) The leakage of gas from gas mains; (2) the action of street railway tracks; (3) excessive sprinkling of the streets; (4) dirt permitted to lie in the gutters; (5) insufficient crowning on some streets; (6) the nature of the subsoil of some of the streets.

[1] If the provision above quoted were the only one in the contract providing for a guaranty of the work, the contention of the paving company would probably have some basis to rest on; but it is elementary that in construing a contract every part of it must be considered. Applying this rule, it is clearly apparent that the first part in that paragraph of the contracts refers to the guaranty for the maintenance and repairs of the pavement for the period of ten years, no matter for what causes, while the other provision refers to the workmanship in putting the pavement down. The guaranty provision only required repairs, while the other applies to the work itself, which if found defective from "overburning or improper mixing, or any other preventable cause, or that the work has been done in an unskillful manner," the paving company obligated itself to "entirely remove such defective portions and replace the same to the satisfaction of the commissioner of public works of the city, at its own cost." The language used is clear and without ambiguity that the paving company is to keep the pavements in good and sufficient repair during the term of ten years, the only exceptions being such repairs as were made necessary by the tearing up of the pavement by the public service companies for the purpose of laying or repairing mains for gas, sewer and water, and the right to make such repairs was granted to the paving company exclusively, which was to receive a higher compensation therefor than that paid by the city under the contract, and was to be paid by the public service companies whose acts made the repairs necessary.

[2, 3] The paving company, at the time it entered into the contracts, knew of the gas mains, and that there would naturally be some leakage of gas, and at times a considerable escape by reason of pipes breaking or joints loosening. It knew of the street railway tracks on the streets which it had contracted to pave; it knew from the specifications what the crowns on the streets would be, and whether they were sufficient or insufficient; and it was bound to take notice of the nature of the subsoil of the streets, as the specifications expressly provided for it. If the gas company was negligent in permitting gas to escape, which caused injury to the pavement, it may be liable to the plaintiff; but there is nothing in the contracts which imposes that liability on the city. These facts being well known to the plaintiff when it entered into the contracts, it cannot now be heard to claim compensation for repairs made necessary by them. That leakage of gas from the mains, under a contract such as this, does not relieve the paving company from its contract to repair was expressly determined in the City of Akron v. Barber Asphalt Paving Co., 171 Fed. 29, 36, 96 C. C. A. 271, 278; Barber Asphalt Paving Co. v. Louisville, 123 Ky. 687, 97 S. W. 31, 9 L. R. A. (N. S.) 154; and Brown v. Jenks, 98 Cal. 10, 32 Pac. 701.

[4] But even if there had been some ambiguity in the language used in the contracts the construction placed upon them by both parties during all that time, from 1901 until the institution of this suit in November, 1912, that these repairs had to be made by the paving company at its own expense, would effectually remove the ambiguity. The law is well settled that, if there is any doubt or ambiguity in a contract arising from the words employed, it is effectually removed by the practical construction continuously put upon it by the parties for so long a period as was done in this case. Chicago v. Seldon, 9 Wall. 50, 19 L. Ed. 594; Brooklyn Ins. Co. v. Dutcher, 95 U. S. 269, 24 L. Ed. 410; Topliff v. Topliff, 122 U. S. 121, 7 Sup. Ct. 1057, 30 L. Ed. 1110; Manhattan Life Ins. Co. v. Wright, 126 Fed. 82, 61 C. C. A. 138; Michigan Home Colony Co. v. Tabor, 141 Fed. 332, 72 C. C. A. 480; Uinta Tunnel, Mining & Transportation Co. v. Ajax Mining Co., 141 Fed. 563, 73 C. C. A. 35; Cook v. Foley, 152 Fed. 41, 81 C. C. A. 237; Guaranty Trust Co. v. Koehler, 195 Fed. 669, 115 C. C. A. 475.

We are clearly of the opinion that the learned trial judge correctly interpreted the terms of the contract and committed no error in directing a verdict for the defendant.

Affirmed.

BUNDAY et al. v. HUNTINGTON. †

(Circuit Court of Appeals, Eighth Circuit. July 2, 1915.)

No. 4417.

1. APPEAL AND ERROR ⊂=1008—REVIEW—FINDING.
It is only in the absence of any request to find facts specially, or to find for plaintiff in error generally, that a general finding by the court, sitting as a jury, has the effect of a general verdict.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3955–3960, 3962–3969; Dec. Dig. ⊂=1008.]

2. APPEAL AND ERROR ⊂=854—REVIEW—AFFIRMANCE.
Where judgment was for the right party, it will be affirmed, though the wrong reason was assigned.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3403, 3404, 3408–3424, 3427–3430; Dec. Dig. ⊂=854.]

3. BANKRUPTCY ⊂=165—PREFERENCES—CONTRACTS—CONSTRUCTION.
A contract of sale provided that the buyers should insure the property, which they were buying on installments, for the benefit of the sellers. A subsequent chattel mortgage given to secure the sellers was more favorable in many respects than the contract, but it did not provide that the property should be insured for the sellers' benefit. *Held*, that the sellers could not claim insurance upon the property, the chattel mortgage having superseded the executory contract of sale, and hence, the property having been destroyed by fire, a payment of the insurance money by the buyers, who were insolvent and known to be, to the sellers, constituted a preference.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 259, 260, 266; Dec. Dig. ⊂=165.]

4. CONTRACTS ⊂=170—CONSTRUCTION—CONSTRUCTION BY PARTIES.
Where the parties to a contract for the sale of goods treated it as not requiring the buyers to insure the property for the sellers' benefit, such action constituted a practical construction to which effect will be given by the court.
[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 753; Dec. Dig. ⊂=170.]

Reed, District Judge, dissenting.

In Error to the District Court of the United States for the District of South Dakota; James D. Elliott, Judge.

Action by Fred G. Huntington, as trustee in bankruptcy of Gideon N. Carlson and Adolph P. Rosdahl, against Ansel E. Bunday and another. There was a judgment for plaintiff, and defendants brings error. Affirmed.

This is an action at law instituted by the defendant in error against the plaintiffs in error, who will be referred to herein as the "plaintiff" and "defendants," as they were in the court below, to recover an alleged preference.

The plaintiff is the trustee in bankruptcy of Carlson & Rosdahl, a mercantile firm, who had been in the retail mercantile business at Bruce, S. D., from April 14, 1909, to May 3, 1910. On November 15, 1910, an involuntary petition in bankruptcy was filed against them, and they were adjudicated as bankrupts on December 2, 1910. Thereafter the plaintiff was duly elected as trustee of the bankrupt estate.

It is charged in the complaint that on May 3, 1910, the stock of merchandise of the bankrupts was destroyed by fire, being covered by insurance; that on July 16, 1910, within four months of the filing of the petition in bankruptcy,

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

† Rehearing denied September 27, 1915.

the bankrupts, being then indebted to the defendants, assigned and transferred to them the policies of insurance on the stock of merchandise and the amounts due them thereunder; that the defendants collected the amounts due from the insurers; that at the time of the transfer and assignment of these policies Carlson & Rosdahl were insolvent, which fact was known to the defendants, and this transfer, and the collection of the insurance money by the defendants, enabled them to obtain a greater percentage of their claim than any of the other creditors of the same class, and was intended as a preference.

The answer of the defendants, so far as it is necessary for a determination of the issues involved on this writ of error, is as follows:

The defendants allege that for many years prior to the 14th day of April, 1909, the defendants, Ansel E. Bunday and Frank F. Ribstein, were copartners under the firm name and style of Bunday & Ribstein, and were engaged in the general retail merchandising business at Bruce, S. D., and on said 14th day of April, 1909, owned a stock of general merchandise of the value of $8,107; and that on said 14th day of April, 1909, when the said G. N. Carlson and A. P. Rosdahl were solvent, and the aggregate of their property at a fair valuation was more than sufficient in amount to pay their debts, these defendants, as copartners aforesaid, made and entered into an agreement and contract in writing with the said Carlson & Rosdahl, in the names of G. N. Carlson and A. P. Rosdahl, respectively, wherein these defendants, among other things, agreed to sell to the said Carlson & Rosdahl the said stock of general merchandise, a copy of which said agreement and contract is hereto attached, marked "Exhibit A," and made a part hereof.

The defendants further allege that thereafter, and in pursuance of said contract, an invoice of stock of merchandise was taken by the parties thereto, and the invoice price and value of said stock of general merchandise was found to be the sum of $8,107, which amount was the true value thereof, and which amount was agreed upon between the parties thereto as the purchase price of said stock of merchandise, and that thereupon these defendants sold, transferred, and delivered the said stock of merchandise to the said Gideon N. Carlson and Adolph P. Rosdahl, for the said sum of $8,107.

The defendants further allege that thereupon and on or about the 26th day of April, 1909, relying upon and in pursuance of said agreement, these defendants sold said stock of merchandise to the said Carlson & Rosdahl, and the said Carlson & Rosdahl paid unto these defendants the sum of $3,000, as a part of the consideration for said stock of merchandise, and as evidence of the indebtedness for the balance of the consideration therefor the said Carlson & Rosdahl, on the said 26th day of April, 1909, executed and delivered to these defendants their certain promissory note wherein and whereby, on or before the 19th day of April, 1914, they promised to pay to the order of these defendants the sum of $5,107, with interest thereon at 6 per cent. per annum until paid, payable annually, a copy of which note is attached hereto, marked "Exhibit B," and made a part hereof.

The defendants further allege that on said 26th day of April, 1909, in pursuance of said contract, the said Carlson & Rosdahl, in their individual names, as additional security for the payment of said promissory note, executed and delivered unto these defendants their certain chattel mortgage, a copy of which is attached hereto, marked "Exhibit C," which mortgage was on the 27th day of April, 1909, filed for record in the office of the register of deeds in and for Brookings county, S. D.

The defendants further allege that thereafter and in pursuance of said agreement, and in compliance with the terms of said chattel mortgage, the said Carlson & Rosdahl replenished said stock of merchandise and kept the value thereof in excess of $8,107, and accounted to these defendants for the sales made by them from said stock of merchandise from time to time, and paid to these defendants the following amounts at the times herein stated; the same being 15 per cent. of the sales of merchandise so made by them under said contract and chattel mortgage, to wit: June 3, 1909, $213.60; July 6, 1909, $156.45; August 6, 1909, $136.50; September 8, 1909, $105.75; October 9, 1909, $180.00; December 10, 1909, $255.00; January 3, 1910, $165.00; March 2, 1910, $161.25—making a total sum of $1,373.55 so paid by them and

received by these defendants prior to the time when said stock of merchandise was destroyed by fire, on the said 3d day of May, 1910, and at said time the said Carlson & Rosdahl were so indebted for and on account of the sale of said stock of merchandise by these defendants to them, and by reason of the said contract and the note and chattel mortgage hereinbefore described, in the sum of $3,733.45, with interest as provided by said promissory note, contract, and chattel mortgage, and these defendants allege that at all times prior to the said 3d day of May, 1910, the said Gideon N. Carlson and Adolph P. Rosdahl, as copartners, and as individuals, were solvent, and that the aggregate of their property at a fair valuation was more than sufficient in amount to pay their debts, and that if they became or are insolvent they so became and are insolvent only by reason of the destruction of said stock of merchandise by the said fire on said 3d day of May, 1910.

The defendants further allege that in and by said contract, and as a part of the consideration for the sale of the said stock of merchandise by these defendants to the said Carlson & Rosdahl, it was agreed by the parties thereto that the said Carlson & Rosdahl should insure said stock of merchandise in favor of these defendants to the amount of $5,000, and that it was the intention and understanding of said Carlson & Rosdahl and of these defendants that the said Carlson & Rosdahl, as a part of the consideration for the said sale, and as additional security for the purchase price of said stock of merchandise, should keep said stock of merchandise insured against loss by fire, to the amount of $5,000, with the loss, if any, payable to these defendants, as mortgagees, so far as their interests might appear, and that in pursuance of said contract, and in accord with the intentions and understanding of the parties thereto, the said Carlson & Rosdahl procured the insurance hereinbefore mentioned, and that it was the intention and understanding of said Carlson & Rosdahl, and these defendants, that the said insurance so procured and issued upon said stock of merchandise was in compliance with said contract, and that the same was so issued in favor of these defendants, but through inadvertence, oversight, and mistake, all of said policies of insurance so issued were taken in the name of said Carlson & Rosdahl, and the loss, in case of fire, made payable to said Carlson & Rosdahl, instead of in the name of these defendants as intended and understood between the parties to said agreement.

Contract of Sale.

This agreement made and entered into this 14th day of April, 1909, by and between A. E. Bunday and F. F. Ribstein, copartners, doing business under the firm name and style as Bunday & Ribstein, parties of the first part, and G. N. Carlson and A. P. Rosdahl, parties of the second part, witnesseth:

That said Bunday & Ribstein in consideration of the covenants hereinafter contained, will sell to said parties of the second part all of their stock of goods, wares and merchandise of every kind, character and description now being in their store, situated on lots 18 and 19, block 6, of the original plat of the town of Bruce, Brookings county, South Dakota, according to an invoice to be hereafter made by the parties hereto.

The parties of the second part shall pay for the same as follows:

For all dry goods, including hats, caps, notions, overcoats, shirts and overalls, etc., invoice price with a discount of twenty per cent., two per cent. to be added for freight.

For all boots, shoes and rubbers, ten per cent. discount, with two per cent. added for freight.

For all groceries, including crockery, glassware and stoneware, and all other articles carried in the grocery department, net invoice price with two per cent. added for freight.

Both parties agree to deposit in the Bank of Bruce the sum of two hundred dollars each, making the whole amount four hundred dollars, to be forfeited by either party not living up to this contract.

In consideration hereof, the party of the second part agrees to pay the party of the first part the sum of $3,000 in cash, the balance by note, bearing 6 per cent. interest secured by first mortgage on the whole stock of goods, said

note to be payable on or before the 14th day of April, 1914, with a provision in said mortgage and note that fifteen per cent. of the amount of the sales of said goods shall be applied on said notes on the first day of each month until the same is fully paid or until such time when the same shall become due and payable in full.

It is further agreed by and between the parties hereto, that the stock in said store shall not be reduced more than two thousand dollars in value of the stock of goods now on hand, and that no goods shall be sold except in the ordinary course of retail trade as shall be provided for in said mortgage, the parties of the first part further agree to lease real estate hereinbefore described to the parties of the second part to the 14th day of April, 1914, for the monthly rent of twenty-five dollars, to be paid in advance on the first day of each month, a written lease in the usual form to be executed by the said parties of the first part.

The parties of the first part do also lease the fixtures in said building for said period.

It is further agreed that the parties of the second part shall insure said stock of goods to the amount of five thousand dollars in favor of the parties of the first part.

It is further agreed that the fixtures and the inside room or rooms of said building shall be kept in repair by the parties of the second part, and that the parties of the first part shall have a ten per cent. discount on all goods purchased by them during the period of said lease.

Chattel Mortgage.

Know all men by these presents:

This mortgage, made the 26th day of April, in the year, A. D. 1909, by G. N. Carlson and A. P. Rosdahl, in the county of Brookings, state of South Dakota, by occupation merchants, mortgagor, to A. E. Bunday and F. F. Ribstein, by occupation merchants, mortgagee, witnesseth: That said mortgagor, being justly indebted to said mortgagee, in the sum of $5,107.00, which is hereby confessed and acknowledged, have for the purpose of securing the payment of said debt, granted, bargained, sold and mortgaged, and by these presents do grant, bargain, sell and mortgage unto said mortgagee and their assigns, all that personal property described as follows, to wit: All of the goods, wares and merchandise of every kind consisting chiefly of dry goods, hats, caps, notions, overcoats, shirts, overalls and other goods kept in a dry goods store, and also boots, shoes and rubbers, and all groceries, including crockery, glassware and stoneware, and all goods and articles of merchandise now contained in a certain building situated on lots eighteen and nineteen of block six of the original plat of the town of Bruce, Brookings county, South Dakota, and also all new goods and articles of merchandise, which shall be hereafter purchased by the said mortgagors and kept in connection with said stock in replenishing or adding to the said stock of goods.

It is further agreed that the said mortgagors may remain in possession and conduct said store and sell said goods in the ordinary course of retail trade, and that the said mortgagors shall make daily deposits of all moneys and proceeds from said sales, and shall on the first day of each month make a just and true account to the mortgagees of all sales made, and that proceeds of all sales shall on the first day of each month be applied to the extinguishment of the mortgage indebtedness mentioned herein, provided that out of said proceeds the mortgagors shall replenish the said stock of goods and keep the said stock of goods at its present value, provided further that if the said stock of goods be reduced below its present value of $8,107.00, all of the proceeds of such sales shall be applied to the extinguishment of the mortgage indebtedness, and provided further that at no time shall less than fifteen per cent. of the monthly sales be applied to the payment of this mortgage.

All the said property being now in the possession of said mortgagor, in the county of Brookings, and state aforesaid, and is free from all incumbrance.

To have and to hold all and singular, the personal property aforesaid, forever as security for the payment of the note and obligation hereinafter described, provided always, that these presents are upon this express condition. That if the said mortgagor shall pay or cause to be paid unto the said mort-

gagee, their executors, administrators or assigns, the sum of five thousand one hundred and seven dollars according to the conditions of one certain promissory note payable to A. E. Bunday and F. F. Ribstein, for $5,107.00, dated April 26, 1909, due April 14, 1914, with interest at six per cent. per annum until paid.

Then these presents to be void and of no effect. But if default should be made in the payment of said sum of money or the interest thereon, at the time said note shall become due, or if any attempt shall be made to dispose of or injure said property or to remove said property from said county of Brookings or any part thereof by the mortgagor or any other person, or if said mortgagor do not take proper care of said property, or if said mortgagee shall at any time deem themselves insecure. Then, thereupon and thereafter it shall be lawful, and the said mortgagor hereby authorizes said mortgagees, their executors, administrators or assigns or their authorized agent to take said property, wherever the same may be found, and hold or sell and dispose of the same and all equity of redemption, at public auction, with notice as provided by law, and on such terms as said mortgagee or * * * agent may see fit, and the said mortgagee may become the purchaser of said property at said sale, retaining such amount as shall pay the aforesaid note and the interest thereon, and an attorney's fee of $10.00 and such other expenses as may have been incurred, returning the surplus money, if any there be, to said mortgagor or their assigns, and the said mortgagor hereby waives demand and personal notice of the time and place of sale. And as long as the conditions of this mortgage are fulfilled, the said mortgagor to remain in possession of said property, and in consideration thereof they agree to keep said property in as good condition as it now is, at their own cost and expense.

They also pray in their answer: "That these defendants be found, adjudged, and decreed to have been the equitable owners of the stock of merchandise mentioned and described herein, and of the insurance policies issued upon said stock by the insurance companies herein mentioned and described, and of the proceeds derived from such insurance policies."

By written stipulation a trial by jury was waived and the court made a general finding in favor of the plaintiff on all the issues and rendered judgment in his favor. The defendants asked the court to make a number of special findings, which the court refused to make, and proper exceptions were preserved to his refusal.

The special findings asked by the defendants, so far as they are material to the determination of this cause, and which were the only ones presented to the court in the briefs and oral argument of counsel for the defendants, are:

(4) That as a matter of law and in equity, under said contract, Bunday & Ribstein acquired an equitable lien upon said fire insurance and the policies so obtained by Carlson & Rosdahl, to the extent of their interest in said stock of goods under their note and chattel mortgage, which, at the time of the fire, was about $3,700.

(6) That in order to facilitate the collection of the amount of the insurance to the extent of their interest therein, and upon which the defendants had said equitable lien, certain written orders were given by Carlson & Rosdahl to the defendants on or about July 16, 1910, directing the following insurance companies to pay the amount of the loss as adjusted to these defendants, to wit: The Merchants' Mutual Fire Insurance Company of Redfield, S. D.; the Druggists' Mutual Fire Insurance Company of Lake Preston, S. D.; the South Dakota Mutual Fire Association, of Aberdeen, S. D.; and the Retail Merchants' Fire Insurance Company, of Sioux Falls, S. D. The face value of which policies for $4,500, but the amount at which the losses had previously been adjusted thereon was $3,328.34, being less than the amount of the balance due to defendants under said note and mortgage. That said orders were given pursuant to said contract of April 14, 1909, and the rights of the defendants to said insurance related back to the date of said contract, note, and mortgage. And that such equitable lien upon said insurance and insurance policies and the proceeds thereof is a valid lien acquired in good faith and superior to any claims of the plaintiff as trustee.

Philo Hall, of Brookings, S. D. (J. P. Alexander and Wallace E. Purdy, both of Brookings, S. D., on the brief), for plaintiffs in error.

H. H. Flor, of St. Paul, Minn. (A. E. Boyesen, of St. Paul, Minn. and Chas. O. Bailey and John H. Voorhees, both of Sioux Falls, S. D., and M. E. Culhane, of Brookings, S. D., on the brief), for defendant in error.

Before ADAMS, Circuit Judge, and TRIEBER and REED, District Judges.

TRIEBER, District Judge (after stating the facts as above). [1] While the court, sitting as a jury, made only a general finding of all the issues in favor of the plaintiff, the request for special findings made on behalf of the defendants, and which was by the court refused, and proper exceptions saved, enables us to review the evidence for the purpose of determining whether it was of such a nature as to make it the duty of the court to make these findings, and whether the refusal to do so is reversible error.

It is only in the absence of any request to find facts specifically, or to find for the plaintiff in error generally, that a general finding by the court, sitting as a jury, has the effect of a general verdict by a jury. National Surety Co. v. United States, for use, etc., 200 Fed. 142, 118 C. C. A. 360. As the defendants, the plaintiffs in error, requested special findings, which, if made by the court, would entitle them to a judgment, it is our duty to examine the evidence for the purpose of determining whether the court erred in refusing to make these findings, or such of them as would entitle the defendants to a judgment in their favor.

It will be noticed that the findings asked by the defendants are really in the nature of conclusions of law. There were other requests for findings of facts made by the defendants which, in view of the conclusions reached by us, it is unnecessary to notice in this proceeding.

[2] If, upon an examination of all the evidence, the judgment of the trial court was for the right party, it is the duty of the appellate court to affirm it, even if a wrong reason was assigned therefor. Latting v. Owasso Mfg. Co., 148 Fed. 369, 78 C. C. A. 183. The insolvency of the bankrupts at the time this transaction took place, and that the defendants had reasonable cause to know that fact, is not disputed.

[3] The original contract made on April 14, 1909, between the defendants and the bankrupts, provided for a mortgage to secure the unpaid purchase money, amounting to $5,000, on the stock of goods sold, and that 15 per cent. of the amounts realized from sales of said goods should be applied on the note; that this 15 per cent. should be paid by the bankrupts to the defendants on the 1st day of each month until the same is fully paid or until such time when the note shall become due and payable in full. It also contains a provision that the bankrupts shall insure said stock of goods to the amount of $5,000; also, that "the stock in said store shall not be reduced more than $2,000 in value of the stock of goods now on hand, and that no goods shall be sold except in the ordinary course of retail trade, as shall be provided in said mortgage." The note was to become due five years after date.

Each of the parties was to deposit in the Bank of Bruce, S. D., $200 to be forfeited by either party "not living up to this contract."

The trade was finally consummated on April 26, 1909, $3,000 being paid in cash and a note for $5,107 executed by the bankrupts, and the mortgage, hereinbefore set out, executed by them for the purpose of securing the note for the unpaid purchase money.

It will be noticed that the mortgage differs in several material respects from the agreement, and is much more favorable to the defendants than the terms of the original contract entitled them. It contains every obligation agreed to be assumed by the bankrupts under the contract except the promise to insure the stock of goods for the benefit of the defendants. It contains the following provisions not required of them in the executory contract:

While the contract only requires a mortgage on the goods sold, the mortgage includes all after-acquired goods of the bankrupts. Under the contract only 15 per cent. of the amount of the sales of "said goods" was to be applied to the payment of the note on the 1st day of each month, and that the stock of goods should not be reduced more than $2,000 in value of the stock now on hand, the mortgage provides that:

"The mortgagors shall make daily deposits of all moneys and proceeds from said sales, and shall on the first day of each month make a just and true account to the mortgagees of all sales made, and the proceeds of all sales shall on the first day of each month be applied to the extinguishment of the mortgage indebtedness mentioned herein, provided, that out of said proceeds the mortgagors shall replenish the said stock of goods and keep the said stock of goods at its present value; provided further, that if the said stock of goods be reduced below its present value of $8,107.00 all of the proceeds of such sales shall be applied to the extinguishment of the mortgage indebtedness, and provided further, that at no time shall less than 15 per cent. of the monthly sales be applied to the payment of this mortgage."

The mortgage therefore varies in several respects from the contract, and is much more favorable to the defendants, but, as before stated, omits the obligation on the part of the mortgagors to insure the goods for the benefit of the mortgagees. Assuming, without deciding, that the provision to insure contained in the contract gave the defendants an equitable lien on the proceeds of the insurance policies, and that this equitable lien is superior to the rights of the plaintiff as trustee in bankruptcy, although the mortgage, which was of record (the contract was not recorded), fails to show it, the judgment of the court is, in our opinion, correct. Whenever an executory contract is executed by a new contract in writing, the latter is presumed to express the final agreement of the parties, and conditions in the former agreement not included in the last, nor reserved or continued by its terms, are, in the absence of fraud, or mistake, deemed waived. And this is especially true when the last contract is more favorable to the party complaining than was the preliminary contract. Andrus v. St. Louis Smelting Co., 130 U. S. 643, 647, 9 Sup. Ct. 645, 32 L. Ed. 1054; American Colortype Co. v. Continental Colortype Co., 188 U. S. 104, 108, 23 Sup. Ct. 265, 47 L. Ed. 404; Grand Trunk W. Ry. Co. v. Chicago, etc., R. R. Co., 141 Fed. 785, 73 C. C. A. 43; Wheeden v. Fiske, 50 N. H. 125; Ford

v. Smith, 25 Ga. 679; Ellis v. Lockett, 100 Ga. 719, 28 S. E. 452; Parmly v. Buckley, 103 Ill. 119; Slocum v. Bracy, 55 Minn. 249, 56 N. W. 826, 43 Am. St. Rep. 499; Hubachek v. Brown's Estate, 126 Minn. 359, 148 N. W. 121; Keator v. Colorado Coal, etc., Co., 3 Colo. App. 188, 32 Pac. 857.

[4] In addition to this, the construction of the mortgage by both parties evidently was that there was to be no insurance for the benefit of the mortgagees; for, although more than a year had elapsed since the execution of the mortgage, none of the insurance policies were made for the benefit of the defendants, but all were made payable to the bankrupts. This was a practical construction of the last contract by the parties and will be given effect by the courts, even if there was an ambiguity. Barber Asphalt Paving Company v. City of St. Paul, 224 Fed. 842, — C. C. A. —, decided at the present term of this court.

The judgment is affirmed.

REED, District Judge (dissenting). I am unable to concur in the conclusion reached in the foregoing opinion.

By the agreement of April 14th, the bankrupts agreed on completion of the sale to give the defendants a chattel mortgage upon the stock of merchandise purchased by them from the defendants as security for the purchase price thereof, and to keep such stock insured in the sum of $5,000 for the benefit of the defendants. April 26th, a mortgage was made pursuant to that agreement in which, however, some changes were made in regard to sales to be made by the bankrupts in the ordinary course of their business, satisfactory to the parties and presumably for their mutual benefit. The agreement to keep the property insured was not carried into the mortgage, and does not require that it shall be. The bankrupts took possession of the property upon the execution of the mortgage and began and continued the sale thereof at retail in the ordinary course of their business as agreed, adding to the stock by the purchase of other merchandise from time to time as it was reduced by such sales, until May 3, 1910, when the property was destroyed by fire. When the chattel mortgage was made the bankrupts were solvent; it was made in good faith to secure the indebtedness of the bankrupts to the defendants for the purchase price of the property. After the mortgage was made, the bankrupts, as they had agreed in the contract of April 14th, insured the property in an amount in excess of $5,000 but took the policies in their own name. In due time the loss was adjusted and the bankrupts gave to the defendants an order upon the insurance companies for some $3,300 of the insurance money to apply upon their indebtedness to the defendants for the purchase price of the merchandise, which amount was paid to the defendants by the insurance companies July 16, 1910. November 15, 1910, an involuntary petition in bankruptcy was filed against the mortgagors upon which they were in due time adjudicated bankrupts, and the plaintiff Huntington appointed as their trustee, who brought this suit and was permitted to recover from the defendants the amount of the insurance so received by them, upon the alleged ground that it was a voidable

preference under the Bankruptcy Act of July 1, 1898, c. 541, 30 Stat. 544.

The transaction between the defendants and the bankrupts arose prior to the amendment of the Bankruptcy Act on June 25, 1910 (Act June 25, 1910, c. 412, 36 Stat. 839). No actual fraud is alleged and none was attempted to be proven. Prior to that amendment it had been frequently held by the Supreme Court that trustees in bankruptcy succeed only to the rights of the bankrupt in the property of his estate in cases unaffected by fraud. Thompson v. Fairbanks, 196 U. S. 516, 25 Sup. Ct. 306, 49 L. Ed. 577; Humphrey v. Tatman, 198 U. S. 91, 95, 25 Sup. Ct. 567, 49 L. Ed. 956; York Manufacturing Co. v. Cassell, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782. In Thompson v. Fairbanks, the court, at page 526 of 196 U. S., at page 310 of 25 Sup. Ct. (49 L. Ed. 577), said:

"Under the present Bankrupt Act, the trustee takes the property of the bankrupt, in cases unaffected by fraud, in the same plight and condition that the bankrupt himself held it, and subject to all the equities impressed upon it in the hands of the bankrupt, except in cases where there has been a conveyance or incumbrance of the property which is void as against the trustee by some positive provision of the act."

See Mitchell v. Winslow, 2 Story, 630, 17 Fed. Cas. 527, No. 9673, applying this rule to an insurance policy.

Under the agreement of April 14th, upon the completion of the sale and the execution and recording of the chattel mortgage the defendants acquired not only a valid lien upon the mortgaged property, but also under the statute of South Dakota, and the settled principles of equity, an equitable lien upon the insurance on the mortgaged property.

The Civil Code of South Dakota (1903) provides as follows:

"Sec. 2022. A lien is created: (1) By contract of the parties; or (2) by operation of law. * * *"

"Sec. 2024. An agreement may be made to create a lien upon property not yet acquired by the party agreeing to give the lien, or not yet in existence. In such case the lien agreed for attaches from the time when the party agreeing to give it acquires an interest in the thing to the extent of such interest.

"Sec. 2025. A lien may be created by contract, to take immediate effect, as security for the performance of obligations not then in existence." Iverson v. Soo Elevator Co., 22 S. D. 638, 119 N. W. 1006; Grand Forks Nat. Bank v. Minneapolis, etc., Elevator Co., 6 Dak. 357, 43 N. W. 806; Wheeler v. Insurance Co., 101 U. S. 439, 25 L. Ed. 1055; Ketchum v. St. Louis, 101 U. S. 306, 318, et seq., 25 L. Ed. 999; Walker v. Brown, 165 U. S. 654, 17 Sup. Ct. 453, 41 L. Ed. 865; Hurley v. Atchison, T. & S. F. Ry. Co., 213 U. S. 126, 29 Sup. Ct. 466, 53 L. Ed. 729; Sexton v. Kessler, 225 U. S. 90, 32 Sup. Ct. 657, 56 L. Ed. 995; In re Ozark Cooperage Co., 180 Fed. 105, 103 C. C. A. 603 (this court); In re Sturtevant, 188 Fed. 196, 110 C. C. A. 68 (C. C. A. 7th Circuit); In re Bird (D. C.) 180 Fed. 229; Miller v. Aldrich, 31 Mich. 408; Cromwell v. Brooklyn Ins. Co., 44 N. Y. 42, 4 Am. Rep. 641.

And such lien or equity is not impaired by the amendment of June 25, 1910, to section 47a (2) of the Bankruptcy Act, giving to the trustee "as to all property coming into the custody of the court of bankruptcy, the rights of a creditor holding a lien." Holt v. Henley, 232 U. S. 637, 34 Sup. Ct. 459, 58 L. Ed. 767.

The property in controversy herein, the insurance fund, never came into the custody of the court of bankruptcy.

In Wheeler v. Insurance Co., above (101 U. S. 439, 25 L. Ed. 1055), it appears that Johnson & Goodrich, commission merchants, being creditors of one Green for advances made to him, suggested to him that he should authorize them to effect insurance upon his buildings and other property for their better security. Green accordingly wrote them, authorizing them to effect such insurance, and they did procure from the defendant insurance company a policy in their own names for $5,500. Before the expiration of the policy, the property was destroyed by fire, and Johnson & Goodrich took measures to recover the insurance, which amounted to some $3,500 in excess of the amount due upon their advances. Wheeler & Co. intervened, and in equity claimed the insurance money as against the insurance company, Green, and Johnson & Goodrich. The defendants severally answered, and upon the hearing the court dismissed the bill, from which decree Wheeler & Co. appealed. It appeared upon the hearing that prior to the employment by Green of Johnson & Goodrich as his commission merchants, he had employed the firm of Foster & Gwyn as such, had become largely indebted to them, and gave them his notes secured by mortgages upon the same property mortgaged to Johnson & Goodrich, with an agreement in some of the mortgages to insure the buildings and machinery, and to transfer the policies to the mortgagees for their better security, or in default of doing this that the mortgagees and all subsequent holders of the notes secured by those mortgages should have the right to effect such insurance at his expense. These mortgages were all given and recorded before Johnson & Goodrich procured their insurance upon the property. Foster & Gwyn under the reserved right contained in their mortgage effected insurance for one year upon the buildings and machinery, but did not renew the same, and after it had expired the property was destroyed. Foster & Gwyn being largely indebted to Wheeler & Co. transferred to them the notes and mortgages by way of collateral security, and upon this security Wheeler & Co. made their claim for the insurance money upon two grounds: (1) That the insurance was effected in the name of Johnson & Goodrich, merely as agents of Green; and (2) upon the ground that when the insurance in question was about to be renewed by Foster & Gwyn they were assured by Green and by Johnson & Goodrich that the Johnson & Goodrich insurance was effected for their (Foster & Gwyn's) benefit. The Supreme Court held against Wheeler & Co. upon each of these grounds; but Mr. Justice Bradley, speaking for the court, said at page 442 of 101 U. S. (25 L. Ed. 1055):

"But as the debt due to Johnson & Goodrich will not exhaust the whole amount of the insurance, and as the balance rightfully belongs to Green, the question arises whether, as to that balance, the claim of the appellants is not maintainable. It is undoubtedly the general rule that a mortgagee has no right to the benefit of a policy taken by the mortgagor, unless it is assigned to him. * * * But it is settled by many decisions in this country that, if the mortgagor is bound by covenant or otherwise to insure the mortgaged premises for the better security of the mortgagee, the latter will have an equitable lien upon the money due on a policy taken out by the mortgagor to the extent of the mortgagee's interest in the property destroyed. (Citing the cases.) And this equity exists, although the contract provides that in case of

the mortgagor's failing to procure and assign such insurance, the mortgagee may procure it at the mortgagor's expense."

In Cromwell v. Brooklyn Insurance Co., above (44 N. Y. 42, 4 Am. Rep. 641), it appeared that Cromwell was the assignee of a contract for the purchase of the lot in question from one Chesley. Chesley by the terms of the agreement was to build a house on the lot and convey it to one Eichenlaube, who was to insure the house for the benefit of Chesley. He did at first procure insurance in his name, which by the terms of the policy was payable to Chesley. When that policy expired the company refused for some reason to renew it. Eichenlaube then took out another policy in his own name, which contained no specifications that the loss, if any, was payable to Chesley or the plaintiff. The court said:

"But, in the absence of any proof to the contrary, it must be inferred that he made the insurance in pursuance of his agreement, and for the benefit of his vendor. And such, undoubtedly, would have been the legal inference, no matter what may have been his secret intention when he effected the insurance, provided he did it while in possession of the premises, and while the agreement between him and Chesley was binding, either in law or equity."

But it is said that because the agreement of April 14th, to keep the property insured for the benefit of the defendants, was not incorporated in the chattel mortgage, it was waived by the parties. The testimony shows, however, without any dispute, that the bankrupts procured the insurance upon the mortgaged property intending it for the benefit of the defendants; for after the mortgage was made the defendants inquired of the bankrupts if they had procured the insurance, and were informed by them that they had; and upon the adjustment of the loss the right of the defendants to the insurance money was clearly recognized by the bankrupts giving to them an order or orders upon the insurance companies for the amount of the insurance received by the defendants; and the bankrupts testified that they gave the defendants such orders because by their agreement to keep the property insured they understood the defendants were entitled thereto to the extent of their indebtedness against the bankrupts. If there was any doubt of the intention of the parties that the defendants were to have the benefit of the insurance to the extent of their indebtedness, the order given by the bankrupts upon the insurance companies therefor seems conclusive of the understanding of the parties, and the interpretation by them of their agreement should not be disturbed at the instance of the trustee, who stands only in the shoes of the bankrupts that he may recover this amount of this insurance for other creditors.

In Metropolitan National Bank v. Benedict Co., 74 Fed. 182, page 185, 20 C. C. A. 377, page 379, Judge Caldwell, speaking for this court, said:

"Moreover, parties have the undoubted right to make their own contracts, and to put their own construction upon them, and to regulate their rights and liabilities thereunder. If the court 'leaves the parties to be governed by their understanding of their own language, it, in effect, enforces the contract as actually made. That they should be so permitted to construe their own agreement accords with every principle of reason and justice.' * * * And when

both parties to a contract, acting in good faith, are agreed as to its meaning and their rights under it, a stranger having no interest in the subject-matter of the contract cannot insist that a different interpretation shall be put upon it, or compel the parties to put that interpretation upon it which will benefit him."

In Hubachek v. Brown's Estate, 126 Minn. 359, 148 N. W. 121, cited by the majority, the agreement involved was by its plain terms a condition precedent to the completion of the purchase. The acceptance of the deed without exacting a compliance with such condition was necessarily a waiver thereof by the grantee. The ruling of the court in that case, as stated in the opinion, applies only to stipulations that are expressly made conditions precedent to the performance of the contract, and does not necessarily apply to stipulations or agreements that are not conditions precedent, citing Taylor v. Railroad Co., 27 S. D. 528, 132 N. W. 152; and see De Rue v. McIntosh, 26 S. D. 42, 127 N. W. 532, and cases there cited, and McDonald v. Daskam, 116 Fed. 276, 53 C. C. A. 554.

The insurance agreement in this case is in no sense a condition precedent to the completion of the contract of April 14th, but is an independent collateral agreement to insure the property for the defendants' benefit; is not required to be in writing and is in no way inconsistent with the terms of the sale or of the chattel mortgage. Upon taking out the insurance policies, some time prior to the fire, an equitable lien at once attached thereunder to the insurance upon the property, which entitled the defendants to the insurance money to the extent of their interest in the property immediately upon its destruction by fire, which was May 3, 1910. McDonald v. Daskam, 116 Fed. 276, 53 C. C. A. 554; Grand Forks National Bank v. Minneapolis, etc., Elevator Co., 6 Dak. 357, 43 N. W. 806. As this was more than four months prior to the bankruptcy, the defendants are entitled to the insurance money received by them as against the plaintiff. McDonald v. Daskam, 116 Fed. 276, 53 C. C. A. 554, above.

Some question is made in the argument in behalf of the plaintiff that, as the mortgage covered after-acquired property which is not a part of the contract of April 14th, the insurance will not attach to such property. But the insurance company did not object to this and it is not for the plaintiff to do so. The question of the validity of a chattel mortgage covering after-acquired property is not open to discussion under the statute of South Dakota. Iverson v. Soo Elevator Co., 22 S. D. 638, 119 N. W. 1006; Grand Forks National Bank v. Minneapolis, etc., Elevator, 6 Dak. 357, 43 N. W. 806, above. And see Mitchell v. Winslow, 2 Story, 630, 17 Fed. Cas. 527, No. 9673.

This case upon its facts is so materially different from Long v. Farmers' Bank, 147 Fed. 360, 77 C. C. A. 538, 9 L. R. A. (N. S.) 585, and In re Great Western Manufacturing Co., 152 Fed. 123, 81 C. C. A. 341, that the decision in those cases is not applicable here.

I reach the conclusion that the judgment of the District Court should have been for the defendants, and as it was not it should be reversed.

UNITED STATES v. P. J. CARLIN CONST. CO. et al.

(Circuit Court of Appeals, Second Circuit. May 12, 1915.)

No. 4.

1. CONTRACTS ⟸32—PROPOSAL AND ACCEPTANCE—AGREEMENT TO MAKE CONTRACT.

When parties enter into a mere verbal agreement, with the understanding that it shall finally be reduced to writing as the evidence of the terms of the contract, it may be that nothing is binding upon either party until the writing is executed; but where the parties, through correspondence, reach a specific and definite agreement, intending that the agreement shall be subsequently expressed formally in a single paper, which, when signed, shall be the evidence of what had been agreed upon, the obligatory character of the agreement cannot ordinarily be defeated by the failure of either party to sign the formal contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 159; Dec. Dig. ⟸32.]

2. CONTRACTS ⟸24—OFFER AND ACCEPTANCE—CONDITIONAL ACCEPTANCE.

An acceptance, to create a binding contract, must correspond to the offer at every point, and must conclude the agreement.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 100–103; Dec. Dig. ⟸24.]

3. UNITED STATES ⟸64—CONTRACTS—ACCEPTANCE OF BIDS.

In inviting bids for government work to be done for the War Department, each bidder was required, in accordance with the provisions of Act April, 10, 1878, c. 58, 20 Stat. 36, as amended by Act March 3, 1883, c. 120, 22 Stat. 487 (Comp. St. 1913, § 6843), to furnish a certified check or a bond as a guaranty that, if his bid was accepted, he would enter into a contract. Defendant submitted a bid, accompanied by a bond conditioned that, on acceptance of its bid within 60 days from the opening of the proposals, it would enter into the contract, which bond was accepted. Defendant was notified of the acceptance of its bid, with a certain proviso, to which it refused to agree. Afterward, but more than 60 days after the bids were opened, it was notified of unconditional acceptance, but refused to execute the contract. *Held*, that the acceptance of its bid was not only not within a reasonable time, but that the government, having accepted the bond with its 60-day limitation, could not insist that it had a longer time, and its acceptance afterward did not bind defendant or its surety.

[Ed. Note.—For other cases, see United States, Cent. Dig. § 47; Dec. Dig. ⟸64.]

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 United States District Court for the Southern District of New York, entered on January 2, 1913, dismissing the complaint on the merits. The action was brought to recover the sum of $115,000, reduced by the plaintiff at the trial to $80,000, as damages for the failure of the Carlin Company to enter into a contract.

H. Snowden Marshall, U. S. Atty., of New York City, and Addison S. Pratt, Sp. Asst. U. S. Atty., of New York City.

John C. Wait, of New York City, for defendant in error J. P. Carlin Const. Co.

Charles A. Winter, of New York City, for defendant in error Illinois Surety Co.

Before COXE, WARD, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge. The government of the United States, acting through its agents, advertised, in March, 1908, that it would receive sealed proposals for the construction of certain improvements to be made at Ft. Mason, San Francisco, Cal., which work was to be done in strict accordance with drawings and specifications. Bids were to be received until noon May 4, 1908, when they were to be publicly opened. The specifications required each bidder to submit with his proposals either a certified check for $10,000, or a surety company bond equal to 10 per cent. of the amount of his proposal, as a guaranty that the contract and bond required by the specifications would be executed within 10 days after the successful bidder had been notified that his bid had been accepted.

The Carlin Company in due time submitted its proposal to do the work for $1,178,000 and to complete it within 30 months. This was its "Lump Bid A." In its "Lump Bid B" it proposed to complete the work on alternative drawings and specifications of its own, using reinforced concrete caisson construction, and agreeing to complete it in 27 months. With its proposal it submitted a bond of the Illinois Surety Company, whereby the latter guaranteed that, if the bid of the Carlin Company was accepted within 60 days from the opening of the proposals, the latter would enter into a contract for the performance of the work and give bond for the faithful fulfillment thereof within 10 days after notice of acceptance, or the Surety Company would pay the United States the difference in money between the amount of the bid and the amount for which the United States might contract with another, not exceeding $125,000. Upon the opening of the bids the Carlin Company was found to be the lowest bidder.

The drawings and specifications which the Carlin Company submitted with its "Lump Bid B" were not sufficiently in detail to be satisfactory to the officials of the government, and the Carlin Company agreed to submit more complete plans and specifications. But there was delay in so doing, and on June 18, 1908, and before the Carlin Company had furnished the completed plans and specifications, which it was to submit in connection with its "Lump Bid B," a letter was sent to the Construction Company by the Quartermaster General of the United States Army informing it that instructions had been issued to make award of the contract—

"to your company in accordance with your proposals, based upon the government plans and specifications as follows: The entire work called for by plans and specifications, except sheds on wharf No. 1 and wharf No. 3. He has been further instructed to insert a clause in the contract whereby the government reserves the right to enter into supplementary agreement with your company for the construction of the sea wall, in accordance with your alternative bid, at a reduction of $80,000, provided satisfactory plans and specifications for this alternative design shall be submitted to and approved by this office within six months from the date of award. This has been rendered necessary because certain minor points in your design for the sea wall recently submitted to this office are not satisfactory. This clause in the contract is desired in order to enable the immediate award of contract, and to give your company ample time in which to submit completed plans for the alternate sea wall; it being understood that it is entirely optional with the government to decide whether or not the sea wall shall be built according to the original plans and specifications or in accordance with the alternate bid, provided a decision is arrived at within six months from date of award.

Additional clauses for the specifications will provide for certain other omissions and additions which were verbally agreed to by Mr. Carlin while in this office."

Correspondence followed between the parties, the Construction Company making objection to the contract as proposed by the government in the letter of June 18, 1908, and declining to accept it. In a letter dated June 20th, Mr. Carlin after stating objections wrote:

"It is manifestly impossible for us to consider the signing of a contract, which places in abeyance, for a period of six months, the determination of a question, without which determination it will be impossible for us to begin. We should be glad to know what provision it is proposed to insert in the form of contract, regarding responsibility for the construction of the work, if the original plans are followed."

To this the government replied on June 24th:

"The award for the construction of the wharves at Ft. Mason, San Francisco, Cal., was ordered made to you on your straight bid for this work. Had you complied strictly with the specifications and instructions to bidders, and submitted complete plans and specifications of the alternate sea wall, the question of a delay in definitely determining the type of sea wall to be used would have been entirely obviated. As it now stands the bid on the government design has been accepted, and the proposed clause in the specifications simply gives you an opportunity to submit an entirely satisfactory design under your alternate bid within six months from the date of the award of the contract. It therefore gives you an opportunity to build the sea wall in accordance with your own design. This clause was inserted in the contract to give you every opportunity to use your alternate design, and you have had no reason at any time for assuming that only the alternate plan would be considered. Your bid is definite, and the acceptance is definite."

On the same date the government wrote the Construction Company that its proposal opened on May 4th was—

"hereby accepted as follows: (1) Item 1 of the bid, $1,178,000, being the lump bid for the construction of the sea wall, crib wall, transport wharves, and sheds complete, as shown by drawings and specifications, deducting item 7, being a reduction of $63,000 for omitting shed complete on wharf No. 1, and item 9, being a reduction of $60,000 for the omission of shed complete on wharf No. 3, making a total award of $1,055,000 for the construction complete, including sea wall, necessary dredging, and filling for the entire project as covered by plans and specifications, except sheds on wharf No. 1 and wharf No. 3."

The letter then went on to state three separate modifications of the contract which the government desired:

"It is desired that a clause be inserted into the contract reserving to the government the right within six months from the date of award to enter into an extra agreement for the construction of the sea wall under the alternative bid of the P. J. Carlin Construction Company at a reduction in price of $80,000, provided satisfactory plans and specifications, based upon their alternative bid, be submitted to and approved by this office within the time mentioned.

"III. It is further desired that a clause be inserted in the specifications providing for the omission of the crib wall along the Laguna street side of the reservation, in accordance with item 10 of the bid, at a reduction of $90,000, provided written notice is served on the contractor prior to six months after date of award of contract.

"IV. It is further desired that a clause be inserted in the contract providing for the construction of sheds on wharf No. 1 and wharf No. 3, which have been omitted in this contract, provided funds become available and the award made within one year from the date of approval of this contract, at the fixed sums of $63,000 and $60,000, respectively.

"Bond to the amount of $450,000 will be required. Please wire this office whether the officer of your company authorized to sign the contract will be in San Francisco ready to sign in the near future, or where the contract as soon as prepared should be sent for his signature. It is absolutely necessary that this contract should be signed at once, and that work should begin as soon as possible."

To the above communication no reply was made, and on July 1st, the government, through the constructing quartermaster at San Francisco, sent a letter to the Construction Company in which it inclosed three copies of the contract, dated July 1st, and stated to be "for the signature of whomever is authorized to sign the contract." The contract thus transmitted to be signed included the three propositions or clauses which the government declared, in the letter of June 24th, that it desired to have inserted in the contract. Then followed on July 7th a letter from the Construction Company to the government at Washington, in which attention was called to the reservations which the government had made in the contract which had been submitted, and also to the fact previously "stated verbally in Washington" that the company had discovered a serious error in its original proposal, amounting to over $100,000. The letter concluded that, for reasons stated therein, "we are constrained to ask that our bid be withdrawn, and that we be not compelled to enter into contract for this work."

Two days later, on July 9th, the Quartermaster General wrote the Construction Company:

"In reply to your communication of July 7th, and on the general subject of the award of contract for the construction of wharves for the transport service at Ft. Mason, San Francisco, Cal., you are informed that the acceptance of your bid and the award of contract is on your straight bid on the government plans and specifications, as you were informed in letters from this office of June 18th and June 24th, and any clause in the contract not provided for in your bid was subject to mutual agreement, and since it appears that you are not willing to accept the conditions which a representative of your firm verbally agreed to in this office, contracts which are drawn in strict accordance with your proposal are herewith inclosed, and you are requested to execute them at once and submit them to this office, with a satisfactory bond to the amount of $450,000."

The correspondence shows that the government forwarded a formal written contract to the Construction Company on July 1st, which it was desired the Construction Company should execute; and that on July 9th another draft of a contract was sent the company to execute. But neither of these contracts was ever signed. Did the failure of the Construction Company to sign a formal contract affect in any way the respective rights of the parties?

[1] When parties enter into a mere verbal agreement, with the understanding that it shall be finally reduced to writing as the evidence of the terms of the contract, it may be that nothing is binding upon either party until the writing is executed. But where the parties reach an agreement through correspondence, intending that the agreement shall be subsequently expressed formally in a single paper or document, which, when signed, should be the evidence of what had been agreed upon, the obligatory character of the agreement cannot ordinarily be defeated by the failure of either party to sign the formal contract. If the court can see from the writings or correspondence

that the minds of the parties have met, that a proposal has been submitted by one party which has been accepted by the other, and that the terms of the contract have been in all respects definitely agreed upon, one of the parties cannot evade or escape from his obligation by refusing to sign the formal contract, which the parties understood was subsequently to be drawn and executed. As said by the New York Court of Appeals in Sanders v. Pottlitzer Bros. Fruit Co., 144 N. Y. 209, 214, 39 N. E. 75, 76, 29 L. R. A. 431, 43 Am. St. Rep. 757 (1894):

"Any other rule would always permit a party who has entered into a contract like this through letters and telegraphic messages to violate it whenever the understanding was that it should be reduced to another written form, by simply suggesting other and additional terms and conditions. If this were the rule, the contract would never be completed in cases where by changes in the market or other events occurring subsequent to the written negotiations it became the interest of either party to adopt that course in order to escape or evade obligations incurred in the ordinary course of commercial business."

And in Thomas v. Derring, 1 Keen, 729 (1837), Lord Langdale, Master of the Rolls, stated the rule as follows:

"I have no hesitation in saying that, by the offer made and accepted as it appears to have been in this correspondence, a binding contract was completed between these parties. It is true that mention is made in the letters of an intended formal contract, to be afterwards drawn up; but there are many cases in which a correspondence, referring to the future execution of a more formal agreement, has been held to constitute in itself a valid contract, and I think that the correspondence is equivalent to a contract in the present case."

The above cases relate to contracts between individuals. The same rules which govern the validity and sufficiency of contracts between individuals control, as a general rule, in case of contracts with the government. It is important, however, to keep in mind that the laws of the United States make it necessary that contracts of the nature of that upon which this suit is based are required to be in writing and signed by the contracting parties and filed in the appropriate office. United States Compiled Statutes 1913, vol. 3, § 6899, provides that:

"It shall be the duty of the Secretary of War, of the Secretary of the Navy, and of the Secretary of the Interior to furnish every officer appointed by them with authority to make contracts on behalf of the government with a printed letter of instructions, setting forth the duties of such officer, under the two preceding sections, and also to furnish therewith forms, printed in blank, of contracts to be made, and the affidavit of returns required to be affixed thereto, so that all the instruments may be as nearly uniform as possible."

The meaning of the provision of the law above cited was under consideration in South Boston Iron Company v. United States, 18 Ct. Cl. 165 (1883). The claimant corporation had submitted in writing proposals to furnish boilers for certain naval vessels. These proposals were accepted in writing by the proper government official. Nine days thereafter, and before the formal contract had been signed, a new Secretary of the Navy repudiated the action which had previously been taken. Thereupon the claimant corporation brought suit against the United States for damages in the sum of $2,000,000 for breach of

contract. The question was whether the correspondence showing an offer and an acceptance amounted to a contract. And the court held that there was not a binding contract. The court said:

"The English statute of frauds provides that one class of contracts shall be 'put in writing and signed by the parties,' and for another class it provides that 'the agreement or some memoranda or note thereof shall be in writing and signed by the party to be charged therewith.' The language of these statutes has been generally followed in legislation of this country. To determine what kind or form of writing and signing came within the requirements of this phraseology has been the object of the great number of judicial decisions, some of which have been cited here. But in the law under consideration the words 'some memorandum or note thereof' are omitted, and the words 'with their names at the end thereof' added. Immediately preceding these added words the statute had already provided all that the English statutes required, to wit, that 'the contract should be in writing and signed by the contracting parties.' It is plain that some additional requirement is involved in the words 'with their names at the end thereof.' They are not repugnant to any other part of the act. They cannot be meaningless. The same idea has been discussed in legislative bodies, and one state at least has required certain contracts 'to be signed at the foot.' Congress inserted these words for a purpose, and courts must give them effect. We cannot shave off the language of an act of Congress to bring its meaning within less restricted language, common in statutes of fraud. These additional words cannot mean less than that the contract shall be so full and complete before signing that it can be signed in whole by both parties. It excludes the idea that one party may sign one part of the contract and the other party another and leave the courts to arrange a contract by collecting and joining the pieces. That can be done, as has been often held, under the English statute, but not under ours, unless we entirely erase the words 'with their names at the end thereof.' This construction is strengthened by the other provisions of the act before noted, especially by those which require the Secretaries to furnish blank forms in order 'that all the instruments may be as nearly uniform as possible,' and the contracting officers to file with the copy of the contracts copies of all 'bids, offers, and proposals.' It is doubtless true that the contractor is not bound to see that the officer obeys all these directions, but he is bound to know that they are in the law, and that it does not become him to aid a reckless officer to evade them. If this is the proper construction of the statute, negotiations, correspondence, proposals, and acceptances, although conducted in writing, but signed only in part by one party and in part by the other, do not constitute the required complete contract signed in whole by both parties. At most they are only preliminary memoranda to be used in drawing a contract so complete that it can be 'signed by the contracting parties with their names at the end thereof.' * * * It may be considered settled that so much of section 3744 as provides that contracts shall be 'reduced to writing and signed by the contracting parties with their names at the end thereof' is mandatory, and contracts which do not comply with its requirements are void. Henderson's Case, 4 Ct. Cl. 75; Clark v. United States, 95 U. S. 539 [24 L. Ed. 518]. In this case a whole and complete contract was not signed by either party. The claimant signed the proposals and the defendant the acceptances. Neither party retained possession of all the original parts. The defendants retained possession of the original proposals and the claimant of the original acceptances. The drawings and specifications, which were to become a very important part of the contract, were not in writing at the time, nor even considered and determined upon."

This construction as to the effect and meaning of the statute was affirmed in the Supreme Court, to which the case was carried on writ of error. That court said:

"An effort has been made in this case to show a contract in writing, but we agree entirely with the Court of Claims that the papers relied on for that purpose are nothing more in law or in fact than the preliminary memoranda

made by the parties for use in preparing a contract for execution in the form required by law. This was never done, and therefore the United States never became bound." South Boston Iron Co. v. United States, 118 U. S. 37, 6 Sup. Ct. 728, 30 L. Ed. 69 (1886).

The answer of the Construction Company, and of the Surety Company as well, sets up that neither party was bound by the offer and acceptance until in accordance with section 3744 of the Revised Statutes (Comp. St. 1913, § 6895) the contract was actually executed by being signed by the contracting parties with "their names at the end thereof." As no such contract was ever signed by the parties, no obligation was imposed, if section 3744 governs the negotiations. However, to whatsoever class of contracts the above section may be applicable, it clearly does not apply to the transactions involved in the present suit. The transactions, on the contrary, are subject to Act of April 10, 1878, c. 58, 20 Stat. 36, as amended by Act March 3, 1883, c. 120, 22 Stat. 487, which was in force at the time and which provided as follows:

"That the Secretary of War is hereby authorized to prescribe rules and regulations to be observed in the preparation and submission and opening of bids for contracts under the War Department. And he may require every bid to be accompanied by a written guarantee, signed by one or more responsible persons, to the effect that he or they undertake that the bidder, if his bid is accepted, will, at such time as may be prescribed by the Secretary of War or the officer authorized to make a contract in the premises, give bond, with good and sufficient sureties, to furnish the supplies proposed or to perform the service required. If after the acceptance of a bid and a notification thereof to the bidder he fails within the time prescribed by the Secretary of War or other duly authorized officer to enter into a contract and furnish a bond with good and sufficient security for the proper fulfillment of its terms, the Secretary or other authorized officer shall proceed to contract with some other person to furnish the supplies or perform the service required, and shall forthwith cause the difference between the amount specified by the bidder in default in the proposal and the amount for which he may have contracted with another party to furnish the supplies or perform the service for the whole period of the proposal to be charged up against the bidder and his guarantor or guarantors, and the sum may be immediately recovered by the United States for the use of the War Department in an action of debt against either or all of such persons."

Under the provisions of the above act the government is entitled, upon the failure to enter into the contract of one who has submitted a bid which has been accepted for a contract under the War Department, to proceed to contract with some other person and to recover the difference in the cost of the work in an action against the defaulting party.

[2] It is necessary, therefore, to determine whether the government duly accepted the offer submitted by the Construction Company. If the offer was never properly accepted, the government cannot maintain this action. It appears that on June 18th the government notified the Construction Company that it would accept the latter's bid with this proviso, that a period of six months must elapse within which to determine whether the government would have the work done according to plan A or according to plan B. This cannot be regarded as an acceptance of the offer. It is elementary that an acceptance must correspond to the offer at every point, and must conclude the agreement. But under the terms of the communication of June 18th the agreement

was not to be concluded unless the government sooner chose to do so until six months elapsed. The Construction Company was under no obligation to consent to this arrangement and refused its assent. Then on July 9th the government by letter accepted the bid on plan A. This was 60 days after the opening of the bids.

[3] An acceptance of an offer to be effective, if no time is fixed in the offer, must be made within a reasonable time. What is a reasonable time is determined by the circumstances or nature of the case. Sometimes it is a question of law for the court, and sometimes one of fact for the jury. 9 Cyc. 292. The court below held that upon the circumstances of this case the government, as a matter of law, had not accepted the offer of the Construction Company within a reasonable time. It appears that at the time the government invited bids it provided that a bidder should do either of two things, put up $10,000 in cash (certified check), or give a bond by a responsible surety company that the bidder would execute the contract. The Construction Company elected to give a bond. That bond, executed by the Illinois Surety Company, guaranteed that if the Construction Company's bid was accepted "within 60 days from the date of the opening of proposals" the Construction Company would within 10 days after notice of acceptance enter into the contract. This bond the government accepted, and having accepted it, with this limitation in it as the period within which the bid was to be accepted, the government is not now at liberty to say that it had more than 60 days within which it could determine whether it would accept the Construction Company's offer.

As the right of the government under the act of 1878 to sue to recover the difference between the amount bid by the Construction Company and the amount for which the government subsequently contracted with another party depends upon the fact that the government had duly accepted the Construction Company's bid, and as no such acceptance was ever duly made, there was no error in dismissing the complaint upon the merits.

Judgment affirmed.

UNITED STATES v. FIDELITY & DEPOSIT CO. OF MARYLAND.

(Circuit Court of Appeals, Second Circuit. April 13, 1915.)

No. 146.

1. PRINCIPAL AND SURETY ⇐123—DISCHARGE OF SURETY—UNITED STATES.
During the military occupation of Cuba by the United States, the President by an order authorized the extension of the postal service over the island, and by virtue of such order the Postmaster General appointed a Director General of Posts for Cuba. The latter established a Bureau of Finance, appointed a chief thereof, and required him to give a bond. Such bond, given by defendant, named the Director General as the "employer," recited that it was executed on the faith of statements and declarations made by the employer, and that it should become void if the employer or his successor should fail to promptly notify defendant of the discovery of any act of the employé which could be made the basis of a claim under the bond, or if, after discovery of any such act, the employé should be

intrusted with money or property without notice to and the consent of defendant. At the time the bond was given the Director General knew that the employé had previously embezzled funds coming into his hands officially, and also knew of continuous embezzlements thereafter, but withheld such knowledge from defendant. *Held*, in an action by the United States on the bond, that, having designated the Director General as its agent to make the contract, plaintiff was bound by its terms, that the requirement of notice by the named employer was reasonable and proper, and that the violation of such requirement invalidated the bond.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 304–311; Dec. Dig. ⟸123.]

2. PRINCIPAL AND SURETY ⟸149—ACTION ON OFFICIAL BONDS—SPECIAL LIMITATION—WAIVER.

By the terms of the bond recovery thereon was conditioned on the bringing of suit within 12 months from the filing of a claim. Notice of claim was given, and within a year thereafter the principal in the bond, the Director General, and another having been arrested for trial in the criminal court of Cuba, the successor of the Director General wrote to defendant, suggesting that in view of the approaching trial matters respecting the bonds should be allowed to rest without prejudice to any preliminary formal steps, "so that at the end of the criminal trial issue may be joined without delay on the merits of the cases." To this defendant assented. *Held*, that by such assent defendant did not wholly waive the special limitation in the bond, but at most only consented to its extension, so that action might be brought "without delay" after the termination of the criminal trial, and that an action brought more than two years thereafter was barred.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. § 414; Dec. Dig. ⟸149.]

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 in favor of defendant in error, which was defendant below. A jury was duly waived, and the cause was tried before Judge Martin, who, besides making findings of fact and conclusions of law, wrote a full and careful opinion, which will be found in a note hereto and may be referred to for facts not hereinafter stated.

H. Snowden Marshall, U. S. Atty., of New York City (H. Harper, Asst. U. S. Atty., of New York City, of counsel), for the United States.

O'Brien, Boardman & Platt, of New York City (A. B. Boardman, Frank H. Platt, and Livingston Platt, all of New York City, of counsel), for defendant in error.

Before LACOMBE, COXE, and ROGERS, Circuit Judges.

LACOMBE, Circuit Judge. As stated in the opinion of the District Judge:

"The President of the United States, as Commander in Chief of the Army and Navy, on July 21, 1898, made an order authorizing the extension of the postal service over the island of Cuba, which had come into the military possession of the United States. By virtue of that order the Postmaster General made an order, December 21, 1898, appointing E. G. Rathbone Director General of the Posts of Cuba. Said Rathbone on January 7, 1899, established the Bureau of Finance, so called, in his department, and on January 11, 1899, assigned C. F. W. Neely to be chief of that bureau and required him to give a bond as such chief. This he did by procuring the bond in suit October 21,

1899. The premium was paid by William H. Reeves, Assistant Auditor of the Department of Posts for the island of Cuba, out of funds received from that postal service. During the life of the bond Neely embezzled from the postal funds of the island of Cuba an amount in excess of the amount of the bond and in excess of another bond not in suit."

Rathbone and Reeves were also embezzlers. The three men plundered the Cuban postal funds with free hands, assisting each other in their fraudulent enterprise. All three were tried and convicted in the Cuban courts. Of the many questions which have been presented and argued, we find it necessary to consider two only.

[1] 1. The bond was given by Neely as principal and defendant company as surety to "E. G. Rathbone, Director General of Posts of the Island of Cuba, or his successor, hereinafter called the 'employer.'" It recites that the employer has delivered to the company certain statements and declarations in writing relative to the duties and accounts of the employé, the manner of conducting the business of the employer, and other matters which, together with any other statements or declarations in writing made by the employer and required by or lodged with the company, do and shall constitute the basis of this contract, and proceeds:

"Now, therefore, in consideration of [the premium] and upon the faith of said statements and declarations of the said employer, as aforesaid, it is agreed that, subject to the provisions and conditions herein contained, which shall be conditions precedent to the right on the part of the employer to recover under this bond, the company shall reimbuse," etc.

The bond provides that it may be continued from year to year, at the option of the employer at the same or an agreed rate of premium; also that the employer shall immediately give the company notice of the discovery of any act which may be the basis of any claim under the contract. The bond also contains the following clause:

"That this bond will become void as to any claim for which the company is responsible hereunder to the employer, if the employer shall fail to notify the company of the discovery of any act which may be made the basis of any claim hereunder, immediately after it shall have come to the knowledge of the employer. And if, without previous notice to and consent of the company thereto, the employer has intrusted or shall intrust the employé with money, securities, or other personal property, after having discovered any act of dishonesty, or condones any act for which the company may be liable hereunder, or makes any settlement with the employé for any loss hereunder, this bond shall be null and void, and any willful misstatement or suppression of facts in any claim made hereunder renders this bond void from the beginning."

It appears that prior to the execution of the bond Neely had violated his trust as Chief of the Bureau of Finance of the Department of Posts of the island of Cuba by embezzling funds that came into his hands officially, and that this was known to Rathbone as Director of Posts at the time of the execution of the bond in suit, but all knowledge thereof was withheld from defendant by plaintiff until July 7, 1900; that the various embezzlements by Neely during the life of the bond were all known to Rathbone at or about the time of their occurrence, but were not made known to defendant at any time prior to October 27, 1900.

We concur with Judge Martin in the conclusion that Rathbone's failure to give notice to defendant of Neely's embezzlements invali-

dated the bond. The plaintiff designated Rathbone as agent to make the contract in suit and became party to the agreement which named him as the "employer" and required him or his successor to give the prescribed notices. It sems unnecessary to add anything to Judge Martin's discussion of this branch of the case. The case of American Surety Co. v. Pauly, 170 U. S. 133, 18 Sup. Ct. 552, 42 L. Ed. 977, and the whole group of cases to the same effect cited on the brief, do not apply, because the language of this bond differs radically from that in the Pauly Case. It unmistakably provides that the Director of Posts is the one who is to make the required statements on behalf of the obligee. It would be most unjust to let the obligee benefit by the fraudulent acts of the very person it had selected and designated as its agent for the purpose of notifying the obligor of misconduct on the part of the person for whom it became surety.

[2] 2. According to the terms of the bond, it was a condition precedent to recovery that suit should be brought by the obligee within 12 months from the filing of a claim. This certainly was not an unreasonable provision. Notice of the claim was served on defendant October 27, 1900, more than 3 years before action was begun. Plaintiff contends that this condition was waived by defendant. As was stated before, a criminal prosecution of Neely was begun in the Cuban court. On August 16, 1901, the Director General wrote to defendant, suggesting that in view of the near approach of the criminal trial the parties should "agree to let matters rest as to the entire group of bonds until conclusion of that trial, on the condition and understanding that it be without prejudice to any preliminary formal steps, so that at the end of the criminal trial issue may be joined without delay on the merits of the cases." To this proposition defendant agreed on August 20, 1901. The criminal proceedings terminated June 17, 1902. This action was begun July 11, 1904. The language above quoted would seem to imply that it was contemplated that the action should be begun by service of the summons within the year stipulated by the contract, but that no further action should be taken and issue not joined until the end of the criminal trial. But it is not necessary to give it that construction. Nor even is it necessary to hold that it was intended to extend the one-year period by such additional time as the criminal trial might take—a reasonable and proper construction as it seems to us. Certainly it contemplated and expressly provided that, when the criminal trial was ended, this action should be promptly brought, so that "issue may be joined without delay."

The government relies on Lynchburg Cotton Mill Co. v. Travelers' Insurance Co., 149 Fed. 954, 79 C. C. A. 464, 9 L. R. A. (N. S.) 654, where the contract required the institution of suit within 30 days. The court said:

"The insurer had the right to insist on the enforcement of this special limitation, but upon departing therefrom, certainly in the *absence of express stipulation to the contrary*, what was done operated, not as a suspension of the clause, but a waiver thereof."

Here, however, there is an express stipulation which clearly indicates that what was agreed to was a suspension and not a waiver.

It is unnecessary to discuss any of the other defenses which are relied upon.

The decree is affirmed.

NOTE.—The following is the opinion of the District Court, by Martin, District Judge:

MARTIN, District Judge. This action was commenced by summons and complaint July 11, 1904, upon a bond given by C. F. W. Neely, as principal, and the defendant, as surety, to E. G. Rathbone, as Director General of the Posts of Cuba, and his successor, as the employer of Neely. Issues were duly joined. July 21, 1898, the President of the United States, as Commander in Chief of the Army and Navy, made an order authorizing the extension of the postal service over the territory of Cuba, which had come into the military possession of the United States. By virtue of that order the Postmaster General made an order, under date of December 21st of the same year, appointing E. G. Rathbone Director General of the Posts of Cuba. Said Rathbone on the 7th of January, 1899, established the Bureau of Finance, so called, in his department, and, on the 11th of the same January assigned said Neely to be chief of that bureau and required him to give a bond as such chief. This he did by procuring the bond in suit October 21, 1899. The premium was paid by William H. Reeves, Assistant Auditor of the Department of Posts for the island of Cuba, out of postal funds received from that postal service. During the life of the bond said Neely embezzled from the postal funds of the island of Cuba an amount in excess of the amount of the bond, and in excess of another bond, not in suit.

The defendant contends that "no recovery can be had on this bond because, according to its terms, it was a condition precedent to recovery that suit should be brought within 12 months from the filing of a claim, and that this action was not brought within that period." Upon this point I find that notice of this claim was served upon the defendant October 27, 1900, 3 years and 9 months before this action was brought. As bearing upon this question the plaintiff introduced a letter from M. C. Fosnes, Rathbone's successor as Director General of the Department of Posts of the island of Cuba, dated August 16, 1901, addressed to the president of the defendant company, which contained the following proposal: "In view of the defensive contention indicated in your letter of collusive relations between employer and employé, affecting primarily the integrity of the bond, and in view, further, of the near approach of the criminal trial in the case of Neely et al., we will agree to let matters rest as to the entire group of bonds until conclusion of that trial, on the condition and understanding that it be without prejudice as to any preliminary formal steps, so that at the end of the criminal trial issues may be joined without delay on the merits of the cases. We expect the criminal case to be reached in the Audiencia (trial court) some time next month, although the date is yet uncertain, and the proceedings may stretch on through October." Also a cablegram sent several days later asking for reply to this letter. The plaintiff next introduced a cablegram sent by the president of the defendant August 20, 1901, to said Fosnes in reply, of which the following is a copy: "I agree your proposition letter sixteenth. Warfield." Said Warfield was president of defendant company. Nothing further occurred until the commencement of this action. The criminal proceedings to which reference was had in said negotiations terminated June 17, 1902.

The contention of the government is that by this consent of delay until after the termination of the criminal proceedings in Cuba the defendant wholly waived the provision in the bond that any suits at law or proceedings in equity brought against the bond to recover any claim thereunder must be instituted and process served upon the company within 12 calendar months next after the first notice of said claim is filed with the company (notice of claim was served upon defendant October 27, 1900), so that no action need be brought within any fixed period; while the defendant contends that about 10 months of the 12 under the terms of the policy had elapsed when this agreement for delay was made, and that the balance of the one year would begin to run at the termination of said criminal proceedings, June 17, 1902; that action was

brought about 23 months after that date, and that the words "without delay" in the Fosnes letter would indicate that there was no waiver of the fixed period in which suit was to be brought.

I do not concur in the plaintiff's claim that there was a total waiver of time in which suit might be brought, nor in the defendant's contention that suit must be brought within the 2 months after the termination of the criminal proceedings in Cuba. I think the fair construction of this correspondence is that suit must be brought with promptitude after the termination of said criminal proceedings. The language "without delay" would clearly indicate that understanding between the parties. Nothing is said in the correspondence to the effect that "without delay" should be within 2 months thereafter; but the words "without delay" must be construed in view of the requirements of the contract and all the circumstances, one of which is that insurance departments compel all surety companies to carry reserves sufficient to cover outstanding claims. This is a general rule known to everybody. Was the bringing of this suit nearly 23 months after the termination of said criminal proceedings acting "without delay"? The contract limits the right of action to one year. No claim is made that such a contract works injustice or is against public policy; hence the language used in the letter above quoted, "without delay," should be construed with the original agreement in mind. The action must be brought with reasonable diligence. How can the words "without delay" be construed to extend the time more than a year after the termination of the suits referred to in said letter? No reasonable excuse for this extended delay is shown by the evidence. I cannot find from this evidence that the plaintiff acted "without delay" in bringing the suit. On the contrary, I find that there was unreasonable delay on the part of the plaintiff in the bringing of this suit.

It is insisted on the part of the government that the government cannot be barred by a statute of limitations and that this contract simply takes the place of a statute. Statutes of limitations rest upon the presumption of payment by the lapse of time. It has been held by the Supreme Court that a right of action once existing in the government of the United States cannot be barred by a state statute. United States v. Nashville, Chattanooga & St. Louis Railway Co., 118 U. S. 120, 6 Sup. Ct. 1006, 30 L. Ed. 81, and cases there cited. Under a limitation in a contract as to time in which an action may be brought, if the action is not commenced within that time, the presumption is that no right of action existed.

The defendant further contends that "the bond in suit was made to the Director General of Posts of the island of Cuba or his successor; the United States has no interest in the bond, has suffered no loss by Neely's alleged embezzlements, and has no cause of action on the bond." While the defendant does not contend that the bond ran to Rathbone individually, it does insist that it was to the Department of Posts of the island of Cuba, in which the United States has no pecuniary interest. The facts relating to this point I need not state in extenso, as they rest upon statutes relating to intervention on the part of the United States with the people of the island of Cuba and official documents and decisions, of which any court will take judicial notice.

I do not concur in this claim of the defendants. The premium for this bond was paid under the authority of the United States, as above stated, and was accepted by the defendants knowing from what source it came. While it is true that the government of the United States turned over to the island of Cuba, at the close of the term of intervention, the postal funds received during said time, as well as other revenue received, yet the government of the United States was in authority, and Rathbone and Neely were its appointees assisting in and conducting the affairs of the Cuban people, and were acting directly for and in behalf of the United States. The United States government had the authority to appoint these men and discharge them at pleasure. Contractual relations existed between them and the United States. They owed an honest duty to this government, and the failure to perform that duty was a violation of their contract with the government and of the trust imposed in them. The United States government had the right to procure fidelity bonds for its own protection and to secure a fair deal for the Cuban people. Whether this action seeks pecuniary gain for the government of the United

States, or whether the recovery is to be turned over to the island of Cuba, I do not deem of any special importance, notwithstanding the provisions of amnesty by the Cuban government as to crimes committed, during the period of intervention, by citizens of the United States. Said amnesty, in my opinion, does not forfeit civil rights. It simply pardons crimes committed during that period—is not a release of legal liability for embezzlement.

The defendant further contends that the "bond according to its conditions became void immediately after it was made and there could be no recovery on it, because the 'employer' had knowledge of Neely's embezzlements and failed to notify the defendant company thereof as required by the bond," and it further claims that the employer's failure to give prompt notice of the assured's frauds is a breach of the contract. I find, from the evidence, that prior to the execution of the bond Neely had violated his trust as chief of the Bureau of Finance, Department of Posts of the island of Cuba, by embezzling funds that came into his hands officially, which was known to Rathbone at the time of the execution of the bond, and that Neely, subsequent to the execution of the bond, embezzled funds that came into his hands officially from time to time during the life of the bond, and that Rathbone knew of those embezzlements; that these facts known to Rathbone were not communicated to the defendant or any of its agents, either at the time of the execution of the bond or thereafterwards; and the said William H. Reeves paid the premium on the bond in question, as above stated. I find that Reeves knew at that time that both Rathbone and Neely were appropriating to their own use funds that came into their hands officially, and that he did not make that fact known to the defendant at all; that Rathbone, Neely, and Reeves were all tried for embezzlement in the Audiencia (trial court) duly established in Cuba, and convicted for that offense.

The bond provides that "the employer shall immediately give the company notice in writing * * * of the discovery of any act which may be made the basis of any claim under the policy, and shall file with the company his itemized claim, at his own cost and expense, with full particulars thereof, duly sworn to, immediately thereafter, and upon the making of such claim the bond shall cease and terminate as regards any liability for any act of the employé committed subsequent to the discovery of such loss." I see in this provision nothing unreasonable or against public policy. A provision that the underwriter shall be promptly informed of any breach of the bond by the employé often affords the underwriter an opportunity to protect itself against loss. It may bring proceedings to arrest the embezzler and secure funds embezzled, or attach property before it is put beyond reach. It surely would afford an opportunity to have the employé removed from service and promptly stop all further stealing on his part; at least, further liability under the bond would then cease. Observe the language of the contract: "Shall immediately give the company notice, * * * shall file with the company his itemized claim, * * * and upon making such claim the bond shall cease."

In the case at bar the contract designates definitely that notice shall come from the employer. Rathbone or his successor is named as the employer. This is a reasonable provision, as the employer would be most likely to first detect embezzlement. The embezzlement occurred under Rathbone, not his successor. Rathbone's failure to give notice was clearly an intended violation of the provisions of this contract. When he was designated as agent to make this contract in suit, and to name the party who should give notice, and named himself or his successor, he was acting within the scope of his power and duty conferred on him by the government. Standing in that relation, his nonfeasance was the nonfeasance of the beneficiary; surely so as between man and man. Such conduct under ordinary contracts would constitute a fraud and invalidate the bond. The surety has the right to infer that the continuance of the employé in the service of his master is, in effect, an assertion that the master has no knowledge of any criminal conduct in the service of his servant. Where silence is sure to effect deceit, silence is culpable. "Neither in morals nor in law can an obligee stand by and knowingly allow an obligor to take a risk which the former knows the latter has no intention to assume." If a man knows that his servant has betrayed his trust, and he still holds him out as a trustworthy man, it is deceit.

In Franklin Bank v. Cooper, 36 Me. 179, the defendant had executed a bond as surety for the good conduct of the cashier of the bank. The bank officers failed to inform the surety that the cashier was a defaulter at the time when the bond was executed. There was a judgment for the defendant. In the opinion of the court this language is used: "The law should be regarded as at rest upon this subject, to the extent that it is the duty of a person taking a guaranty for the good conduct of an employé to disclose the past malpractices of such employé in the course of the business to which the guaranty relates, and that if such duty is not performed the instrument so taken is ipso facto invalid. The continuance of an agent in an employment is an act so expressive of trust and confidence that it is tantamount to an express declaration to that effect, and hence it must, under usual circumstance, have all the effect of a meditated fraud, if the person so retaining the agent can be permitted to disown the implications inevitably arising from his own conduct." See, also, Smith v. The Governor and Company of the Bank of Scotland, 1 Dow. 272; Phillips v. Foxhall, L. R. 7 Q. B., 666; United States Life Insurance Co., etc., v. Salmon, 91 Hun, 535, 36 N. Y. Supp. 830; Howe Machine Co. v. Farrington, 82 N. Y. 121; Connecticut General Life Ins. Co. v. Chase, 72 Vt. 176, 47 Atl. 825, 53 L. R. A. 510. A large number of other cases may be cited in support of this doctrine, but it is so well settled that further citations are unnecessary.

Does the conspiracy of these three men to defraud affect the application of these principles of law to the case in hand? I think not. The failure of Rathbone to promptly notify the defendant of the first known act of embezzlement by Neely, in my opinion, was a violation of the plain terms of the contract. If the government seeks fidelity bonds for protection against its employés who may become thieves, it can doubtless get them by paying a sufficient sum therefor; but it should not stipulate for the giving of prompt notice, or name one of said employés as the person to give the notice, or make him its agent in executing the contract, as was done in this case. I see no reason why this contract should not be construed like any other. It does not present the question as to liability of the government for the omission or commission of acts of its servants or employés.

The learned Assistant District Attorney, Mr. Wemple, who very ably tried this case in behalf of the government, has cited several cases in support of the principle that the government of the United States is not bound "by any laches of their officers, however gross, in a suit brought by it as a sovereign government to enforce a public right or to assert a public interest." This rule of law is based upon the great principle of public policy and is applicable to all sovereign nations. It forbids that the public interests or public rights should be prejudiced by the negligence of its servants or agents. That principle applies to the interests and rights of the public that abide with the people of a sovereign nation; but if a sovereign nation should become a contracting party with some individual that contract would be construed like any other, according to the fair meaning of the language used. There are no rights or interests vested in the public until the government performs its contract. When the contract has been performed, and public interests or public rights have been established, neither malfeasance nor nonfeasance of public officers can affect those rights. If the plaintiff is to be construed as a party to this contract, it must be upon the theory that Rathbone was its duly constituted agent in making the contract. His acts and omissions were the acts and omissions of the plaintiff, and before any rights can accrue under the contract, or can become "public rights or public interests," the terms of the contract must be performed.

The government of the United States alone was responsible in the selection of these men, not only for the handling of these funds in the personal service of the island of Cuba, but for the making of this contract, and, as a contracting party, if such it was, it must see to it that the plain provisions of the contract are performed. This is no harsh doctrine and does not in any manner challenge the rights of a sovereignty. It is simply holding that a government—town, state, or nation—must stand or fall upon the terms of a contract entered into through its officers to whom are delegated contractual powers. This principle of law can work no harm to the government except as to this case, because, as I understand the practice, the government does not now accept

bonds for its protection against loss caused by official malfeasance containing provisions of this character.

It is unnecessary to discuss the other points raised in the case, for I hold: First, that the terms of the contract were not complied with and no rights accrued thereunder to the plaintiff; second, that there was unreasonable delay in bringing the suit.

Let judgment be entered for the defendant.

LANSBURGH et al. v. McCORMICK et al.

(Circuit Court of Appeals, Fourth Circuit. May 4, 1915.)

No. 1290.

1. JUDICIAL SALES ⇐9—COLLATERAL ATTACK—ERROR AS TO PLACE OF SALE.

That a public sale of real estate under a decree of a federal court was through mistake ordered and held at a place other than the courthouse of the county in which the land was situated, as required by Act March 3, 1893, c. 225, § 1, 27 Stat. 751 (Comp. St. 1913, § 1640), is not jurisdictional, and does not render the sale void nor subject to collateral attack.

[Ed. Note.—For other cases, see Judicial Sales, Cent. Dig. § 33; Dec. Dig. ⇐9.

Collateral attack on judicial sale, decree or order therefor or confirmation thereof, see note to Wood v. Browning, 100 C. C. A. 172.]

2. JUDICIAL SALES ⇐33—COLLATERAL ATTACK—ESTOPPEL.

A defendant in a decree ordering a sale of real estate, who advertised the sale by pamphlets, and, although present, neither then nor in his objections to confirmation made any objection because the sale was not held at the place designated by statute, is estopped to attack its validity collaterally on that ground.

[Ed. Note.—For other cases, see Judicial Sales, Cent. Dig. § 70; Dec. Dig. ⇐33.]

3. TAXATION ⇐674—TENANCY IN COMMON ⇐3—TAX TITLE—CAPACITY OF PURCHASER—RELATIONSHIP TO TITLE.

A decree established a lien in favor of the complainant in the suit against a large tract of land owned by the defendant, and also authorized the complainant to bring actions in the name of the defendant against trespassers claiming portions of the land; the costs and expenses, so far as uncollectible, to be a lien. *Held*, that such authority did not make him a tenant in common with the defendant so as to deprive him of the right to purchase the land at tax sale as against defendant, especially as defendant, although having knowledge of the purchase during nine years, made no offer to pay the taxes or redeem from the sale.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1357–1360; Dec. Dig. ⇐674; Tenancy in Common, Cent. Dig. §§ 5–17; Dec. Dig. ⇐3.]

4. TAXATION ⇐615—TAX TITLES—VALIDITY—CONSTRUCTION OF STATUTE.

All requirements of the law leading up to tax sales which are intended for the protection of the taxpayer against surprise and the sacrifice of his property are to be regarded as mandatory and strictly enforced, but those provisions designed merely for the guidance of the officers in order to secure due and orderly conduct of the public business concern the state only, and as to the individual taxpayer are to be regarded as directory.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1264; Dec. Dig. ⇐615.]

5. TAXATION ⇐615—SALE OF LAND FOR TAXES—CONSTRUCTION OF STATUTE.

Code, W. Va. 1913, c. 31, § 25 (sec. 1084), which in effect provides that a tax deed shall vest the grantee with title notwithstanding any irregu-

larity in the proceedings, unless the same was prejudicial and prevented the redemption of the land by the former owner, construed, and *held* constitutional and valid.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1264; Dec. Dig. ⟸615.]

6. TAXATION ⟸734—TAX SALES—VALIDITY.

Irregularities in the assessment of land and in proceedings for its sale for delinquent taxes *held* not such as to invalidate the sale as against the former owner.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1408, 1470–1473; Dec. Dig. ⟸734.]

Appeal from the District Court of the United States for the Southern District of West Virginia, at Charleston; Henry Clay McDowell, Judge.

Suit in equity by Sidney Lansburgh, administrator of the estate of Max Lansburgh, deceased, Rebecca Lansburgh, widow, and Sidney Lansburgh and others, heirs at law of Max Lansburgh, against Henry B. McCormick, Vance C. McCormick, William M. Ritter, and the Pocahontas Coal & Coke Company. Decree for defendants, and complainants appeal. Affirmed.

James M. Payne and W. E. R. Byrne, both of Charleston, W. Va., and W. C. Prentiss, of Washington, D. C. (W. R. Lacey, of Oskaloosa, Iowa, and R. G. Linn, of Charleston, W. Va., on the brief), for appellants.

Geo. E. Price and Malcolm Jackson, both of Charleston, W. Va., Z. T. Vinson, of Huntington, W. Va., and A. W. Reynolds, of Princeton, W. Va. (James L. Hamill, of Columbus, Ohio, Jos. S. Clark and Henry A. McCarthy, both of Philadelphia, Pa., Anderson, Strother & Hughes, of Welch, W. Va., Vinson & Thompson, of Huntington, W. Va., and J. J. Divine, of Welch, W. Va., on the brief), for appellees.

Before KNAPP and WOODS, Circuit Judges, and WADDILL, District Judge.

WOODS, Circuit Judge. The primary issue in this cause is whether the Pocahontas Coal & Coke Company has acquired the title of Max Lansburgh to a tract of land containing about 44,000 acres. This issue depends on the validity of two sales of the land as the property of Lansburgh, under which the coal company claims; one a sale by the order of the District Court October 20, 1897, of 16,504 acres, and the other a tax sale of the entire tract December 13, 1897. Lansburgh filed his bill on July 11, 1907, to set aside these sales. Henry McCormick, who was the purchaser at both sales, having died, his sons, Henry B. McCormick and Vance McCormick, as his executors, and the former in his own right, and Wm. M. Ritter, who received title from McCormick and conveyed to the coal company, were made co-defendants with the coal company. An accounting for timber cut and coal mined, and generally for the rents and profits, was sought against all the defendants. Lansburgh having died on June 10, 1910,

the suit was revived and an amended bill filed in the name of his administrator and heirs at law. The District Court, after a full hearing on the merits, dismissed the bill in a formal order.

The judicial sale was made under these circumstances: On June 10, 1889, Lansburgh entered into a written agreement with Henry McCormick to convey to him 10,000 acres of the large tract above mentioned, to be ascertained and surveyed as indicated in the paper, for the price of $35,000, of which McCormick paid $23,353.33. A dispute arose as to the land to be conveyed, and Lansburgh offered to refund the money paid and annul the agreement. After refusing this offer McCormick brought suit for specific performance, and by his amended bill asked that if it should turn out that Lansburgh could not make a good conveyance, then that the court decree the return of the purchase money paid, making it a lien on the land. The litigation resulted in the rescission of the contract and a judgment against Lansburgh for $27,899.37, which included the cash payment made by McCormick and taxes paid by him pending the suit. The decree provided that if Lansburgh should not pay the amount found against him within 60 days, two parcels of the land, aggregating 16,504 acres should be sold to pay the debt. At a sale made under this decree October 20, 1897, McCormick bought the land for $23,333.33. Lansburgh filed exceptions to the commissioner's report of sales, but the sale was confirmed. After applying the proceeds and a sum paid into court by the Panther Lumber Company for timber cut, a balance of $12,623.65 remained in favor of McCormick against Lansburgh, which was decreed to be a lien on the remainder of the land.

[1] This sale is attacked as a nullity because under the order of the court the sale was made in the city of Charleston, and not, as required by the federal statute, on the premises or at the courthouse door of McDowell county, in which the land lies. The court having jurisdiction to order the sale, the mistake of directing that it be made at a place different from that required by the statute did not make the sale void for want of jurisdiction, but was an error to be corrected by appeal or by direct application to the trial court. Godchaux v. Morris, 121 Fed. 482, 57 C. C. A. 434. This court, it is true, held in Cumberland Co. v. Tunis, 171 Fed. 352, 96 C. C. A. 244, that a purchaser who had purchased at a private sale, ordered by the court, contrary to the statute requiring sales to be made at auction, should be relieved from his purchase even after confirmation, upon his own application to the court wherein the cause was pending. But this is very far from holding that a purchaser who is invited by the court to rely on its order of sale would be deprived of his purchase after he has paid his bid and received the court's title, because the sale had not been made at the place designated by the statute. Indeed the court recognizes and distinguishes the case of Godchaux v. Morris. The cases holding sales made by merely ministerial officers at a place not authorized by statute to be void obviously stand on a different footing.

[2] But if the law were otherwise, Lansburgh's conduct in requesting the judge to have the decree of sale carried out as soon as possible, in advertising the sale by pamphlets, in making no objection, though

present at the sale, and in filing exceptions to the report of sale, which made no allusion to the error of ordering the sale at Charleston, would estop him from now having the sale annulled after the rights of third parties have become involved. Kirk v. Hamilton, 102 U. S. 68, 26 L. Ed. 79; Cumberland Co. v. Tunis, supra.

[3] The objections to the tax sale of the entire tract made on December 13, 1897, are more serious. Against this sale it is first alleged that Henry McCormick was either a tenant in common with Lansburgh, or stood in such trust relation to him that he could not acquire title against him at a sale for taxes. The position rests mainly on this provision of the order confirming the judicial sale above discussed:

"And, the court being advised that there are divers and sundry persons within the bounds of said tract of 50,000 acres, who claim to hold adversely tracts and parcels of land by titles inferior to the title of Lansburgh, and who have been and are committing trespass upon the same, and there being a possibility that the statute of limitations may be successfully pleaded should the prosecution of this action be extended, and no action speedily taken to stop the running of the statute, it is hereby ordered that unless the said Lansburgh, within 30 days from the date of this decree, institute actions of ejectment in his own name to recover such tracts or parcels of land, then the said complainant, Henry McCormick, or his assignee or assignees, is hereby authorized and empowered to institute and prosecute in the name of the said Lansburgh such action or actions of trespass or both as he may be advised, the expenses and costs of which, however, to be advanced by the said McCormick, whether instituted by the said Lansburgh or by the said McCormick in his name, so much thereof as shall not be recovered from the defendants in such actions of ejectment to be a charge upon said lands, subject to the order of the court."

This order was made at the instance of McCormick and opposed by Lansburgh. It therefore amounted to a voluntary undertaking on the part of McCormick to advance the expenses and look to the land for repayment if they could not be collected from the alleged trespassers. The order clearly made a community of interest in the litigation between Lansburgh and McCormick, and contemplated that any recovery of the land should be for the benefit of both—Lansburgh as owner and McCormick as lienholder—and that McCormick should have a further lien for his expenses. But it did not impose upon McCormick any other duty to Lansburgh, or any burden to pay the taxes on any portion of Lansburgh's land; and the record affords no evidence that McCormick in any other way assumed burdens either expressly or impliedly. Suits were brought in the name of Lansburgh for the recovery of the lands referred to, the declaration being signed by E. L. Buttrick, S. L. Flournoy, and M. F. Stiles as plaintiff's counsel. Mr. Flournoy was counsel for Lansburgh in his litigation with McCormick. He and Mr. Buttrick, McCormick's attorney in the litigation with Lansburgh, died before the trial of this cause. Mr. Stiles was brought in to assist in the ejectment cases, and testified to his recollection of the relations of the parties. His evidence and the letters of Mr. Flournoy written to Lansburgh's counsel in Washington show that McCormick retained all the attorneys in the ejectment suits; that Flournoy communicated to Lansburgh's counsel in Washington, where Lansburgh lived, his acceptance of employment from McCormick because of his belief that McCormick and Lansburgh had a common interest in the

recovery of the land, and that it would inure to Lansburgh's benefit; that although Mr. Stiles had nothing to do with the tax sale, his impression was that McCormick made the purchase at the sale as a means of perfecting the title against the alleged trespassers; and that it was not intended that the title acquired by McCormick should be set up against Lansburgh. If this were all, there would be ground to say that McCormick sustained such relation to Lansburgh that he could not set up the tax sale against him. But on the other hand, there are these considerations: Lansburgh knew the taxes were assessed against his land, and he took no notice of the matter, though he must have known a sale would result unless they were paid; McCormick had assumed no obligation to pay the taxes, and Lansburgh had no reason whatever to suppose he would pay them; notice by letter from Mr. Flournoy to Lansburgh's home counsel that McCormick's son had bought at the tax sale, warning that he would lose the land unless he redeemed it within a year, and urgent advice that he take action and redeem the land were all ignored. This letter shows that Flournoy considered the purchase adverse to Lansburgh, and put him on notice that McCormick did not understand he was under any duty to pay the taxes or hold the purchase in trust. Thus Lansburgh not only refused to pay the taxes, but refused to redeem the land after it was sold for taxes. Even if there had been such relation and such concert of action contemplated at the time the order providing for the ejectment suits was made as would preclude McCormick from acquiring a tax title against Lansburgh, it is impossible to resist the conclusion that Lansburgh repudiated the relation and left McCormick to take care of his own interest as best he could. This refusal was continued by inaction for nine years, without recognition in any way by Lansburgh of a correlative duty to pay the taxes or the purchase money of the tax sale. Equity must hold such a decisive and indisputable repudiation of the burdens to carry with it a repudiation of the relation out of which the burdens arose, and an abandonment of any claim to benefits from such relation. Beyond this, Lansburgh's course of conduct is in itself the strongest affirmance of the defendant's position that Lansburgh, as well as McCormick, understood they were dealing at arm's length, with no obligation on the part of McCormick except that imposed by the order of the court to advance the expenses of the ejectment suits.

At the time of the tax sale there was no relation of cotenancy. McCormick had acquired in severalty 16,504 acres of the tract, and he was a mere lienholder as to the remainder. As the taxes had accrued before McCormick had acquired the tract of 16,504 acres he owed no duty to pay the taxes; on the contrary, the duty was on Lansburgh to pay them. There was nothing then in the legal relations of the parties that forbade McCormick to buy Lansburgh's interest at a tax sale. Summers v. Kanawha, 26 W. Va. 159; Holt v. King, 54 W. Va. 441, 47 S. E. 362; Towle v. Shelly, 19 Neb. 632, 28 N. W. 292; 37 Cyc. 1347. But even if there had been such relation, it was repudiated by Lansburgh.

[4, 5] The next inquiry is whether there was such failure to comply with the laws of West Virginia as made the tax sale invalid. In con-

sidering the grounds of attack, it should be borne in mind that the right to tax property, so essential to the very existence of government, can be enforced only by subjecting property to sale for nonpayment of taxes assessed against it. To hold tax sales invalid for slight and technical irregularities would therefore be to embarrass the state in the collection of its revenue. The sound view is that all requirements of the law leading up to tax sales, which are intended for the protection of the taxpayer against surprise and the sacrifice of his property, are to be regarded mandatory and to be strictly enforced. On the other hand, those provisions of the statute, designed merely for the guidance of the officer in order to secure the due and orderly conduct of the public business, concern the state only, and, as to the individual taxpayer, are to be regarded directory; and the courts will not in his behalf declare a tax sale void for failure by the officer to follow the strict letter of such provisions of law. Cooley on Taxation, 471; French v. Edwards, 80 U. S. 510, 20 L. Ed. 702; Gerke Brewing Company v. St. Clair, 46 W. Va. 93, 33 S. E. 122; Mosser v. Moore, 56 W. Va. 478, 49 S. E. 537. The statute of West Virginia provides:

"When the purchaser of any real estate so sold, and not redeemed as aforesaid, his assignee, or heirs or devisees, shall have obtained a deed therefor according to the provisions of this chapter and caused the same to be admitted to record in the office of the clerk of the county court of any county in which such real estate or any part thereof may be, such right, title and interest in and to said real estate, as was vested in the person or persons charged with the taxes thereon for which it was sold, at the commencement of, or at any time during the year or years for which said taxes were assessed, and all such right, title and interest therein of any other person or persons having title thereto, who have not in his or their own name been charged on the land books of the proper county or assessment district, with the taxes chargeable on such real estate for the year or years for the taxes of which the same was sold, and have actually paid the same as required by law, shall be transferred to and vested in the grantee in such deed, notwithstanding any irregularity in the proceedings under which the same was sold, not herein provided for, unless such irregularity appear on the face of such proceedings of record in the office of the clerk of the county court, and be such as materially to prejudice and mislead the owner of the real estate so sold, as to what portion of his real estate was so sold, and when and for what year or years it was sold, or the name of the purchaser thereof; and not then, unless it be clearly proved to the court or jury trying the case, that but for such irregularity the former owner of such real estate would have redeemed the same under the provisions of this chapter." West Virginia Code 1913, § 1084.

[6] It is a violation of constitutional right to make a tax deed conclusive evidence of the validity of the sale (Marx v. Hanthorn, 148 U. S. 172, 13 Sup. Ct. 508, 37 L. Ed. 410), but this statute does nothing more than make the deed prima facie evidence, with the additional provision that it shall be valid unless the irregularity was prejudicial, and that but for the irregularity the owner would have redeemed the land. This is another way of saying that technical irregularities, which produced no harm and interfered in no way with the redemption of the land by the owner, shall not make a tax sale invalid. We think there is no constitutional objection, founded in reason or authority, to such a provision of law. It facilitates the collection of the revenues of the state, and it imposes no unreasonable burden on the citizen, who is always charged with knowledge that taxes on his land are due to

the state, and that it will be sold in case of default. The statute was given full effect in Hamill v. Glover (W. Va.) 81 S. E. 970. The irregularities here alleged were: Insufficient advertisement of the sale; the designation of the location as Big Creek district instead of Sandy River district; designation of the owner as "Max Lausburg" instead of Max Lansburgh; inclusion in the number of acres mentioned of a portion of the tract lying in the state of Virginia. Such irregularities, occurring in the proceedings looking to the sale, are, under the case cited, unavailable to Lansburgh, because there is no proof that they were prejudicial, or that he would have paid the taxes or redeemed the land but for them. On the contrary, the evidence tends to show that he must have known the land was delinquent, and that he took no heed of the fact.

Similar irregularities in the assessment, it seems, do not fall under the statute; and as to these, strict compliance with the law is necessary to the validity of a tax sale. Male v. Moore, 70 W. Va. 448, 74 S. E. 685. It is alleged that the assessment was—

"null and void in that it was attempted to be made and purported to be upon the whole of your orator's land described as 44,350.5 acres, including the part thereof lying in the state of Virginia, as well as the portion thereof in said McDowell county, and was not apportionable, and in its description of the land attempted to be assessed the said assessment was fatally vague and indefinite, in that it described said land merely as 44,350.5 acres, Panther, Dry Fork and Bradshaw, in the Sandy River district."

If this defect were set up by another person interested in the land it might present a serious question under the authority of the case last cited. So also if the assessment or delinquent list had contained no description at all it would be held fatal even as against the owner. Mosser v. Moore, 56 W. Va. 478, 49 S. E. 537. But an inadequate description in the assessment proceedings, or the inclusion of a larger area than was proper, cannot avail one who was the owner at the time of the assessment and the time of the sale, for the reason that the assessor is required by law to obtain from the owner the description of the land. Code of West Virginia, § 898. The presumption therefore is that the description was furnished to the assessor by Lansburgh, and he cannot now allege that it was insufficient or incorrect after the rights of other persons have become involved. We conclude there is no illegality in the tax sale available to Lansburgh.

There would be no value in an analysis of the mass of testimony relating to the details of the sale by McCormick to Ritter. Careful consideration of all of it leads to these conclusions: McCormick, annoyed and vexed by the long and expensive litigation and the uncertainty as to the title, was very anxious to sell all his interest, and believed that he had acquired whatever title Lansburgh had. He also believed with good reason that Lansburgh had abandoned all claim to the land. Ritter, in proposing to purchase tried to get the best bargain he could, and had no other interest in the matter. The price of $60,000 was obviously inadequate for a clear title, but other persons were setting up claims, and McCormick accepted the low price in order to escape further trouble. The record furnishes no sufficient evidence of an intention to defraud Lansburgh by collusion between

McCormick and Ritter or otherwise. It is true McCormick conveyed only his interest, but the purchaser Ritter acquired every right, both legal and equitable, which McCormick had, and, as already indicated, McCormick had acquired all of Lansburgh's interest.

Importance was attached in the argument to the fact that Mr. D. L. Flournoy, who represented Lansburgh in his litigation with McCormick, and who died before this suit was brought, was one of the representatives of McCormick in negotiating the sale of Ritter. In the light of subsequent events it was unfortunate that Flournoy took this course without the express and direct statement of Lansburgh that he regarded his title lost; but careful scrutiny of the record leads to the clear conclusion that he believed, and had good reason to believe, that Lansburgh had abandoned all claim to the land when he failed to accept his advice and redeem it after the tax sale. For this reason his action leaves no shadow on his fair name.

In meeting the charge that Flournoy and his associates had betrayed the trust which as counsel they owed to Lansburgh, all communications written and oral between them and Lansburgh or his counsel in Washington were clearly admissible in their vindication. Hunt v. Blackburn, 128 U. S. 464, 9 Sup. Ct. 125, 32 L. Ed. 488; Grant v. Harris, 116 Va. 642, 82 S. E. 718. We conclude: First, that Lansburgh's interest passed under the judicial and tax sales; and, second, if he had any legal or equitable right afterwards, he lost it by his laches.

Affirmed.

WILHELMSENS DAMPSKIBAKTIESSELSKAB et al. v. CANADIAN VENEZUELAN ORE CO., Limited, et al.

AKTIESELSKABET C. MATHIESENS REDERI v. SUBCHARTER FREIGHT, ETC., et al.

(Circuit Court of Appeals, Second Circuit. March 9, 1915.)

Nos. 195, 196.

1. PRINCIPAL AND AGENT ⇐132—AGENT'S CONTRACT—VALIDITY—OFFER AND ACCEPTANCE.

After negotiations between the agent of a time charterer of certain steamships, who had general authority to make subcharters, and a proposed subcharterer, the latter prepared a written contract of subcharter for two years, which was sent by mail to such agent for signature. In his answer he referred to the contract and stated that before signing he desired explanation or modification of two clauses therein, and his suggestions in both respects were agreed to by a letter in response. In a subsequent letter it was stated that to save any question the subcharterer requested that the contract be signed by an officer of the corporation time charterer expressly authorized by its by-laws to execute such instruments. *Held* that, by the agreement between the subcharterer and the agent of the time charterer, who was in fact authorized to execute the contract, upon all the terms of such contract, the minds of the parties met, and a valid contract was made, binding on both; the incorporation of the contract by reference in the letter of the agent being a sufficient "memorandum in writing" signed by "the lawful agent of the party to be charged" to satisfy the statute of frauds, and that such contract was not

invalidated by the subsequent refusal of the president of the time charterer to sign it.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 459, 467–471; Dec. Dig. ⊂⊃132.]

2. ADMIRALTY ⊂⊃47—FOREIGN ATTACHMENT—DEFENSES BY GARNISHEE.

A garnishee under a foreign attachment in admiralty may set off a claim in his favor against the respondent, notwithstanding the fact that it is one not cognizable in admiralty.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 396–403; Dec. Dig. ⊂⊃47.]

Ward, Circuit Judge, dissenting.

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

These causes come here upon appeal from decrees of the District Court, Southern District of New York, in favor of libelants. The questions presented are the same in each case and it will tend to simplify the matter if the facts in the first case only are discussed in this opinion. The libelant is hereinafter called the Wilhelmsens Company or the shipowner; the respondent is called the Canadian Company; the garnishee is called the Inter-American Company.

R. Leech, of New York City, for appellant.

Haight, Sandford & Smith, of New York City (John W. Griffen, of New York City, of counsel), for appellees Wilhelmsens Dampskibaktiesselskab and others.

Convers & Kirlin, of New York City (J. M. Woolsey, of New York City, of counsel), for appellee Aktieselskabet C. Mathiesens Rederi.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge. Libelant, owner of the steamship Trafalgar, brought suit in admiralty against the Canadian Company for unpaid charter hire. No one disputes the finding of the District Court that respondent owes libelant over $5,000 for such unpaid charter hire. Process in such suit was issued, with clause of foreign attachment against respondent's credits, effects, etc., in the hands of the Inter-American Company. No one disputes the finding that there is due by the latter company to the Canadian Company the sum of $1,823.25 for unpaid charter hire under a subcharter of the Trafalgar by the Canadian Company to the Inter-American Company. The latter company, however, set up a prior cause of action of itself against the Canadian Company for breach of contract, alleging that the damages therefrom would greatly exceed the amounts which might be due to the Canadian Company for charter hire of the Trafalgar and the Imataca (the steamship with which the second suit is concerned). It therefore denied that there were any credits in its hands belonging to the Canadian Company. The District Court found that the damages resulting from the breach of this alleged contract—if the making of the contract were proved—will exceed all unpaid charter hire due from the Inter-American to the Canadian Company on vessels subchartered by the latter to the former. No one disputes this finding. The District Court, however, found that no contract such as the garnishee set up had been proved, and therefore entered decree that libelant recover

from the garnishee "the said sum of $1,823.25 belonging to the Canadian Company, which sum is in the hands of said garnishee." From that decree the garnishee appeals.

[1] The first question to be determined is whether such contract was made. Its general character is set forth correctly by the Commissioner (whose report was confirmed by the District Judge without opinion) as follows:

"The contract is alleged to be set forth in an unsigned writing * * * the substance of which was that the Canadian-Venezuelan Company should furnish the Inter-American Company with steamers for the carriage of all coal provided by the Inter-American Company for shipment from Philadelphia, Norfolk, or Newport News, at the Inter-American Company's option, to St. Lucia or Port of Spain, during the years 1914 and 1915, and that for such transportation the Inter-American Company should pay freight at the rate of $1.55 per ton. The paper contains various stipulations appropriate for such a contract, and in form is a complete contract."

The facts which, it is contended, evidence the making of such a contract, although the formal writing was not signed, may be thus summarized from the detailed narrative in the commissioner's report:

The head office of the Canadian Company was in Montreal; it had a branch office in Philadelphia, in charge of Mr. Stephens, its purchasing agent. The duty of finding business for and subchartering his company's chartered steamers had been delegated to him, and he had negotiated and signed many such contracts on behalf of his principal. His authority to make such contracts was disputed on the argument, it being contended that, although he did sign a number of charters on behalf of the Canadian Company, it did not appear whether he had general authority to do so, or whether he did so by special authority in each case; it being suggested that the by-laws were not in evidence, nor any evidence shown of action by the board of directors. We are satisfied that a prima facie case was made out on the question of his entering into binding contracts of this sort; if the by-laws and the records of the company might impair the strength of this case, it was for libelant to show what they were.

Mr. Wrigley, of the NewYork & Porto Rico Steamship Company, shipbrokers, acting on behalf of the Inter-American Company, and Mr. Black, of Bowring & Co., shipbrokers, acting for the Canadian Company, had many interviews and telephone conversations in reference to a proposed contract. Black during these negotiations was in constant communication with Stephens and followed his instructions. The contract under negotiation was one whereby the Canadian Company, which had a number of chartered vessels that were available, should furnish tonnage to the Inter-American Company for the carriage of coal to Port of Spain and St. Lucia during 1914 and 1915. The Inter-American was under contract with the Royal Mail Steam Packet Company to supply it with coal at those places and required steamers to fulfill that contract. The negotiations began early in November, 1913. Not only the price, but also other terms, were subjects of discussion. On November 10th a rough memorandum was drawn up, noting some of these proposed terms—number of sailings, etc. On November 14th a somewhat fuller one was prepared, containing a noticeable change in the phraseology as to number of sailings. On No-

vember 11th Black wrote to Stephens at some length as to the requirements of the other negotiator. We are fully satisfied from the testimony that by November 17th both negotiators and Stephens personally had a reasonably definite understanding of what were to be the terms of the contract that Wrigley for the Inter-American would be willing to agree to. Of course, in all such contracts there are some clauses of a general character which negotiators presuppose will be included, without preliminary discussion. On November 17th, agreement was reached as to the rate per ton; Stephens authorizing an acceptance of the $1.55, which Wrigley had continually insisted on. Thereupon Wrigley prepared and delivered to Black a written contract bearing date November 17th, which the latter at once transmitted to Stephens informing him that it had just been handed him by Berwinds' broker for signature, and requesting him to "sign and return it, whereupon the customary number of copies would be issued." The document was a detailed one; it dealt with class of steamer, amount of service required, period covered by the contract, shipping ports, destination, rate of freight, shipments, rate of loading, rate of discharge, dispatch money, agency, stevedores, bunker coals, coal, form of charter party (inclosing a copy attached), option, commission, etc.

In reply Stephens wrote on November 19th acknowledging receipt of letter of "the 18th inclosing original contract," and adding:

"Before signing same there are one or two points we desire to take up with you."

These points he enumerates as follows:

"Dispatch Money. We note we are to allow dispatch money at the rate of 5 cents per net register ton for each and every lay day or part of lay day saved in discharging. We presume that the intention is that on parts of lay days saved that we will pay only a proportionate rate. Are we correct in this?

"We also note that the merchants have the option of stating what the amount of cargo will be; that is, between 2,500 and 3,600 tons. In the preliminary negotiations we did not understand it that way. Our understanding was that we could use steamers which would not carry less than 2,500 tons or more than 3,600 tons. As it now reads, it can be worked out to a great disadvantage to us. For instance, should we put the Trafalgar in, which steamer will be able to carry about 3,200 tons of coal, and they would not load more than 2,500 tons, you can readily see that we would be in a very bad position.

"Will you please explain these points to us and oblige."

This letter was signed in the name of the Canadian Company. Bowring & Co. replied to this on November 20th as follows:

"Dispatch Money. It is understood by merchants that this clause is intended to mean at the rate of 5 cents per net registered ton for each and every lay day or part of a lay day saved in discharging. The words 'at the rate of,' they tell us, are intended to mean the same as pro rata; that is, if there is part of a lay day saved, it is at the pro rata rate of 5 cents per net register ton per day.

"Regarding the amount of cargo, this is a mistake. It should read 'at time charterer's option,' and we shall be glad if you will change this accordingly."

When Bowring & Co. thus agreed to the only amendments suggested to the form of contract, the minds of the parties met and a contract was entered into. Moreover, we are of the opinion that the

Stephens letter of November 19th, which by reference incorporated in its text the full form of contract, constituted a "note or memorandum in writing" signed by the "lawful agent of the party to be charged," within the meaning of the statute of frauds. We are also inclined to the opinion that the libelant, a third party, cannot avail of this statute. Stitt v. Ward, 142 App. Div. 626, 127 N. Y. Supp. 351.

The next question to be considered is whether certain other facts negative the conclusion that the minds of the parties met on November 20th, so that a contract was then entered into.

Bowring & Co.'s letter of November 20th, above quoted from, concluded with the following paragraph (it may be noted the word "Berwinds" means the Inter-American Company):

"Berwinds have brought up the point about the signing of this contract, and request that same be signed by an officer of your company who is properly authorized to sign such contracts under your by-laws. They ask us to be sure to tell you that they in no way wish to hurt your feelings, but they recently had a coal contract which was signed by the purchasing agent of a company, and when that company got into difficulties it was shown that as purchasing agent that party had no authority to sign such contracts, as that company's by-laws only allowed certain officers of the company to sign. This being a two, option of three, year contract, they are anxious to have it properly signed, and we shall be obliged if you will see that the contract is properly signed as desired by them."

Thereupon the form of contract and letter were sent to Montreal for signature of the contract. The president of the company, Jones, refused to sign it, and made suggestions of several changes. A long correspondence ensued, the Inter-American trying to meet Jones' wishes in the matter. Finally he refused to sign it, even as modified, for the expressed reason that he doubted the Canadian Company's ability to carry it out. Shortly afterwards that company went into liquidation.

We do not agree with libelant's contention that the last quotation from Bowring & Company's letter indicates that Stephens had no authority to sign and that Bowring's client knew that he had not. All that it indicates is that, although the writer supposed Stephens had authority, he did not wish his parties, in the event of subsequent litigation, to be put to the trouble of proving such authority. The real and only question arising on this branch of the case is whether Stephens *did* have authority to make and sign such a contract. The evidence in this record shows that he did have authority, and, since he did, his principal was bound when his mind met with the mind of the other party as to the terms of the contract. Their minds did meet on November 20th when Stephens' only criticisms of the proposed form were accepted and agreed to, and contract was then entered into. We are not persuaded that defendant lost any of its rights under this contract, because subsequently it endeavored to reach some agreement with the president of the Canadian Company as to modification of some of its terms.

[2] One more question remains to be considered. The claim of the Canadian Company against the Inter-American for unpaid freight is a claim in admiralty. It is contended that, if it were being prosecuted

by the Canadian Company in an admiralty proceeding, defendant's claim for damages for breach of the contract above referred to could not be set off against it. Such is the practice in admiralty, and it sometimes will work injustice. For example, A., a person utterly insolvent, may have a valid claim justiciable in admiralty for $3,000 against B., who is entirely solvent, and who may hold a note of A. for $5,000 borrowed money, long past due. If A. sues in admiralty, he may obtain judgment for the $3,000 and collect it in full; the $5,000 due B. not being allowed as counterclaim or set-off. Judgment which B. might recover in some other court for the $5,000 will be worthless, since A. is insolvent.

A majority of the court are unwilling to extend this practice to a proceeding in admiralty where B. is brought in solely as a garnishee. We do not think the authorities require us to do so. Schuler v. Israel, 120 U. S. 506, 7 Sup. Ct. 648, 30 L. Ed. 707; North Chicago Rolling Mill v. St. Louis Ore Co., 152 U. S. 596, 14 Sup. Ct. 710, 38 L. Ed. 565; Thebideau v. Cairns (D. C.) 171 Fed. 233; Aktiesselskabet Borgestad v. Munson Steamship Line,[1] an opinion of Judge Hough holding that the sole question in garnishee proceedings is, how much does the garnishee owe to the respondent? in which holding a majority of this court fully concurs.

The decrees are reversed, with costs of appeal, one-half in each cause, and causes remanded, with instructions to dismiss the libels, with costs.

WARD, Circuit Judge (dissenting). I concur in the opinion of the court, except as to the extent of the garnishee's liability to the attaching creditor. The decree should be affirmed, because the amount due to the garnishee for charter hire to the respondent, $1,823.25, is not subject to any set-off or counterclaim in admiralty arising out of other independent transactions. The court cites two common-law cases, viz., Schuler v. Israel, 120 U. S. 506, 7 Sup. Ct. 648, 30 L. Ed. 707, which holds that the garnishee may set up any defense against the attaching creditor which he can set up against the defendant; and North Chicago Rolling Mill Co. v. Ore Co., 152 U. S. 596, 14 Sup. Ct. 710, 38 L. Ed. 565, which holds that the rights of the attaching creditor do not rise above those of his debtor. Now it is perfectly well settled, as indeed the court finds, that in the admiralty set-offs and counterclaims arising out of independent transactions are unknown. Benedict on Admiralty, § 392, and cases cited. This is recognized in Supreme Court rule in admiralty 53 as to cross-libels, which restricts them to cross-demands "arising out of the same cause of action." It follows from the cases cited by the court to the effect that the rights of the attaching creditor are exactly the same as, and no more and no less than, the rights of the defendant, that the garnishee cannot set up against the attaching creditor set-offs or counterclaims which he cannot set up against the respondent. Therefore the writ in this case covers the unpaid charter hire due by the garnishee to the respondent.

[1] See note at end of case.

As to the two admiralty decisions cited by the court, it is to be noted that in Thebideau v. Cairns (D. C.) 171 Fed. 233, the question does not seem to have been raised; certainly Judge Hale did not discuss it. In the case of Actieselsskabet v. Munson Line [1] Judge Hough says the sole question is, how much does the garnishee owe to the respondent? The question, I think, is not this at all, but how much can the respondent recover in a suit in admiralty against the garnishee? This sum, whatever it is, the writ of the attaching creditor covers.

NOTE.

In the District Court of the United States for the Southern District of New York, per Hough, District Judge, in the cause entitled "Aktiesselskabet Borgestad, Owner of the Steamship Brynhild, Libelant, against Subcharter Hire Due Canadian Venezuelan Ore Company., Limited, from Munson Steamship Line, and against Canadian Venezuelan Ore Company., Limited, Munson Steamship Line, Garnishee," handed down an opinion as follows:

"The history of foreign attachment in admiralty is treated in Smith v. Mien, Fed. Cas. No. 13,081. It is an adaptation of civil law, not a borrowing from common law or the custom of London. The rule that a cross-libel must rest on or grow out of the same transaction as the one sued on in original libel rests in our Supreme Court rules. See United, etc., Co. v. N. Y. & Balt. Trans. Line, 185 Fed. 386, 107 C. C. A. 442. We have extended the cross-libel rule to set-offs. Emery v. Tweedie Trading Co. (D. C.) 143 Fed. 144.

"Now this libelant wishes to treat the garnishee as though he were a respondent pleading a set-off or counterclaim. This would be logical, if the garnishee were being sued by the libelant on a cause of action cognizable in admiralty. But a libelant need have no cause of action at all against a garnishee. He usually has none. This case is an example of the usual condition. The sole question in garnishee proceedings is, How much does the garnishee *owe* to the respondent? How much is owed is to be ascertained according to general rules of law; if conflict arises, civil law.

"The garnishee's exceptions are without merit. He has been allowed his real damage. All exceptions overruled. The correction in figures agreed on has been physically affixed to the commissioner's report."

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[1] See note at end of case.

JACKSON v. JACKSON et al.

(Circuit Court of Appeals, Fourth Circuit. May 4, 1915.)

No. 1317.

1. PARTNERSHIP ⟸72—CONTRACTS—RIGHTS AND OBLIGATIONS OF PARTIES.
A contract between four persons, which recited that each agreed to furnish an equal amount of money sufficient to option and control a coal field, and which declared that each should share alike in all the options taken, executed when they expected that $5,000 would finance the scheme, which sum was paid by each paying his share, imposed on each to pay his share of any additional sum necessary to carry out the object; and, where one of them refused to put up his share of an additional sum, his associates were not bound by the provision to share alike in all options taken, and a decree awarding his assignee a share, determined by the ratio which $1,250 bore to the aggregate sum contributed by all the parties out of the gross profits realized, gave adequate relief.
[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 117; Dec. Dig. ⟸72.]

2. PARTNERSHIP ⟸306—CONTRACTS—RIGHTS AND LIABILITIES OF PARTIES.
H., A., W., and G. entered into a contract stipulating that each would furnish an equal amount of money sufficient to option and control a coal field. Each contributed $1,250, but it developed that a further sum of $8,000 was needed. W. refused to pay his share of the $8,000, and his associates paid the same. H. subsequently executed an assignment, which recited that W. was the owner of a fourth undivided interest. A. and G. knew nothing of the transfer until long afterwards, and H. was not personally concerned, for he took the assignment for the sole purpose of turning it over to the wife of W., which he did on the same day. *Held*, that there was no recognition of the right of W. to share equally in the profits realized by his associates after his refusal to make his contract contribution.
[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 706–709; Dec. Dig. ⟸306.]

3. JUDGMENT ⟸241—SEPARATE JUDGMENTS—ASSIGNEE.
Where an assignee of one of four partners was entitled to recover against the remaining three partners, it was not error to direct a separate judgment against the three.
[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 426; Dec. Dig. ⟸241.]

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

Suit by Ida G. Jackson against Henry C. Jackson and others. From a decree granting insufficient relief, complainant appeals. Affirmed.

James S. McCluer, of Parkersburg, W. Va. (McCluer & McCluer, of Parkersburg, W. Va., and William G. Cavett, of Memphis, Tenn., on the briefs), for appellant.

W. H. Wolfe and B. M. Ambler, both of Parkersburg, W. Va. (Van Winkle & Ambler and William Beard, all of Parkersburg, W. Va., on the briefs), for appellees.

Before KNAPP and WOODS, Circuit Judges, and CONNOR, District Judge.

KNAPP, Circuit Judge. The opinion of this court on the former appeal (Jackson v. Jackson, 175 Fed. 710, 99 C. C. A. 286) contains a full statement of the facts out of which the litigation arose, and of the issues which were then determined, and a brief summary will suffice for the questions that remain for decision. The basis of the suit is a contract which reads as follows:

"This, the first day of November, 1899, Henry C. Jackson, A. B. White, W. W. Jackson, H. B. Nye and G. A. Newlon enter into the following agreement between themselves; that is to say, that they each agree to furnish an equal amount of money sufficient to option and control the Gilmer County Coal Field, and do hereby appoint G. A. Newlon their lawful agent to manage and direct said business in every respect that he may deem conducive to the interests of the said parties above named.

"That the said Henry C. Jackson, A. B. White, W. W. Jackson, H. B. Nye and G. A. Newlon shall share alike in all the options so taken on said coal in said fields, until such time as the parties hereto may decide to take no more options on said coal."

This contract was executed about the time of its date by all the parties named, except Nye, who for some reason did not go into the venture. It seems to have been expected at the outset that $5,000 would be sufficient to finance the scheme, and accordingly each of the four signers put in $1,250. In the course of the next few months options were obtained on something like 25,000 acres of coal lands, situated in the locality mentioned, and those options were ultimately disposed of at a profit which was at least several times the amount of the original contribution. The principal matters now in dispute are: (1) The amount of net profit actually realized from the operation; and (2) the share of the same to which the plaintiff, who sues as assignee of her husband, W. W. Jackson, is entitled. As the latter question is the more important it will be first considered.

[1] We deem it quite unnecessary to review the great mass of testimony, which extends through more than 300 pages of the printed record, because in our view the question in hand turns upon facts which lie within narrow compass and are wholly undisputed. It was one thing to get options on these coal properties, which were secured for speculative purposes, and quite another thing to dispose of them to advantage before they expired. Much difficulty was experienced, and many complications, arose even in the early stages of the undertaking. Among other things, it was found that other parties, known as "Nease and Associates," had entered the field with the same object in view, and some arrangement had to be made with this hostile group of promoters. Without going into details, it is sufficient to state that by the beginning of May, 1900, the situation became such as to threaten entire failure unless the sum of $8,000 or thereabouts could be provided to keep the enterprise afloat. White, Newlon, and H. C. Jackson were ready to advance their proportion of this amount, but W. W. Jackson declined to make any further contribution. He was asked, and even urged, to come in with his share, but persistently refused to do so, whether from lack of means or confidence is not altogether certain. Upon his election to stay out, the other three put up the needed money, with the result that the total investment was $13,789.85, of which W. W. Jackson contributed $1,250, H. C. Jackson $3,595, White $3,595,

and Newlon $5,349.85. Nor did W. W. Jackson do anything to aid his associates in the long and doubtful struggle which followed, and no credit was due to him for the measure of success which good fortune finally brought. Indeed, his secret dealings with the Braxton Coal Company, which was organized in pursuance of the agreement of May 5, 1900, was clearly adverse to the common interest and inconsistent with his partnership obligations.

Nevertheless, it is insisted that the plaintiff, who on the 11th of April, 1901, succeeded to whatever rights W. W. Jackson then had, should be awarded one-fourth of the realized profits, and this on the theory that the contract of November 1, 1899, created a partnership between the parties thereto, that the capital of this partnership, and its only capital, was the $5,000 originally contributed, and that the subsequent investments by the other members of the firm, when W. W. Jackson refused to go any further, were in legal effect nothing but loans to the partnership, which were of course to be repaid to them, as though borrowed from an outsider, but which did not change the basis for dividing the surplus that remained after paying the debts and expenses.

We are unable to sustain this contention. The partnership in question, to call it such, had no fixed or definite capital. The agreement of the parties was that each of them would furnish "an equal amount of money sufficient to option and control the Gilmer county coal field," and this plainly implied the obligation of each to furnish one-fourth of whatever sum proved necessary to carry out the project. This obligation W. W. Jackson failed to perform. He did not deny, when called upon for his share, that the further sum of $8,000 was needed, nor did he raise any question as to what was to be done with the money. He simply declined to take any risk beyond the $1,250 already invested, and so left the others to the alternative of providing the necessary funds themselves or allowing the whole scheme to go by the board. They had the courage to go on without him, and there is no reasonable doubt that the venture was saved, almost in spite of W. W. Jackson, by the efforts of the other parties and the additional $8,000 which they contributed; and, in our estimation, this $8,000 was just as much "capital" as was the $5,000 put in originally.

[2] Taking all the circumstances into account, it seems plain to us, when W. W. Jackson refused to put up his share of the amount required to avoid disaster, that his associates were no longer bound by the contract provision to "share alike in all the options so taken." Events had developed an entirely new situation, and this refusal on his part operated to recast the prior relations of the parties. Nor are we satisfied that the defendants at any time afterwards recognized the right of W. W. Jackson to share equally with them in the benefits realized by their unaided efforts. Much is sought to be made of a recital in the assignment from him to H. C. Jackson on the 11th of April, 1901, that he "was the owner of a one-fourth undivided interest." But this recital loses its significance when it is remembered that White and Newlon knew nothing of this transfer until long afterwards, and that H. C. Jackson was not personally concerned because he took the assignment for the sole purpose of turning it over to the plaintiff, which he did on the same date.

There is no occasion for extended discussion. As we see the matter it comes to this: The mutual promise in the first contract to furnish an equal amount of the necessary funds for controlling these coal options was the essential condition of the right to an equal share of the expected gains, and when one of the parties failed to meet this condition, the others were absolved from the corresponding obligation. In other words, the contract upon which the plaintiff bases her claim was broken by the failure of her husband to bear his share of the financial burden, and she therefore cannot recover what it would be inequitable for him to receive. The court below held that her just share was determined by the ratio which $1,250, the sum contributed by W. W. Jackson, bears to $13,789.85, the aggregate sum contributed by all the parties, and we are of opinion without further comment that she is not entitled to a more favorable division.

It was found by the special master, and his finding has been confirmed by the trial court, that the gross profit realized was $48,353.48, but the plaintiff asserts that it was $11,000 more, or a total of $59,353.48. The difference between these two amounts is the profit resulting from the purchase and sale of the so-called Maxwell land. Concerning this transaction the special master reported as follows:

"The master finds from the evidence that W. W. Jackson or Ida G. Jackson is not entitled to participate in any profits paid to the owners of the fee of the Maxwell land. The evidence is clear that A. B. White and others (W. W. Jackson not included) bought this land outright and sold it outright to the purchasers of the coal options, and are entitled to whatever profits there may have been in the deal without accounting to W. W. Jackson for any part of the same. The evidence further shows that the coal underlying this land was included in the sale of the other coal options, and that A. B. White and others (W. W. Jackson not included) got their share of the profit from the coal, and such profit is included in the amount of gross profits determined above."

It would serve no useful purpose to review the evidence and argument respecting this disputed item. We are satisfied after careful examination that the conclusion of the special master is supported by adequate testimony. There is certainly no such preponderance of opposing proof as to justify us in setting aside a finding which has been passed upon and approved by the court below. It is sufficient to say that in our judgment this $11,000 was rightly excluded from the sum in which the plaintiff is entitled to share.

The same may be said of the claim that the net profit has been improperly reduced by the allowance of certain expenses which were not sufficiently proved. The special master has fully explained his reasons for crediting the account with these expenses, and we see no occasion for disturbing his findings in that regard.

[3] The plea that it was error to direct separate judgments against the defendants, instead of a joint judgment against all of them, must be rejected. There is no support for the contention that the refusal to give plaintiff one-fourth of the profit amounted to a misappropriation or conversion by the defendants of the balance remaining in their hands after the expenses were paid. They offered to return the sum which her husband originally contributed, and denied that he was entitled to anything more. Treating the parties as holding a partnership

relation, which is the plaintiff's theory, we see no reason for not applying the ordinary partnership rule, which supports a separate judgment against the several partners in such cases.

We are of opinion that the record discloses no reversible error, and the decree appealed from will therefore be affirmed.

PHŒNIX SECURITIES CO. v. DITTMAR.

(Circuit Court of Appeals, Ninth Circuit. July 12, 1915.)

No. 2525.

1. APPEAL AND ERROR ⟸219—REVIEW—GENERAL FINDING BY COURT.

Under Act March 3, 1865, c. 86, § 4, 13 Stat. 501 (Rev. St. §§ 649, 700 [Comp. St. 1913, §§ 1587, 1668]), providing that the court's finding on the facts, where the case is submitted to it by written consent to waive a jury, shall have the effect of a verdict, and its rulings during the trial, excepted to at the time, may be reviewed, if presented by bill of exceptions, and if the finding is special the sufficiency of the facts found to support the judgment may be reviewed, the general finding in such a case is not reviewable, except where there is no evidence to support it, and then only when the question was expressly presented to the trial court and exception saved to its ruling thereon.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1315, 1317–1320, 1322, 1323; Dec. Dig. ⟸219.]

2. BROKERS ⟸82—COMPENSATION—REASONABLE VALUE—PLEADING AND PROOF.

One of the counts, in a broker's action for a commission on a sale, being for the reasonable value of his services, he though not showing a promise to pay the reasonable value or any amount, yet showing a contract establishing the relation of agency, and that defendant took the benefit of what he did in pursuance of the contract and appropriated his services, may show and recover the reasonable value.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 101–103; Dec. Dig. ⟸82.]

3. PLEADING ⟸430—VARIANCE—WAIVER.

Right to predicate error on the ground of variance, on the admission of evidence of the reasonable value of plaintiff's services, because there was no evidence of the express promise alleged to pay such reasonable value, was waived by failure to present specifically that ground of objection when the testimony was offered.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1438–1441; Dec. Dig. ⟸430.]

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

Action by M. E. Dittmar against the Phœnix Securities Company. Judgment for plaintiff, and defendant brings error. Affirmed.

The defendant in error was the plaintiff in an action at law to recover a commission upon a sale of mining properties. The plaintiff in California conducted correspondence wth the defendant in New York in the spring of 1907, which resulted finally in a contract of date May 1, 1907, whereby the defendant and the Stauffer Chemical Company agreed that the latter should have an option to purchase the mining properties for the sum of $85,000 within a period of 18 months from that date, and that in the meantime the

chemical company should have a license to enter upon the properties and explore and develop the same and extract ore therefrom, the net proceeds thereof to be deposited in a designated bank and eventually applied on the purchase price of the properties in case the chemical company should elect to purchase under the option. It was further agreed that the chemical company should have the right to discount the purchase price and acquire the title within 90 days from May 1, 1907, upon the payment of $50,000 to the defendant and a commission of $5,000 to the plaintiff.

The agreement between the plaintiff and the defendant as to the payment of a commission is all contained in the correspondence, and it is finally and definitely stated in the letter which the plaintiff wrote to the defendant on May 4, 1907, in which he said: "The price fixed to the Stauffer Chemical people was based on $75,000 net to yourselves, as discussed while I was in New York. To this price I have added $10,000 as my commission, based on an 18 months' contract. * * * In case the sale is concluded in the course of a few months for a lower figure than under the time arrangement covering 18 months, then I am willing to accept ten per cent. or a smaller commission percentage than if I must wait for this deal to be consummated 18 months hence." It elsewhere appears in the correspondence that, in case the property was taken at $85,000 under the 18 months' option, the plaintiff's commission of $10,000 was not payable until the consummation of the sale. The property was not purchased by the chemical company under the option. That company, after operating the mines a few months, made complaint to the defendant that the terms proposed were too onerous. Negotiations were had, and a new agreement was entered into, the terms of which are found in the letter of December 27, 1907, written by the attorneys for the defendant to the Stauffer Chemical Company. In that agreement the option contract was annulled, and it was stipulated that a new corporation should be organized to take over the property, the same to be a dummy corporation managed by the chemical company. The dummy company was to pay the defendant $25,000 cash, and thereafter was to pay a royalty of 50 cents a ton on the product of the mine, until the total amount of $60,000 should be paid, and the buyer was at liberty to abandon the entire undertaking at any time. Under this substituted agreement, the defendant had received at the time of the trial $51,000. There was no agreement between the plaintiff and defendant as to commissions upon a sale under the substituted contract, and the matter was not even discussed.

There are three counts in the complaint. In the first the plaintiff alleged that some time prior to May, 1907, he made and entered into a contract with the defendant, by the terms of which the defendant authorized him to find a purchaser for a certain group of mines, and agreed that when he should have found a purchaser who should be ready, willing, and able to purchase said group of mines for the sum of not less than $75,000 net to defendant, payable upon such terms as might be arranged, the defendant would, upon the completion and consummation of such sale, pay plaintiff for his services such sum of money in excess of $75,000 as said property might be sold for by the defendant to such purchaser; that the plaintiff thereafter found a prospective purchaser of the properties, to wit, Stauffer Chemical Company, which was then and there willing, able, and ready to purchase said property from the defendant, and did then and there agree to purchase the same and to pay therefor the sum of $85,000, and for that sum the defendant sold to the Stauffer Chemical Company said properties on terms satisfactory to the defendant; that thereby there became due to plaintiff the sum of $10,000. The second cause of action alleged that the defendant authorized the plaintiff to find a purchaser for said mines upon such terms as might be agreed to between the defendant and the purchaser, and in pursuance of that authorization he discovered a purchaser who was willing to purchase the mines for $85,000, and that on or about the 1st day of February, 1908, defendant agreed upon terms with said purchaser, and sold said property for the agreed price of $85,000; that the value of the plaintiff's services in procuring said purchaser was $10,000. The third cause of action alleged that the defendant authorized plaintiff to find a purchaser for the mines and for such service promised to pay him 10 per cent. of the money the defendant might actually

receive in cash on account of the sale of said mines; that, in pursuance of that agreement, he discovered a prospective purchaser, who was willing to pay $85,000 for the mines, and on or about February 1st did pay $40,000 therefor on account, with an agreement to pay the further sum of $45,000 in deferred payments upon certain conditions; and that, at the time of the commencement of the action, the sum of $50,000, more or less, in all, had been paid, whereby the sum of $5,000, more or less had become due and payable to the plaintiff.

There was a written consent to waive a jury and the case was tried before the court. At the conclusion of the trial, the case was taken under advisement, and thereafter the court ordered that judgment be entered in favor of the plaintiff and against the defendant in the sum of $5,000. There were no findings of fact.

L. A. Redman, of San Francisco, Cal., for plaintiff in error.

Morrison, Dunne & Brobeck, of San Francisco, Cal. (R. L. McWilliams, of San Francisco, Cal., of counsel), for defendant in error.

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

GILBERT, Circuit Judge (after stating the facts as above). [1] Upon the assignment that there was no evidence to sustain the judgment, the question arises: To what extent may the decision of the court below be reviewed here upon the writ of error? The statute of March 3, 1865 (13 Stat. 501; Rev. Stat. §§ 649, 700), provides in substance that the finding of the court upon the facts, in a case where an action is submitted to the court by a written consent to waive a jury, shall have the same effect as the verdict of a jury, and that the rulings of the court in the progress of the trial of the cause, when excepted to at the time, may be reviewed upon writ of error or upon appeal, provided the rulings be duly presented by bill of exceptions and that, when the finding is special, the review may also extend to the determination of the sufficiency of the facts found to support the judgment. Under this statute, the general finding of the court in such a case is not subject to review in an appellate court, except in cases where there is no evidence to sustain the finding, and then only when that question has been expressly presented to the trial court and an exception has been saved to the ruling thereon. Said Mr. Justice Woods, in Martinton v. Fairbanks, 112 U. S. 670, 5 Sup. Ct. 321, 28 L. Ed. 862:

"If the question was whether all the evidence was sufficient in law to warrant a finding for the plaintiff, he should have presented that question by a request for a definite ruling upon that point."

In Pennsylvania Casualty Co. v. Whiteway, 210 Fed. 782, 127 C. C. A. 332, this court said:

"When an action at law is tried before a jury, their verdict is not subject to review unless there is absence of substantial evidence to sustain it, and even then it is not reviewable unless a request has been made for a peremptory instruction, and an exception taken to the ruling of the court. When a jury is waived, and the cause is tried by the court, the general finding of the court for one or the other of the parties stands as the verdict of a jury, and may not be reviewed in an appellate court unless the lack of evidence to sustain the finding has been suggested by a request for a ruling thereon, or a motion for judgment, or some motion to present to the court the issue of law so involved, before the close of the trial. Martinton v. Fairbanks, 112 U. S. 670, 5 Sup. Ct. 321, 28 L. Ed. 862; Wilson v. Merchants' Loan & Trust Co.,

183 U. S. 121, 22 Sup. Ct. 55, 46 L. Ed. 113; Boardman v. Toffey, 117 U. S. 271, 6 Sup. Ct. 734, 29 L. Ed. 898; Barnard v. Randle, 110 Fed. 906, 49 C. C. A. 177; United States Fidelity & G. Co. v. Board of Com'rs, 145 Fed. 144, 76 C. C. A. 114; Felker v. First Nat. Bank, 196 Fed. 200, 116 C. C. A. 32; Bell v. Union Pac. R. Co., 194 Fed. 366, 114 C. C. A. 326. There was no such request or motion made in the case in hand, and the judgment of the court below is therefore conclusive of the facts determined thereby."

The case at bar was submitted to the court for decision upon the pleadings and evidence at the close of the trial, and the question whether there was any evidence to sustain the judgment for the plaintiff was not presented to that court. Under these circumstances, upon a review of the case in this court we are confined to the consideration of the question whether the complaint stated a cause of action, and whether any objection was taken and exception reserved to the admission of testimony in the course of the trial.

[2] The defendant objected to certain testimony offered on the trial, tending to prove the reasonable value of the services rendered by the plaintiff, and to the ruling of the court in admitting such testimony over its objection duly excepted. It is contended that it was error to admit such evidence for the reason that there was no testimony whatever tending to show that the defendant ever promised to pay plaintiff the reasonable value of his services as a broker. But it does not follow from that fact that the plaintiff could not recover upon a quantum meruit. It is true that, where a broker elects to stand on a special contract, he cannot recover on a quantum meruit. Veatch v. Norman, 109 Mo. App. 387, 84 S. W. 350; Edwards v. Goldsmith, 16 Pa. 43; McDonald v. Ortman, 98 Mich. 40, 56 N. W. 1055; Emery v. Atlantic Exchange, 88 Ga. 321, 14 S. E. 556; McDonnell v. Stevinson, 104 Mo. App. 191, 77 S. W. 766; Hammers v. Merrick, 42 Kan. 32, 21 Pac. 783; King v. Stephenson, 29 Okl. 29, 116 Pac. 183; Bentley v. Edwards, 125 Minn. 179, 146 N. W. 347, 51 L. R. A. (N. S.) 254. But one of the causes of action pleaded by the plaintiff in the case at bar was for the recovery of the reasonable value of his service. It is the general rule that if the plaintiff fails to prove performance of the special contract, and fails to show that he has accomplished the precise thing which would entitle him to the compensation agreed upon therein, and yet shows that the contract established the relation of agency, and that the defendant has taken the benefit of that which the plaintiff did in pursuance of the contract, and has appropriated the plaintiff's services, the latter may recover the reasonable value of such services upon a quantum meruit. Sussdorff v. Schmidt, 55 N. Y. 319; Steinfeld v. Storm, 31 Misc. Rep. 167, 63 N. Y. Supp. 966; Clark v. Davies, 88 Neb. 67, 129 N. W. 165; Veatch v. Norman, 95 Mo. App. 500, 69 S. W. 472; Wheeler v. F. A. Buck & Co., 23 Wash. 679, 63 Pac. 566; In re Breon Lumber Co. (D. C.) 181 Fed. 909.

[3] It is contended that it was error to admit evidence of reasonable value of the plaintiff's services for the further reason that no evidence was adduced to prove the express promise to pay such reasonable value which was alleged in the second count, and that therefore there was variance between the complaint and the evidence which was so received and objected to. But, if there was such variance as is

now alleged, the right to predicate error on the admission of such testimony was waived by the defendant's failure to present specifically that ground of objection at the time when the testimony was offered. In Roberts v. Graham, 6 Wall. 578, 18 L. Ed. 791, the court said:

"The objection of variance not taken at the trial cannot avail the defendant as an error in the higher court, if it could have been obviated in the court below."

See, also, Nashua Savings Bank v. Anglo-American Co., 189 U. S. 221, 231, 23 Sup. Ct. 517, 47 L. Ed. 782; Preiss v. Zitt, 148 Fed. 617, 78 C. C. A. 56; and Sussdorff v. Schmidt, 55 N. Y. 319.

We find no error.

The judgment is affirmed.

KANSAS CITY SOUTHERN RY. CO. v. CLINTON.†

(Circuit Court of Appeals, Eighth Circuit. July 6, 1915.)

No. 4424.

1. CARRIERS ⊜316—PERSONAL INJURY—PRESUMPTION AND BURDEN OF PROOF—NEGLIGENCE.

Prima facie, when a passenger on a railroad train is injured by reason of an unusual occurrence on the train, negligence on the part of the carrier is presumed, and the burden of proof shifts to it to show that it was not guilty of negligence.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1261, 1262, 1283, 1285–1294; Dec. Dig. ⊜316.]

2. CARRIERS ⊜320—PERSONAL INJURY—QUESTION FOR JURY—NEGLIGENCE.

In an action for injuries from negligence in causing the train and caboose in which plaintiff was riding to be violently and suddenly jolted, where the evidence as to the jolt was conflicting, it was the duty of the court to submit the defendant's negligence to the jury, especially in view of Kirby's Dig. Ark. § 6773, enacted pursuant to Const. Ark. art. 17, § 12, declaring that all railroads built and operated in the state shall be responsible for all damages to persons caused by the running of trains.

[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.]

3. EVIDENCE ⊜474½—OPINION EVIDENCE—SEVERITY OF TRAIN JOLT.

In an action for personal injury from negligence in causing the train and caboose in which plaintiff was riding to be violently and suddenly jolted, nonexpert testimony as to the severity of the jolt was admissible; the weight thereof being for the jury.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2220–2233; Dec. Dig. ⊜474½.]

4. EVIDENCE ⊜127—RES GESTÆ—STATEMENT ACCOMPANYING TRANSACTION.

Evidence that at the time of the accident, and when arising from his fall, plaintiff said "I believe the train hurt me," was admissible as a part of the res gestæ.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 377–382; Dec. Dig. ⊜127.]

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

† Rehearing denied September 27, 1915.

5. EVIDENCE ⟸555—OPINION EVIDENCE—SUBJECT-MATTER—PAIN.
Testimony of the physician and surgeon who had treated the plaintiff for his injury that plaintiff suffered a great deal of pain, based on statements made to him by the plaintiff, was admissible.
[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2376; Dec. Dig. ⟸555.]

6. EVIDENCE ⟸192—DEMONSTRATIVE EVIDENCE.
There was no error in permitting the plaintiff, suing for personal injuries, to give a practical illustration of his condition before the jury.
[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 677; Dec. Dig. ⟸192.]

7. TRIAL ⟸295—INSTRUCTIONS—CONSTRUCTION AS A WHOLE.
Appellant, in his assignments of error, cannot select one sentence of the charge on a subject; but the charge must be taken as a whole, and if it then states the law correctly there is no cause for complaint.
[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 703–717; Dec. Dig. ⟸295.]

8. CARRIERS ⟸298—PASSENGERS—DEGREE OF CARE.
In an action for personal injury, while riding on defendant's local freight train in a caboose from a violent jolt, an instruction that under the laws of Arkansas the defendant was required to carry passengers for hire upon its local freight trains, but not required to equip its cabooses like passenger cars, that one traveling in the caboose of a local freight train is bound to know that it is subject to more violent jerks in stopping and starting than passenger trains, and that plaintiff asumed the risk of injury from any usual or ordinary jerk, stated the law correctly.
[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1192, 1205, 1206; Dec. Dig. ⟸298.]

9. TRIAL ⟸260—INSTRUCTIONS—CREDIBILITY OF WITNESSES.
A charge that, in weighing the evidence, to find whether it was equally balanced, or in whose favor it preponderated, the jury would not necessarily be controlled by the number of witnesses on either side, given in connection with a charge that they were the sole judges of the credibility of the witnesses and the weight to be given to the testimony of each witness, was sufficient.
[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651–659; Dec. Dig. ⟸260.]

10. TRIAL ⟸260—INSTRUCTIONS.
When a requested instruction is included in the charge given, it is not error to refuse it.
[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 Western District of Arkansas; Frank A. Youmans, Judge.

Action by J. N. Clinton against the Kansas City Southern Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

For convenience, the parties will be referred to herein as plaintiff and defendant, as they were in the court below. The plaintiff, in his complaint, alleges that while a passenger on one of the defendant's local freight trains, carrying a caboose for the purpose of carrying passengers, and while seated in the caboose, as required by the rules of the defendant and the officer in charge of said train, he was seriously injured by reason of the defendant's negligence in causing the train and caboose in which he was seated to be violently and suddenly jerked. He sets out the injuries sustained by him by reason thereof, his suffering, and loss of earnings. The answer denies all the allegations of

the complaint, and also pleads that the plaintiff, by riding upon a freight train and taking passage thereon, assumed all the dangers and risks due to the operation of such a train, and his injuries, if he received any, are injuries received only because of the ordinary risks and dangers incident to traveling upon a freight train. It also pleads contributory negligence. There was a trial to a jury, and a verdict for the plaintiff.

James B. McDonough, of Ft. Smith, Ark. (S. W. Moore, of Kansas City, Mo., on the brief), for plaintiff in error.

James D. Head, of Texarkana, Ark. (Elmer J. Lundy, of Mena, Ark., on the brief), for defendant in error.

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

TRIEBER, District Judge. [1, 2] It is claimed that the court erred in refusing to direct a verdict for the defendant. There is substantial evidence that the plaintiff was a passenger on one of the defendant's local freight trains, which carries passengers in a caboose carried for that purpose; that he was seated in the caboose, as required by the rules of the company; that when the train approached an intermediate station it slowed down to about two or three miles an hour, and when within about two car lengths of the depot a Mr. Ellis, one of the passengers on the train, arose from his seat next to that of the plaintiff, and while in the act of picking up his grips there was a sudden stop and an extraordinary jerk, which threw Mr. Ellis against him with such violence that he sustained the serious injuries complained of. Two physicians, one who had treated him, and another who had made an examination of his person, testified to his injuries, which were principally internal. Another party, Mr. Woodell, also testified to the violence of the jolt and the falling of Mr. Ellis on the plaintiff. Other witnesses for the plaintiff testified that before the accident he was a strong, healthy man, and worked in a sawmill, but that since the accident he had lost about 40 pounds in weight and is unable to do such work as he was engaged in before the injury, or any hard work. On the part of the defendant evidence was introduced tending to show that the jolt was not unusual, but only such as is usual when a freight train comes to a stop. There was no evidence whatever that the plaintiff was guilty of contributory negligence.

Prima facie, when a passenger on a railroad train is injured by reason of an unusual occurrence on the train on which he was riding, negligence on the part of the carrier is presumed, and the burden of proof shifts to the company to show that it was not guilty of negligence. Railroad Company v. Pollard, 22 Wall. 341, 22 L. Ed. 877; Gleason v. Virginia Midland R. R. Co., 140 U. S. 435, 443, 11 Sup. Ct. 859, 35 L. Ed. 458; Kirkendall v. Union Pacific R. R. Co., 200 Fed. 197, 118 C. C. A. 383, and authorities there cited. The evidence being conflicting, it was the duty of the court to submit that issue to the jury under proper instructions, especially in view of the statute of Arkansas enacted in pursuance of constitutional requirement. Section 12, art. 17, Constitution of Arkansas. The statute (section 6773, Kirby's Digest of the Laws of Arkansas) reads:

"All railroads which are now or may be hereafter built and operated in whole or in part in this state shall be responsible for all damages to persons or property done or caused by the running of trains in this state."

This statute has been construed by the Supreme Court of Arkansas in numerous cases to the effect that:

"Where an injury is caused to a passenger by the operation of a train, a prima facie case of negligence is made against the company operating such train." Barringer v. Railway Co., 73 Ark. 548, 85 S. W. 94, 87 S. W. 814; Kansas City Southern Railway Co. v. Davis, 83 Ark. 217, 103 S. W. 603; Railway Company v. Briggs, 87 Ark. 581, 113 S. W. 644.

There was no error committed in refusing to direct a verdict for the defendant.

[3] It is next claimed that the court erred in permitting the plaintiff and another passenger in that caboose to testify as to the violence of the jolt, for the reason that they were not experts on that question. The plaintiff testified that he had been riding in cabooses on local freight trains frequently for a period of six or seven years, and that was "the severest jolt he ever got on a train of any kind." Mr. Woodell, another passenger, testified that he had been a traveling salesman for a number of years, and while such he had been riding on local trains probably once a week, and that this jolt "was more severe than I have seen since." He also testified that the jolt was of such force that it threw him down. This evidence was clearly admissible. It is true they were not experts, but they had frequently ridden on such trains, and their testimony on this point was properly admitted, leaving it to the jury to determine what weight it should be accorded. It is hardly reasonable to expect that passengers will carry experts with them in order that they may testify in case of an accident. That such evidence is admissible see Connecticut Mutual Life Ins. Co. v. Lathrop, 111 U. S. 612, 624, 4 Sup. Ct. 533, 28 L. Ed. 536; Queenan v. Oklahoma, 190 U. S. 548, 23 Sup. Ct. 762, 47 L. Ed. 1175; Turner v. American Security & Trust Co., 213 U. S. 257, 260, 29 Sup. Ct. 420, 53 L. Ed. 788; Union Pacific R. R. Co. v. Lucas, 136 Fed. 374, 69 C. C. A. 218; Robinson v. Louisville, etc., Ry. Co., 112 Fed. 484, 50 C. C. A. 357; Rothe v. Pennsylvania Company, 195 Fed. 21, 114 C. C. A. 627; Moore v. Saginaw, etc., R. R. Co., 115 Mich. 103, 72 N. W. 1112; Southern Railway Co. v. Vandegriff, 108 Tenn. 14, 64 S. W. 481; St. Louis, I. M. & S. Ry. Co. v. Osborne, 95 Ark. 310, 129 S. W. 537.

[4] It is also claimed that the court erred in permitting the witness Woodell to testify that at the time of the accident he heard the plaintiff, when arising from the fall, say, "I believe the train hurt me." This was admissible as part of the res gestæ. Delaware, L. & W. R. R. Co. v. Ashley, 67 Fed. 209, 14 C. C. A. 368; Guild v. Pringle, 130 Fed. 419, 64 C. C. A. 621.

[5] It is next claimed that the court erred in permitting Dr. Hilton, the physician and surgeon who had treated the plaintiff for this injury, to testify that the plaintiff suffered a great deal from pain, upon the ground that this opinion was based upon statements made to him by the patient. Union Pacific Ry. Co. v. McMican, 194 Fed. 393, 114

C. C. A. 311, decided by this court, is relied on to sustain this assignment of error. But in that case what the court did decide was that a physician who did not treat the patient, but was only called to examine him for the purpose of testifying as an expert, can only testify to objective symptoms; but as to a physician called professionally to treat a person the court in that case said:

"The rule is well settled that, where a physician is called to professionally treat a party, he may give his opinion, based upon subjective as well as objective symptoms."

A physician must frequently rely on the statements of his patient in order to diagnose his case properly, and especially when the injuries are, as in this case, internal, and his opinion, based on such statements, made to him for the purpose of enabling him to treat the patient, is clearly admissible.

Nor did the court err in permitting Dr. Hilton to answer the hypothetical question propounded to him. The objection is:

"The question failed to embrace all the essential undisputed facts which appeared in the issue."

In our opinion it did.

[6] It is also claimed that the court erred in permitting the plaintiff to give a practical illustration of his condition before the jury. There was no error in this. Birmingham R., Light & Power Co. v. Rutledge, 142 Ala. 195, 39 South. 338; Adams v. City of Thief River Falls, 84 Minn. 30, 86 N. W. 767; Carr v. American Locomotive Co., 26 R. I. 180, 58 Atl. 678; Schroeder v. Railroad Company, 47 Iowa, 375; Osborne v. City of Detroit (C. C.) 32 Fed. 36. This last case was reversed by the Supreme Court (135 U. S. 492, 10 Sup. Ct. 1012, 34 L. Ed. 260), but not on this point.

[7, 8] An error in the charge of the court complained of is that the charge imposed on the carrier a higher degree of care than the law demands of local freight trains carrying passengers in a caboose. Defendant, in its assignment of errors, selects only one sentence of the charge on that subject. This is not permissible. The charge must be taken as a whole, and if it then stated the law correctly there is no cause for complaint. Choctaw, O. & G. R. R. Co. v. Tennessee, 191 U. S. 326, 24 Sup. Ct. 99, 48 L. Ed. 201; Guild v. Andrews, 137 Fed. 369, 70 C. C. A. 49; Chicago, Great Western Ry. Co. v. McDonough, 161 Fed. 657, 88 C. C. A. 517; Truelock v. Willey, 187 Fed. 956, 112 C. C. A. 1. The charge of the court on that issue was:

"Under the laws of the state of Arkansas, the defendant is required to carry passengers for hire upon its local freight trains. But the defendant is not required to equip its cabooses of cars on local freight trains as passenger cars are equipped on passenger trains. The person who travels upon local freight trains is bound to know that such trains cannot be moved, stopped, and started with the same slow and easy movement with which passenger trains are moved, stopped, and started; and a traveler upon such local freight trains is further charged with the knowledge that local freight trains are subject to more violent jerks in stopping and starting than passenger trains; therefore the plaintiff, in entering upon this local freight train, assumed the risk of any injury that might occur to him by reason of any usual or ordinary jerk which might occur in the stopping of said local freight train. If the plaintiff's injury, if he has suffered any injury, is due to a sudden stopping of the caboose

caused by the usual and customary handling of the local freight train, then the plaintiff cannot recover. The defendant has the right, as a matter of law, to operate its local freight trains in the usual and ordinary manner. If it operated the train on which plaintiff was riding in the usual and ordinary manner, and if the sudden stopping was an incident of usual and ordinary handling of such trains, the plaintiff cannot recover."

Taking this part of the charge in connection with the part complained of, it states the law correctly. Indianapolis & St. Louis R. R. Co. v. Horst, 93 U. S. 291, 23 L. Ed. 898; Delaware, L. & W. R. R. Co. v. Ashley, 67 Fed. 209, 14 C. C. A. 368. And this is the rule under the Arkansas statute hereinbefore set out. Pasley v. St. Louis, I. M. & S. Ry. Co., 83 Ark. 22, 102 S. W. 387, 13 Ann. Cas. 121; St. Louis, I. M. & S. Ry. Co. v. Brabbzson, 87 Ark. 109, 112 S. W. 222; Miles v. St. Louis, I. M. & S. Ry. Co., 90 Ark. 485, 119 S. W. 837; St. Louis Southwestern Ry. Co. v. Jackson, 93 Ark. 119, 124 S. W. 241.

[9, 10] It is next claimed that the court erred in charging the jury that:

"In weighing the evidence to find whether it is equally balanced, or in whose favor it preponderates, the jury will not necessarily be controlled by the number of witnesses on either side."

This part of the charge was in connection with the charge that the jury were the sole judges of the credibility of the witnesses and the weight to be given to the testimony of each witness. It was further charged:

"It is your duty to reconcile the testimony, if you can; that is, to reach a conclusion which will permit the testimony of all the witnesses to stand, if that can be done. Every witness is presumed to speak the truth until the contrary appears. The contrary may appear in a number of ways; one or more witnesses may testify to a state of facts, and another one or more may testify to a state of facts directly opposite. It is then for you to say which you will believe. One witness may state facts which modify or explain facts testified to by another. This may arise because one has better means of knowing that about which he testifies than the other. The manner or deportment of one witness while testifying may lead you to believe that his story is true, while the manner and deportment of another witness may convince you that his story is not trustworthy. The interest of one witness in the result of a trial may be so apparent as to lead you to discredit his statement, or the improbability of the story of one witness may lead you to disregard it in favor of the more probable story of another. All these things must be taken into consideration. You are to bring to the consideration of the testimony your impartial and unbiased judgment, and judge the evidence of each witness by the reasonableness or unreasonableness of his story, the means he has of knowing that about which he testified, his interest, if any, his bias, or prejudice, if he manifests any, and give all the testimony of each witness the weight it should have in reaching a conclusion as to what is the truth of the case."

The defendant asked the court to charge the jury that:

"In weighing the evidence to find whether it is equally balanced, or in whose favor it preponderates, the jury will not necessarily be controlled by the number of witnesses on either side. But if, on the question of whether there was unusual violence, or whether there was injury resulting from that violence, there be an equal number of witnesses on either side, and if said witnesses be equally credible, or if there be, on either of said issues, a larger number of witnesses on one side, and if said witnesses be equally credible, then the jury should be controlled by the number of witnesses, and in that event should

find the issue in favor of that party in whose favor the number of witnesses preponderates."

This instruction was refused, and a proper exception saved. Taking the charge of the court as a whole, it covers practically all that the defendant asked, although in different language. The charge was certainly as favorable to the defendant as it was entitled to. Renard v. Grande, 29 Ind. App. 579, 64 N. E. 644; Kozlowski v. City of Chicago, 113 Ill. App. 513. In St. Louis, I. M. & S. Ry. Co. v. Evans, 99 Ark. 69, 137 S. W. 568, a similar instruction, given in connection with other instructions, not quite as strongly drawn in favor of the defendant as in the case at bar, was by the court approved. The law is well settled that, when a requested instruction is included in the charge of the court, it is not error to refuse it. Texas & Pacific R. R. Co. v. Watson, 190 U. S. 287, 23 Sup. Ct. 681, 47 L. Ed. 1057; A. T. & S. F. Ry. Co. v. Phillips, 176 Fed. 663, 100 C. C. A. 215; Chicago Great Western Ry. Co. v. McCormick, 200 Fed. 375, 118 C. C. A. 527, 47 L. R. A. (N. S.) 18.

We have now considered all the assignments of error presented to the court by the plaintiff in error, and, finding no error, the judgment is affirmed.

THE METIS.

(Circuit Court of Appeals, Fourth Circuit. May 4, 1915.)

No. 1288.

COLLISION ⇐96—VESSELS IN HARBOR—STEAMSHIP AND LIGHTER.

A collision occurred in the daytime in Havana Harbor between the steamship Metis, which had just left her loading berth and was passing out between two anchored steamships, which was the only practicable passage, and the sail lighter General Prim, which appeared from the opposite side of one of such steamships which it was unloading. *Held*, on the evidence that the Metis was proceeding at slow speed, gave all proper signals to warn boats which might be expected to be unloading the other vessels of her approach, and did all that was possible to avoid collision after the General Prim was seen, and that she was not in fault.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 203–205; Dec. Dig. ⇐96.]

Appeal from the District Court of the United States for the Eastern District of Virginia, at Norfolk; Edmund Waddell, Jr., Judge.

Suit in admiralty for collision, by the Mannheim Insurance Company, Fireman's Fund Insurance Company, and others against the steamship Metis, W. D. Henry, master and claimant. Decree for respondent, and libelants appeal. Affirmed.

For opinion below, see 212 Fed. 798.

T. Catesby Jones, of New York City (Harrington, Bigham & Englar, of New York City, on the brief), for appellants.

Charles R. Hickox, of New York City (Convers & Kirlin, of New York City, Hughes, Little & Seawell, of Norfolk, Va., and William H. McGrann, of New York City, on the brief), for appellee.

Before KNAPP and WOODS, Circuit Judges, and CONNOR, District Judge.

CONNOR, District Judge. Libelant, Mannheim Insurance Company, alleges that on the 20th day of March, 1912, the steamship Metis, while passing out of the harbor of Havana, Cuba, ran down and sunk the lighter General Prim, loaded with merchandise, the property of Menendez & Co. and Platt & Co., of Havana; that the owners assigned their interest in the property, and their claim to libelant. The Fireman's Fund Insurance Company also filed a libel, alleging the same facts and the assignment of the claim of Balleste Foyo Company, of Havana. Both libels charged that the collision was due to the negligence of the steamer Metis, in that: (1) The steamer failed to keep out of the way of the lighter, General Prim, as required by the rules of navigation; (2) that said steamer, having the said lighter on her starboard side, failed to keep out of the way; (3) that said steamer maintained no sufficient lookout; (4) that said steamer failed seasonably to stop and reverse; (5) that said steamer took no precautions to avoid the collision after the damage had become apparent.

The master and claimant of the Metis, answering the libels, admitted the collision and loss of the lighter and her cargo, but denied the allegations charging negligence. The libels were filed, and the Metis seized while in the jurisdiction of the District Court for the Eastern District of Virginia. The judge found the following facts: The Metis had been anchored in the harbor of Havana, Cuba, taking on a cargo. The steamers Kronprinzessin Cecilie, the Havana, of the Ward Line, and a Spanish mail steamer were severally at anchor lower down in the harbor, and at a point slightly below the San Francisco wharf, or pier, which extended out some distance into the channel. They were all large vessels, the Havana, a large passenger and freight steamer, with a superstructure which almost obstructed the view of outgoing craft on the inland side of her; all three vessels were trailing across the channel under the influence of a northeast wind, nearly filling the entire passageway. The Spanish ship was furthermost to the starboard side of the channel, the Havana slightly to the southward and westward of her, and the Kronprinzessin Cecilie slightly to the southward and westward of the Havana. A short time prior to the collision, the Metis, a ship some 340 feet long, which had been taking on a cargo of sugar for three or four days, raised anchor and proceeded down the harbor, intending to pass out to sea, between the Cecilie and the Havana. When approaching, and about to pass under the stern of the Havana, the General Prim, a sail lighter engaged in unloading freight from the Havana, to be taken to the dock, piled high with boxes, emerged from behind and on the port side of the Havana, and but a short distance therefrom, coming into collision with the Metis, as a result of which the General Prim was sunk. The judge reached the conclusion that the Metis was not negligent in any of the respects specified in the libels, and that she was not in fault in failing to give due and timely signals, indicating that she had raised her anchor and was moving down the channel, and dismissed the libels. A num-

ber of errors are assigned in the record. In the brief and upon the oral argument, while none of them were specifically abandoned, appellants relied principally upon the contention that the Metis failed to give the signals of her approach prescribed by the navigation rules of the harbor of Havana and the general rules of navigation. This contention is based, to a large extent, upon the testimony tending to show that "those in charge of the Metis, as she was passing out of the harbor, well knew that a lighter might, at any time, leave the side of the steamship Havana as the Metis approached her," and that therefore it was their duty to give a signal of one prolonged blast of her whistle upon approaching a vessel anchored in the position occupied by the Havana. This contention is stated in the brief. "The court erred in finding that the Metis was free from fault because she gave due and timely signals, indicating that she had raised her anchor." Appellee insists that this point is not open to appellant because not specified in the libel. In this we do not concur—the question is presented by the evidence, and specifically passed upon by the District Judge. It is true that, not having been alleged in the libel, appellee's witnesses, in their depositions taken at Norfolk, where the Metis was libeled, were not fully interrogated upon that point. Passing the objection raised by the appellee, in that respect, we proceed to examine the evidence, upon which the finding of the judge is based.

Jose Pomares y Guerra, witness for appellee, says:

That he was the pilot in charge of the Metis, at the time of the collision. "We were going out with the steamer, we were whistling with the usual precautions, and while we were passing in front of the German steamer, Kronprinzessin Cecilie, and behind the stern of the American steamer Havana, there being no other channel, there came out from the port side of the American steamer a loaded launch without sails and, for this reason, out of control, and the steamer Metis had to reverse and drop her port anchor. The launch struck up against the starboard side of the Metis. We had no other way to go through. I was on the bridge beside the captain, giving orders to the captain, when he was to pass. We were proceeding at about two miles an hour. The engines had just enough steam to give steerage way to the vessel * * * I could not say how many times the whistle of the Metis was blown, but it was several times."

Upon cross-examination, he says:

That he has a license issued by the Treasury Department. "The rules in force are the rules adopted by the Cuban government since the American intervention. These rules are the International Rules." He saw that the Havana was unloading. "It was very likely that a launch or lighter would be coming out from the far side of the steamer, the same launch, the General Prim. At any moment it might be possible for a launch to come away with the due precautions. It is customary to blow the whistle on going through any such channel. The Metis had one whistle—blew several times, because there was a good deal of traffic, and a lot of boats in the bay. * * * We blew for the first time when we took up the anchor. It was two or three minutes after we blew the last signal before the General Prim came out from under the stern of the Havana."

John O'Brien, witness for appellee, says:

That he has been a pilot in, or about, Havana, nine years. "Vessels at anchor are always attended by lighters, either loading or unloading. It is safe to assume that, at any time there is likely to be a lighter running from the side of one of these ships to the shore. You can never tell when one will

shove off from the ship to the shore. I always take great precaution in passing these ships for fear of a lighter darting out. I always go slow. We are obliged to blow the whistle anyway. If a vessel is proceeding to sea with one of the harbor pilots on board, we are obliged to, and we surely do, blow the whistle, as we approach steamers at anchor, so as to give any lighters that may be on the other side warning of our intention to pass through. The International Rules of Navigation are supposed to be in force here. * * * The usual signal that is blown as a notice to lighters on the far side of the vessel is a long, single blast."

This testimony establishes libelant's contention that it was known, or should have been known, to those in charge of the Metis, as she approached the passageway made by the steamships lying at anchor, that a lighter might, at any moment, come out from under the stern of the Havana, and that the duty was imposed upon them to give the signals usually, or by the Rules of Navigation, in force in the harbor, required to be given. No rules were introduced. The foregoing is all of the evidence, found in the record in that respect. It may be conceded that the duty is imposed upon the appellee to show that those in charge of the Metis, in respect to giving the signals, discharged their duty.

Considered from this point of view, any suggested negligence on the part of the Havana or the General Prim is irrelevant. The pertinent inquiry is whether the Metis was at fault in respect to giving the usual signals, as she raised her anchor and approached the Havana. The principal testimony bearing upon this inquiry comes from the witnesses examined at Havana. John O'Brien, who appears to be disinterested, says:

That he was on the end of the pilot wharf, called "Recreation Pier." "After I heard the ship's whistle blowing, I looked around to see our boat go off, as I was satisfied that the whistle was for our boat to go off to take the pilot out, and I saw the ship swinging around. * * * I first noticed the Metis that afternoon by her blowing the whistle. I could not say exactly when she blew her whistle. It was a long whistle, as far as I recollect. It was a general alarm they blow for the pilot to come out."

On cross-examination, he says:

"The usual signal that is blown as a notice to lighters on the far side of the vessel is a long, single blast."

We have quoted the testimony on this point of the pilot Pomares. Thomas Abbott, a witness for claimant, who was not on the Metis, and appears to have been disinterested, says:

"I heard her blow her whistle two or three times, as she approached—blasts of the whistle. I did not notice any other signals, but I noticed the steamer whistling as she came out. She was coming towards me; this was before the collision."

Edmund J. Frederick, who does not appear to be interested, says that he did not see the collision, but saw the vessel before and after—he did not see the Metis get under way—after she got under way he heard the whistle, two or three times. He says:

"As she proceeded, I heard her whistle two or three times. I thought that she was whistling for the boat to come out to take off the pilot; that was before the collision."

This is all of the affirmative testimony taken by the appellee at Havana upon the question of signals.

Menendez, libelant's witness, who was in charge of the General Prim, at the time of the collision, says:

"I was coming from the port side of the steamer Havana, and going to the general wharves. When I left the port side of the Havana I did not see anything, but afterwards I saw the steamer Metis, about two blocks from us, when she commenced to whistle and reverse the engines. We were going under the jib and were ready to hoist the mainsail. We had gotten two lengths of the lighter beyond the stern of the Havana when the Metis began to whistle."

Figueroa, for libelants, was one of the crew of the General Prim. Among other things he says that he did not hear any signals before he left the side of the Havana. "When the collision was imminent she blew a whistle and reversed the engines." Both their witnesses say that the Metis was "going very fast at the time she struck the lighter," at "full speed." Every other witness contradicts them in this respect —no one of them puts her speed at more than three knots. Abbott says: "She was proceeding slow; say two or three knots—she was going at a slow speed." Pomares says: "We were proceeding at about two miles an hour." O'Brien says "three miles." Frederick says she was going slowly. She raised her anchor about 20 minutes, and had been moving about 10 minutes before the collision. The overwhelming weight of the evidence shows that the Metis was moving at from two to three miles an hour. Much stress is placed by libelants, upon the testimony of appellee's witnesses, taken at Norfolk, who were on the Metis, in respect to the time and character of the signals. Whitney, the first mate, describing the movement of the Metis from the time she raised her anchor until the collision, says:

That as he saw the lighter coming out from the port quarter of the Havana, about 50 feet from her, "with her head to the westward, and her jib set, the pilot blew his whistle, blew two whistles. * * * Then it was that he blew these whistles."

Walter Johnson, also on the Metis, saw the collision—says that the lighter came out from under the stern of the Havana, "heard the whistle of the Metis blow several times, two blasts." Linderman, on the Metis, says same. W. D. Henry, the master of the Metis, was on the bridge with the pilot and a man at the wheel. "The pilot did blow whistle, but how many times, I don't know."

The foregoing is substantially the testimony in regard to the signals given by the Metis. These witnesses gave, in a narrative form, an account of the movement of the two boats and what occurred immediately before and at the moment of the collision—no negligence had been suggested in the libels regarding the giving of signals. They all say that the whistle was blown immediately upon seeing the lighter come out from under the stern of the Havana. When the testimony of the pilot was taken he says: "We were going out with the steamer Metis; we were whistling with the usual precautions." Knowing that, at any moment, a launch might be expected to come out from the Havana, he says they whistled several times, "because it is customary to blow the whistle on going through any such channel"; that he blew "several

times because there was a good deal of traffic, and a lot of boats in the bay."

O'Brien says:

> That his attention was drawn to the Metis, by hearing the "long whistle, the general alarm they blew for the pilot to come out. * * * The usual signal that is blown as a notice to lighters on the far side of the vessel is a long, single blast."

Abbott testifies that the Metis "was whistling as she came out. She was coming towards me; this was before the collision." Frederick corroborates this testimony. The testimony, as is usual in such cases, is capable of more than one interpretation, and from varying aspects sustains, with more or less force, different conclusions. It is not so much contradictory as it is fragmentary. The failure of the witnesses on the Metis, on their examination at Norfolk, to testify fully in regard to signals, is not necessarily, nor reasonably, construed contradictory of the testimony taken at Havana. Giving to the conclusion of the learned, experienced, and careful District Judge the weight to which it is entitled, and an examination of the testimony, found in the record, we are of the opinion that it should be sustained.

Passing to the other contentions made by the appellant in the brief, we note the criticism of the language of the District Judge:

> "That the evidence seems undisputed that neither the General Prim, nor the Havana, whose cargo she was taking off, gave any signal to passing ships to indicate the General Prim's movements, and this neglect was what brought about the collision;"

—and the conclusion drawn by appellant therefrom that the judge exonerated the Metis because of the negligence of the steamer and the lighter, thus, as argued, violating the principle which entitles the owner of the cargo to full compensation from either of the ships in default. The Atlas, 93 U. S. 302, 23 L. Ed. 863. We think that counsel misconceived the meaning of the judge. He had clearly, in his opinion, announced his conclusion that the Metis was free from blame in any respect—in passing between the Cecilie and the Havana, in giving due and timely signals, or in using every precaution at her command to avoid the collision after she saw the General Prim come out from under the stern of the Havana. It was upon these conclusions that the decree, dismissing the libel, was based. The reference to the negligence of the Prim and the Havana was simply to give expression to the opinion of the judge that the collision was not the result of an "inevitable accident," but of the negligence of the other vessels. The decision in The Atlas, supra, sustains the position of appellants that the negligence of the General Prim is not imputed to the owners of the cargo, and that if both the Metis and the General Prim were negligent, the owners of the cargo are entitled to hold either or both responsible for the loss sustained. There is evidence of negligence on the part of the General Prim, but this does not avail the Metis, in this case, if she was likewise in default, unless the question raised by appellee that the negligence of the General Prim was the proximate cause of the collision exonerates her. In view of the conclusion reached by the District Judge this question is not presented.

Appellants, in their brief, concede that the Metis had the right to use the channel, conditioned upon her observance of the rules of navigation prevailing in the harbor of Havana. The overwhelming, almost uncontracted evidence is that the Metis was properly equipped—had a full crew and licensed pilot, all of whom were in their appropriate positions—that she was not moving at an excessive speed, and that she used every means possible after seeing the General Prim to prevent the collision. We concur with the conclusion reached by the District Judge.

Affirmed.

KANSAS CITY SOUTHERN RY. CO. v. WILLSIE. †

(Circuit Court of Appeals, Eighth Circuit. July 7, 1915.)

No. 4423.

1. CARRIERS ⊂=247—CARRIAGE OF "PASSENGERS"—WHO ARE.

In view of Kirby's Dig. Ark. § 6613, declaring that all passengers who do not procure regular tickets shall be transported over all railroads at the same price charged for such tickets, plaintiff, who repaired to the station of the defendant railroad company to take passage on its train but did not buy a ticket because informed that none would be sold, was, while waiting to get on board, a passenger entitled to protection as such, and, having been injured, defendant cannot complain that the court submitted to the jury the question whether plaintiff was a passenger.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 984–993; Dec. Dig. ⊂=247.

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

2. CARRIERS ⊂=283—CARRIAGE OF PASSENGERS—LIABILITY FOR ACTS OF SERVANTS.

Where a brakeman on defendant's train placed a torpedo which he found at the station on the track to see whether it would explode and it did, injuring a passenger, the carrier was liable; for a carrier is bound to protect its passengers from the assaults of its own servants even when they are malicious or aggressive and are without the scope of the servant's duties.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1119–1124, 1140, 1141; Dec. Dig. ⊂=283.]

3. CARRIERS ⊂=302—INJURIES TO PERSONS AT STATION—LIABILITY OF CARRIER.

Where a passenger standing on defendant's station was injured by a torpedo placed on the track, and exploded by the train, defendant is liable under Kirby's Dig. Ark. § 6773, declaring that all railroads shall be responsible for all damages to persons and property done or caused by the running of trains.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1221–1223; Dec. Dig. ⊂=302.]

4. TRIAL ⊂=105—ADMISSION OF EVIDENCE—MOTION TO STRIKE.

Where defendant did not move to strike the testimony or request an instruction to the jury to disregard it, it cannot complain that such testimony might have been misleading.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 260–266; Dec. Dig. ⊂=105.]

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

† Rehearing denied September 27, 1915.

5. APPEAL AND ERROR ⇐1004—WRIT OF ERROR—MATTERS REVIEWABLE.
On writ of error, the question of the excessiveness of a verdict cannot be reviewed.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3944-3947; Dec. Dig. ⇐1004.]

In Error to the District Court of the United States for the Western District of Arkansas; Frank A. Youmans, Judge.

Action by J. W. Willsie against the Kansas City Southern Railway Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

James B. McDonough, of Ft. Smith, Ark. (S. W. Moore, of Kansas City, Mo., on the brief), for plaintiff in error.

James D. Head, of Texarkana, Ark., for defendant in error.

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

CARLAND, Circuit Judge. The parties to this writ of error will be named as at the trial. On September 25, 1913, the plaintiff walked from his home in Little River county, Ark., to a station on defendant's road called Winthrop, a distance of about four miles, for the purpose of taking passage on a local freight train for Wade, another station on a branch line of defendant. Plaintiff arrived at Winthrop station about 9 o'clock a. m., at about the time the train was running up. The train was standing at the middle of the depot. The caboose was south of the depot. The train was a local freight which carried passengers. Plaintiff had made several trips to Wade before on this same train, had paid cash fare at those times, and had money to pay his fare on this occasion. Plaintiff was told by the agent prior to the present proposed trip that defendant did not sell tickets to Wade. Plaintiff was standing on the station platform which was made of gravel waiting for the caboose to pull up so that he could get on. He was on the west side of the track about seven or eight feet distant. On the other occasions that he had taken this same train the caboose had stopped here.

[1] While so standing, a brakeman of the defendant employed on this same train placed a torpedo on one of the rails of the track on which the train stood and under one of the car wheels. There was an explosion when the car moved soon thereafter, which threw a piece of gravel or tin into the left eye of plaintiff knocking him down and causing injury. The brakeman testified that he took the torpedo from the platform and that it looked as if it had been exploded; that he placed it on the track to see if it had been exploded; that he did not place it on the track in connection with his work on the train. At the close of all the evidence counsel for the defendant made a motion for a directed verdict in its favor. The motion was overruled and an exception taken. There was a verdict and judgment for plaintiff. It is insisted by counsel for defendant that the plaintiff under the evidence was not a passenger. We think the weight of authority is decidedly in favor of the proposition that when the plaintiff repaired to the station of the defendant at

Winthrop under the circumstances detailed in the evidence in good faith intending to become a passenger, and having the money to pay his fare, he in law and fact became a passenger and was entitled to protection as such. Chicago, Rock Island & Pacific Railroad Co. v. Stepp, 164 Fed. 785, 90 C. C. A. 431, 22 L. R. A. (N. S.) 350 (8th Circuit); Moore on Carriers, vol. 2 (2d Ed.) §§ 8 and 9; 2 Cooley on Torts (3d Ed.) p. 1364; 3 Thomp. Neg. 2638; 2 Hutchinson, Carriers (3d Ed.) 1006, 1009; Grimes v. Pennsylvania Co. (C. C.) 36 Fed. 72; Riley v. Vallejo Ferry Co. (D. C.) 173 Fed. 331; Atlantic City Ry. Co. v. Clegg, 183 Fed. 216, 105 C. C. A. 478; Railway Co. v. Hutchinson, 101 Ark. 424, 142 S. W. 527; Railroad Co. v. Watson, 102 Ark. 499, 144 S. W. 922; Metcalf v. Railway Co., 97 Miss. 455, 52 South. 355, 28 L. R. A. (N. S.) 311; 6 Cyc. 536; Krantz v. Railway Company, 12 Utah, 104, 41 Pac. 717, 30 L. R. A. 297; Harris v. Stevens, 31 Vt. 79, 73 Am. Dec. 337.

As bearing upon the question of purchasing a ticket, Kirby's Digest, § 6613, reads as follows:

"All passengers who may fail to procure regular fare tickets shall be transported over all railroads in this state at the same rate and price charged for such tickets for the same service."

In Railway Company v. Kilpatrick, 67 Ark. 47, 54 S. W. 971, and Railroad v. Blythe, 94 Ark. 153, 126 S. W. 386, 29 L. R. A. (N. S.) 299, it is decided that, in the absence of any rule requiring the purchase of a ticket before entering the train, the passenger may pay fare upon the train and is entitled to the rights of a passenger if he intends to pay his fare when called upon. There is no evidence in the record that such a rule existed in the present case. The trial court left it to the jury to say whether under the circumstances the plaintiff was a passenger at the time of his injury. We think in so doing the trial court was as favorable to the defendant as it could ask.

[2] It is next insisted that the evidence showed that in placing the torpedo upon the track the brakeman was not engaged in the performance of any business of the defendant; therefore his act was beyond the scope of his employment and the defendant is not liable therefor. The present state of the law in relation to the question presented is well stated in section 26, vol. 2, Moore on Carriers, p. 1148, as follows:

"Although the generally accepted doctrine of the courts in many cases, which seem to have been determined mainly from the responsibilities attaching to the relation of principal and agent or master and servant, has been that a carrier of passengers is liable for the tortious acts of its servants, even when willful or malicious, if done within the scope of their employment, in the latest and best considered cases and writings upon this subject the distinctions which attend the doctrine of respondeat superior are held to be unimportant in view of the absolute nature of the carrier's duty to protect the passenger from the assaults and insults of its own servants during the transit, or, if considered, are applied with a very strong bias against the master, even where the servant's acts appear to be aggressive, wanton, and malicious. The more acceptable rule now seems to be that a common carrier is liable to any one sustaining the relation of passenger to it for an injury resulting from any acts of its servants or employés, whether willful and malicious or not, and even though such acts are not done in the course or within the scope of the servants' or agents' employment; the rule that the master is not liable for injury resulting from the willful and malicious acts of his agents, not done

within the scope of their employment, is not applicable when the injury is inflicted upon a passenger by the carrier's agents or servants. The carrier is liable in such cases because the act is violative of the duty and a breach of the obligation it owes through the servant to the passenger, and not upon the idea that the act is incident to a duty within the scope of the servant's employment; and it is manifestly immaterial that the act may have been of private retribution on the part of the servant, actuated by personal malice toward the passenger and having no attribute of service to the carrier in it. The rule in England and in some of the states in this country is to the contrary, however, and it is held that no liability is incurred by the carrier for an injury to a passenger by the willful or malicious tort of its servant, unless the act was done while he was acting within the scope of his employment."

The above language is fully sustained by the authorities cited in support thereof. In addition we cite the following: Railway Company v. Hutchinson, 101 Ark. 424, 142 S. W. 527; 6 Cyc. 600, 601; Neville v. Southern Ry. Co., 126 Tenn. 96, 146 S. W. 846, 40 L. R. A. (N. S.) 995; Krantz v. Railway Co., 12 Utah, 104, 41 Pac. 717, 30 L. R. A. 297; Haver v. Railway Co., 62 N. J. Law, 282, 41 Atl. 916, 43 L. R. A. 84, 72 Am. St. Rep. 647; Georgia R. & B. Co. v. Richmond, 98 Ga. 495, 25 S. E. 565; S. F. & W. R. Co. v. Quo, 103 Ga. 125, 29 S. E. 607, 40 L. R. A. 483, 68 Am. St. Rep. 85; Railway Co. v. Cooper, 6 Ind. App. 202, 33 N. E. 219; Railway Co. v. Divinney, 66 Kan. 776, 71 Pac. 855; O'Brien v. Transit Co., 185 Mo. 263, 84 S. W. 939, 105 Am. St. Rep. 592; Keene v. Lizardi, 5 La. 431, 25 Am. Dec. 197; Williams v. P. P. Car Co., 40 La. Ann. 417, 4 South. 85, 8 Am. St. Rep. 538; Johnson v. Railway, 130 Mich. 453, 90 N. W. 274; Conger v. Railway, 45 Minn. 207, 47 N. W. 788; Railway Co. v. Sanderson, 99 Miss. 148, 54 South. 885, 46 L. R. A. (N. S.) 352; Maleck v. Railway, 57 Mo. 17; Railway Co. v. Luther, 40 Tex. Civ. App. 517, 90 S. W. 44; Railway Co. v. Dean, 98 Tex. 517, 85 S. W. 1135, 70 L. R. A. 943; Fick v. Railway Co., 68 Wis. 469, 32 N. W. 527, 60 Am. Rep. 878; Daniel v. Railway, 117 N. C. 592, 23 S. E. 327, 4 L. R. A. (N. S.) 485; 3 Thomp. Neg. §§ 3190, 3191; Tate v. Railway (Ky.) 81 S. W. 256; Railroad Co. v. Batchler, 32 Tex. Civ. App. 14, 73 S. W. 981; Railroad Co. v. Bowlin (Tex. Civ. App.) 32 S. W. 918; Savannah, etc., R. Co. v. Bryan, 86 Ga. 312, 12 S. E. 307, 22 Am. St. Rep. 464; Railway Co. v. Savage, 110 Ind. 156, 9 N. E. 85; Railroad Co. v. Dowgiallo, 82 Ark. 289, 101 S. W. 412; Terre Haute Railway Co. v. Jackson, 81 Ind. 19; 4 Elliott, Railroads, § 1638; Barrow S. S. Co. v. Kane (C. C. A. 2) 88 Fed. 197, 31 C. C. A. 452; N. J. Steamboat Co. v. Brockett, 121 U. S. 637, 7 Sup. Ct. 1039, 30 L. Ed. 1049; Railroad Co. v. Jopes, 142 U. S. 18, 12 Sup. Ct. 109, 35 L. Ed. 919; Clancy v. Barker et al., 131 Fed. 161, 66 C. C. A. 469, 69 L. R. A. 653; 2 White, Personal Injuries on Railroads, § 736; Dwinelle v. N. Y. C. & H. R. R. Co., 120 N. Y. 117, 24 N. E. 319, 8 L. R. A. 224, 17 Am. St. Rep. 611; Hayne v. Union Street Railway Co., 189 Mass. 551, 76 N. E. 219, 3 L. R. A. (N. S.) 605, 109 Am. St. Rep. 655; Harmon v. Flintham (C. C. A. 6) 195 Fed. 635, 116 C. C. A. 309.

Counsel for the defendant cite Goodloe v. Railroad, 107 Ala. 233, 18 South. 166, 29 L. R. A. 729, 54 Am. St. Rep. 67. This case is severely criticized by Mr. Thompson in his work on Negligence (volume 3, § 3190), and in a subsequent case Birmingham Ry. & Electric Co. v.

Baird, 130 Ala. 334, 30 South. 456, 54 L. R. A. 752, 89 Am. St. Rep. 43, the Supreme Court of Alabama practically overruled the case of Goodloe v. Railroad, in so far as the question now before the court is concerned. What we have heretofore said upon this point has been from the viewpoint of the common law.

[3] Counsel for plaintiff also claims a liability under section 6773 of Kirby's Digest, Ark., which reads as follows:

"All railroads which are now or may be hereafter built and operated in whole or in part in this state, shall be responsible for all damages to persons and property done or caused by the running of trains in this state."

The following cases decided by the Supreme Court of Arkansas seem to have applied this statute to almost every conceivable injury caused by the running of trains: Railroad v. Blewitt, 65 Ark. 237, 45 S. W. 548; Railway v. Neeley, 63 Ark. 636, 40 S. W. 130, 37 L. R. A. 616; Railway Co. v. Cooksey, 70 Ark. 481, 69 S. W. 259; Railway Co. v. Evans, 80 Ark. 22, 96 S. W. 616; Railway Co. v. Carr, 94 Ark. 251, 126 S. W. 850; Railway Co. v. Davis, 83 Ark. 221, 103 S. W. 603; Railway Co. v. Standifer, 81 Ark. 278, 99 S. W. 81; Railway Co. v. Pitcock, 82 Ark. 443, 101 S. W. 725, 118 Am. St. Rep. 84, 12 Ann. Cas. 582; Railway Co. v. Pollock, 93 Ark. 243, 123 S. W. 790; Railway Co. v. Rhoden, 93 Ark. 32, 123 S. W. 798, 137 Am. St. Rep. 73, 20 Ann. Cas. 915; Railway Co. v. Stell, 87 Ark. 312, 112 S. W. 876; Railway Co. v. Briggs, 87 Ark. 581, 113 S. W. 644; Oliver v. Railway, 89 Ark. 469, 117 S. W. 238; Railway Co. v. Knox, 90 Ark. 1, 117 S. W. 779, 134 Am. St. Rep. 17.

The brakeman, Stevens, was in the employ of the defendant and at the time of the injury was one of the persons engaged in operating the freight train. We are of the opinion that, under the acts appearing in the evidence, there was no error in permitting the case to go to the jury, certainly no error of which defendant can complain.

We may close the discussion of the question under consideration by quoting from Neville v. So. Ry. Co., supra, as follows:

"It is unnecessary in this case to discuss the degree of care which is required by law to be exercised by the common carrier for the safety and protection from insult and injury of a passenger, after he is aboard its vehicle, and in process of transportation. This subject is fully discussed in Railroad Co. v. Flake [114 Tenn. 671, 88 S. W. 326, 108 Am. St. Rep. 925], and Ferry Companies v. White [99 Tenn. 256, 41 S. W. 583], supra, and the authorities in each of them cited. We are only concerned in the present case with the degree of care required while the passenger is in the station where the carrier has invited him to come and wait for his train, and where in response to such invitation the passenger is there waiting. In such case it is clear that the legal duty of the carrier is to exercise ordinary care in the protection of the passenger from insult or injury, whether caused by the negligence or by the willful or wanton acts of its own servants, irrespective of the scope of the authority or grade of employment of the servant, and a breach of this duty by the carrier fixes its liability. Under the facts of this case, the carrier cannot escape liability under its plea that the act of its servant was unauthorized, for it may be granted that the act was wholly without authority from the carrier, and yet the fact remains that by the act the legal duty of the carrier was breached, and from this breach the right of action flows, not because the carrier authorized the act, but because it did not prevent it by the exercise of ordinary care."

[4] The plaintiff at the trial sought to introduce evidence in support of the proposition that torpedoes were carried upon the train and the purpose of carrying the same. His questions, however, were objected to on the part of counsel for defendant and the objections were sustained, so that the object that plaintiff had in introducing the testimony was frustrated. What little evidence that was left in the case on this question could not have prejudiced the defendant as to the issues submitted to the jury. Defendant could have moved to strike it out or could have requested an instruction to the jury to disregard it, if it was calculated to mislead. United States Smelting Company v. Parry, 166 Fed. 407, 92 C. C. A. 159.

[5] We have examined the testimony of Dr. Lanier and find that any objection, which was properly made, was sustained by the trial court. We do not think the criticism of the court's charge on the measure of damages has merit. There was no charge which allowed a recovery for mental suffering unconnected with the injury. It is doubtful, moreover, whether the exception to the charge was sufficiently definite to raise the question. The remark made by the trial court in ruling upon the question as to the liability of the defendant for the act of the brakeman could not have been prejudicial in view of the manner in which the case was submitted to the jury. Whether or not the verdict is excessive cannot be reviewed on writ of error. Counsel for defendant cites the decision of this court in the case of Bowen v. Illinois Central Railway Co., 136 Fed. 310, 69 C. C. A. 444, 70 L. R. A. 915, as completely sustaining his contention as to the liability of the defendant for the act of the brakeman. It is sufficient to say that the case cited was not a passenger case.

We find no error in the record, and the judgment below must be affirmed.

And it is so ordered.

OLD COLONY TRUST CO. v. WICKARD BROS.

FORT DODGE, D. M. & S. R. CO. v. SAME.

(Circuit Court of Appeals, Eighth Circuit. May 19, 1915.)

Nos. 4128, 4180.

SUBSCRIPTIONS ⟸19—RAILROADS—DISCONTINUANCE OF LINE—RECOVERY OF DONATIONS UNDER IOWA STATUTE.

Code, Iowa, 1897, §§ 2092, 2094, provide that a court may authorize a railroad company to change or remove the line of its constructed road, but that such change or removal of a line shall not be made without repayment of "all moneys * * * which were donated to the company building the same exclusively in consideration of said railroad being located and constructed on such line." *Held*, that to entitle persons to recover under such provisions on the discontinuance of a line of road, there must be substantial evidence that the money was paid to the company which built the road, and that it was given and received as a donation, and exclusively in consideration of the location and building of the road where it was.

[Ed. Note.—For other cases, see Subscriptions, Cent. Dig. §§ 22, 24; Dec. Dig. ⟸ 19.]

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

Suit in equity by Old Colony Trust Company, of Boston, Mass., and others against the Ft. Dodge, Des Moines & Southern Railroad Company, Wickard Bros., and about 150 others, interveners. From provisions in the decree in favor of interveners, complainants and the Railroad Company appeal. Modified.

James C. Davis, of Des Moines, Iowa, for appellant Old Colony Trust Co.

S. R. Dyer, of Boone, Iowa, for appellant Ft. Dodge, D. M. & S. R. Co.

O. C. Meredith, of Newton, Iowa, for appellees.

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

SANBORN, Circuit Judge. These are appeals from the decree of foreclosure of the mortgage of the Ft. Dodge, Des Moines & Southern Railroad Company to the Old Colony Trust Company rendered September 15, 1913. They do not assail the general terms of that decree, but they challenge those portions thereof which require the payment to Wickard Bros. and others, interveners in the foreclosure suit, and appellees here, of the sum of $2,450 on account of certain alleged donations they claimed to have made to the Newton & Northwestern Railroad Company, a corporation, which about the year 1904 constructed about 100 miles of railroad from Rockwell City in Calhoun county, Iowa, by way of Des Moines Junction, to Goddard and Newton in that state. About the year 1908 a mortgage made by the Newton & Northwestern Railroad Company, which had become insolvent, was foreclosed and under the foreclosure the Ft. Dodge, Des Moines & Southern Railroad Company became the owner of the railroad constructed by the former company. On June 4, 1910, the Old Colony Trust Company commenced a suit for the foreclosure of its mortgage of $3,500,000 on the property of the Ft. Dodge Company, receivers were appointed, and the suit culminated in the decree of foreclosure from which these appeals were taken. During the pendency of that suit the court below, on December 7, 1912, on the petition of the receivers, rendered a decree that they should abandon that portion of the railroad 27 miles in length between Des Moines Junction and Goddard, that they should sell the salvage thereof, and that they should also sell the 14 miles of the railroad extending from Newton by way of Goddard to Colfax. An appeal from that decree was taken to this court, where it was affirmed. Reference is made to the report, statement, and opinion in that case for a map of the railroad and a more extended history than it is thought necessary to set forth here. State of Iowa v. Old Colony Trust Co., 215 Fed. 307, 311, 313, 314, 131 C. C. A. 581, 585, 587, 588, L. R. A. 1915A, 549.

After the decree of abandonment of the 27 miles and of the separate sale of the 14 miles of the railroad had been rendered, Wickard

Bros. and others filed a petition of intervention in the foreclosure suit, in which they alleged that they donated to the Newton & Northwestern Railroad Company sums of money aggregating about $2,450 at the time the railroad from Rockwell City to Newton was constructed, that those sums were used in the construction of that railroad at the request of representatives of that railroad and in reliance upon their assurances that a line of railroad would be built and permanently operated between Rockwell and Newton. In answer to this petition the Old Colony Trust Company pleaded its mortgage from the Ft. Dodge Company, alleged that this mortgage was a first lien on all the property of that company, and denied any knowledge or notice of the alleged donations. The Ft. Dodge Company made a similar answer.

The petition of the interveners is founded on these provisions of the statutes of Iowa:

"Any railroad desiring to change or remove the line of its road, after the same has been permanently located and constructed, may file a petition in the district court in any county wherein the change or removal is proposed to be made, describing with reasonable accuracy that portion of its line which it seeks to have changed or removed, and asking the court to grant authority to make such change or removal." Code of Iowa 1897, § 2092.

"No railway company shall be allowed to change or remove its line of road, after a permanent location and construction, without repaying all moneys, and restoring all property, or its value, which were donated to the company building the same exclusively in consideration of said railroads being located and constructed on such line, to the parties donating the same, their heirs or assigns." Section 2094.

Evidence was introduced, a final hearing was had, and the court inserted in subdivision 11 of paragraph 10 of the decree of foreclosure provisions to the effect: (a) That if the 14 miles of railroad from Newton to Colfax should be dismantled, or if it should not be operated by September 15, 1914, $2,457.50 should be paid to the interveners; and (b) that in selling this part of the railroad $2,457.50 should be deposited in the registry of the court for the interveners as a condition of the confirmation of the sale, and it inserted in section 6 of paragraph twenty-fifth of the foreclosure decree a provision that out of the proceeds of the sale of the other parts of the property of the Ft. Dodge Company nothing should be paid on the debt secured by its mortgage to the Old Colony Trust Company or on certain other claims until the $2,457.50 had first been paid to the interveners.

Counsel for the Old Colony Company and for the Ft. Dodge Company challenge these provisions of the decree on the grounds: (1) That the evidence fails to prove the facts essential to the right of the interveners under the statute to the repayment of any moneys; (2) that no proceedings have ever been taken for the abandonment of the 14 miles of railroad between Colfax and Newton; (3) that the abandonment of the 27 miles of railroad from Des Moines Junction to Goddard pursuant to the decree of the court in the foreclosure suit because under the general principles and practice in equity its farther operation was inequitable and inexpedient, was not a proceeding under the statutes, nor of the nature of such a proceeding, and therefore entitled the interveners to no repayment; and (4) that

the lien of the mortgage to the Old Colony Trust Company is superior in equity to the claim of the interveners.

The interveners demand the repayment of moneys under section 2094 as a condition of the change or removal by the Ft. Dodge Company of a portion of its line of railroad. It is, however, moneys "which were donated: (1) To the company building the same (the railroad); (2) exclusively in consideration of said railroad being located and constructed on such line," and such moneys only that may be repaid under this statute. The petition of the interveners alleges that they donated their money to the Newton & Northwestern Railroad Company. This averment is denied by the answers. There were only two witnesses in the case. C. F. Morgan, a merchant, who was president of the Commercial Club or Business Men's Association of Newton in the years 1902, 1903, and 1904, testified that Hamilton Brown called on him in January, 1903, "and said they were contemplating building a road, as I remember it, to either Oskaloosa or Newton," and he wanted to know if the citizens of Newton would contribute something to secure the coming of the road to Newton; that he wanted $3,000; that Mr. Hindorff collected about $2,500, and caused a draft to be issued on July 1, 1904, for $2,457.50 which he "signed over to Hamilton Brown," and sent to him. On cross-examination he testified that there was a written subscription, setting out the terms and conditions under which this money was subscribed, which was circulated around, but that he did not know where it was unless the bank had it; that the point the people of Newton were anxious for was that the railroad should run into Newton; that he did not recall what company constructed the road, whether it was a construction company or a railroad company; that all he knew about it was that the people of Newton contributed $2,500 to Hamilton Brown; and that the impression was that Hamilton Brown was the construction man, or the man who did construct the railroad, or was the general manager of construction, but that he knew nothing about that personally. A. E. Hindorff testified that he was not interested personally in the subscription; that he did not know what became of the original subscription paper; that his understanding is that it was turned back to Mr. Morgan, or the officers of the association; that a paper which he presented and introduced in evidence contained a list of collections which he made for the benefit and construction of the Newton & Northwestern Railroad Company; that he was hired and paid $50 for making the collection; that he was assistant cashier of the Jasper County Savings Bank at the time he made this collection, and was cashier of that bank when he testified; that on July 1, 1904, he issued a draft No. 113,238 on the Commercial National Bank of Chicago issued by the Jasper County Bank of Newton for $2,457.50, payable to the order of C. F. Morgan; that that draft was cashed on the Commercial National Bank of Chicago by Hamilton Brown; that the draft came back from Chicago to the Jasper County Bank; that he turned it over to J. C. Cross; that J. C. Cross was at one time secretary of the Commercial Association, and when he testified was an attorney in Newton; that he had made search to ascertain the whereabouts of the

draft, but had been unable to find it; and that he had always thought that it was taken in this case and presented as evidence. He further testified that his understanding was that the draft was indorsed over by Mr. Morgan to Hamilton Brown, and that he used it "for the benefit of the construction or building of the Newton & Northwestern Railroad Company near by the city of Newton." The foregoing is all the material evidence upon the question now under consideration in this case.

The burden was on the interveners to prove by substantial evidence that they donated this $2,457.50, as they alleged: (1) To the Newton & Northwestern Railroad Company; and (2) exclusively in consideration that the road should be located on the line from which it is proposed to remove it. Repeated readings of the testimony have failed to disclose any substantial evidence of either fact. It is essential to proof of a donation that there should be substantial evidence of the person to whom, or corporation to which, the donation was made and of his or its acceptance of the gift. It is a remarkable fact in this case that while it is conclusively proved that there was a written subscription agreement which set out the terms and conditions of the subscription, and there is no evidence that any search has been made for this agreement, or that it cannot be found, yet it is not produced. It is equally remarkable that while there is evidence tending to show that the money contributed was paid over by Mr. Morgan to Hamilton Brown by means of a draft of the Jasper County Bank, which was paid and returned to that bank and delivered to Mr. J. C. Cross, an attorney of Newton, Mr. Cross was not called as a witness, nor was the draft produced. It seems probable that the subscription agreement and the draft would have shown the party for whom or for which the subscription was made with clearness and certainty. But all the evidence in the record upon this subject amounts to this. There is substantial evidence that on the statement of Hamilton Brown that "they" were contemplating building a railroad a subscription list, which stated the terms and conditions of the subscription, was made and signed by the interveners; that from the parties who signed that list Mr. Hindorff collected $2,450, which he embodied in a draft on a Chicago bank payable to Mr. Morgan, who signed it over to Hamilton Brown, who cashed it. But there is not a scintilla of evidence that Brown solicited this money for or paid it to the Newton & Northwestern Railroad Company which, according to the finding of the court below, built the railroad, or that that company ever received or accepted this money. There is no substantial evidence that Hamilton Brown was authorized by the railroad company as its agent, officer, or otherwise to solicit, or receive, or accept the money for that railroad company. The strongest testimony in the record for the interveners on this issue is Hindorff's testimony that his understanding was that the draft was indorsed over to Hamilton Brown, and "he used it for the benefit of the construction of the Newton & Northwestern Railroad Company near by the city of Newton," and the testimony of Morgan, who "signed over" the draft and sent it to Hamilton Brown, that the impression was that Hamilton Brown—

"was the construction man, or the man who did construct it, or the general manager of the construction. Q. Of course, you knew nothing about that personally? A. No, sir. * * * Q. You don't even know what company really constructed the road, whether it was a construction company or a railroad company? A. I don't recall that either. Q. You don't know whether Hamilton Brown kept the money or turned it over to a railroad? A. No, sir. Q. All you know is that people of Newton made a contribution to Hamilton Brown of $2,500? A. Yes, sir."

And that is all that the evidence in this case proves and all that this court knows or can learn from the record of it. The understanding of Mr. Hindorff as to the use of the draft or the money it represented by Brown, in the absence of any evidence whatever that he had any knowledge of the facts relating to the subject, is insufficient to warrant the taking by any court of $2,450 from the mortgagee, the Old Colony Trust Company, which on the record is entitled to it in payment of the mortgage debt, and transferring it to the interveners. As the evidence fails to prove the donation of the $2,457.50 to the railroad company which built the railroad, the portions of the decree questioned by the appeals cannot be sustained, and they must be stricken from the decree on this ground.

The conclusion which has been reached renders it unnecessary to discuss any of the other objections to the decree. It seems equally clear, however, that there is no substantial evidence in this case that the alleged donations were made by the interveners "exclusively in consideration of said railroad being located and constructed on the line which the Old Colony Trust Company, or the Ft. Dodge Company, or the receivers, desire to change or remove." The only evidence on that subject is the testimony of Mr. Morgan that the point the people of Newton were anxious for was that the railroad should run into Newton. There is no desire or proposition to change or remove the line from Colfax via Goddard to Newton, or from Goddard to Newton. The line which has been abandoned, the 27 miles between Des Moines Junction and Goddard, does not reach or enter Newton, and no proceeding has been taken under the statute to change or remove it. That portion of the railroad has been abandoned by virtue of a decree of the court below, affirmed by this court, because its operation is so inconvenient and inequitable that the courts were of the opinion it was their duty to have the receivers abandon it. There is no proof that it was exclusively on account of the location and construction of the line over these portions of the railroad that the interveners made their subscription and paid their money to Hamilton Brown.

Let that portion of the decree of foreclosure herein from which these appeals were taken, which contains in subdivision 11 of paragraph 10 thereof the provisions to the effect: (a) That if the 14 miles of railroad extending from Newton to Colfax should be dismantled, or if it should not be operated by September 15, 1914, $2,457.50 should be paid to the interveners; and (b) that in selling this part of the railroad, $2,457.50 should be deposited in the registry of the court for the interveners as a condition of the confirmation of the sale thereof; and that portion of the decree in section 6 of paragraph 25 thereof which provides in effect that out of the proceeds

of the sale of the property covered by the mortgage foreclosed, nothing should be paid on the debt secured by that mortgage, or on certain other claims until $2,457.50 had first been paid to the interveners—be removed from the foreclosure decree, and let the appellants recover their costs herein.

MUDGE v. BLACK, SHERIDAN & WILSON et al.

(Circuit Court of Appeals, Eighth Circuit. May 12, 1915.)

Nos. 4229, 4230, 4233, 4234.

1. CORPORATIONS ⊜469—BONDS—LEGALITY OF ISSUE—PLEDGE TO SECURE ANTECEDENT DEBT—MISSOURI CONSTITUTION AND STATUTE.
Bonds of a corporation of Missouri, issued by it to secure an antecedent debt, with no new consideration, except an extension of the debt, are void by virtue of the constitutional or statutory provision of that state prohibiting its corporations from issuing bonds, except for money paid, labor done, or property actually received.
[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1832; Dec. Dig. ⊜469.]

2. CORPORATIONS ⊜469—BONDS—ISSUANCE "FOR" MONEY, LABOR, OR PROPERTY.
In the constitutional or statutory provision of Missouri that "no corporation shall issue stock or bonds except for money paid, labor done or property actually received," the word "for" is used in the sense of "in place of"; the purpose of the provision being to prevent the issue of stock or bonds unless the corporation receives in place of the same an amount in value, in money, labor, or property, equal to their par value.
[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1832; Dec. Dig. ⊜469.
For other definitions, see Words and Phrases, First and Second Series, For.]

3. COURTS ⊜366—FEDERAL COURTS—AUTHORITY OF STATE DECISIONS.
The construction of the Constitution and statutes of a state by its highest judicial tribunal is controlling in the national courts, in the absence of any question of general or commercial law or of a violation of the Constitution or statutes of the United States.
[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 954–957, 960–968; Dec. Dig. ⊜366.
Conclusiveness of judgment between federal and state courts, see notes to Kansas City, Ft. S. & M. R. Co. v. Morgan, 21 C. C. A. 478; Union & Planters' Bank of Memphis v. City of Memphis, 49 C. C. A. 468; Converse v. Stewart, 118 C. C. A. 215.]

Appeal from the District Court of the United States for the Eastern District of Missouri; David P. Dyer, Judge.

Suit in equity by the Whitney-Kemmerer Company, a partnership, against the St. Louis Blast Furnace Company and others. From a decree of distribution, Edwin W. Mudge, H. L. Brenneman, and Frank L. Perin, Cohen-Schwartz Rail & Steel Company, and W. H. Smollinger, doing business as the Iron Mountain Stock Farm, intervening creditors, appeal. Affirmed.

Frank Y. Gladney, of St. Louis, Mo., Edwin C. Luedde and Leo M. Grace, of St. Louis, Mo. (Augustus L. Abbott and John B. Edwards, both of St. Louis, Mo., on the briefs), for appellants.

William G. Pettus, of St. Louis, Mo., for appellees.

Before SANBORN and SMITH, Circuit Judges.

SANBORN, Circuit Judge. [1] In Kemmerer v. St. Louis Blast Furnace Co., 212 Fed. 63, 128 C. C. A. 519, this court held that the pledge of the bonds of a Missouri corporation to secure an antecedent debt without the receipt by the corporation of any consideration except the former consideration for the old debt and the extension of the time of payment of that debt was a violation of the provisions of the Constitution and statutes of Missouri which rendered the bonds void. Those provisions are:

"No corporation shall issue stock or bonds, except for money paid, labor done or property actually received, and all fictitious increase of stock or indebtedness shall be void." Constitution of Missouri, art. 12, § 8.

"The stock or bonds of a corporation shall be issued only for money paid, labor done or property actually received." Revised Stat. of Missouri 1909, § 2981.

The appellants present this question again in the same foreclosure proceeding upon facts so nearly identical with those in Kemmerer's Case that it is unnecessary to state them. Reference to the opinion in that case is made for the material facts. If our decision in that case was right, the decision of the court below in the cases of the appellants was also right. Their counsel contend that our former decision was erroneous, and they have presented briefs so exhaustive and have argued the issue with such marked ability and evident candor that they have persuaded us to examine it again. The authorities they have cited, their oral arguments, and their briefs have received consideration and meditation. But our examination has served only to confirm and strengthen our former conviction. Our conclusion and the reasons for it were so clearly and forcibly stated in Judge Carland's opinion in Kemmerer's Case that any general discussion of the question would be futile. Accordingly, this opinion will be confined to a brief statement of a few reasons why some of the arguments of counsel for appellants have failed to satisfy that our former decision was a mistake.

They contend that the indebtedness of the corporation was not increased by the pledges of the bonds. But the pledges of the bonds unquestionably created, at the times they were respectively made, legal liabilities of the corporation to increase its indebtedness by the difference between the amounts that should eventually be realized from the enforcement of the pledges and the par value of the bonds pledged. It is knowledge too common to escape judicial cognizance that these differences are ordinarily great, often more than 75 per cent. of the par value of the bonds. In Kemmerer's Case bonds of this corporation of the par value of $4,000 sold under the collateral agreement for only $100 so that the pledge of those bonds increased the debt of the corporation $3,900. Suppose a corporation gives its note for $10,000 for

a just antecedent debt and pledges its mortgage bonds for $50,000 to secure it, and the pledge is foreclosed by decree of court, and thereafter the bonds are sold for $5,000 to a third party. There then remains a debt of the corporation of $5,000 to the original creditor and a debt of $50,000 to the purchaser of the bonds, and the cause of the increase of the indebtedness of the corporation from $10,000 to $55,000, of which $45,000 would be without any valuable consideration and fictitious, would be the original pledge of the bonds. A decision that the provisions of the Constitution and the statute could be evaded by such pledges would have the practical effect of nullifying them.

Again, the prohibition of the Constitution and of the statute is not against a fictitious increase of the indebtedness of the corporation only; it is first and chiefly against the issue of stock or bonds except for money paid, labor done, or property actually received—that is to say, unless the corporation actually receives an amount equal to the par value of the bonds in money, labor, or property. Counsel insist nevertheless that their clients escape the ban of this inhibition because long before the bonds were issued, when the antecedent debts they were pledged to secure were incurred, the corporation actually received property equivalent in value to the amounts of those debts and the Constitution and the statute fail to specify when the money, labor, or property which conditions the lawful issue of the bonds must be received, and they contend that these bonds were issued and pledged within the meaning of the Constitution and the statute for the property which formed the consideration of the antecedent debts. If that were the true interpretation of the provisions of the Constitution and the statute, a corporation which had incurred a just debt of $10,000 for property actually received might thereafter successively issue and pledge its stock or its bonds to secure that debt to the amount of $10,000 and permit them to be sold under the pledge for $100, or some small amount, and it might thereby increase its outstanding stock or bonds on account of its antecedent debt of $10,000 to many times that amount. These interpretations of the terms of the Constitution and the statute for which counsel argue seem strained, unnatural, and inconsistent with these familiar canons of construction; the plain, obvious, natural meaning should be preferred to any curious, hidden sense suggested by the meditation and ingenuity of able and acute minds and the exigencies of the case. The object which the enacting body sought to attain and the evil which that body sought to remedy may always be considered for the purpose of ascertaining its intention, and that intention should be given effect if the terms of the enactment do not render that result impossible. A rational, sensible construction, one that will advance the remedy and repress the wrong, must be given if consonant with the terms of the Constitution or the statute.

[2] The obvious, natural, reasonable meaning of the inhibition of the Constitution and the statute is that no corporation shall issue stock or bonds except in exchange for value equal in amount to the par value of the stock or bonds, either in money paid, labor done, or property actually received. The word "for" is used in numberless relations and has many meanings. One of them is "in place of," "instead of,"

"in consideration of," "as to pay a dollar for a thing, two for five cents." Century Dictionary, For, 4. It was in this sense that this word was used in this prohibition. The object of the enacting bodies was to prevent the issue by a corporation of any stock or bonds unless the corporation received instead of them an amount of value equal to the par value thereof, and this to the end that the amount of stock and bonds of a corporation should not misrepresent and deceive those who dealt with it regarding the value of its assets. Now in these cases the corporation received no money, or labor, or property, no increase of its assets for, or instead of the bonds it pledged for its old debts. In each case it had the same amount of assets the moment before it made the pledge that it had thereafter. But thereafter that portion of its assets covered by the mortgage securing the bonds was incumbered by an additional liability. Not only this, but the corporation did not even issue its bonds in payment to the extent of their par value of its antecedent debts so that it can be truthfully said that it received in the property, which was the consideration of those old debts, an amount of value equal to the par value of the bonds it issued. On the other hand, if it were true that it issued its bonds for the property that was the consideration of its old debt, it would also be true that by its pledges of its bonds it issued them for an amount of value in property equal to that percentage of the par value of the bonds which should thereafter be realized from the sale of them under the foreclosure of the pledges. The construction that the pledge of bonds to secure antecedent debts of a corporation is forbidden by the provisions of the Constitution and the statute accords with the obvious, natural meaning of those provisions, gives effect to the intention of the enacting bodies, represses the wrong they sought to prevent and advances the remedy they provided.

Another contention of counsel is that the former decision of this court was founded on the opinion in Nichols v. Waukesha Canning Co. (D. C.) 195 Fed. 807, that the Court of Appeals of the Seventh Circuit subsequently overruled that opinion, and in First Savings & Trust Co. v. Waukesha Canning Co., 211 Fed. 927, 931, 128 C. C. A. 305, 309, delivered one adverse to the decision of this court. Repeated readings of the opinion of that court, however, have led our minds to the conclusion that, instead of conflicting with, it sustains, the conclusion of this court that the bonds pledged in the Kemmerer Case and in the cases in hand were issued in violation of the Constitution and statute of Missouri and are void, although the reasoning by which the court reached that conclusion may not in all things coincide with the views of this court. That case arose under a statute of Wisconsin to the effect that no corporation should issue bonds except for money, labor, or property estimated at its true value actually received equal to 75 per cent. of the par value thereof, and that all bonds issued contrary thereto should be void. A corporation of Wisconsin pledged its bonds to secure its antecedent debts under an agreement with the pledgees that they would take them in payment and satisfaction of those debts at not less than 75 per cent. of the face of the bonds. The following

words of the Court of Appeals of the Seventh Circuit embody its decision:

"We are therefore of the opinion that in agreeing to take the bonds in question as collateral at the rate of not less than 75 per cent. of their face value upon their past-due claims, and in extending time of payment of the same, the present bondholders afforded to the corporation a valid property consideration equal to 75 per cent. of the face of the bonds, and are therefore satisfying the demands of the Wisconsin statute above set out, provided, of course, the creditors had agreed to accept the bonds on that basis. As to this proposition, all the creditors, excepting perhaps American Appraisal Company, are in the same situation. Unless there was such an agreement, the collateralized bonds are invalid. Pfister et al. v. Milwaukee Electric R. R. Co., 83 Wis. 86, 53 N. W. 27; Hinckley v. Pfister, 83 Wis. 64, 53 N. W. 21; National Foundry & Pipe Works, Ltd., v. Oconto Water Co. et al. (C. C.) 52 Fed. 29; Mowry v. Farmers' Loan & Trust Co., 76 Fed. 39, 22 C. C. A. 52; Haynes v. Kenosha Ry. Co., 139 Wis. 227, 119 N. W. 568, 121 N. W. 124."

The Constitution and statute of Missouri prohibited the issue of the bonds in these cases except for money, labor, or property equal to 100 per cent. of the par value of the bonds. As there was no agreement between the pledgor and the pledgees that the latter would take the bonds in payment of their debts at not less than 100 per cent. of their par value, the bonds, according to the decision of the Court of Appeals of the Seventh Circuit to which reference has just been made, were void. There were, however, many other reasons why this court reached its former decision beside the fact that the United States District Court for the District of Wisconsin had reached a like conclusion in Nichols v. Waukesha Canning Co., 195 Fed. 807.

[3] Finally, the question to be determined here is one of local law, of the interpretation of the Constitution and statutes of Missouri. The construction of the Constitution and statutes of a state by its highest judicial tribunal is controlling in the national courts in the absence of any question of general or commercial law, or of a violation of the Constitution or statutes of the United States. If the decision of the question at issue by this court accords with the decision, or with the probable decision, of the Supreme Court of Missouri, it is right, although there may be conflicting decisions, to some of which counsel has called our attention, in other courts.

Repeated decisions of the Supreme Court of Missouri have established beyond doubt or debate the law in that state that the true construction of the provisions of the Constitution and statute of Missouri under consideration is that they require the money paid, labor done, or property actually received that are made indispensable to the issue of stock by a corporation of that state, to be equal in value to the par value of the stock issued. Garrett v. Kansas City Coal Mining Co., 113 Mo. 330, 338, 20 S. W. 965, 35 Am. St. Rep. 713; Van Cleve v. Berkey, 143 Mo. 109, 134, 135, 136, 44 S. W. 743, 42 L. R. A. 593; Berry v. Rood, 168 Mo. 316, 328, 330, 331, 67 S. W. 644; Hunter v. Garanflo, 246 Mo. 131, 132, 133, 151 S. W. 741.

As the Constitution and the statute condition the power of a corporation of Missouri to issue bonds in the same clause by the same limitations that condition its power to issue its stock, it is equally indispensable to its issue of valid bonds that they be issued only for

money paid, labor done, or property actually received which is equal in value to the par value of the bonds. The opinions of the highest judicial tribunal of Missouri and the considerations to which reference has been made in our former opinion, and in this opinion, have convinced that when the question is presented the Supreme Court of Missouri will decide that bonds issued by a corporation of that state and pledged to secure its antecedent indebtedness without the receipt by the corporation of any valuable consideration for them except the consideration of the old debts and the extension of the time for their payment are issued in violation of section 8, art. 12, of the Constitution of Missouri, and of section 2981, Revised Statutes of that state, and that there was no error in the decision of this question in Kemmerer's Case, nor in the decisions of the court below in the cases in hand.

Let the portions of the decree below challenged by the appellants be affirmed.

CHESAPEAKE & O. COAL & COKE CO. v. BLACK, SHERIDAN & WILSON et al.

(Circuit Court of Appeals, Eighth Circuit. May 12, 1915.)

No. 4231.

CORPORATIONS ⟸628—INSOLVENCY AND RECEIVERS—DISTRIBUTION OF ASSETS.

Where, prior to the appointment by a federal court of a receiver for the property of a corporation, a creditor had obtained a judgment against the corporation in a state court which was a lien on its real estate, and a garnishment had also been issued and served, the receiver took the property subject to the liens thereby acquired, and the federal court was without authority to require the creditor to surrender the lien secured by its garnishments as a condition to sharing in the proceeds of the real estate sold by the receiver.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. ⟸628.]

Appeal from the District Court of the United States for the Eastern District of Missouri; David P. Dyer, Judge.

Suit in equity by the Whitney-Kemmerer Company, a partnership, against the St. Louis Blast Furnace Company and others. Appeal by Chesapeake & Ohio Coal & Coke Company from a provision of a decree distributing assets of defendant. Modified.

Edwin C. Luedde (Augustus L. Abbott and John B. Edwards, both of St. Louis, Mo., on the brief), for appellant.

William G. Pettus, of St. Louis, Mo., for appellees.

Before SANBORN and SMITH, Circuit Judges.

SANBORN, Circuit Judge. This is the case of another creditor of the St. Louis Blast Furnace Company that held bonds of that corporation which the latter had pledged to the appellant, the Chesapeake & Ohio Coal & Coke Company, a corporation, to secure an antecedent debt of the furnace company to it. The court below adjudged these bonds void because they were issued in violation of the provisions of

section 8, art. 12, of the Constitution of Missouri, and of section 2981, Revised Statutes of Missouri 1909. The Ohio Company appealed, specified that ruling as error, and caused its case to be argued and submitted to this court with Mudge v. Black, Sheridan & Wilson et al., 224 Fed. 919, and other cases which involved the correctness of that ruling and in which the opinion is filed herewith. For the reasons stated in Kemmerer v. St. Louis Blast Furnace Co., 212 Fed. 63, 128 C. C. A. 519, and in the opinion in that case, the ruling challenged is sustained and affirmed.

The coal company presents another complaint. The proceedings in these cases were had in the suit of Kemmerer v. St. Louis Blast Furnace Co. which was instituted on October 19, 1911, and the rulings assailed are in the decree of distribution of the proceeds of the property of the furnace company which was rendered in that case on June 12, 1913. The court had appointed a receiver of the property of the furnace company in that suit on September 24, 1912, and the property mortgaged to secure the bonds had been sold under a decree of foreclosure rendered October 23, 1912. On November 29, 1912, the court had appointed a special master to hear claims and especially to report the character of the claims and the respective rights of the claimants to priority, if any, in the distribution of the assets of the furnace company, and it was upon his report and exceptions thereto that the decree of distribution was founded.

Prior to the appointment of the receiver, the coal company had brought an action and had recovered a judgment against the furnace company in the circuit court of the City of St. Louis for $18,491.81. "On the day fixed by the master," reads the statement of the evidence approved by the court below under rule 75 in equity for the purpose of the appeal to this court, "the Chesapeake & Ohio Coal & Coke Company appeared by its attorney and presented to and filed with the special master one bond for $1,000 and four bonds of $500 each, making a total face value of $3,000 bonds of the blast furnace company, and in presenting these bonds attorney for the claimant stated that he presented them subject to whatever rights the claimant had obtained by virtue of the garnishments hereinafter described, that the Chesapeake & Ohio Coal & Coke Company held these bonds as collateral security for an indebtedness the principal sum of which was $17,654.31, which indebtedness had been reduced to judgment in the circuit court of the city of St. Louis. On this judgment the Chesapeake & Ohio Coal & Coke Company had obtained and claimed a prior lien arising from a garnishment issued on execution issued prior to the appointment of the receiver on which garnishment the Chesapeake & Ohio Railway Company and the Southern Railway Company had been summoned as garnishees. The certificate of the clerk of the circuit court was offered in evidence showing a judgment in favor of the plaintiff." The facts that the coal company recovered its judgment in the St. Louis circuit court against the furnace company for $18,491.81, and that this judgment secured to it a lien prior to the claim of the receiver on all the real estate not covered by the mortgage of the furnace company in the city of St. Louis, and on condition

that it released its garnishments, entitled it to a proper proportionate lien with other judgment creditors on the assets in the hands of the receiver realized from the sale of the said real estate were found by the master and reported to the court. The master and the court allowed the claim of the coal company as a general creditor for the amount of its judgment. Thereupon the court decreed that the coal company "recall, dismiss, and release all executions upon any and all judgments procured by it against the St. Louis Blast Furnace Company, and dismiss and release all garnishments sued out in aid of the same," and this portion of its decree is specified as error by the appellant.

Prior to the appointment of the receiver by the federal court, the coal company had, by the judgment, execution, and garnishment of the state court secured a lien upon all the realty of the furnace company in St. Louis and upon all the money and property held for that company, or owing to it by the Chesapeake & Ohio Railway Company and the Southern Railway Company. When the receiver had been appointed, he stood in the shoes of the furnace company and took its property subject to those liens. The coal company believed that its claim against the furnace company was secured (1) by the pledge of the mortgage bonds of that company of the par value of $3,000, (2) by its judgment lien on the real estate of the furnace company not covered by the mortgage securing the bonds, (3) and by its garnishment lien on the amounts of money and property owing to the furnace company by the railway companies. It had the right to pursue each and all of these securities until it obtained full payment of the debt owing to it by the furnace company. The federal court sold the mortgaged property and took the proceeds of the sale into its possession. The coal company presented its pledged bonds to that court "subject to whatever rights it had obtained by virtue of the garnishments," and prayed that it might share in the distribution of the proceeds of the mortgaged property. This was not a submission to but a reservation from the jurisdiction of the federal court of its claims under the garnishments, claims of which and of the property subject to which the state court had first acquired and still had jurisdiction exclusive of the federal court so far as was necessary to enforce the liens of the garnishments.

It was therefore error to require the coal company, either absolutely or as a condition of securing the benefit of its judgment lien on the real estate, not covered by the mortgage, which the federal court had taken and sold and had possession of the proceeds of, to require it to surrender the liens it had secured by the garnishments. Its liens upon the real estate and upon the money or property held for the furnace company by the railway companies were secured before the receiver was appointed. He and the court that appointed him took the property subject to those liens, and the coal company had both the legal and equitable right, until it obtained complete payment of the debt which the furnace company owed it, simultaneously to enforce each of those liens against the property subject to it in any and every court that had or acquired jurisdiction of that property.

Let the decree of distribution be modified by removing from it the

part which requires the coal company to "recall, dismiss, and release all executions upon any and all judgments procured by it against the St. Louis Blast Furnace Company and dismiss and release all garnishments sued out in aid of the same," and let the appellant recover its costs against the appellee.

GILL, Internal Revenue Collector, v. BARTLETT.

(Circuit Court of Appeals, First Circuit. June 18, 1915.)

No. 1113.

1. INTERNAL REVENUE ⊂⊃4—STATUTES—CONSTRUCTION.
The imposition by the government of a tax is a burden on private interests laid on private property, and where the question is whether given property is subject to a tax the statute must clearly cover the property.
[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 4, 5; Dec. Dig. ⊂⊃4.]

2. INTERNAL REVENUE ⊂⊃8—LEGACIES—WAR REVENUE TAX—SHARES IN REAL AND PERSONAL ESTATE TRUSTS.
War Revenue Act June 13, 1898, c. 448, § 29, 30 Stat. 464, providing that any person having any trust as administrator, executor, or trustee in legacies or distributive shares arising from personal property shall be subject to a tax, does not authorize a tax on the face of legacies or certificates of shares held in trust, but authorizes a tax thereon when arising from personal property only, and where property covered by legacies representing personal and real property, the tax may be imposed only so far as the legacies represent personal property.
[Ed. Note—For other cases, see Internal Revenue, Cent. Dig. §§ 11, 12; Dec. Dig. ⊂⊃8.
Internal revenue tax on legacies, inheritance, and transfers, see note to Ward v. Sage, 108 C. C. A. 417.]

In Error to the District Court of the United States for the District of Massachusetts; Geo. H. Bingham, Judge.

Action by Schuyler S. Bartlett, executor, against James D. Gill, Collector of Internal Revenue. There was a judgment for plaintiff (221 Fed. 476), and defendant brings error. Affirmed.

James S. Allen, Jr., of Boston, Mass. (George W. Anderson, U. S. Atty., of Boston, Mass., on the brief), for plaintiff in error.

Burton E. Eames, of Boston, Mass. (Tyler, Corneau & Eames, of Boston, Mass., on the brief), for defendant in error.

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

ALDRICH, District Judge. The question to be considered here, under section 29 of the War Revenue Act of 1898, is one of first instance, and it seems to us that the question is plainly one to be determined upon an interpretation of the statute itself, and that the decision below was sufficiently favorable to the government.

[1, 2] It is apparent that Congress in this statute disclosed no purpose to arbitrarily lay a tax upon distributive shares or legacies as

specific properties, without regard to whether they are based upon real estate, or upon mixed real and personal properties. It is also apparent that Congress did not intend to make the validity of the tax in a given situation depend upon interpartnership or interassociate trust relationships in respect to distributive shares and legacies, irrespective of the origin and character of the property covered by such evidences of title.

The provision of the statute in question does not assume to authorize the laying of a tax upon the face of legacies or certificates of shares held in trust. It cuts under legacies and shares, and authorizes the imposition of a tax upon such only as arise from personal property. It would be a forced and unwarrantable construction of a statute, which fundamentally directs its authority to tax evidences of title which arise from personal property, to make it so read as to include such part of a legacy or share as is in fact based upon real estate.

The statute bases the tax upon the character of the property and the origin of the legacy or share. Therefore the cases cited from various jurisdictions which involve questions as to what property under given partnership relations is answerable for partnership debts, and cases involving questions as to what constitutes a technical conversion of land, held in trust, into personal estate, have very little, if any, bearing, even by way of analogy, upon the question presented in the case at hand.

The imposition of a tax imposed by a government is a burden upon private interests laid upon private property under the necessary exercise of an arbitrary power, and because of the character of the power exercised, the rule is universal that, when the question arises whether given property should be held subject to the burden, the taxing power must make it clear that the statute was intended to cover the property in question.

There is nothing in the statute which shows that Congress had any idea that the tax was to be justified under technical rules of conversion in respect to trusts and wills, or upon inter partes relationships and dealings in respect to partnership interests and trust associations. It seems clear that Congress, in exercising the power to impose the tax in question, did not have in mind any such contingencies and uncertainties.

If the words of the statute were general, that "any person or persons having in charge or trust as administrators, executors or trustees, any legacies or distributive shares shall be * * * subject to a duty or tax to be paid to the United States," the situation would be quite different from the one with which we are confronted. In such a case it is probable that a tax upon shares or legacies would be sustained without any question as to the character of the property, but clearly that is not the case here. This is so because the statute expressly limits the tax to "legacies or distributive shares arising from personal property," thus in terms excluding the idea that there was any intention to touch, through this statute, legacies or distributive shares based upon land.

Through expressly basing the tax upon the origin and character of the property from which legacies and distributive shares arise, the statute puts out of consideration all questions as to how the legacies or shares may have been treated after they came into existence. This intention is so obvious that there seems to be no occasion for suggesting possible reasons for limiting the tax upon legacies and shares to such as arise from personal property. But among the possible reasons may have been the idea that the situs of personal property is in a sense transitory, and therefore not always reached by the taxing powers of the local governments, while the situs of real estate is fixed and open, with no reasonable probability that it will not be subjected to the burden of local taxation. Indeed, it is conceded in this case that all real property interests represented by the legacies in question have been taxed under the Massachusetts law.

The properties covered by the legacies in question represent both landed properties and personal properties, and the learned Circuit Judge presiding in the District Court construed the statute as justifying the tax in question upon such portions of the legacies only as were based upon personal property, and held the tax invalid, so far as the legacies represented real estate, upon the ground that the statute only authorized a tax upon legacies and distributive shares arising from personal property. This construction of the statute was followed by a discussion of the character of the properties and the relationships of the parties and the trust associations, and it was found, under an elaborate discussion in respect to the character of the holdings and the relationships of the parties, that the situation was such that the properties under the various trusts were susceptible of separation, and that the fact might be established as to what proportion of the legacies arose from personal property and what from real property, and the parties were given an opportunity, by agreement, to segregate the personal from the real; and upon their failure to do so it was suggested that the question of segregation would be referred to a master. The parties, acting under this suggestion, agreed upon the amount of real estate, and the amount of personal estate, covered by the legacies in question. A judgment was entered for so much of the tax as was not based upon legacies arising from personal property.

The judgment is affirmed, with costs of this court.

PUTNAM, Circuit Judge. I concur. I think Congress desired to avoid any question of constitutionality which might be raised by reason of the decisions of the Supreme Court with reference to assessing taxes on real estate, or the fruits thereof, and was not very particular in the choice of the language necessary to accomplish that purpose.

HOCKING VALLEY RY. CO. v. LACKAWANNA COAL & LUMBER CO.

(Circuit Court of Appeals, Fourth Circuit. May 4, 1915.)

No. 1319.

1. CARRIERS ⟸30—SCHEDULE OF FREIGHT RATES—APPLICATION OF PROPORTIONAL RATES.

A joint proportional rate, made by railroad companies from the Kanawha district in West Virginia to Toledo, "on cargo coal when for lake shipments beyond," *held* not to apply to coal which, although originally intended for lake shipment, was sold and delivered to vessels at Toledo as bunker coal.

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

2. CARRIERS ⟸30—FREIGHT SCHEDULES—"PROPORTIONAL RATE."

A "proportional rate," as the term is used in a schedule of freight rates, is the carrier's part of a through rate.

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

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

Action at law by the Hocking Valley Railway Company against the Lackawanna Coal & Lumber Company. From the judgment, plaintiff brings error. Reversed.

W. N. King and V. L. Black, both of Charleston, W. Va. (Brown, Jackson & Knight, of Charleston, W. Va., on the brief), for plaintiff in error.

Staige Davis, of Charleston, W. Va. (Connor Hall, of Charleston, W. Va., and H. R. Van Deusen, of Scranton, Pa., on the brief), for defendant in error.

Before KNAPP and WOODS, Circuit Judges, and WADDILL, District Judge.

KNAPP, Circuit Judge. [1] From August 4 to November 15, 1910, the Chesapeake & Ohio, Kanawha & Michigan, and Hocking Valley Railroads had in effect a joint proportional tariff on bituminous coal from Kanawha (group No. 2) district to Toledo, Ohio, of 97 cents per ton of 2,000 pounds. The application of this tariff was fixed and limited by a provision therein as follows:

"Note A. Proportional Rates on Cargo Coal when for Lake Shipments Beyond.—F. O. B. Cars on Dock—The charge for loading from cars to vessels is 5 cents per ton of 2,000 pounds, and will be in addition to the above rates."

While this tariff was in force the New River-Kanawha Fuel Company, whose liability for freight charges was afterwards assumed by defendant, shipped from Pratt, a station within the district named, 5,613.3 tons of coal consigned to Toledo for lake shipments beyond. By the written direction or consent of the fuel company these shipments of coal were at Toledo delivered to and used for fuel by vessels plying the Great Lakes, instead of being forwarded as cargo from that port.

At the time these shipments moved there was no joint through rate on coal from Pratt to Toledo as a final destination. On such coal the through charge was the 50 cents local rate of the Chesapeake & Ohio from Pratt to Charleston, W. Va., plus the joint rate of the Kanawha & Michigan and Hocking Valley of $1.07 from Charleston to Toledo. The tariff naming the latter rate stated that it applied only on coal consigned to Toledo dock when used as fuel for vessels, and that there would be an additional charge of 11 cents per ton for transferring the coal from cars to vessels.

The plaintiff claimed that the lawful rate on the coal in question, which was in fact used by vessels for fuel and loaded into their bunkers for that purpose, was $1.68, made up of the items just stated. The defendant claimed that it was entitled to the rate of $1.02 per ton, made up of the 97 cents for transportation to Toledo, and 5 cents for unloading, named in the joint proportional tariff above mentioned. After suit was brought the freight money at the $1.02 rate was paid to and accepted by the plaintiff, but without waiving its right to prosecute the action for the excess claimed to be due, amounting to 66 cents per ton. The trial judge held, without stating his reasons therefor, that the 97-cent. rate applied for the haul to Toledo, but that the plaintiff was entitled to the unloading or transfer charge of 11 cents a ton, instead of the 5 cents which defendant had paid. The jury accordingly found a verdict for the difference of 6 cents a ton, besides interest, and the plaintiff thereupon brought the case to this court.

[2] We are clearly of opinion that the learned judge was in error in holding that the coal in question was entitled to the 97-cent rate. That rate, as stated in the caption of the tariff, was a "joint and proportional rate" which applied only to "lake shipments beyond," that is, to shipments carried as cargo from Toledo to more distant destinations. A "proportional rate," as the term implies, is simply a part of a through rate. It is the share of the aggregate charge from origin to destination which one or more of the carriers accepts for performing a definite portion of the whole transportation service. It is a matter of common knowledge that through rates are generally less than the sum of intermediate local rates; and when all the participating carriers do not join in establishing the through rates, it is a common practice for one or more of them to name proportional rates up to some point of connection with another carrier which completes or continues the transportation. The propriety and lawfulness of proportional rates to the point of transfer which are less than local rates to that point have frequently been affirmed by the Interstate Commerce Commission, and are sanctioned by considerations of public policy. Kansas City Transportation Bureau v. A., T. & S. F. Ry. Co., 16 Interst. Com. Comn. R. 195, 201; Southwestern Shippers' Traffic Association v. A., T. & S. F. Ry. Co., 24 Interst. Com. Comn. R. 570, 578; Boney & Parker Milling Co. v. A. C. L. R. Co., 28 Interst. Com. Comn. R. 383, 388.

In our judgment it is not open to question that shippers could get the benefit of the 97-cent rate only on coal which was carried as freight beyond Toledo, to whatever points the vessels might transport it. It was so limited in its application by the express terms of the published

tariff, and this limitation was none the less effectual because contained in what is called a "Note." By necessary implication this tariff excluded coal which at Toledo was dumped into vessels, not into their holds to be carried on as cargo, but into their bunkers to be used as fuel. It is plain that coal consigned to Toledo as a final destination was subject to an aggregate rate of $1.68, including the unloading charge of 11 cents, and it is equally plain, in fact and in law, that coal which there went into bunkers to be used for vessel fuel was coal of which Toledo was the final destination, because in that case its transportation as an article of traffic ended at Toledo. In other words, the coal in question was not entitled to the 97-cent rate because it was not transported beyond Toledo, and the shipper was therefore bound to pay the lawful rate then in force on coal consigned from Pratt to Toledo. That rate was $1.68, and the carrier had no option except to collect it. The difference in charges was fixed by the tariffs which respectively applied, and that difference is justified, not by difference of use, but by difference of destination.

The reasonableness of the $1.68 rate is a question for the Commission, and not for the courts. While that rate stands in the published tariffs of the carriers, it is the only legal rate, and binds shipper and carrier alike. The regulating statute on this point is explicit, and neither party can avoid its provisions. This has been repeatedly held by the Supreme Court in a long line of cases from Gulf, Colorado & Santa Fé v. Hefley, 158 U. S. 98, 15 Sup. Ct. 802, 39 L. Ed. 910, to Louisville & Nashville R. Co. v. Maxwell, 237 U. S. 94, 35 Sup. Ct. 494, 59 L. Ed. ——, decided April 5, 1915. The judgment must be reversed, and the case remanded for further proceedings not inconsistent with this opinion.

Reversed.

GUTH v. GUTH CHOCOLATE CO.

(Circuit Court of Appeals, Fourth Circuit. May 4, 1915.)

No. 1327.

TRADE-MARKS AND TRADE-NAMES ⊂=35—SALE OF GOOD WILL—RIGHT TO USE NAME.

G., widely known as a candy manufacturer and whose name was a valuable asset in connection with the business, transferred to a corporation organized by him certain property and rights, together with the good will and use of the name G., for the purpose of manufacturing and selling candies under the G. label. Afterwards he withdrew from the company and launched a new candy enterprise, in which he made his name prominent in every way, using his full name, instead of his surname only, as formerly. *Held*, that he was properly enjoined from using his name as a trade-mark.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Dec. Dig. ⊂=35.

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

Appeal from the District Court of the United States for the District of Maryland, at Baltimore; John C. Rose, Judge.

Suit by the Guth Chocolate Company against Charles G. Guth. Decree for complainant (215 Fed. 750), and defendant appeals. Affirmed.

George W. Lindsay and Richard B. Tippett, both of Baltimore, Md., for appellant.

Laurence A. Janney, of New York City (Emery, Booth, Janney & Varney, of New York City, on the brief), for appellee.

Before KNAPP, Circuit Judge, and WADDILL and CONNOR, District Judges.

KNAPP, Circuit Judge. We are satisfied with the disposition of this case by the court below and need only indicate our reasons for affirming the judgment.

1. It is well settled that a person who has adopted and used his surname as a trade-mark, or trade-name, may transfer the same with the good will of a business and thereby divest himself of the right to use his name in connection with such a business. In Russia Cement Co. v. Le Page, 147 Mass. 206, 17 N. E. 304, 9 Am. St. Rep. 685, a case of marked similarity to the one at bar, the rule is stated as follows:

"One who has carried on a business under a trade-name, and sold a particular article in such a manner, by the use of his name as a trade-mark or a trade-name, as to cause the business or the article to become known or established in favor under such a name, may sell or assign such trade-name or trade-mark when he sells the business or manufacture, and by such sale or assignment conclude himself from the further use of it in a similar way. * * * A person may be enjoined, therefore, from using his own name as a description of an article of his own manufacture, and from selling the article under that particular name, when he has parted with the right thus to apply it. * * * It is not upon the ground of the invasion of the trade-name adopted by another, but by reason of the contract he has made, that he is deprived of the right himself to use his name as all others of the same name may use theirs."

The kindred case of Le Page v. Russia Cement Co., 51 Fed. 943, 2 C. C. A. 557, 17 L. R. A. 354, dealing with substantially the same facts, states the proposition thus:

"It is equitable that a manufacturer or dealer, who has given reputation to any article, should have the privilege of realizing the fruits of his labors by transmitting his business and establishment, with the reputation which has attached to them, on his decease to his legatees or executors, or during his lifetime to purchasers; and it is also in accordance with the principles of law, and with justice to the community, that any trade-mark, including a surname, may be sold with the business or the establishment to which it is incident."

These cases have been frequently cited with approval, as, for example, in Royal Baking Powder Co. v. Royal, 122 Fed. 337, 346, 58 C. C. A. 499, 508, where Judge Lurton, speaking for the Sixth Circuit Court of Appeals, says:

"Where one has used his own name as a trade-name, and then parted with it, he may, of course, be enjoined from using his name in that business."

2. As to the sale in this case: When Guth organized the Guth Chocolate Company of Delaware, in 1909, to take over the business of the

Guth Chocolate Company of Baltimore, which had become insolvent, he transferred to the new corporation—the transaction taking the form of a resolution accepting his written offer of sale—certain specified property and rights, "together with the good will and use of the name Guth for the purpose of manufacturing and selling candies under the Guth label," etc. At that time he was widely known to the trade as a candy manufacturer of superior skill, and his name was a valuable asset in connection with that business. He was made president of the new company, became later the owner of 80-odd per cent. of its common stock, and dominated its activities until he disposed of his stock, in February, 1913, for several times what it cost him. A few months afterwards he withdrew from the company altogether and started another concern for the manufacture of candy, known as the Chocolate Products Company, which he appears to control.

In exploiting this venture, by circulars and otherwise, he took pains to inform the trade that he had severed all connection with the Guth Chocolate Company, had launched an entirely new enterprise, and was making his goods by new processes and machinery. But he made prominent in every way the name of Guth, and evidently relied for success upon the popularity of candies associated with that name. True, he made use of his full name, "Charles G. Guth," instead of the surname "Guth," or "Au Guth," which he had previously employed; but it is the surname which catches the public, and few purchasers would notice the difference between one form and the other. In the nature of things confusion was inevitable.

We are unable to distinguish the case in hand from the Le Page Cases above cited, and others of similar import, which fully sustain the decree of the trial court. When, in 1909, Guth sold, among other things, "the use of the name Guth for the purpose of manufacturing and selling candies under the Guth label," he dispossessed himself of the right thereafter to use his name as a trade-mark, and no valid reason appears for not holding him to his obligation. The commercial value of his name as a trade-mark is confined to the surname Guth, and the contract he entered into was not less effectually broken because he used his full name, instead of the surname only, on the packages of candy which he put upon the market. Stripped of all pretenses, what he really seeks to do is to keep for himself the essential thing he sold, and also keep the price he got for it. A court of equity may properly prevent such manifest unfairness. The injunction granted goes no further than to enforce the agreement which Guth actually made in regard to the use of his name, and he cannot justly complain of a decree which compels him to abide by his bargain.

Affirmed.

McSPADDEN v. UNITED STATES.

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

No. 4393.

1. INDICTMENT AND INFORMATION ⟸133—VALIDITY OF INDICTMENT—MODE OF TESTING.

The validity of an indictment cannot be tested by an objection to any evidence on the part of the government.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 454–468; Dec. Dig. ⟸133.]

2. INDIANS ⟸38—OFFENSES—INTRODUCTION OF LIQUOR.

An indictment charging that accused introduced liquor into the state of Oklahoma from without the state, into a county within that which was formerly the Indian Territory, charges a violation of Act March 1, 1895, c. 145, 28 Stat. 697, § 8.

[Ed. Note.—For other cases, see Indians, Cent. Dig. §§ 22, 64, 66; Dec. Dig. ⟸38.]

3. INDIANS ⟸38—OFFENSES—INTRODUCTION OF LIQUOR INTO INDIAN TERRITORY—EVIDENCE.

In a prosecution for introducing liquor into what was formerly the Indian Territory from without the state of Oklahoma in violation of Act March 1, 1895, c. 145, 28 Stat. 697, § 8, evidence *held* sufficient to go to the jury.

[Ed. Note.—For other cases, see Indians, Cent. Dig. §§ 22, 64, 66; Dec. Dig. ⟸38.

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

4. CRIMINAL LAW ⟸814—TRIAL—INSTRUCTIONS.

In a prosecution for violating Act March 1, 1895, c. 145, 28 Stat. 697, § 8, relating to the introduction of liquor into the Indian Territory, requests applicable to Act Jan. 30, 1897, c. 109, 29 Stat. 506, § 1 (Comp. St. 1913, § 4137), are properly refused.

[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.

Booth McSpadden, alias Henry Moore, was convicted of introducing liquor into the Indian Territory from without the state of Oklahoma, and he brings error. Affirmed.

J. I. Howard and C. B. Holtzendorff, both of Claremore, Okl., for plaintiff in error.

W. P. McGinnis, of Muskogee, Okl. (D. H. Linebaugh, of Muskogee, Okl., on the brief), for the United States.

Before ADAMS, Circuit Judge, and TRIEBER and REED, District Judges.

ADAMS, Circuit Judge. Plaintiff in error was indicted and convicted for introducing liquor into the Indian Territory from without the state of Oklahoma in violation of the act of March 1, 1895. The indictment particularizes the offense by alleging that the defendant introduced liquor into the county of Ottawa and state of Oklahoma from

without the state of Oklahoma; that county being within the limits of what was before statehood the Indian Territory. A plea of not guilty was entered by the defendant and he went to trial.

The evidence tended to show that the defendant lived in Chelsea, Okl., which was within the boundary of the Indian Territory, and that he was arrested by a United States deputy marshal on his way home from Baxter Springs, Kan., having in his possession two suit cases, one of which contained seven quarts of whisky; that he gave an assumed name upon his arrest and endeavored by shifting his suit cases from one place to another on the train to prevent the officer from finding him in actual possession of the liquor. From this evidence and other facts and circumstances produced in evidence the jury found him guilty as charged in the indictment, and he was sentenced to be imprisoned in jail for a period of five months and to pay a fine of $100. To reverse this judgment he prosecutes this writ of error.

[1-3] He assigns as error that the trial court erred in overruling his objections to any evidence on the part of the United States, on the alleged ground that the indictment failed to charge a penal offense. There are two good reasons why there was no error in that ruling: First, it is not permissible in federal practice to test the validity of an indictment by objection to evidence offered by the government at the trial; and, second, because the indictment without any doubt did well state an offense under the law. He assigns for error that the court erred in denying his request for an instructed verdict in his favor at the close of the evidence. There was clearly no error in so ruling. The facts and circumstances brought out at the trial, as already outlined, were sufficient to require a submission of the issue of guilt or innocence under proper instructions to the jury.

[4] He next assigns for error the refusal to give two certain requested instructions to the jury. These instructions related to what might or might not have been material considerations if the charge had been introducing liquor into the Indian country, in violation of the act of Congress of January 30, 1897, instead of into the Indian Territory in violation of the act of March 1, 1895. They were therefore properly refused.

The next assignment of error is that the court erred in its charge to the jury on the subject of circumstantial evidence. A careful reading of the charge shows that the usual and proper definition of circumstantial evidence was given and no improper comments made about it.

Finding no reversible error in the case, the judgment of the District Court is affirmed.

BETHLEHEM STEEL CO. v. FIRTH STERLING STEEL CO.

(Circuit Court of Appeals, Third Circuit. June 22, 1915.)

No. 1906.

PATENTS ⇐328—ANTICIPATION—ARMOR-PIERCING PROJECTILE.

The Davis patent, No. 945,492, for an armor-piercing projectile, comprises in combination a sharp-pointed projectile, a soft metal cap surrounding and supporting the point of said projectile, and a hollow contour cap or shell over the same which, when secured to the projectile, leaves a hollow space between its extreme point and the forward point of the soft metal cap. All of these elements were not only singly old in the art, but there were also known combinations of the pointed projectile with the soft nose cap and with the contour-cap and of a blunt head projectile with both. *Held*, that in view of such prior art the patent is void for anticipation, especially by the Hadfield British patent, No. 16,901, of 1898.

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

Suit in equity by the Firth Sterling Steel Company against the Bethlehem Steel Company. Decree for complainant and defendant appeals. Reversed.

For opinion below, see 216 Fed. 755.

J. A. Watson, of Washington, D. C., and Livingston Gifford, of New York City, for appellant.

Melville Church, of Washington, D. C., for appellee.

Before McPHERSON and WOOLLEY, Circuit Judges, and THOMPSON, District Judge.

WOOLLEY, Circuit Judge. This is an appeal from a decree of the District Court of the United States for the Eastern District of Pennsylvania, holding valid and infringed letters patent No. 945,492, granted to Cleland Davis, on January 4, 1910, upon an application filed April 21, 1908, for a contour-cap for projectiles.

Both parties to this action are manufacturers of armor-piercing projectiles. When this suit was instituted, the United States government was their principal, if not their sole, customer. The Firth Sterling Steel Company, the complainant, manufactures under the patent in suit. The Bethlehem Steel Company, the defendant, manufactures upon a government design, which, it is claimed, infringes the patent of the complainant. The two projectiles are so alike in the essentials of their functions and structure, that if the patent is valid or is construed to be as broad as its terms, infringement must be found.

The Davis patent, as disclosed by a typical claim, is for—

"the combination of a pointed armor-piercing projectile; a soft metal cap surrounding and supporting the point of said projectile; and a contour-cap secured to said projectile having a shape adapted to give to the projectile as a whole that contour best adapted for piercing the air with the minimum re-

sistance and said contour-cap when in position on the projectile leaving a hollow space between its extreme forward point and the forward point of said soft metal cap, substantially as described."

As broadly construed by the learned trial judge:

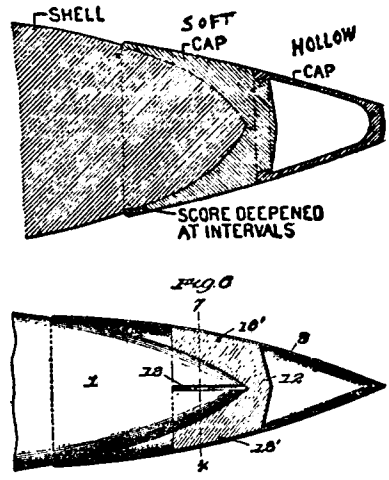
"The design of the patentee consists of an armor-piercing projectile of standard, or any desired, type, having any desired cavity for explosives, any desired degree of sharpness to enable it to most readily penetrate, with the point protected and supported in any desired manner to make its power of penetration effective, with the point inclosed in a shell or cap so formed as to give the whole projectile any desired contour to promote length of flight, the shell having a cavity or space in front of the nose of the projectile proper so that the functioning of the nose construction may not be hampered."

To understand the meaning of the patent and the breadth of its claims as construed, something of the prior art must be known. Long before the conception of Davis, it was known that the flight of a projectile was affected and in a measure controlled by its contour. It was found that a sharp-pointed projectile would travel faster and farther than a dull-pointed or a blunt projectile, but upon impact, the sharp point would be "upset" and the penetration of the projectile retarded or prevented. It was found that by surrounding and laterally supporting the sharp point of a projectile by a cap of relatively soft or ductile metal, its point would be protected and its penetrating function preserved. While there is no difference of opinion with respect to the efficient result of so protecting the point of a projectile, there has been a wide difference of scientific views with respect to its precise action. One theory was that the softer metal acted as a lubricant to the hardened metal of the projectile; another, that it bent back the armor plate before the impact of the point of the projectile; but the latest and probably the prevailing theory is, that as the radial inertia of the cap is a great deal more than its tensile strength, the point of the projectile is thereby supported laterally, and passes unbroken into the hard face layers of the plate and opens the way for the projectile thereafter to perforate the body of the plate by its true boring action.

The protection of the hard point of a projectile by a soft metal nose was a great discovery, but it had one drawback, namely, when the soft metal nose was placed upon and around the point, it disturbed the contour of the projectile and correspondingly retarded its flight, and therefore diminished its velocity at the time of impact. To preserve the advantage of length of flight and velocity upon impact, produced by the proper contour of a projectile, and also the power of penetration, assisted and aided by a soft metal cap, Davis claims to have made his invention. To obtain in a projectile these opposing forces, both Davis and the appellant made projectiles which contained the same elements, namely, a projectile of the standard type, the point of which is surrounded and laterally supported by a soft metal cap, connected with which in different ways is a hollow metal contour-cap. The first figure below represents the alleged infringing projectile of the Bethlehem Steel Company, the defendant, and the second repre-

sents the projectile of the Firth Sterling Steel Company, the complainant.

Davis claims that by his invention the flight of a projectile is lengthened, its trajectory flattened and its ability to penetrate preserved. He does not claim to have invented the separate elements that produce or contribute to these results, but that he has made an improvement over the prior art by combining these elements, which are: (a) A pointed armor-piercing projectile; (b) a relatively soft metal cap surrounding and supporting laterally the point of the projectile; (c) A contour-cap having an external shape adapted to give the projectile as a whole that contour best adapted for piercing air with the minimum resistance; and (d) having a hollow space between the extreme forward point of the contour and the portion of the soft metal that surrounds and supports the point of the armor-piercing projectile.



The invention claimed by Davis, therefore, is a combination of elements in one structure. Davis does not deny that these elements are old in the art. In truth, he admits in his specification, both by expression and inference, that they already existed, but maintains that he employed them in a new combination which produced a useful result not theretofore attained. It is contended by the defendant, however, that there existed in the prior art not only the elements employed by Davis in his combination, but certain combinations of those elements, which are the same as the combination for which Davis claims invention. These opposing contentions are so involved that it becomes necessary to ascertain: First, what are the elements in Davis' combination and whether they are old; and second, whether his claim to an invention of a combination has been anticipated by a combination of substantially the same elements, producing the same results in substantially the same way. Our inquiry, therefore, briefly stated, is, What did Davis contribute to the art which was not already there?

Armor plate was old. Armor-piercing projectiles were old. As in the progress of the art, armor plate from time to time was hardened, so the problem of increasing the armor-piercing quality of projectiles was progressively presented and solved.

As stated by Davis in his specification, it was well known—

"that there is a certain contour, or taper, which, when given to the exterior of projectiles, causes them to meet with a minimum resistance from the air."

A projectile tapered to a point, for the purpose of reducing air resistance, flattening its trajectory, prolonging its flight and maintaining

its velocity at the time of impact, was old in the art. Journal U. S. Artillery 1895. The contour of a projectile of the caliber measurement employed by Davis appears in United States letters patent No. 841,861 to Gleinich in 1907. Gleinich discovered that the radius of curvature of the head of a projectile, in order to maintain the longest flight and to maintain the greatest efficiency upon impact, should be within the limits of 4.7 calibers and 8.2 calibers, the "Caliber" being the diameter of the projectile. Following Gleinich, manufacturers of projectiles have generally employed the mean of these two calibers, Davis choosing 6 calibers or diameters, and those who designed the alleged infringing projectile selecting 7 calibers radius of curvature.

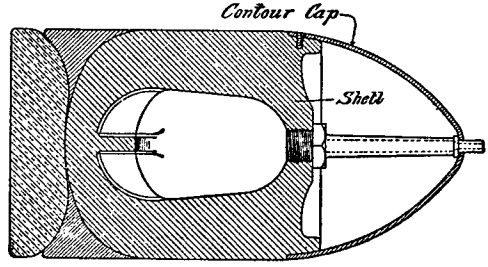
Before Gleinich's discovery in 1907 of the best mathematical contour to reduce air pressure, pointed projectiles of various dimensions existed, as shown by United States letters patent No. 541,280 to Johnson, 1895; British patent No. 8,764 of 1900 to Staunton; British patent No. 751 of 1904 to Motteram; United States letters patent No. 720,242 to Hadfield, 1903; and United States letters patent No. 875,023 to Wheeler and McKenna, 1907. It therefore appears that in 1908, pointed projectiles were old, and the function of contour was known in the art, and neither was discovered or by mechanical contrivance improved by Davis.

The use of hollow caps upon projectiles, for the purpose of reducing air resistance, was very old. Caps for this purpose have been employed since 1860 upon projectiles of different designs which at different periods were standard designs. British patent No. 1,872 of 1860 to Haddan, was granted for an improvement to projectiles, "by adding or affixing pointed peaks, caps, or fronts to or upon cylindrical, or to or upon flat-headed shot and shell." The Haddan cap, like the cap in British patent No. 1,615 of 1863 to Clark, was a cap made with a contour considered the best adapted to assist the flight of a blunt-headed projectile, then the standard projectile. The shape and arrangement of the Haddan and Clark caps are shown by drawings in the letters patent, as follows:

Haddan's 1860 Projectile.

Haddan's British Patent No. 1,872 of 1860 (Appellant's Ex. Book, p. 41).

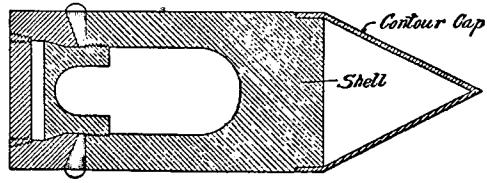
"Thin sheet metal cap * * * to assist the flight without adding materially to the weight at the front end so produced upon the projectile" (page 38).



Clark's 1863 Projectile.

Clark's British Patent No. 1,615 of 1863 (Appellant's Ex. Book, p. 71).

"False conical or other shaped head or end on a plan which shall aid their flight, * * * by reducing friction in cleaving the air" (page 63).

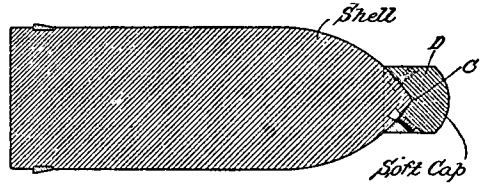


United States letters patent No. 465,230 to Wilson, 1891, were for a hollow cap affixed to a projectile that was pointed in the sense of having angular shoulders of different sizes. The cap was especially designed to reduce air resistance. British patent No. 16,901 of 1898 to Hadfield, was a patent for a combination including a hollow cap, to deflect air and facilitate flight. So also were British patents to Staunton, 1900, and to Motteram, 1904, before cited. The use and function of hollow caps, therefore, were long known.

Soft metal caps of various designs, but intended to perform the same function, surrounding and laterally supporting and protecting the sharp points of projectiles, were old in the art. To Johnson may be credited the invention of surrounding and enveloping the point of a projectile with a soft metal cap. For his invention he was granted United States letters patent No. 541,280, in 1895. While he neither stated nor knew the scientific reason for the action of a soft metal cap in preventing the upsetting of the point and in assisting the penetrating quality of a shell, he knew and disclosed to the art the function of such a cap and its results. A hard-pointed projectile, capped with a soft metal nose, as conceived by Johnson, appears in the drawings of his patent, as follows:

Johnson's 1895 Projectile.
Pointed Armor Piercing Projectile with Soft Cap.

Johnson U. S. Patent No. 541,280, Issued June 18, 1895 (Appellee's Ex. Book, p. 105).



Following Johnson, British letters patent, No. 8,764, of 1900, to Staunton, disclose a soft metal nose upon the sharp point of a projectile, as do United States letters patent, No. 720,242, to Hadfield, 1903, and United States letters patent, No. 875,023, to Wheeler and McKenna, 1907.

As Davis' application for letters patent was filed April 21, 1908, it thus appears that sharp-pointed projectiles were old; that the use of hollow contour-caps upon and in combination with projectiles of all kinds, including sharp-pointed projectiles, for the purpose of aiding flight, was old; and that the use of soft metal caps upon and in combination with projectiles of all kinds, including sharp-pointed projectiles, surrounding the point for the purpose of aiding penetration, was old. Therefore it appears that not only were sharp-pointed projectiles, hollow contour-caps and soft metal noses old, but that the combination of a pointed projectile and a hollow contour-cap and the combination of a pointed projectile and a soft nose cap, were old. The only remaining combination, therefore, which, if new, possesses the merit of novelty and entitles Davis to a patent, is a combination of these combinations, whereby a projectile having a sharp point surrounded by a soft metal nose *is enclosed* in a hollow metal contour-cap.

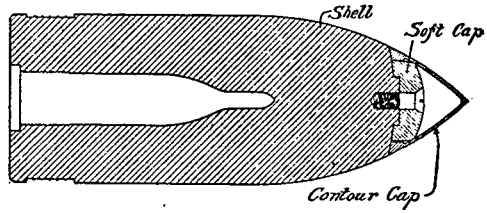
Having been told as early as 1860 and 1863 by Haddan and Clark of the function of hollow metal caps as wind deflectors, and having been taught by Johnson in 1895 the penetrating function of a soft metal

nose on the hard metal end of a projectile, Sir Robert Abbott Hadfield, in 1898, combined the two by surmounting on the hard metal end of a projectile a soft metal cap, and surmounting on the soft metal cap a hollow contour-cap, obviously with the intention of obtaining in combination the advantages with respect to flight and penetration which he had been told each cap possessed.

The following is a drawing of the Hadfield projectile, as appears in his letters patent:

Hadfield's 1898 Projectile.

Hadfield's British Patent No. 16,901 of 1898 (Appellant's Ex. Book, p. 81).



British patent No. 16,901 of 1898 to Hadfield, shows two kinds of caps, with respect to which the patentee says:

"I produce projectiles * * * with blunt heads, which I furnish with what are known as caps, and sometimes with devices I call air deflectors, which are adapted to reduce resistance and thereby to facilitate the flight of the projectile through the air."

Two structures are produced in the drawings, being precisely alike with the exception that the one here reproduced has the addition of the hollow metal cap or "air deflector." Each consists of a projectile with a contour tapering toward the head. The head is somewhat rounded, but as it is not pointed, we, like Hadfield, will call it a blunt head. Upon this blunt head is placed a solid cap, which, as the patentee says, "may be of any suitable metal, either hard, soft, or medium, but preferably I make them of soft steel." When the soft metal cap is thus added to the hard metal projectile, there is added to the structure a—

"hollow metal conoid, conveniently attached to the (soft metal) cap, as by screwing, so that when it is in place, the thus built up front ogival part of the projectile is completed to a point."

This structure, therefore, contains in combination four elements: (1) An armor-piercing projectile; (2) a soft metal cap; (3) a hollow metal cap fastened to and enveloping the soft metal cap; and (4) a contour given to the three, tapered with regard to flight.

The defendant urges that the combination of Hadfield embraces all the elements of the combination of Davis and anticipates his invention, but the complainant contends that the Hadfield combination of a soft metal cap and a hollow metal cap upon a projectile related and was limited to a combination upon such a projectile as is shown by Hadfield, which was a blunt head projectile, basing the contention upon the theory that Hadfield dealt with the problem presented by the standard projectiles of his day, which were blunt, while Davis dealt with and solved a problem which had to do with the standard projectiles of his day, which were pointed, and therein lies a difference in problems and a corresponding difference in inventions. With

this contention, evidently, the learned trial judge was seriously impressed. He said:

"This brings us to the defense of anticipation so far as involved in the state of the art before the Phillips design. This is best presented in the Hadfield patent. The strength of the argument lies in this: In the Hadfield device, as in the Davis design, the essential idea was to surmount the projectile designed for penetration with a hollow cap which would transform the projectile as a whole into one having the qualities of prolonged flight. The then prior state of the art as to the ballistic form of projectiles must be remembered. *The sharp point form of projectile had not as yet been adopted.* Hadfield dealt with the projectile proper as it was. It is within the limits of fair surmise that *had the pointed form with the soft metal nose been then in use* his design would have incorporated it. In this lurks the only doubt in the way of a finding that the Davis idea had not been anticipated. Although, however, Hadfield might have incorporated the sharp point feature *had it then been known*, he in fact did not. He might also have overlooked the combination of nose and point, as did those who first followed him. He might also have extended his design by first discovering the merits of the sharp point feature and then incorporating it with the others. Here again, however, he did not. The possibility of what he might have done does not detract from what Davis did."

But the art discloses that at the time of Hadfield's invention and theretofore sharp-pointed projectiles existed, and to some extent had been adopted. Johnson knew it three years before. It is fair to assume Hadfield got his idea of a soft metal cap from Johnson. If so, we must assume that he knew of sharp-pointed projectiles of the type to which Johnson combined the soft metal cap. With this knowledge, Hadfield, in describing his invention, states that:

"Although I have shown examples by way of illustration, it is to be clearly understood that I do not limit myself to the forms of blunt-headed projectiles or to the forms of caps, * * * as they may evidently be more or less varied according to the requirements, as may also the proportions of the parts and the materials used."

We, therefore, do not agree with the statement upon which the learned trial judge based discussion, and perhaps, was influenced in his decision, that "the sharp point form of projectile had not as yet (that is, at the time of Hadfield's invention) been adopted." The projectile with the *sharpest* point had not then been adopted, but sharp-pointed projectiles of different caliber, as distinguished from blunt head projectiles, had been adopted. If the testimony is not clear that in Hadfield's day a sharp-pointed projectile was a standard projectile, and that if Hadfield's patent is not broad enough to embrace a combination of a contour-cap, a soft metal cap and a sharp-pointed projectile, then such a combination may be found in British letters patent No. 8,764 of 1900 to Staunton, which, like the patent to Hadfield of 1898, antedates Davis' application for a patent.

The Staunton patent discloses a combination of a sharp-pointed shell, the point of which is covered and surrounded by a "pad of lead or other comparatively soft metal which is enveloped by a casing or contour-cap" in a way strikingly similar to that employed by Davis. The function of the soft metal "pad" is not made clear. Nevertheless it is there, and it is enveloped in a hollow contour-cap attached to the body of a sharp-pointed projectile. We are not satisfied that

Staunton taught the art the function of the soft metal cap. Its function, however, had been disclosed by Johnson five years before; and by those conversant with the art, the use of such a "pad" might readily be inferred. But in Hadfield's invention, resort need not be made to inference. He combined in one structure all that was combined by Davis in his structure, each element in the two combinations possessing like functions. The one difference was in the character of the projectiles used. The question of anticipation then is resolved to this: Whether Hadfield's invention was restricted to blunt head projectiles or extended to sharp-pointed projectiles then known to the art, in view of his saving clause that "it is to be clearly understood that I do not limit myself to the forms of blunt-headed projectiles."

It is evident that Johnson, Hadfield and Davis intended to include in the combinations which they respectively patented an armor-piercing projectile such as was known and in use at the time of their respective inventions. It is certain that at the time of Hadfield's invention, there were two kinds of projectiles, blunt-headed and sharp-pointed. Which was the standard projectile or which was the better or more commonly used projectile is unimportant, in view of the fact that both existed and that both were armor-piercing projectiles. Upon the blunt head projectile, Hadfield surmounted the soft metal cap. Had the use of such a cap been possible only on a projectile of the blunt head type, then obviously Hadfield's invention would not anticipate Davis'; but to transpose Hadfield's conception of a soft metal cap for a blunt-headed projectile into a soft metal cap for a sharp-pointed projectile would not call for invention. It would require only the skill of a mechanic. Hadfield's invention, therefore, extends equally to both kinds of projectiles.

Novelty of a soft metal cap or a soft metal nose for a sharp-pointed projectile was exhausted by the Johnson patent. After Johnson had disclosed the function and the result of a soft metal nose on a sharp-pointed projectile, and after Hadfield had taught the art how to put both a soft metal cap and a hollow contour-cap on an armor-piercing projectile and preserve thereby in one structure the functions of both, there was left nothing for invention but the various means to be employed in attaining the same result. The difference in such means is largely a difference in mechanics and proportions, a difference in mechanics in determining the best method for joining the three structures, a difference in proportion in ascertaining the best contour to be obtained by the union. Neither Hadfield nor Davis attempted to patent the precise measurements of the contour. Each used such proportions as in his opinion was "best adapted for piercing the air." Neither patented nor obtained a monopoly of the special contour which each adopted. The only difference in contour of the two caps is the difference in proportion, determined by caliber, and in this respect Davis had the advantage of Hadfield in being taught by Gleinich a mathematically correct contour. There would then seem to remain merely a question whether Davis is entitled to a patent for the mechanical means employed in his combination, and this question is not here in issue.

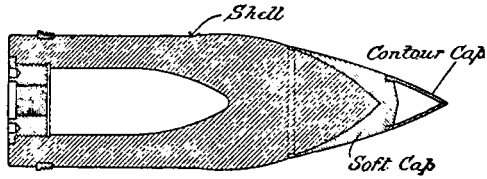
It is important to note that for years prior to the design and the manufacture of the two projectiles in controversy in this action, the old conflict between armor plate and armor-piercing projectiles continued to be waged. The Bureaus of Ordnance of the War and Navy Departments of the United States, acting through their officers and officers of the Army and Navy, in conjunction with both of the parties to this action, had been continuously engaged in efforts to perfect projectiles of types that would prevail against improved armor plate. These efforts were directed along the old lines of obtaining projectiles with the minimum of air resistance and a maximum of velocity and flight, as well as the maximum power of penetration.. The two projectiles in controversy are the direct results, perhaps separately attained, of these efforts. Plans of projectiles were made by the Bureaus of Ordnance. The government, being without an ordnance factory, employed at different times both of the parties to this action to manufacture projectiles according to their designs; but, possessing proving grounds, the government made and conducted its own trials. The Army and Navy officers connected with the Bureaus of Ordnance were in a large measure conversant with the designs and the results of trials made from time to time; and the parties to this action, in manufacturing projectiles upon the government's plans, became well aware of what was progressing in the government's bureaus of ordnance and at the government's proving grounds.

By trials made in the fall of 1906, the Army Bureau of Ordnance found that a sharp-pointed projectile with a 7-caliber point radius produced a greater range and a flatter trajectory than the projectile then in use. These tests were conducted by Capt. William A. Phillips of the Army, who, fearing that the increased range of the projectile of the higher caliber was attained at the expense of the penetrating ability of the projectile, set about to design a projectile that would preserve the several essentials of maximum flight, velocity and penetration. On May 4, 1907, he submitted to the Bureau of Ordnance a drawing of a full-sized projectile, the construction of which consisted of a sharp-pointed projectile, a soft metal nose and a hollow cap, the whole possessing the same elements and forming a contour almost identical with that of the patent in suit, as well as with the alleged infringing projectile. Phillips, however, intended to use in the hollow cap a lubricant of nonliquid oil and graphite. The sketch appealed to the bureau as possessing merit, and an order was made for the manufacture of six shells from Phillips' design, the hollow caps of two of which were to contain a lubricant, concerning the advantages or functions of which the bureau had doubts, and the hollow caps of four were to remain empty. The trial of the projectiles, made in accordance with Phillips' design, was postponed until after the completion of other trials already ordered, with the result that a trial of the Phillips' projectile was never made. Although tests of the Phillips' projectile were never made, the Phillips' design was adopted by the bureau, and is the basis of the government's design upon which the alleged infringing projectiles were ordered and made. The designs of the Phillips and the Army projectiles are here reproduced for comparison with the designs

of the alleged infringing projectiles and the Davis projectile, produced in the beginning of this opinion:

Capt. Phillips' 1907 Projectile.

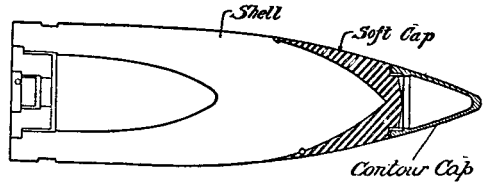
As recommended to the Chief of Ordnance, U. S. Army, by the Ordnance Board, U. S. A., May 24, 1907. Four of this design recommended for test.



U. S. Army's Design.

Drawing "Enc.-17" July 27, 1908 (Appellant's Ex. Book, p. 139).

Referred to by the Chief of Ordnance, War Department in communication of July 28, 1908 (page 134). In reply communication of July 31, 1908, the Ordnance Board, U. S. A., said: "The Board notes that the design shown on Enc.-17 is similar to that submitted by Capt. Phillips, Ord. Dept." (page 136).



On April 21, 1908, or about a year after Phillips had made and submitted his design, Cleland Davis, then Lieutenant-Commander in the Navy, applied for and was subsequently granted the patent in suit, a drawing from which has already been reproduced.

The defendant charges that Davis secured his ideas from Phillips' design, and in addition to its defense of invalidity for want of novelty, the defendant avails itself of the defense provided by the second paragraph of section 4920, R. S. (Comp. St. 1913, § 9466), namely:

"That he had surreptitiously or unjustly obtained the patent for that which was in fact invented by another, who was using reasonable diligence in adapting and perfecting the same."

The evidence does not disclose that Davis saw the Phillips' design. It is in evidence that Davis was informed by officers of the Bureau of Ordnance of what was being done generally in the progress of developing projectiles. There is much testimony concerning the invention of Phillips, his diligence in perfecting his design, and whether or not his design anticipated Davis' invention. While the testimony is sufficiently strong to convince us that the Phillips' design was the basis of the army design, and likewise of the alleged infringing projectile built upon the government's orders, we are constrained, however, to arrive at the conclusion, considered with respect to the law of patents, that Phillips' invention did not progress beyond a drawing, and therefore cannot defeat the patent in suit.

Two projectiles of the Davis type were made and upon trial proved unsuccessful. The caps fell off in flight. This doubtless was due to mechanical defects. Nevertheless, it does not appear that more projectiles were ever made from the design of the patent, although the projectiles made by the complainant are claimed to be within the scope of the patent.

A comparison of the designs of Davis, the army and the defendant, with the design of Phillips, shows in essentials a striking similarity. The one substantial difference disclosed is, that in projectiles of the

army, Phillips' and the defendant's designs, the hollow contour-cap is screwed upon the head of the soft metal cap, just as Hadfield taught in 1898, and the contour of the whole structure is derived from the harmonious caliber of its parts, while in the Davis structure, the hollow contour-cap alone supplies the whole contour and envelops the soft metal nose and a considerable portion of the projectile proper. But, to make one more comparison, the Davis contour-cap envelops the soft metal cap just as Hadfield taught in 1898, and envelops as well a part of the projectile, as Staunton taught in 1900. The difference between Davis' projectile and projectiles of the types of Hadfield, Staunton, Phillips, the army and the defendant is simply in contour and proportion and the mechanical means of affixing caps to projectiles.

We are therefore of opinion that Davis' invention of a combination of the elements described was anticipated by the prior art, and particularly by British patent No. 16,901 of 1898 to Hadfield, and that claims 1, 2, 7, 8, 9, 10 and 11 of letters patent No. 945,492, to Davis, are invalid.

The judgment below is reversed.

CAMBRIA IRON CO. v. CARNEGIE STEEL CO.

CARNEGIE STEEL CO. v. CAMBRIA IRON CO.

(Circuit Court of Appeals, Third Circuit. June 24, 1915.)

No. 1857.

1. PATENTS ⇐318—SUIT FOR INFRINGEMENT—ACCOUNTING FOR PROFITS.

On an accounting for profits for infringement of a process patent, the infringer is not liable for the profit made by his use of what is already free to the world, but only for the profit made by the use of the patentee's contribution to the art; and if he could have obtained the same result by the use of older methods, such methods are the proper standard of comparison, and the measure of the profit for which he is liable is the lessened cost of production, if any, by the use of the patented process.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 566–576; Dec. Dig. ⇐318.

Accounting by infringer of patent for profits, see notes to Brickill v. Mayor, etc., of City of New York, 50 C. C. A. 8; Clark v. Johnson, 120 C. C. A. 389.]

2. PATENTS ⇐318—SUITS FOR INFRINGEMENT—ALLOWANCE OF INTEREST.

The allowance of interest on an accounting for infringement is largely a matter of discretion, to be exercised under the circumstances of the particular case.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 566–576; Dec. Dig. ⇐318.]

Cross-Appeals from the District Court of the United States for the Western District of Pennsylvania; Joseph Buffington, Judge.

Suit in equity by the Carnegie Steel Company against the Cambria Iron Company. Decree for complainant, awarding damages, and both parties appeal. Affirmed.

See, also, 185 U. S. 403, 22 Sup. Ct. 698, 46 L. Ed. 968.

Charles C. Linthicum, of Chicago, Ill., and David A. Reed, of Pittsburgh, Pa., for plaintiff.

James I. Kay, of Pittsburgh, Pa., and Francis T. Chambers, of Philadelphia, Pa., for defendant.

Before McPHERSON and WOOLLEY, Circuit Judges, and THOMSON, District Judge.

Cambria Iron Company's Appeal.

McPHERSON, Circuit Judge. This prolonged litigation is now, we may hope, approaching its final stage. It grows out of the Jones patent, No. 404,414, granted June 4, 1889, for an improvement in the method of mixing molten pig metal, and charges the Cambria Iron Company with infringement, especially of the second claim. In a very careful and elaborate opinion (Carnegie Steel Co. v. Cambria Iron Co. [C. C.] 89 Fed. 721) Judge Buffington sustained the validity of this claim and held the process infringed. He found that the central idea of the patent was the maintenance of a "dominant pool"—a happy term, as the Supreme Court afterwards said—and that the Iron Company's method was a plain infringement. The Circuit Court of Appeals disagreed on the subject of infringement (Cambria Iron Co. v. Carnegie Steel Co., 96 Fed. 850, 37 C. C. A. 593), but the majority of the Supreme Court differed from this opinion, and adopted the views of the District Court (Carnegie Steel Co. v. Cambria Iron Co., 185 U. S. 403, 22 Sup. Ct. 698, 46 L. Ed. 968). Thereupon the case went to an accounting, and in that proceeding the Carnegie Company did not ask for damages, but demanded profits alone. As the principal question, both below and here, is, By what standard should the profits be computed? we may pause to consider the established rule on this subject.

[1] Of course, such an inquiry always seeks to ascertain how much money the infringer has made by the use of the patented process; but the problem is not fully stated in so general a form, since this may leave out of account the infringer's right to use whatever is open to the world. The state of any art usually presents much that may be freely used, and if these devices can do substantially the same work, if they can produce the same result that is accomplished by the process in question, a patentee cannot complain if the earlier methods be adopted. What he has done is to contribute something to an existing stage of development, and therefore an infringer is liable, not for the profit made by his use of what is already free to the world, but only for the profit made by the use of the patentee's contribution. But it must always be borne in mind that in order to compare processes accurately they must be such as produce the same, or practically the same, result. Speaking generally, the object of any process is to produce something to be sold or used. Nobody practices a process for the mere satisfaction of taking the steps required; at the end, he desires a foreseen result, and if the thing produced be inferior in quality or less adapted for use than the thing produced by the patented process, the comparison is not satisfactory. Under such circumstances the cheaper cost of the inferior article is not decisive. Certainly it would not be fair to say that, because an infringer might

have produced an inferior unpatented article more cheaply, his possible profit in so doing should measure the amount of his liability, although he had really gained a larger sum by producing the superior article protected by the patent. A court is more concerned with actual facts than with contingencies.

These rules are scarcely open to question. In Mowry v. Whitney, 81 U. S. (14 Wall.) 621, 20 L. Ed. 860, the Supreme Court said:

"The question to be determined in this case is: What advantage did the defendant derive from using the complainant's invention over what he had in using other processes then open to the public and adequate to enable him to obtain an equally beneficial result? The fruits of that advantage are his profits. They are all the benefits he derived from the existence of the Whitney invention. It is found that there were other processes by which the inherent strain caused by unequal cooling could be, and was prevented, counteracting which strain was the sole object of the complainant's invention, and a car wheel could be prepared for similar service, valuable in the market, and salable at a price not less than was obtained for those which the defendant manufactured. The inquiry then is: What was the advantage in cost, in skill required, in convenience of operation, or marketability, in bringing car wheels by Whitney's process, from the condition in which they are when taken hot from the molds to a perfected state, over bringing them to the same state by those other processes, and thus rendering them equally fit for the same service? That advantage is the measure of profits."

And in Tilghman v. Proctor, 125 U. S. 136, 8 Sup. Ct. 894, 31 L. Ed. 664, the Supreme Court used the following language in speaking of the profits for which an infringer must account:

"The infringer is liable for actual, not for possible, gains. The profits, therefore, which he must account for, are not those which he might reasonably have made, but those which he did make by the use of the plaintiff's invention, or, in other words, the fruits of the advantage which he derived from the use of that invention over what he would have had in using other means then open to the public and adequate to enable him to obtain an equally beneficial result. If there was no such advantage in his use of the plaintiff's invention, there can be no decree for profits."

See, also, Sessions v. Romadka, 145 U. S. 29, 12 Sup. Ct. 799, 36 L. Ed. 609.

The object of the Jones patent is the mixing of molten metal from a blast furnace in such a manner that, as successive charges of the mixture are furnished to a Bessemer converter to be transformed into steel, they shall change their composition and other characteristics so gradually that for practical purposes each charge shall be substantially uniform with its immediate predecessor. And the object is accomplished; the result is that a better and a more uniform steel is produced. The molten metal does not cool after leaving the blast furnace, and this method of producing steel is therefore properly called "direct." Other direct methods had previously been used, but these had not been successful. We need not pass upon the Steel Company's contention that the Supreme Court has by necessary inference excluded the direct process in any of its varieties from use as a standard of comparison. For present purposes we may assume that this process was still open to consideration after the case was sent back for the purpose of taking the account; but we do not think the conclusion can be avoided that the court did express a definite opinion

about the merits, and therefore the availability, of this process. A few quotations will show clearly that the earlier methods were considered, and were declared to produce an inferior result:

Page 424 of 185 U. S., page 706 of 22 Sup. Ct. [46 L. Ed. 968]: "While all [these prior devices] contemplate the reservoir between the blast furnaces and the converters, such reservoir is used for storage and for such incidental steps toward uniformity as the necessary mixing of the different products of the blast furnace would lead to, while in none of them is there a provision for supplying and withdrawing from the mixer such quantities of metal at a time, and the retention of a considerable quantity of metal in the reservoir, as a necessary prerequisite to that uniformity of product which was recognized as the great desideratum and was the constant effort of manufacturers to secure. Granting that some of these devices may have been made use of to carry out the Jones process, none of them in practical operation, seems to have been effective to secure the desired result. * * *"

Page 425 of 185 U. S., page 707 of 22 Sup. Ct. [46 L. Ed. 968]: "To enable the Jones process to be successfully carried out it is necessary: (1) That the intermediate reservoir or mixer should be of large size, 'say 100 tons' capacity; (2) that it be covered to prevent the access of cold air from without; (3) that it be provided with a stop, so that it may not be tilted so far as to be emptied of its contents; (4) that a quantity of molten metal, so large as to absorb all the variations of the product of the blast furnace received into it and thus to unify the metals discharged into the converters, be constantly retained in it. None of the prior patents or processes to which we are referred meets these requirements. Indeed, it is scarcely too much to say that none meets more than one of them. When we add to this that none of them was ever used, or was ever susceptible of being used, without material alteration, to carry out the Jones process, it is evident that the defense of anticipation by prior patents rests upon a slender foundation.

"Certain discussions, reported in the Journal of the British Iron and Steel Institute, are relied upon as embodying a description of the Jones process. Running through all these discussions there is the same idea of the difficulties experienced in the practical carrying out of the direct process by reason of the want of uniformity in the different products of the blast furnaces, and the possibility of remedying this and thereby doing away with the expense of remelting the pig iron in cupolas by a mixture of such products in a reservoir intermediate the furnaces and converters; but the dominant idea of the Jones patent, of maintaining a permanent and large quantity of molten metal in the mixer for that purpose, does not seem to have occurred to any of the writers upon the subject. Through all these papers there is an admission of practical failure in the efforts theretofore made to obviate the difficulty, and a half-expressed hope that American ingenuity might ultimately solve the problem. * * *"

Page 429 of 185 U. S., page 708 of 22 Sup. Ct. [46 L. Ed. 968]: "An attempt was made to show that the Jones invention was anticipated by the practice, common in steel works prior thereto, of tapping iron from cupola furnaces into a receiving ladle, which became known as the Bessemer cupola ladle, from which it was poured into the converters. Molten iron was tapped from several cupolas into this ladle, from which a charge was drawn and delivered to the converter vessel. Of course, if the ladle were of greater capacity than was necessary to charge a single converter, a residuum of metal would be left in it; but this seems to have been merely an incident of the operation of the ladle, which was used primarily for storage, and to have been of no substantial benefit in securing uniformity of product, which can only be obtained by making the receiver of larger size and retaining a considerable quantity of metal in it after each discharge. * * *"

Page 445 of 185 U. S., page 715 of 22 Sup. Ct. [46 L. Ed. 968]: "Discarding, now, all that does not bear directly upon the validity of the Jones patent, and dropping all superfluity of words, let us determine exactly what Jones has contributed, if anything, to the art of making steel. He undoubtedly found reservoirs of small size in use, in which were poured from receiving ladles enough molten metal to fill them, and from which a sufficient amount

was discharged to supply a converter, usually about half the size of the reservoir. But in all these cases the fact whether any particular amount of metal was left in the reservoir was treated as a matter of indifference or accident, although there must have been necessarily some incidental mixing; and probably the metal as it ran into the converters approximated more nearly to uniformity than when it ran into the reservoir. The former methods were adequate for cupola metal, uniformity in which had been largely secured by a careful selection and breaking up of the pigs; but it had not proved a success for blast furnace metal, except that it had been used to a very limited extent in foreign countries, where the peculiar character of the iron ore had rendered it possible to carry on a direct process, although apparently by methods quite other than those employed by Jones. The principal step employed by Jones was to magnify the capacity of the reservoir about twenty-fold, provide it with a cover, and to arrange that it should not be tilted beyond a certain point, in order that a 'considerable quantity' of molten metal might be retained in it for a sufficient time to accomplish a pretty thorough mixing, but little change having been made in the meantime in the size of the receiving ladles and converters. As the reservoir was designed to hold a large quantity of metal for a considerable time, it must have been covered to obviate the contents being crusted over or skulled.

"As soon as this method had proven to be successful by employment at the Edgar Thomson Works, and had become so well known as to attract the attention of other manufacturers of steel, it found a ready sale, was adopted by all the leading manufacturers in this country, and was sold for use abroad for about $50,000.

"It should be borne in mind that this process was not accidentally discovered, but was the result of a long search for the very purpose. The surprise is that the manufacturers of steel, having felt the want for so many years, should never have discovered from the multiplicity of patents and processes introduced into this suit, and well known to the manufacturers of steel, that it was but a step from what they already knew to that which they had spent years in endeavoring to find out. It only remains now for the wisdom which comes after the fact to teach us that Jones discovered nothing, invented nothing, accomplished nothing."

There was another method, however—the "indirect," or cupola, method—by which better results were produced than by any direct process. In the cupola method the molten metal from the blast furnace was run into pigs and allowed to cool, and these were afterwards carefully tested, selected, mixed, and remelted in the cupola, thus producing in the successive charges furnished to the converters a practical and substantial uniformity similar to that produced by the patented process. But the cupola method is more expensive, and the patented process has thus a decided advantage.

What standard of comparison, then, should be used to determine the profit made by the Cambria Iron Company during the infringing period? Certainly not the direct process in any of the forms used before Jones came into the field, for this process would not produce the same result. As the Supreme Court has said (page 411 of 185 U. S., page 702 of 22 Sup. Ct. [46 L. Ed. 968]):

"Practical experience, in this country at least, showed that the refining of iron without first casting it into pigs, selecting or mixing the pigs, and remelting them, was attended with such expense that the entire abandonment of the practice was seriously considered."

The direct process is also declared (page 415 of 185 U. S., 22 Sup. Ct. 698 [46 L. Ed. 968]) to have had difficulties "so serious as to render [it] commercially impracticable"; and the court also said (page

417 of 185 U. S., 22 Sup. Ct. 698 [46 L. Ed. 968]) that "such attempts [to use it] in this country had proven practically failures and had been abandoned." On the other hand, the cupola process is thus referred to (page 410 of 185 U. S., page 701 of 22 Sup. Ct. [46 L. Ed. 968]):

"The process of running molten metal from blast furnaces into pigs and remelting them in cupola furnaces for use in a converter was termed the indirect process, and was generally used prior to the Jones invention. * * *"

Page 413 of 185 U. S., page 702 of 22 Sup. Ct. [46 L. Ed. 968]: "By this cupola process a product, practically uniform in character and suitable for further treatment in the converters, was secured, but at the expense (more than 60 cents per ton) of rehandling and remelting the iron as it came from the blast furnaces, in cupolas, and the contamination of the metal with sulphur evolved from the coke in the process of remelting."

And the testimony of Mr. Julian Kennedy, one of the experts, is quoted with approval on the same page:

"For this reason the practice, until within comparatively recent years, has been to cast the metal in pigs, then to analyze it and reject any portion not closely approximating a rigid specification in its chemical composition, and to select, mix, and then melt the approved metal in cupola furnaces. By this means very great uniformity of chemical composition of the remelted metal can be obtained, and good and reliable steel made from it with regularity and certainty."

It would seem quite clear, therefore, that the proper standard of comparison is the cupola process, and this is the standard adopted by Judge Buffington in the court below. This also was the process used by the Cambria Iron Company itself before it adopted the infringing device, as will clearly appear from these further extracts from the Supreme Court's opinion (page 438 of 185 U. S., page 712 of 22 Sup. Ct. [46 L. Ed. 968]):

"The question of infringement only remains to be considered, and, in the view we have taken of the prior devices, presents no serious difficulty. The Court of Appeals was of opinion that 'the defendant's reservoir, or accumulating ladle, complained of, is the same in principle as one which has been in use at the Cambria Works ever since Bessemer steel was first manufactured there, with only this difference, that at first it was used at cupola, now at furnace.' If such were the fact, of course, defendant would not be open to the charge of infringement. Undoubtedly it has the right to make use of all prior devices, and particularly such as had been used at its own manufactory. In order to understand the device made use of by the defendant prior to the Jones invention, we reproduce herewith two small, but easily understood, cuts taken from its brief, showing the character of the ladle known as the Bessemer intermediate ladle, used by it and generally by all American mills manufacturing steel by the Bessemer process. [Reproducing cuts.]

"It appears elsewhere in the testimony that the intermediate reservoir or ladle was from 15 to 18 tons capacity, and the converter from 6 to 8 tons; that the molten metal was tapped from the cupolas into the reservoir and withdrawn for the converter, and as the intermediate ladle held considerably more than the amount of metal necessary to charge a converter, there was some incidental mixing; but the main and perhaps the only purpose of the reservoir was for storage, and that if any quantity of metal were left in the reservoir it was by accident rather than by design. It will be noticed, too, that the reservoir was open at the top. It does not appear to have been made use of in carrying out what is known as the direct process, the difference being that the cupola practice furnished a metal for the Bessemer converter that was uniform in composition, or practically so, while the direct metal was largely variable in composition.

"The testimony further shows that, after the installation of the Jones mixer at the Edgar Thomson Works, Mr. Morgan, the defendant's mechanical engineer, visited and inspected these works and obtained information as to their practical operation, and was advised by the superintendent as to the location and proper size of the mixer and its contiguity to the converters. Mr. Morgan does not deny this conversation, although he qualifies it by saying that he thought the Jones apparatus had grave defects. Shortly after this visit, and in the latter part of 1895, defendant installed an apparatus of its own for the operation of the direct process, which is herewith produced upon a small scale, and in comparison with the Jones process. [Reproducing cuts.] It consisted of a covered refractory lined and turtle-shaped vessel of about 300 tons capacity, and arranged to tilt, and having a spout at either side for receiving and pouring out the metal. The metal was brought to the mixer and poured in at one end, and through a spout on the other side was poured into a ladle, which supplied the Bessemer converters. The metal was supplied both from blast furnaces and cupolas, the former furnishing about two-thirds, the latter about one-third, of the metal used; but the metal from the cupola system was delivered by a ladle to the converter direct, and not through the reservoir. The metal from the blast furnace entered the reservoir in about 15-ton ladle lots, and was withdrawn in approximately 12-ton lots. The chief engineer of the company states that, 'in accordance with the natural way of using the reservoir, it is ordinarily kept well filled up.' That in the practical operation of the mixer or reservoir a large quantity of iron was retained for mixing purposes is evident from the fact that a chalk mark was made on the side of the mixer, which was not allowed to run below the floor, as a guide to the men who rotated or tilted the mixer, since, if the mark went below the floor and out of sight, they could not tell how much iron was left in the mixer. Under these instructions not to allow the chalk mark to go below the floor, there was retained in the mixer about 175 tons of molten metal, amply sufficient for the purposes stated in the Jones patent. Its principle of construction was similar to that of the Jones mixer, and its operation identical. Indeed, defendant's engineer himself says: 'With the exception of additions of cupola metal, I do not know that there is any material difference between our practice and that described in the second claim' of the Jones patent. We agree, in the opinion of the Circuit Court, that 'it is quite clear, in view of these facts, that infringement takes place. That initial mixing, rather than storage, is the purpose of the reservoir is shown by the fact that the cupola metal is not stored, but served direct in ladles to the converter plant. And that the homogeneous mixture, once obtained, is used as a dominant pool to produce a graduated, nonabrupt product, is shown by the chalk line minimum limit of 175 tons. With such a permanent dominant pool in constant use, we are clear that respondent's practice infringed the second claim of the Jones patent in both letter and spirit.'

"If the contents of the mixer used by defendant were allowed habitually to become empty in carrying out its process, there would be no infringement; but all the evidence contradicts this. In the Jones practice this cannot be done, since the mixer cannot be tilted beyond a certain point. In the defendant's mixer it can be done, but is not, since the operator is not allowed to tilt it beyond a certain point gauged by a chalk mark. This seems to be the only foundation for the charge so frequently reiterated, and in varying language, that the methods in use before the Jones process deprived that process of all novelty, and if novelty existed it was by reason of the varying modes of executing such methods; the inference from this being that, as the Jones method was old, it could only be treated as new because of the conduct of individuals in applying the method and their intentions, and that this reduces itself to the proposition that the Jones patent rests upon the mere intention or minds of persons. If we understand this argument correctly, it is that the prior method contemplated storing only, and the mixing was but an incident, while the Jones patent contemplates mixing as its main object and storage only as an incident. * * *

"If, as insisted by the defendant and found by the Court of Appeals, the reservoir now used is the same in principle as the one which had been in use at the Cambria Iron Works ever since the Bessemer steel was first manufac-

tured there, and the same were adequate for the purposes of the direct process, why was any change made? Therein we think the Court of Appeals made its most serious error. The defendant had an unquestioned right to manufacture steel, as it had been accustomed to do; but instead of that it abandons the Bessemer uncovered ladle of 12 to 18 tons, and adopts a covered refractory lined reservoir of 300 tons capacity, and makes use of it, not as before, for the storage of cupola metal, but for the mixing of blast furnace metal according to the direct process. This, too, was done immediately after Mr. Morgan's visit to plaintiff's works."

Judge Buffington's opinion, adopting the cupola method as the proper standard of comparison, has not been reported, and we quote a part of his discussion:

"First. As found by this court, the chalk mark direct-method practice of the defendant infringed the second claim of the Jones' patent. As conceded by the parties the defendant from November 1, 1895, to October 31, 1898, manufactured 526,445½ tons of steel by said infringing direct-method process. In accord with the findings of the Supreme Court, and this court, and the proofs, we now find and hold that there was no other direct process in use prior to Jones' which produced the result of Jones' process. We accordingly find the proper standard of comparison for measuring the profits accruing to the defendant by the use of the Jones process was the cupola practice, the only successful practice then known and open to the public. In line with this conclusion we refer to the following authorities: Tilghman v. Proctor, 125 U. S. 136, 8 Sup. Ct. 894, 31 L. Ed. 664; McCreary v. Penna. Canal Co., 141 U. S. 459, 12 Sup. Ct. 40, 30 L. Ed. 817; Sessions v. Romadka, 145 U. S. 29, 12 Sup. Ct. 799, 36 L. Ed. 609; 3 Robinson on Patents, § 1145; Locomotive Safety Truck Co. v. P. R. R. (C. C.) 2 Fed. 677.

"Comparing the relative costs of the cupola and the direct methods, we note that, as blast furnace smelting is a step common to both, the cost of blast furnace treatment need not be considered. The evidence shows that, where the Jones direct method was used, the cost of transportation service from blast furnace to mixer was $0.0615, and of mixer supplies and treatment $0.1131 per ton, a total of $0.1746. The proofs also show that in the cupola practice there was a metal loss, in excess of the direct process, of from 3 to 4 per cent. This loss was occasioned by metal being carried off with slag in the cupola melting process. This loss is well established by the proofs—Williams, McDanald, and Lewis—under which there is full warrant for fixing the money value thereof at $0.3331, the amount claimed by plaintiff. In addition to this, in the cupola practice the molten metal from the blast furnace was cast into pigs, these pigs being subsequently classified and put into the cupola for remelting. The cost of these operations was saved in the direct process, where no casting and no remelting took place. During the infringing period the defendant used in its mixer both direct metal from its blast furnaces and remelted metal from its cupolas. The expenses incurred by it in its own cupola practice would seemingly afford reliable data from which a cost standard of comparison could be established. These costs, as shown by the defendant's cupola operations, were, for the expense of casting, transportation, etc., $0.263 per ton, and for cupola operation, fuel, labor, and incidentals, $0.669 per ton, a total of $0.932. As to this last item, $0.669, no question is made, but as to the item of $0.263 it is contended the same is too high. We have carefully considered the testimony of Mr. McHenry, the auditor of defendant, who furnished these figures. As we understand his contention, it is that, while these figures show the actual costs of the defendant in the casting incident to its cupola practice during the infringing period, they should not be followed, for the reason that this cost would have been much lower if the defendant had not used the infringing process, but had cast all its metal into pigs and used the cupola method alone. This contention does not commend itself to us. The simple fact is that the defendant did infringe, and in the cupola practice incident to such infringement did incur these costs. We have, therefore, before us these admitted costs based on the actual workings of the defendant when carrying on their infringing operations. This affords a practical and reliable

standard of comparison. The other is problematical. With the presumptions that properly arise against an infringer (Westinghouse v. Wagner, 225 U. S. 604, 32 Sup. Ct. 691, 56 L. Ed. 1222, 41 L. R. A. [N. S.] 653), and with these data based on actual practice before us, we feel warranted in adopting such proven figures in preference to speculative estimates. Finding, then, as we do, that the defendant by the use of the Jones process in its chalk marked mixer realized a profit and saving over the cupola method of $0.3331 in metal saving and $0.7574 in smelting per ton, a net saving of $1.0925 on 526,445½ tons, we find the defendant should account to the plaintiff for the sum of $575,141.71."

We shall only add that we are in full agreement with this conclusion, and see no need to discuss the correctness of the figures. Upon the appeal of the Cambria Iron Company, therefore, the decree will be affirmed.

Carnegie Steel Company's Appeal.

This appeal raises two questions: First, whether the Iron Company is liable after November 1, 1898, when its practice was changed; and, second, from what date interest should be allowed.

Upon the first question we do not find it necessary to say more than this: Without committing ourselves to the proposition that the so-called "random" process is always noninfringing, we understand that the following quotation from the opinion below means that on the record before the court this particular use of the "random" process did not infringe:

"From November 1, 1898, to May 31, 1902, there was manufactured by the same appliances, but by a different practice, to wit, the random practice, 1,000,094 tons of steel. We find that such random practice, as well as the subsequent fill and empty practice, did not infringe the Jones patent for the reason that its operation without any mark or stop, and without the maintenance of any dominant pool, did not fulfill the requirements laid down by the Supreme Court in reference to a reservoir, namely: '(3) That it be provided with a stop, so that it may not be tilted so far as to be emptied of its contents; (4) that a quantity of molten metal so large as to absorb all the variations of the product of the blast furnace received into it, and thus to unify the metal discharged into the converters, be constantly retained in it.' So far as fact proof is concerned, we find support for this conclusion in the testimony of the witnesses Halderman, Stewart, Lewis, Frederick, McGarvey, Callio, Horner, Parker, and others."

[2] Upon the second question we are also in accord with the District Court. The allowance of interest is largely a matter of discretion, to be exercised under the circumstances of the particular case, and we have not been persuaded that error was committed by fixing May 1, 1912, the date of the master's report.

Upon each appeal the decree is affirmed; the Cambria Iron Company to pay the costs in this court, and the costs in the District Court to be awarded by that tribunal.

J. M. BURGUIERES CO., Limited, v. DEMING APPARATUS CO.

(Circuit Court of Appeals, Fifth Circuit. June 11, 1915.)

No. 2699.

1. PATENTS ⊂=255—PURCHASER OF PATENTED ARTICLE—RIGHT TO MAKE IMPROVEMENTS.

By a valid sale of a patented article it becomes the private property of the purchaser, who, as against the owner of the patent, may use it until it is worn out, and may repair and improve it as he sees fit.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 397, 399; Dec. Dig. ⊂=255.]

2. PATENTS ⊂=328—INFRINGEMENT—APPARATUS FOR SEPARATING SOLIDS FROM LIQUIDS.

The Deming patent, No. 885,450, for an apparatus for separating solids from saccharine solutions, which is an improvement patent, and one element of which is a water-tight cover for the settling tank, *held* not infringed by a tank which did not include such feature.

Appeal from the District Court of the United States for the Eastern District of Louisiana; Rufus E. Foster, Judge.

Suit in equity by the Deming Apparatus Company against the J. M. Burguieres Company, Limited. Decree for complainant, and defendant appeals. Reversed.

R. E. Milling, of New Orleans, La., for appellant.

John H. Brickenstein, of Washington, D. C., and Eraste Vidrine, of New Orleans, La., for appellee.

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

SHEPPARD, District Judge. This is an appeal from the District Court of the United States for the Eastern District of Louisiana, and brings here for review a decree of that court declaring patent No. 885,450 to be infringed by the J. M. Burguieres Company, Limited, appellant, allowing an injunction and appointing a commissioner to ascertain and report plaintiff's damages. The controversy involved patentable invention, anticipation, and infringement, and, after taking much testimony on the issues made by the pleadings, the judge, following the theory of the parties, enjoined the alleged infringement.

Here we may advert to the record and ascertain by the uncontradicted evidence in the case the contractual relation of the parties. These pertinent facts appear: On December 25, 1894, Eugene W. Deming obtained patent No. 531,460 on an apparatus for the separation of solids from saccharine solutions. A second patent was obtained by him August 25, 1896, numbered 566,726, on a similar device. In April, 1897, there was made and sold to the J. M. Burguieres Company, by the Deming Apparatus Company, "or its assignor Eugene W. Deming," a set of tanks covered by these two patents. Discovering that the tanks as purchased would not give results desired or expected, the J. M. Burguieres Company proceeded to make some changes and additions in the construction and operation of the tanks. In the gra-

dation of alterations and additions which followed, one in particular, the cover to the tank, was adopted after the issuance of the patent in suit on April 21, 1908, numbered 885,450. This latter patent, covering tanks similar in construction and operation, describes a water-tight cover which is an essential element of the combination providing means for the operation of the tanks under pressure.

The Deming Apparatus Company, having acquired the rights of the patentee under the patent in suit, brought this action in the District Court, complaining that the tanks then in use by the Burguieres Company were an infringement. A decree in its favor resulted, from which this appeal was taken.

[1] It is necessary to refer to patents numbered 531,460 and 566,726, because of the fact that the tanks referred to were made and sold to the Burguieres Company under them. The briefs of respective counsel contain exhaustive arguments on the propositions of patentability, anticipation, and infringement, ignoring entirely the appellant's assertion of unqualified title to and ownership of the tanks by purchase from the plaintiffs below, set up in the third paragraph of defendant's supplemental answer, viz.:

"That the defendant in the month of April, 1897, purchased from the complainant herein, or from its assignor, Eugene W. Deming, a certain apparatus for the settling of cane juices in an iron tank," etc.

In the absence of any evidence to the contrary, it is to be assumed that this sale to the Burguieres Company was unrestricted, and this is the reasonable construction to be given the uncontradicted answer. Conceding this to be the legal effect of the pleading, then the relation of the patentee or his assignee to the Burguieres Company is nothing short of vendor and vendee under an unrestricted sale. What rights, then, does such a purchaser acquire as against his patentee vendor? The Supreme Court answers:

"When the patentee, or the person having his rights, sells a machine or instrument whose sole value is in its use, he receives the consideration for its use and he parts with the right to restrict that use. The article, in the language of the court, passes without the limit of the monopoly. That is to say, the patentee * * * having in the act of sale received all the royalty or consideration which he claims for the use of his invention in that particular machine or instrument, it is open to the use of the purchaser without further restriction on account of the monopoly of the patentees." Bauer v. O'Donnell, 229 U. S. 18, 33 Sup. Ct. 620, 57 L. Ed. 1041, 50 L. R. A. (N. S.) 1185, Ann. Cas. 1915A, 150, text and cases there cited.

This would be unquestionably the law of this case as to the naked tanks. It appears from the evidence that the changes made in and the additions to the tanks by the Burguieres Company were such as to enable the purchaser to obtain the desired results for which the tanks were purchased, and these may be classed as improvements. So let us see how this would affect the contractual relation of the parties, where the patentee vendor in the meantime obtains a patent purporting to cover the particular improvements. In the case of Chaffee v. Boston Belting Co., 22 How. 223, 16 L. Ed. 240, the Supreme Court said:

"By a valid sale and purchase, the patented machine becomes the private individual property of the purchaser, and is no longer protected by the laws of the United States, but by the laws of the state in which it is situated.

Hence it is obvious that, if a person legally acquires a title to that which is the subject of letters patent, he may continue to use it until it is worn out, or he may repair it or improve upon it as he pleases, in the same manner as if dealing with property of any other kind."

[2] Passing to the merits of the claims in the patent in suit, and the improvements by the Burguieres Company, and the question of infringement, we find that the Supreme Court in the case of McCormick v. Talcott, 20 How. 402, 15 L. Ed. 930, states as the law that:

"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." Morley Machine Co. v. Lancaster, 129 U. S. 274, 9 Sup. Ct. 302, 32 L. Ed. 715, text.

The appellant, at least so far as the appellee is concerned, was entitled to improve the machine it bought in any way not involving a use of the particular combination of elements disclosed by the claims of the patent sued on. It is not made to appear that the improvement devised by the appellant and made use of by it on its machine is the same or the equivalent of the one which is described in the two claims of the patent in suit which are relied on. Each of those claims makes a water-tight covering of the tank an essential feature of the improvement sought to be protected by the patent. The appellant's improvement did not include this feature. The appellant put a cover on the top of its tank, as it was reconstructed; but this cover was not water-tight, being supplied with four inch vent pipes open to the outer air above and affording an outlet through the cover for the liquid in the tank; and it did not perform the function claimed by the patentee for a water-tight cover, in that it did not prevent contact of the liquid in the tank, when full, with the air above, and by that means tend to prevent the rise to the surface of the impurities separated from the juice by the heating under pressure of the liquid in the tank, with the result of such impurities finding their way to the bottom of the tank. The appellee, having made the water-tight feature of the tank covering an essential element of the improvement sought to be protected by its patent, is not at liberty to say that that feature of the claims relied on is immaterial, and cannot sustain a contention that another's improvement which dispenses with that feature, or any equivalent of it, is an infringement of the patent, though it accomplishes the same purpose in a manner perhaps equally effective. Wright v. Yuengling, 155 U. S. 47, 15 Sup. Ct. 1, 39 L. Ed. 64; Consolidated Engine Stop Co. v. Landers, Frary & Clark, 160 Fed. 79, 87 C. C. A. 235. It is very questionable under the evidence whether the appellant's improvement embodied other features of the patented improvements which the patentee made elements of his claims. The above-announced conclusion dispenses with the necessity of passing on the other questions so arising.

It follows, from the views here expressed, that there was no equity in the bill, and the decree of the District Court should be reversed, with directions to dissolve the injunction and dismiss the bill. It is so ordered.

SIMMONS MFG. CO. v. KINNEY-RODIER CO. et al.

(Circuit Court of Appeals, Seventh Circuit. January 23, 1915. Rehearing Denied May 25, 1915.)

No. 2118.

PATENTS ⊂=328—INVENTION—BED SPRING.

The Gail patent, No. 639,223, for a bed spring, *held* void for lack of invention, in view of the prior art.

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois; Arthur L. Sanborn, Judge.

Suit in equity by the Simmons Manufacturing Company against the Kinney-Rodier Company, Frank W. Kinney, and F. E. Williams. Decree for defendants, and complainant appeals. Affirmed.

Complainant, assignee of John F. Gail, the grantee in letters patent 639,223 for "Improvements in Spring Beds and Seat Bottoms," filed its bill charging defendants with infringement. The court below held the patent void, and this appeal is from a decree dismissing the bill.

For opinion below, see 206 Fed. 68.

Albert H. Graves and Charles K. Offield, both of Chicago, Ill., for appellant.

George P. Fisher, of Chicago, Ill., for appellees.

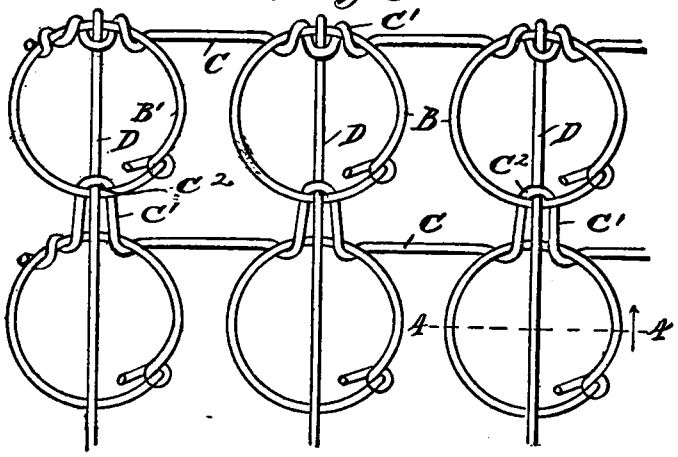
Before BAKER and SEAMAN, Circuit Judges, and GEIGER, District Judge.

GEIGER, District Judge. Gail's improvement relates to bed bottoms formed by using vertically disposed spiral springs extending in rows in which they are held within and upon a frame by wire tie and keyrods. The patent has been before the courts (Simmons Manufacturing Company v. Southern Spring Bed Co. [C. C.] 131 Fed. 278; Id. [C. C. A., Fifth Circuit], 140 Fed. 606, 72 C. C. A. 174) in which latter volume may be found a description and an illustration of the structure. These courts, trial and appellate, while strongly intimating invalidity, relieved the defendant therein from the charge of infringement. The present case, while the issues are likewise validity and infringement, really narrows to the consideration of the patent in the light of a prior art structure—not a reference in the adjudged case noted—and presents the one question whether, upon such reference, in connection with certain prior patents, the patent in suit can be saved by a limitation of its fundamental claim. The latter reads thus:

"The combination of spiral springs having their ends formed into rings, single parallel tie-rods extending across said springs and bearing lateral loops extending upward through the rings of one row of springs and laterally across and vertically through the adjacent rings of the adjacent row of springs, and key-rods arranged transversely to the said tie-rods and extending midway along rows of springs and through said loops where the latter extend through the springs, substantially as shown and described."

The three essential elements of the claim are the spiral springs, the tie-rods with the lateral loops, the key-rods. A better understanding of the question now presented may be had upon reference to one of the figures of the patent:

Fig. 3.



In this, a representation of a portion of a bed spring, *B*, represents the upper ring of the spirally disposed spring, *C*, the tie-rod with the lateral loops, *C'C'DDD*, the key-rods which cross the tie-rods and intercept the lateral loops at C^2C^2, where they reach around the rings of the spring.

The proofs establish, to the requisite degree of certainty, that on April 6, 1897, one Tinkham filed an application in the Patent Office for a patent upon an improved spring bed, which, however, was not prosecuted, in fact was abandoned because of rejection by the office of the claims made, that as early as 1896 a corporation, whereof he was president, began to manufacture and sell a spring bed embodying the invention thus claimed but rejected, and that such sale and manufacture continued down to the present time. Consideration of the claims made by Tinkham in his patent application is not now necessary; but, respecting the structure made and sold, as stated, it appears, not only upon comparison of the two, but also upon the concession of complainant, that it responds literally to the claim of the Gail structure. This one difference is disclosed: Tinkham's spiral springs are in closer proximity to each other, as a result whereof the lateral loops, instead of being elongated, forming a sort of link, are more nearly a "twist" through which, with the transverse key-rod, the adjacent rings are held in position. Therefore, in order to avoid this reference, complainant urges that Gail's claim should be interpreted and limited to embody an elongated lateral loop as disclosed in his drawing.

We believe these considerations to be fatal to such contention: (1) No suggestion is contained in Gail's claims or specifications that the

length of the lateral loop was deemed of essence in the invention. (2) The Patent Office history of the patent suggests breadth of a combination claim rather than unexpressed limitations. (3) The practical art forbids such limitation. The necessity for any limitation is not now suggested as an aid to interpretation, nor to give effect to what, on the face of the patent, might otherwise appear to be an inoperative structure; nor to give effect to what, in view of the art, appears to be a clear forward step to be dignified as invention, but solely to avoid the Tinkham structure wherein the loop is not elongated. Now, it may be true that complainant, in its commercial structure, has hit upon an elongation of the loop which gives the most satisfactory degree of resilience; but it cannot credit Gail as its teacher in that particular; and the court, if a limitation were now to be injected, would be obliged, arbitrarily, to find it outside of the patent. But, as noted, the practical—and for that matter the paper art—forbids such a limitation. No one has urged a hard and fast rule as to the number of spiral springs to be used in a spring bed structure, nor their relative proximity; and until such rule is incorporated into a structure which can be said to be the last stroke of inventive genius in this particular art, there can be no claim of invention in the use of a loop which, because of the length in fact adopted, seems to promote the structure commercially.

There is, however, this further conclusive answer to complainant's contention: In none of the many prior art structures is the length of the loop or of the tie-rod space between the spirals asserted or suggested to be an essential feature of the invention. Mellon, patent No. 331,523, December 1, 1885, uses a tying loop which, from his drawing, appears to have the same elongation as Gail's; but whether any particular length was essential is a matter upon which his specification and claims are just as silent as is Gail. Hence Gail really seeks an adjudication whose effect must be to avoid the Tinkham structure, because its loop is shorter. But, to be of avail as against Mellon, such adjudication must also be to the effect that the latter does not anticipate because his loop is either longer or shorter than Gail's. This cannot be done. Defendant's structure is like complainant's; but its permissible contention that the elongated loop is used upon Mellon's, and not Gail's, teaching is unanswerable. Therefore, even if the Tinkham structure be avoided, and reference be had to the key-rods of Purefoy, patent 458,067, and the Mellon tie-rod (with respect to elongation of the loop) and the Tinkham structure (with respect to the style, not elongation, of the loop), a plain defense of lack of invention in view of those prior structures is established by the defendant.

The decree is affirmed.

SMITH et al. v. BECKFORD & FRANCIS BELTING CO.

(Circuit Court of Appeals, Second Circuit. June 22, 1915.)

No. 314.

PATENTS ⊂=328—VALIDITY AND INFRINGEMENT—FIRE ALARM.

The Smith patent, No. 850,681, for a fire and temperature alarm or indicator, claim 1, *held* valid and infringed.

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

This cause comes here upon appeal from a decree finding infringement of letters patent No. 850,681, granted April 16, 1907, to the complainant George L. Smith for "fire and temperature alarm or indicator." The opinion of the District Judge will be found in 221 Fed. 673.

Griggs, Baldwin & Baldwin, of New York City (Geo. T. May, Jr., of Chicago, Ill., and Arthur J. Baldwin, of New York City, of counsel), for appellant.

Clifford E. Dunn, of New York City (Charles C. Linthicum, of Chicago, Ill., and Clifford E. Dunn and Edmund Quincy Moses, both of New York City, of counsel), for appellees.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge. In Judge Hazel's opinion there is the following statement of invention:

"By his invention the patentee has provided a pneumatic fire alarm which will automatically indicate a sudden, but not a gradual, rise in temperature at any part of the room of rooms in which the apparatus is placed, or through which the leads pass, irrespective of the original temperature of the room or rooms. The device is operated by the expansion of air in a wire tubing of exceedingly small diameter bore, which is strung along the ceiling of the protected area; such expansion being due to rise of temperature resulting from fire. The tubing is closed at one end and at the other connected to an electric contact apparatus, which closes its circuit whenever the pressure of air in the tube increases."

The claim relied on, which was allowed as filed, is the first, quoted in full in Judge Hazel's opinion. It comprises the following elements:

1. In fire and temperature alarms:

2. A metal tube of small diameter and bore, which is strung along through the rooms to be protected and is closed at one end. This tube contains air, which of course expands when the temperature rises, and, because of the closure at one end, can make exit only at the other end of the tube.

3. A closed chamber, with the interior of which the open end of the tube communicates, and into which the expanding air makes its way.

4. Two electrical contacts, normally out of engagement, but which, when brought into contact, establish a circuit which sounds an alarm.

5. "Means for operating" these contacts, whenever the air in the tube is suddenly expanded by a rapid rise of temperature. The means

shown consist of an outlet in the closed chamber, such outlet being covered by a diaphragm, or similar movable part, which is moved outward when the air flows through the outlet. One contact is on the outside of the diaphragm; as the latter moves, this contact is brought into engagement with the fixed contact.

6. A vent for permitting air to pass slowly to and from the bore of the tube upon a gradual and ordinary variation of temperature. The vent as shown in the specifications is an aperture located in the wall of the closed chamber; the claim is broad enough to admit of its location elsewhere.

7. Means for regulating said vent. This is necessary in order to make the capacity of the vent sufficient to accommodate a rate of discharge which will relieve the air pressure in the bore produced by a *gradual* or ordinary rise in temperature, but will not accommodate abnormal increase of pressure resulting from the *abrupt* rise of temperature produced by a fire. Being choked at the vent by reason of this regulation of its capacity, the expanding air pours through the outlet behind the diaphragm and forces the latter outward, thereby starting the alarm. The specification states that the devices controlling or regulating the vent "can be infinitely varied." The form shown in the patent is as follows: Into the vent hole there is inserted a screw; along the shank of the screw there is a groove, so that when the threads of screw and vent hole engage there is a passageway left through which air may pass from the closed chamber to the flat under side of the screw head. The screw is not fully inserted. Between its head and the wall of the closed chamber there is a washer of porous material, such as porous paper, cloth, or the like. Through the pores of this material, the air, which has come from the interior of the closed chamber along the groove in the shank of the screw, passes out. It is obvious that, if the screw head presses lightly on the porous material, the pores of the latter will accommodate a greater outflow than if the screw head reduced their capacity by compressing them. Either by mathematical calculation, or by experiment, it is ascertained what volume of outflow should be provided for in order to meet the conditions that arise from the size of the various parts of the apparatus and the environment in which it is to operate. When that is ascertained, and the degree of compression to which the washer should be subjected is secured, the vent is "regulated," in the language of the patent, and the apparatus of this claim is ready for use.

We are not altogether sure whether or not the defendant actually contends that the device above described is not patentable; but, if it does, we fully concur with Judge Hazel that the patented combination, although some of its parts are old, is novel, useful, and patentable, and think it unnecessary to add anything to his discussion of the prior art.

The main argument of defendant is in support of the proposition that infringement is not shown. The only ground of contention relates to the "vent" and the "means for regulating said vent." In defendant's apparatus the air in the small bore tubing (closed at one end) passes through an outlet *5*, shown on Fig. 2 of the drawing of defendant's device, to a closed chamber, in escaping from which it

operates the electrical contacts. From this outlet *5* there branches out another outlet *4*, which leads to the open air; it is the "vent" through which air passes out of or into the closed tube when the change of temperature is gradual or ordinary. To regulate this vent there is inserted into its mouth a short length of capillary glass tubing, such tubing as we find in thermometers. By proper proportioning of its bore and its length mathematically, and by testing and experiment, it is ascertained just what size and length will so regulate the vent that in the environment where the apparatus is located it will care for all outflow of air produced by gradual or ordinary rise of temperature. When this is ascertained, and the tube inserted, the vent is regulated, and the apparatus is ready for use.

So far as the record discloses, once properly regulated, the apparatus of both patentee and defendant will operate successfully without further regulation, until its environment changes or time deteriorates some of the parts. By reason of the circumstance that the patentee's means for regulating consists in part of a screw, the depth of insertion of which into a threaded hole may be readily changed with a screw driver, it may properly be said that his means for regulating the vent is "adjustable." There is a vigorous dispute between the parties as to whether defendant's means is also adjustable, by cutting off part of the capillary glass tube, or otherwise. But it is not necessary to determine that question of fact. Adjustability of the regulator is not a part of this claim; it is an element of claim 2, which includes as an element "means for *adjustably* regulating the passage of air through said vent." But claim 2 is not declared upon in this suit. That defendant's apparatus infringes claim 1 we are entirely satisfied.

Decree affirmed, with costs.

KANSAS CITY, MO., v. SANITARY STREET FLUSHING MACH. CO.

(Circuit Court of Appeals, Eighth Circuit. July 6, 1915.)

No. 4420.

1. APPEAL AND ERROR ⊜954—INTERLOCUTORY INJUNCTION—DISCRETION.
   The granting of a preliminary injunction, resting in the sound judicial discretion of the trial court, may not be reversed without clear proof of abuse of that discretion.
   [Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3818–3821; Dec. Dig. ⊜954.]

2. PATENTS ⊜298—INFRINGEMENT—STREET FLUSHING MACHINE—PRELIMINARY INJUNCTION.
   There being substantial evidence in a suit for infringement of the Ottofy patent, No. 795,059, for a street flushing machine, that defendant's machines are not identical with machines held not to infringe, but differ from them in the material respect that they throw a stream at an angle less than 20 degrees, there was no abuse of discretion in granting a preliminary injunction.
   [Ed. Note.—For other cases, see Patents, Cent. Dig. § 478; Dec. Dig. ⊜298.]

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

Suit in equity by the Sanitary Street Flushing Machine Company against the City of Kansas City. From an order granting a preliminary injunction, defendant appeals. Affirmed.

F. P. Warfield, of New York City (C. H. Duell, H. S. Duell, and R. W. France, all of New York City, on the brief), for appellant.

C. V. Edwards, of New York City (Edwards, Sager & Wooster, of New York City, on the brief), for appellee.

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

TRIEBER, District Judge. This is an appeal from an order of the District Court granting a preliminary injunction against the city of Kansas City, Mo., the defendant in the court below, restraining it from the use of two pneumatic flushing machines purchased from the Studebaker Corporation, and alleged to be an infringement of patent No. 795,059, granted to Ottofy July 18, 1905.

For the appellant it is claimed that the question is res adjudicata by reason of the decision of the Circuit Court of Appeals for the Second Circuit in St. Louis Union Trust Company v. Studebaker Corporation et al., 211 Fed. 980, 128 C. C. A. 478. The parties to this action are, in fact, the same as those in that case. In that case the court said:

"As to the machine now alleged to infringe the testimony is conflicting, but we are inclined to think defendant's witnesses have based their statements more on careful measurements and less on estimates. Upon the whole we think it has been shown that defendant's machines, as made and operated, do not deliver the stream at any less angle than 25 degrees, which seems to be a satisfactory arrangement for modern streets and is not an infringement of the patentee's device. We are also satisfied that defendant's machine has all the elements of the patent claims, except the angle less than 20 degrees, and that it is a very simple and easy job to modify it, so that it will be a complete infringement. The mere lengthening of the pipes a very few inches, and a trifling regulation of the position of the nozzle, will make any one of defendant's machines an infringing device. As at present organized these machines would probably not commend themselves to a municipality which had streets paved with cobble or blocks with earth interstices, but the changes which would adapt it for use there are so slight that there must be a constant temptation to make them. However, until that temptation has been yielded to, we cannot find that the patent has been infringed, and therefore affirm the decree dismissing the bill, with costs of this appeal to defendants."

In the instant case it was shown by the affidavit of Professor Francis E. Nipher, of the Department of Physics of Washington University, at St. Louis, Mo., who by permission of the authorities of Kansas City, and in the presence of that city's deputy street cleaning commissioner, and also in the presence of Mr. A. M. Reece, of the engineering staff of the Kansas City Southern Railway Company, and Mr. Sutter, president of the appellee company, examined the machines, that he observed the operation of them and took careful measurements of the nozzle settings and delivery of the sheet of water. The result of these measurements, having been tabulated by him, shows the angles of the streams to be as follows:

Wagon No. 21, right side of wagon, inner end of slit, 18 degrees; outer end of slit, 10 degrees; left side of wagon, inner end of slit, 21½ degrees; outer end of slit, 10 degrees.

Wagon No. 22, right side of wagon, inner end of slit, 17¾ degrees; outer end of slit, 8 degrees; left side of wagon, inner end of slit, 16 degrees; outer end of slit, 9¼ degrees.

These measurements of Prof. Nipher were corroborated by Mr. Reece and Mr. Sutter. The accuracy of the measurements has not been contradicted by any direct or positive testimony. The only affidavit presented to the court in which their accuracy is questioned is that of Mr. Edwin W. Hammer, in which he states that:

"From reading the affidavit of Prof. Nipher he finds them very sketchy and general in their terms, and especially lacking in detailed information as to the conditions under which the tests were made."

Mr. Hammer has not seen the machines used in Kansas City; he is a consulting engineer residing in East Orange, N. J., and, as he says:

"It was upon the results of my investigation of the Studebaker street flushing machines that the Circuit Court and the Court of Appeals found that such machines did not and could not (without reconstruction) infringe the sustained claims of such Ottofy patent."

[1] As it is the well-settled rule of this court that "the granting or dissolution of an interlocutory injunction rests in the sound judicial discretion of the court having original jurisdiction," and as the District Court has not departed from the rules and principles of equity established for its guidance, its orders in this regard may not be reversed by the Appellate Court without clear proof that it abused its discretion. The question is not whether the Appellate Court would have made or would make the order. It is to the discretion of the trial court, not to that of the Appellate Court, that the law has intrusted the power to grant or dissolve such an injunction, and the question here is: Does the proof clearly establish an abuse of that discretion by the court below? American Grain Separator Co. v. Twin City Separator Co., 202 Fed. 202, 120 C. C. A. 644; Wayne Mfg. Co. v. Coffield Motor Washer Co., 209 Fed. 614, 126 C. C. A. 608.

[2] As there is substantial evidence that the machines used by the appellant are not identical with the machines before the New York court, but differ from them in the very matter upon which the patent was by that court held not to be infringed, the nozzle of the Kansas City machines throwing a stream at less than 20 degrees, there was no abuse of discretion in awarding the preliminary injunction.

The decree is affirmed.

CADWELL et al. v. MOTZ TIRE & RUBBER CO.

(Circuit Court of Appeals, Second Circuit. June 22, 1915.)

No. 303.

PATENTS ⟸328—VALIDITY AND INFRINGEMENT—VEHICLE TIRE.

The Cadwell patent, No. 887,997, for a vehicle tire, which is of solid rubber with recesses in the side and preferably with cells in its base, is for an improvement in structures of the prior art, and the claims are limited to the particular improvement described therein. As so construed, *held* not infringed by the structure of another improver.

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

This cause comes here upon appeal from a decree dismissing the bill in a suit for infringement of patent. The patent sued upon is No. 887,997, issued May 19, 1908, to Edwin B. Cadwell for a vehicle tire.

Albert T. Scharps, of New York City (Thomas B. Kerr, of New York City, of counsel), for appellants.

Jesse B. Fay and Jno. F. Oberlin, both of Cleveland, Ohio, and Chas. W. Stapleton, of New York City, for appellee.

Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge. The invention relates to cushion tires, the so-called solid rubber as distinguished from pneumatic tires. The tire is preferably constructed of soft vulcanized rubber with recesses formed in its side and cells in its base. The arrangement of these cells and recesses is such that the rubber, when under compression due to the load of the vehicle, will flow evenly into the cells and recesses and thus impart the qualities termed cushioning.

The specification states:

"When tires are made from solid rubber, the rubber when under compression, can flow but in two directions, namely, in the longitudinal direction of the tire and laterally. This being the case, it will be seen at once that the flow of the rubber in the longitudinal direction would be very short for the reason, that it would be flowing in a direction tending to compress the rubber in a direct line of the tread of the tire, and therefore most of the rubber tends to flow laterally; since rubber cannot be compressed, but must flow by displacement, it is easy to see that a tire composed of a solid section might easily be forced beyond the elastic limit of the rubber, and thereby permanently weaken the same."

"In the present invention the spacing of the recesses and cells is such that the rubber may flow evenly in all directions from the line of compression, and thereby prevent excessive strains, which would cause rapid disintegration and destruction of the tires."

Describing the structure of his tire in more detail the patentee says:

"In Fig. 1 I show the recesses formed V-shape and extending from the sides across the center of the tire. The recesses on one side alternate throughout the length of the tire with the recesses on the opposite side thereof, and with the cells formed in the base, and spaced between the said recesses, and extending upward to about the center of the tire; these cells in the base of the tire are practically sealed when said tire is placed in the metal channel

piece usually on the felly of the wheel, and into which the base of the tire fits, and thereby the chambers so made are filled with air which give to the tire pnuematic properties.

"In Figs. 5 and 6 the recesses do not extend across the center of the tire but are opposite each other, and form thereby a central web section, which extends from the base of the tire to the tread surface forming an unbroken web between these cells and recesses; this form is provided for the driving wheels of a vehicle, such as the driving wheels of an automobile, for the reason that the longitudinal strength of the tire is thereby strengthened. The binding wires *D* are arranged as shown, one of them on each side of the tire and one extending at the center of the tire longitudinally through the solid portion of the rubber, and are united at the ends in the usual manner well known to the art, when the tire is fitted in the channel piece."

The patentee refers to a prior structure of his own devising, in which the recesses extended upward through the tread, and states that, in the new structure, "by maintaining the tread section unbroken I prevent the tire from collecting dirt, gravel and mud and throwing same when the vehicle is moving rapidly, which is objectionable."

The claims relied on are 7, 9, 10, 13, 14, and 15, which do not contain the "cells" as an element; defendant's structure has no cells. Of these claims 7, 9, 10, and 15 cover side recesses which contract toward the center of the tread, a feature not found in what complainant contends are the recesses of defendant's tire. Claims 13 and 14 are as follows:

"13. A tire having a plurality of recesses in each of its sides which terminate near the center thereof and are adapted to contract under tread pressure, said tire presenting an unbroken tread surface substantially as shown.

"14. A tire having a plurality of recesses in each of its sides which extend less than the width of said tire and are adapted to contract under tread pressure, said tire having an unbroken tread surface substantially as shown."

Defendant's tread differs from the tread of the patent in having a circumferential valley in the tread having dual lobes. This so-called "valley" is well illustrated in Fig. 1 of Motz patent, No. 925,937, issued June 22, 1909, under which defendant manufactures.

Defendant also makes tires, having the lobes *C* without the bridges *E* between them. The tread of the patented structure is flat-faced, it has neither transverse recesses nor a circumferential valley or groove to break its surface.

The art was a crowded one, showing many ingenious structures; but, tested by all the prior patents in evidence (save one), we find no anticipation of the particular combination of recesses and cells which Cadwell disclosed, and are inclined to hold his type of tire patentable—it differs from the whole group of prior inventions. But the prior art also contains a patent to Cadwell himself for the structure, with broken tread, to which he refers in the specifications of the patent in suit. This prior patent is No. 846,453, issued to Cadwell March 12, 1907. Except that in the patent in suit the side recesses do not extend upward, and therefore the tread is unbroken the two structures are identical. In substance, Cadwell has merely surrounded his old tire with a rubber tread which covers over the recesses and presents, upon rotation, a flat surface to the ground. It may be that the addition of this unbroken tread was a patentable improvement—we need not decide that question now—but the fact that Patent Office so decided and

issued a patent (No. 887,997) for the improved device does not eliminate the structure shown in the earlier patent from the prior art. What has happened is this: Cadwell has added to the novel combination shown in 846,453 a flat-faced unbroken tread; defendant has added to the same combination a tread which is not flat-faced, nor in a sense unbroken, since it has the deep circumferential valley dividing the tread into two parts. It seems to us that each improver is entitled to his particular form of improvement, and that neither can stop the other from using the same with an interior combination which was disclosed in a patent, which antedates both improvers.

Decree affirmed with costs.

HIDE-ITE LEATHER CO. et al. v. FIBER PRODUCTS CO.

SAME v. WATERPROOF LEATHERBOARD CO.

(District Court, D. Massachusetts. January 30, 1915.)

Nos. 291, 329.

PATENTS ⇐328—VALIDITY AND INFRINGEMENT—WATERPROOF LEATHERBOARD.

The Buffum & Carter patent, No. 965,152, for waterproof leatherboard, and process of making same from a pulp mixture containing fibers of tanned leather, with or without fibers of other materials, *held* not anticipated nor invalid for prior use, but to disclose a patentable invention and cover a meritorious product, as evidenced by its increasing commercial success. Also *held* infringed, both as to the process and product claims.

In Equity. Two suits by the Hide-ite Leather Company and others against the Fiber Products Company and the Waterproof Leatherboard Company, respectively. On final hearing. Decrees for complainants.

Fish, Richardson, Herrick & Neave, of Boston, Mass., for complainants.

Isaac B. Owens, of New York City, and Jacobs & Jacobs, of Boston, Mass., for defendants.

DODGE, Circuit Judge. The plaintiffs, as exclusive licensee under and owner of United States patent 965,152, issued July 26, 1910, to Buffum & Carter, complain of its infringement by both the above defendants. The separate suits against them have been consolidated.

The patent is for improvements in waterproof leatherboard and processes of preparing the same. It states that it uses the term "leatherboard" to denote—

"a product made from a pulp material or mixture containing fibers of tanned leather, whether said material is composed of leather fibers only, or whether it is made up in part from such fibers and in part from fibers of other materials suitable for the purpose."

The patent has five claims. Four only are said to be infringed, viz., Nos. 1, 2, 3, and 5. The first three cover the patentees' described process. No. 5 is for waterproof leatherboard produced by the same process.

The alleged infringement by the defendant Fiber Products Company, a corporation organized in 1907, was at its factory in South

Framingham, Mass., and during the period between the issue of the patent on July 26, 1910, and May 5, 1911, on which date its manufacture of leatherboard was stopped by foreclosure of a mortgage on its machinery. The plaintiffs' bill against it was filed November 27, 1911.

It was succeeded by the defendant Waterproof Leatherboard Company, which began operations in the same factory in the latter part of September, 1911, and is alleged to have infringed the claims in suit by the manufacture of leatherboard there carried on from that time until the filing of the plaintiffs' bill against it on March 27, 1912, and subsequently thereto.

The evidence shows the operations of both companies to have been under the same control.

According to the disclosure of the patent, the patentees' process is to be applied to "a pulp mixture containing fibers of tanned leather." It is carried on at first in a "beater," wherein the pulp mixture is "ground in the usual manner until it attains the desired degree of fineness." It is stated to consist in: (1) Adding an "alkaline substance such as" certain specified substances, which are stated to produce results then described; (2) mixing with the mixture produced as above a solution of soap; what is included under this term being then stated, and so operating upon the mixture thus produced as to distribute the soap equally upon the fibers; (3) then adding a precipitant which will so react with the soap as to form an insoluble compound by union of the fatty acids with the base of the precipitant, and deposit the insoluble precipitate upon the fibers. After further mixing in the "beater," the pulp mixture is to be formed into sheets or other articles as usual.

I consider it proved that the defendant Fiber Products Company made waterproof leatherboard by this process and sold what it thus produced in considerable quantities during the period between June, 1910, and May 5, 1911. The testimony of the chemist employed by this defendant from June, 1910, to April, 1911, called as a witness by the plaintiffs, I think sufficient for this conclusion, and I do not find it met by any testimony on the defendant's behalf amounting to contradiction of it, or to direct and frank disclosure of the process in fact used. It further appears that Reynolds, superintendent and general manager first of the Fiber Products Company, afterwards of its successor, Waterproof Leatherboard Company, had, according to statements made by him to the president of the Hide-ite Company, secretly gained admission by night, at some time between November, 1908, and June, 1909, to the Hide-ite Company's factory, and thus obtained knowledge of all that was being done by that company. The patented process was then being used there. The application for the patent had been filed on January 29, 1909, and was then pending. According to the defendant's evidence, the Fiber Products Company was then and had for some time been experimenting with the object of discovering some satisfactory process for making waterproof leatherboard. One such experiment in November, 1908, is hereinafter considered. It is not unreasonable to suppose that Reynolds, having thus obtained knowledge of the patented process, proceeded to put it into use for the Fiber Company's benefit. The fact of its use under his direction as

superintendent being shown as above, I see no reason to doubt that the plaintiffs are entitled to a decree against the defendant Fiber Products Company on all the claims in suit, if the patent is valid.

The validity of the patent is attacked on various grounds which it will be convenient to consider before inquiring whether or not there is sufficient proof that the Waterproof Company has infringed it since May 5, 1911.

The Hide-ite Company, as is not disputed, had abandoned the use of the patented process before either bill against these defendants was filed, and now produces its waterproof leatherboard by means of a wholly different process, the nature of which is not further disclosed. This fact is relied on as tending to show that the process has no commercial merit. But the evidence leaves no doubt in my mind that the process was successfully used at Brockton by this plaintiff, just as the patent describes it, from February 1, 1908, to May, 1909, during which period nearly 1000 tons of waterproof leatherboard were produced and sold, of a quality such as obtained for it marked and increasing commercial success. The plaintiff's reason for discontinuing the process in May, 1909, I find to have been, not any dissatisfaction with it, but the fact that the discharge of its waste products into a stream in Brockton involved controversy with the local authorities, to be avoided only by purifying the effluent water at an expense to be avoided if possible.

The admitted fact that the plaintiff's sheets of leatherboard, said to be waterproofed as above, were passed, after drying, first through melted parafine and then through heated calendar rolls, is relied on as showing that their waterproof quality was really obtained by the above final step in their manufacture rather than by the patented process. But I think it sufficiently shown that any addition to their water-resisting power thus obtained was insignificant in comparison to the waterproofing throughout the fabric effected by the patented process. It appears that the parafine added, instead of penetrating through the sheet, went only about one thirty-second of an inch below its surface; also that it was used to produce a better finish and secure a smoother edge upon whatever might be cut from or died out of the sheet, these being the only results from its use of any consequence. Nothing appears regarding its use which I can regard as tending to show want of merit in the process of the patent.

The defendants contend that certain prior patents and the alleged prior use of certain processes claimed to be in substance the same, show want of novelty in the process patented.

The prior patents first relied on are British patents to Hardy (1875) and Minns (1878), both for "artificial leather." Both purport to be for an invention by Minns. His patent purports to be for an improvement over the process described in Hardy's patent, wherein nothing is said about waterproofing. After stating that the artificial leather produced will be far superior to that produced by Hardy's method, the Minns patent adds that it "will also be waterproof."

The Hardy product is to be made from manila, jute, and leather scraps. The manila and jute are to be boiled with lime to extract

grease. The leather scraps, "partly ground," are mixed with the boiled manila and jute, also with tan and logwood, also previously boiled. To the mixture, when sufficiently ground, rosin size and soda ash are added. The soda ash is said to render the rosin size soluble in order to allow it to mix with the pulp. Alum is next added, which is said to unite with the alkaline rosin compound and precipitate the insoluble rosin on the fiber. But, except as artificial leather generally may be expected to have water-resisting qualities, there is no hint that any feature of the process has or is intended to have the effect of waterproofing the product.

Minns adds buffalo hide or scraps thereof to Hardy's manila, jute, and leather scraps; and, having made his artificial leather out of them by following Hardy's process, he charges it with rosin, beeswax, and parafine oil mixed in specified proportions. This last mixture appears to be what is relied on for waterproofing his product. His patent goes on to describe apparatus which will be found effective in carrying out his invention. In this apparatus the leather scraps, reduced to "shavings," are subjected to the action of a solution of common soda in water, after which they are drained and washed with clean water to remove the soda solution. All this, it is said, will partially pulp the leather, which is next put into the ordinary beating engine with the manila, jute, etc., and the whole brought to the state required for subjecting it to Hardy's process. There is no hint that his use of the soda solution has anything to do with waterproofing. It is only said that a long process of soaking is thereby avoided.

For the following reasons, I cannot regard either of these patents as anticipations of the invention described in the patent in suit:

It is doubtful whether the disclosures made in them could, in any event, be considered sufficiently full, clear, and exact to permit their being so regarded for any purpose. Tan or tan liquor and logwood are ingredients of Hardy's pulp mixture. Why or in what proportions does not appear, nor why Minns uses also buffalo hide or scraps. As to the proportions in which the rosin size and soda ash, or the subsequent alum, are to be used, nothing is disclosed, nor anything regarding the time during which the pulp is to be treated with either.

There is nothing to show that waterproof artificial leather, still less waterproof leatherboard, ever was or can be made by following only the directions given in the patents.

One result of the alkaline treatment forming step (1) of the patented process is stated in the patent to be neutralization of the tannic or chromic acid in the leather fibers. It is stated that these are converted into soluble salts, and the premature precipitation of the waterproofing compound thereby prevented. The proportion of soda ash required for this purpose is stated. The proper quantity of soap to be used for step (2) of the process is also stated, and the relative quantity of precipitant to be used in the succeeding step (3). There are also statements of the proper time during which treatment of the pulp mixture by each of the above should continue. Nothing of all this is found in either British patent mentioned, and the use of tan or tan liquor as an ingredient of the pulp mixture, with the provision for washing out all

soda solution therefrom in the Minns apparatus, prevents the conclusion that either includes the use of alkali or soda ash made by the patentee. It cannot fairly be said from anything disclosed in either that the idea of making waterproof leatherboard by depositing insoluble precipitates upon its leather fibers in the beater, before forming the pulp mixture into sheets, is involved.

I do not find in any of the other prior patents relied upon by the defendants any nearer approach to the process described in these two patents, and if the above conclusion regarding them is right, no necessity appears for discussing the others in detail.

Taking the alleged prior uses upon which the defendants rely in the order of time, the first is said to have been between 1881 and 1885 at the Dawson factory in Lawrence, Mass., and the second at the factory of the Milton Leatherboard Company, at Milton, N. H., in 1893, and subsequently. The evidence relied on to show both is the testimony of Frank E. Norton, manager of a leatherboard factory in Canada, taken in surrebuttal in November, 1913. He states that from 1881 to 1885 he worked at the Dawson factory in various positions, and that later he worked for some years, beginning in 1893, for the Milton Company. He describes the process whereby "counterboard" was made while he was at Lawrence, and the process whereby "shankboard" was made at Milton.

As to both processes, Norton's testimony was based only upon his memory, and was not supported by anything whatever in the nature of concrete, visible, cotemporaneous proofs, speaking for themselves. Under the circumstances, it would be, in any case, impossible to accept it as establishing anticipation, consistently with what has been declared by the Court of Appeals for this Circuit to be the underlying rule in such cases. Emerson, etc., Co. v. Simpson Bros. Corp., 202 Fed. 747, 750, 121 C. C. A. 113. And without applying the rule referred to, I am also unable to believe that his description of either of the above processes sufficiently shows any employment of the patented process in either manufacture he describes. As to the "shankboard" said to have been made from a pulp mixture containing 70 per cent. of leather fiber, all that his testimony shows is that 10 pounds of lime and 7–10 pounds of soda ash were added to it in the "beater," the lime being sometimes omitted and sometimes the soda, but never both. As to the "counterboard," there was in the pulp mixture, according to Norton, only 3 per cent. of leather fiber, the remainder being composed of wood pulp or other vegetable fiber, to which was added "a certain number of pails of rosin size and a certain amount of alum and a certain number of pounds of venetian red." If, as he says or seems to imply, the rosin size was used for waterproofing the pulp mixture and the alum for setting the color and the rosin in the fiber, nothing more is shown than that it was not new with the patentee to add rosin size and alum to pulp mixtures in general, as in the Hardy and Minns patents. Norton's crude description affords no indication of any such adaptation of their use to the thorough waterproofing of the leather fiber contained in such mixtures, as it was the declared object of the patent in suit to accomplish.

What appears regarding the other alleged prior use is as follows: A letter dated November 19, 1908, from the Arabol Manufacturing Company, a New York manufacturer of rosin size and other sizes, acknowledges the receipt from the defendant Fiber Products Company of a keg of beaten leather scrap, and promises further advice about it "as soon as we receive a report from our laboratory." A subsequent letter, dated December 4, 1908, to the same defendant from the Arabol Company, signed by "E. Weingartner, President" (marked "Defendant's Exhibit Arabol Manufacturing Company Report"), stated that:

"Our laboratory reports that your stock is so acid that the size may be precipitated as soon as added, that is, before it could be evenly distributed in the stock."

Advice how to overcome this follows. The defendants contend that the suggestions made set forth, in substance, the process of the patent, and they claim to have shown that the Fiber Products Company followed the suggestion, and by doing so produced waterproof leatherboard during the first week of December, 1908. The application for the patent in suit was on January 29, 1909. The defendants say that it was thus anticipated by the Fiber Products Company, and further that, Weingartner having been thus able to put the process of the patent on paper, offhand and with no other motive than to assist the sale of his rosin size, the patentee cannot be credited with any invention in respect thereof.

Weingartner's suggestions were made for the purpose of showing how premature precipitation of the waterproofing elements, due to acid in the pulp mixture, might be prevented, and this, as appears from the patent, is one of the results which the patentees claim to accomplish. What he suggested, in substance, was, first to neutralize the stock with caustic soda lye, then to add the size, and finally to neutralize with sulphate of alumina, or with part sulphate of alumina and part sulphuric acid, in place whereof a solution of alum in water might be used, though the acid was stated to be preferred. The quantity of alum required "to set the rosin size" is indicated, and there are further suggestions as to details. What he suggested, though including the neutralization of acid in the pulp mixture, by means of an alkaline substance, and also the use of alum to precipitate rosin size, seems to me to cover only some of the rudimentary ideas of the patented process, and to stop far short of the developed process. If it be true that the Fiber Products Company made leatherboard according to these suggestions, and that it was to any extent waterproof, the evidence fails to show that it compared in quality with the patentees' product, or even that it was capable of commercial success. The sample produced, and the admission of the defendants' witnesses that it was "too hard and brittle to be suitable for the trade it was intended for," and that "the stock seemed burnt," indicate that the attempt to manufacture according to these suggestions resulted only in failure. It does not appear to have been tried again. I am unable to regard what is shown concerning it as establishing anticipation.

No sufficient ground for denying validity to the patent appearing, I

next consider whether infringement by the Waterproof Leatherboard Company is proved. If there was such infringement, it must have been after that concern began making leatherboard in September, 1911, and, in order to be dealt with in this case, it must have begun before the second of the above bills was filed on March 27, 1912.

Edwin B. and Harry Eising owned substantially all the Waterproof Company stock, were its officers, and controlled it as they had controlled the Fiber Products Company, whereof they were also officers. They organized both companies, and held a mortgage on the machinery of the company last mentioned, which they foreclosed, as stated, in May, 1911. They employed C. R. Reynolds as general manager and superintendent, first of the Fiber Products Company, afterward of the Waterproof Company, as above stated.

According to their testimony, the Waterproof Company, from the beginning of its operations in September, 1911, followed the process, said to have been evolved from numerous experiments carried on during the previous operations of the Fiber Products Company, of washing the pulp mixture in a "beater" with water only, until the tannic acid and the tannates in the leather fiber had been washed out, after which the waterproofing emulsion (composed of soap, etc.) was added, the beating continued until this was thoroughly mixed with the fiber, and finally alum was added as a precipitant, in quantity sufficient to precipitate the soap and waxes on the fiber. Then followed the forming of the contents of the "beater" into sheets.

This was the process of the patent, save that for the first step thereof, viz., the addition of an alkaline substance, said in the patent to produce certain results, among them neutralization of the tannic or chromic acids in the pulp mixture, there was substituted the removal of such acids, unneutralized, by washing only. The defendants contend that the process described as above does not infringe claims 1, 2, or 3 of the patent, in each of which a preliminary alkaline treatment is specified.

Claim 3 requires specifically that the pulp mixture be rendered receptive to the waterproofing agents, "by means of alkaline reagents adapted to combine with the acid derived from the leather to form soluble compounds thereof," and the plaintiffs do not insist that the washing-out process infringed it. But they insist that claims 1 and 2, which require only that the mixture be rendered receptive, etc., "by an alkaline treatment," were infringed, because washing is a well-known equivalent for "alkaline treatment" as a method of getting rid of the acids referred to in such pulp mixtures.

Upon the question thus raised, I am obliged to agree with the defendants. I am unable, in view of what appears, to regard washing with water and alkaline treatment as equivalents, each well known as a proper substitute for the other. If it be true that there is no difference in the result accomplished, it cannot be said that there is substantial identity in the mode of operation by which the result is reached. There is some reason to believe that the washing process may render the leather fiber more receptive to the subsequent waterproofing process than does the alkaline treatment, and is so far superior to it

At any rate it takes more time, and the acids are not chemically combined in order to remove them. Having limited themselves to a mode of freeing the fiber from its acids which involves chemical action, I do not think the patentees can justly claim, as covered by their patented process, a method which dispenses with chemical action so far as this step is concerned.

The plaintiffs contend that, in any event, the product of the process above described infringed claim 5 of the patent, which is for—

"a waterproof leatherboard made from pulp containing disintegrated fibers of tanned leather and having insoluble waterproofing compounds deposited by precipitation upon and thereby intimately mixed with the fibers of which it is composed, substantially as described."

It is expressly stated in the patent that the invention "includes the product resulting from the process described as well as the process itself," and I do not think, in view of what appears, that claim 5 can be construed broadly enough to sustain this contention. I must regard the product covered by claim 5 as including only such waterproof leatherboard as has been produced by the process of the patent or its equivalent. Downes v. Teter-Heany, etc., Co., 150 Fed. 122, 80 C. C. A. 76. So far, therefore, as the Waterproof Company followed only the process described by its witnesses as above, I hold that it did not infringe any of the claims of the patent.

Upon the evidence, however, I think the plaintiffs have sufficiently shown that the "washing-out process" was not in fact the only one followed by the Waterproof Company in making the leatherboard it produced subsequently to September, 1911.

The testimony of Edwin B. Eising, vice president of the company and in full charge of its affairs, was, at most, that no other methods were used "in a commercial way," or not "regularly as a commercial proposition," at least with his knowledge and consent. He admitted that perhaps the alkaline treatment was used "in an experimental way." But this is contradicted by the plaintiffs' witness Parsons, a competent and experienced observer, employed in the Waterproof Company's factory as beater foreman from February 8, 1912, to January 23, 1913. Parsons' testimony is direct and positive to the effect that sodium carbonate, either as soda ash, monohydrate, or sal soda, were regularly used in the beaters, in quantity amounting to 1½ per cent. during the period from February 8th until some time in the following April, when washers were installed; that after the installation of the washers the use of alkali was for a time discontinued, but resumed later, so that in the following August the alkali was again regularly put into the beaters after their contents had been washed. This was done, according to Parsons, by Lemoine, the company's chemist, under the direction of Reynolds, its superintendent.

Parsons, while at the defendant's factory, was, as he himself states, a detective sent there by the plaintiffs and acting for them, but there is no such contradiction of his statements as might have been expected if they were not true. The defendant has not called Reynolds or Lemoine, nor has it excused or explained the absence of any testimony from either of them. Lemoine, as is not denied, sent daily to the de-

fendant's New York office written reports of all the chemicals used in the beaters, but the defendant has refused to produce any of these reports. There is proof of declarations by Reynolds, in December, 1911, that soda ash was among the materials they were using and discharging into a neighboring brook. There is uncontradicted evidence showing regular purchases of sal soda in large quantities between December, 1911, and March, 1912. These, with other circumstances, tend to confirm Parsons' testimony; nor does it seem to me that he can be regarded as discredited by any of the evidence upon which the defendants rely for that purpose in view of their failure to meet his testimony by direct contradiction as above.

Parsons' testimony further satisfies me that there was a regular use by the Waterproof Company of borax as an ingredient of its waterproofing emulsion, in quantity sufficient to make such use an infringement of the patent, wherein it is expressly provided that, if desired, the neutralizing alkali employed may be mixed with the soap. The only conflict upon this point between Parsons' testimony and that of Eising is as to the quantity of borax used. Eising's statements regarding this matter I am unable to regard as sufficiently direct and consistent to be accepted as against those of Parsons without confirmation; and here, as before, that confirmation which might have been expected from the defendant is wanting.

In my opinion, therefore, the plaintiffs have proved that the Waterproof Leatherboard Company used the "alkaline treatment" of the patent as one step of the process whereby they made leatherboard; the other steps being, as appears from their own testimony, those of the patented process. I find therefore that there has been infringement by that company of all the claims of the patent.

In reaching the above conclusions, I have taken the plaintiffs' view that prior methods of sizing or waterproofing vegetable fiber in the manufacture of paper are immaterial upon the question of the validity of the patent, and that we are concerned only with methods of treating leather fiber in the manufacture of leatherboard. Whether or not one of the results of the patentees' "alkaline treatment" is to restore the original colloidal character of the leather fiber substance treated, as stated in the patent, I have not thought it necessary to inquire. There being no question as to its effect in neutralizing and converting the acids referred to into soluble salts, I see no occasion for determining whether or not the belief of the patentees, expressed in their specification, that it also renders the leather fibers more receptive to the action of the waterproofing agents in the manner stated is or is not shown to be a correct belief.

I hold the patent valid, not anticipated, and infringed as to all the four claims in suit, by both defendants. A decree may be entered accordingly.

GOODYEAR TIRE & RUBBER CO. v. HOOD RUBBER CO.

(District Court, D. Massachusetts. December 28, 1914.)

1. PATENTS ⇐62—ANTICIPATION BY PRIOR STRUCTURES—EVIDENCE TO ESTABLISH.

Evidence of the making and use of cores for use in making pneumatic tires, which were in all essential respects the same as that covered by a subsequent patent to another, consisting of dated working drawings from which the cores were made, the testimony of the person who made the drawings that he made and dated them at or near the times of the dates thereon, with clear evidence that cores were made from the drawings, and used continuously from the time of their completion, *held* sufficient to establish the date of such use and to render the patent void for anticipation.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 78; Dec. Dig. ⇐62.]

2. PATENTS ⇐328—ANTICIPATION—COLLAPSIBLE CORE FOR MAKING PNEUMATIC TIRES.

The State patent, No. 865,064, for a collapsible core for use in the manufacture of pneumatic tires, *held* void for anticipation by cores having all the essential features of that of the patent made and used by others prior to the date of the alleged invention by the patentee.

In Equity. Suit by the Goodyear Tire & Rubber Company against the Hood Rubber Company. On final hearing. Decree for defendant.

Decree affirmed in 225 Fed. —, — C. C. A. —.

H. A. Toulmin, of Dayton, Ohio, for complainant.

James M. Spear, of Washington, D. C., and Ellis Spear, Jr., of Boston, Mass., for defendant.

DODGE, Circuit Judge. The plaintiff owns United States patent No. 865,064, issued September 3, 1907, to Will C. State, for a collapsible core. In its bill (dismissed by consent as to the Shawmut Tire Company) the Hood Rubber Company is charged with infringing all of the four claims of the patent.

The patented core is for use in manufacturing pneumatic tires of the double-tube type having inextensible bands or edges. The rubber tire, annular in form, having been built up and molded by heat upon the core, it is then necessary to withdraw the core from within the completed tire through the opening left along its inner or rim face. The diameter of the core within the tire being much greater than the width of the opening referred to, the inextensible bands or edges of the tire prevent the withdrawal of the core entire and require it to be constructed in sections which, held together as a complete core during the molding process, can be readily disconnected from each other after that process has been completed and separately pulled out.

The plaintiff is a large manufacturer of tires, and it also manufactures the cores which it uses for the purpose. The defendant, also a maker of tires, buys the cores which it uses from others. There is no proof of any infringement except by use of cores thus purchased. There is no dispute as to the kind of cores the defendant has thus

used. They are like Complainant's Exhibit Collapsible Core illustrated on page 112 of the complainant's record. They infringe all the claims of the patent if said claims are valid.

Claims 1 and 4 are broader than claims 2 and 3. They cover a device comprising independent segment-shaped members adapted to abut against each other with means overlapping their inner portions for maintaining them in abutting engagement (claim 1), or a plurality of independent segment-shaped members adapted to fit against each other and forming a collapsible core when in an abutting engagement with means independent of them for maintaining them in abutting position (claim 4).

The further requirements of claim 2 are, in substance, that the lines of severance between the several parts shall be oblique to the radii of the annular member formed by the parts, and that the parts shall be held in position together by a pair of rings clamping an annular beading formed by the inwardly projecting portions of the parts. The further requirements of claim 3 are that the parts shall be adapted when united to form an annular body, the points of severance being oblique to the radii, besides forming with their inwardly projecting edges an annular beading adapted to be clamped by a pair of rings with means for clamping the beading on the rings.

The defendant relies on a number of prior patents in support of its contention that the patent in suit is invalid in view of the prior art. I am unable to find in any of them what can fairly be called an anticipation of the patented device. If some of the devices described in them comprise cores made collapsible by division into sections, and if it can be said as to some of these that the core-sections are divided "non-radially," I do not find in any of them core-sections held together for use either by means overlapping their inner portions, or independent of them, or by any means corresponding to the annular beading formed by their inwardly projecting edges and the grooved clamping rings which constitute the means described in the patent; nor, as to any of these prior patented devices, does it appear that they were intended for or capable of use in the manner or for the purposes contemplated by the patent in suit.

The defendant further relies upon various unpatented core devices said to have been made or used by other tire manufacturers, beginning in the latter part of 1904 or the early part of 1905.

The bill in this case was filed December 5, 1910. The evidence was taken beginning in March, 1912. There was a supposed final hearing in September, 1913, but before any decision was announced the defendant was permitted, in June, 1914, to reopen the case for further evidence regarding another alleged prior use claimed to have been earlier than 1905. The additional evidence bearing upon this question having been completed on both sides, the case was further argued, and was finally submitted December 18, 1914. It thus appears that all witnesses testifying with regard to prior use in 1905 or earlier gave their testimony at least six years after the events to which their testimony relates.

[1] Among the alleged anticipatory devices brought before the court by the defendant's evidence in September, 1913, the only ones

which seem to me capable, in any event, of being regarded as anticipating the device of the patent are certain cores said to have been made and used by the Goodrich Rubber Company, of Akron, Ohio. This company, like the plaintiff and defendant, is and has been since 1900, or earlier, a large manufacturer of tires, including, from about the beginning of 1904, tires of the kind intended to be made on the patented device. Unlike the defendant, instead of buying its cores, this concern has made them itself, or had them made to order for it.

Cores made according to the working drawings from the Goodrich Company's files, which have been marked Defendant's Exhibits Goodrich Drawings E1412, E1414, E1416, E1418, E1423, respectively, would, in my opinion, embody the invention described in the patent in suit without material difference. These drawings bear various dates from August 17 to August 23, 1905. They are identified by a draftsman then in the Goodrich Company's employ, as made and dated by him at or near the time of the dates which they bear. That the Goodrich Company made or had made for it cores according to these drawings at least as early as the dates upon them, that it was then using and has been ever since using such cores in the manufacture of its tires, seems to me sufficiently established by the testimony. Some of the witnesses were then and have ever since been employés of the company in positions requiring them to know about the manufacture of its tires and the various cores used. Others were at the time employés, in capacities requiring similar knowledge, of core-making concerns from which cores to be made according to the drawings were ordered by the Goodrich Company. What were claimed to be original orders for the manufacture of such cores were also produced. It is true that none of the identical cores then made according to the drawings were produced, but it appears that the cores soon wear out in use and have to be replaced by others. It cannot be said, however, that the testimony of these witnesses is based merely on their unaided recollection after six years, and it seems to me that the drawings sufficiently meet the requirement that testimony of this kind must be supported by "concrete, visible, cotemporaneous proofs which speak for themselves," according to the opinion of the Court of Appeals for this circuit in Emerson & Co. v. Simpson, etc., Corporation, 202 Fed. 747, 750, 121 C. C. A. 113. The testimony referred to further tends to show the experimental making and use of cores according to some of these drawings as early as the spring of 1905.

To meet this evidence, the plaintiff attempted, by the testimony of the patentee and others, to carry back the date of his invention from the date of his application for the patent (December 14, 1906) to the fall of 1904, or some time in January, 1905. The patentee was then and has ever since been in the plaintiff's employ as mechanical engineer. He testified that he conceived his invention in the early part of the fall of 1904; that the first experimental tire was made on it "along in October, 1904;" that his experimenting was carried on "around December" of 1904; and that tires were produced commercially from his cores by the plaintiff company in the spring of 1905. The first core, according to him, was built from a pencil sketch, which is not produc-

ed. The first working drawing, according to him, was made April 15, 1905. A drawing bearing this date, from the files of the Goodyear Company, is in evidence, marked "Complainant's Exhibit Goodyear Blue Print." The patentee, however, did not make or date this drawing, nor is there any testimony from the person who did make or date it. The plaintiff, however, like the defendant, and no doubt for like reasons, fails to produce any identical core made from the drawing referred to, at the time testified to.

The only testimony directly tending to corroborate that of the patentee himself as to the time when the first experimental tire was made on a core such as the Goodyear drawing shows comes from a witness who has been a tiremaker in the Goodyear Company's employ since 1898, and was foreman of its tireroom when he testified in 1913. He says he built the first tire on such a core in October or November, 1904, or "about that time"; but he could refer to nothing enabling him to fix the date beyond the fact that the then foreman of the tireroom came to the factory in 1903. The president of the Goodyear Company, connected with it since 1898, testified that the name "New Goodyear Detachable" was given to tires made on the patented type of core, that the name was first applied to them "about January 1, 1905," just before preparations were made to market that type of tire, and substantially at the time the first tire of the type was built. He also testified that he had no knowledge of tires of the type called by the above name being built on any other type of core than that described in the patent. Records and orders from the company's files show sales of tires under the above name as early as January 11, 1905, but it does not seem to me clearly established that so-called "New Goodyear Detachable" tires then sold must have been made on cores corresponding to the Goodyear drawing, bearing the date of April 15, 1905.

The evidence upon which the plaintiff seeks to carry back the date of the invention to the fall of 1904 does not seem to me, on the whole, by any means as convincing as that whereby the defendant seeks to show use of cores made according to the Goodrich drawing as early as the spring of 1905—particularly in view of the facts that the precise date of the Goodyear drawing is left to be determined only from the date found on it, without testimony from any witness who made or dated it, or any other positive proof—and that the patentee himself, while undertaking to fix the date of his invention as above, cannot deny that he let two years from that date pass before applying for any patent upon the alleged invention. I must hold that the plaintiff's evidence is not sufficient to prove the patentee entitled to a date earlier than that of his application, and this leaves the patent anticipated by the Goodrich cores shown to have been made and used at least as early as August, 1905.

But whether or not this result is right, I am obliged to regard the evidence taken after the reopening of the case in June, 1914, as establishing the use by the Fisk Rubber Company, of Chicopee, Mass., of cores embodying every essential feature of the invention described in the patent as early as the spring of 1904, a time considerably antedating the earliest date claimed by the patentee.

Like the plaintiff, the defendant, and the Goodrich Company, the Fisk Company is and has been a large manufacturer of tires. It has been so engaged since 1901. It has also been making tires with inextensible edges since some time in 1902.

The testimony of its vice president, connected with it since 1902 (in 1904 superintendent of its factory), of its assistant superintendent, connected with it since 1903, and of the foreman of its machine shop between 1902 and 1906, seems to me to have shown that in the spring of 1904 it began to make tires with inextensible edges upon cores such as are shown in a drawing produced from its files and marked "Defendant's Exhibit J." The drawing bears date April 30, 1904, but as in the case of the Goodyear drawing there is no testimony from the person who made and dated it. It also bears, however, the date "5/4/04" with the letters "O. K. J. C. B.," and John C. Bennett, foreman of the machine shop at the time, has testified that he put those letters on the drawing in compliance with instructions from his superiors that he "O. K." all drawings before patterns were made or machine work done from them.

The full and explicit testimony given by the three witnesses referred to regarding the construction of cores according to this drawing, their division into sections, and their use in the early part of 1904 in making tires with inextensible edges, leaves me satisfied that the Fisk Company had then adopted and were successfully using what was substantially the device described in the patent in suit.

The testimony referred to shows that Defendant's Exhibit J was one step in the Fisk Company's development of a core adapted to the manufacture of such tires, which development, begun in 1902 or 1903, progressed after May, 1904, until it resulted in the use of what is referred to as the "Integral Head and Dome Core" instead of the "Two Part Head and Dome Core" shown in the drawing J. The later form has been continuously used since 1904. But the evidence seems to me sufficient to prove that the "Two Part, etc., Core" was, for all practical purposes, no less an anticipation of the patent than the later "Integral, etc., Core," used from the fall of 1904 down to the present time. What in the former consisted of two castings fastened together became one casting in the latter, and there was no other difference.

The plaintiff insists that because the drawing Exhibit J does not show any division of the core it represents into removable sections, it is not proof of the kind required by what is above quoted from Emerson, etc., Co. v. Simpson. But the metal "dome head" adapted to fit over and be fastened to the metal "air bag ring," as shown in Exhibit J, was adopted to replace an "air bag" of rubber covered with fabric previously used outside the metal "air bag ring" and capable of inflation so as to keep the tire in shape during the vulcanizing process, as the testimony fully shows. That the "air bag ring," while so used, was nonradially divided into sections in order to remove it from within the finished tire is not left to depend on the unsupported memory of the witnesses. A specimen is produced from among the Fisk Company's discarded cores and the testimony is sufficient for the conclusion that it was made before the summer of 1904. It is nonradially divided

into sections, and seems to me enough to support the testimony of the witnesses that when the crown casting forming the "dome head" came to be joined to the "air bag ring" for the purpose of forming the "Two Part, etc., Core," it was divided into sections corresponding with those in the "air bag ring" as shown by the specimen referred to. The necessities of the case would then require such a division; and according to the testimony, after the "air bag ring" and the dome ring had been fitted and fastened together, such division was made by sawing the core so composed. Thus divided, the sections held together by bead rings clamping their inner projections, as shown in the drawing Exhibit J, constituted, in substance, as it seems to me, the device of the patent.

The plaintiff attacks the testimony of the witnesses from the Fisk Company upon evidence claimed to show that cores more exactly like the cores of the patent than its "Integral Head and Dome Core" are and have been used by that company in producing tires of the kind referred to. The argument is that "the Fisk Company had a motive in volunteering this evidence, being an infringer of the State patent." But supposing the Fisk Company's use of such cores established, I am unable to find sufficient reason for doubting the substantial truth of the testimony of the witnesses referred to, taken in connection with the exhibits produced, upon the points above considered.

[2] The evidence in the case seems to me to show that at or shortly before the beginning of 1904 the attention of tiremakers in general was being devoted, more than it had previously been, to the manufacture of tires with inextensible edges and the development of the kind of core best adapted to their production. That the plaintiff company, the Goodrich Company, and the Fisk Company should, by independent endeavors in this direction, have reached results so nearly resembling each other tends strongly to indicate what the patent itself, in view of the various earlier patented core devices, affords no little reason to believe, viz., that the production of the patentee's device did not involve patentable invention, and was the result of nothing more than mechanical skill. But, however this may be, I hold, for the above reasons, that the patent is, in any event, anticipated by the cores produced or used by the Fisk Company and the Goodrich Company in 1904 and 1905.

A decree may be entered dismissing the bill, with costs.

In re WILLIAMS.

(District Court, S. D. Georgia, Albany Division. August 5, 1915.)

1. BANKRUPTCY ⟸345—PRIORITIES—MORTGAGES.
A mortgage by a bankrupt, which was executed in Florida, was attested by a notary of that state in accordance with Civ. Code Ga. 1910, § 4203. The caption of the mortgage read "Georgia, Colquitt County," which was the place where the lands were located. The mortgage was duly recorded in Georgia. There was no fraud in its preparation, and the caption was the result of a mistake. *Held*, that such mortgage was valid, and, upon bankruptcy of the mortgagor, entitled the mortgagee to priority of payment out of the proceeds of the mortgaged property.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 531, 532, 534, 539, 540; Dec. Dig. ⟸345.]

2. MORTGAGES ⟸58—ATTESTATION—WITNESSES—COMPETENCY.
A stockholder in a corporation is not incompetent as a nonofficial witness to the signature of a mortgagor to a mortgage in favor of the corporation.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 153, 154; Dec. Dig. ⟸58.]

3. BANKRUPTCY ⟸342—PROCEEDINGS—DELAY.
The referee's order, disallowing petitioner's claim to priority under a mortgage, provided that proper intervention could be thereafter filed for correction of mistake, to be considered as though the disallowance of the mortgage had never been made. The attorney for the mortgagee was appointed trustee, and he delayed more than a year after adjudication in bankruptcy before filing the intervention. *Held* that, as the attorney was acting in a dual capacity, being bound to file the intervention for his client, the mortgagee, and to resist it for the unsecured creditors, the delay should not be charged against the mortgagee.

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

4. BANKRUPTCY ⟸342—PROCEEDINGS—DELAY.
In such case, as the order of the referee specified no time limit, relief could not be denied on the ground that the intervention was not filed within a year after adjudication in bankruptcy.

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

In Bankruptcy. In the matter of J. C. Williams, bankrupt. Petition to review the report of the referee disallowing the priority of a mortgage in favor of the Covington Company. Decision of the referee overruled, and the mortgage allowed priority.

Pope & Bennet, of Albany, Ga., for claimant.
Pottle & Hofmayer, of Albany, Ga., for objecting creditors.

SPEER, District Judge. The mortgage lien in favor of the Covington Company against the bankrupt estate was disallowed as such by the referee. The mortgage was dated February 2, 1911, and the mortgagor was the bankrupt, J. C. Williams. It was made to secure past-due indebtedness and to cover future advances. It was written on the printed form generally used for such securities in this state. The caption reads, "Georgia, Colquitt County," but the acknowledgment of the notary public fixes the place of execution in Duval coun-

ty, Fla. The notary was J. L. Head, a duly commissioned notary under the laws of the state of Florida, and his official certificate is fully and formally written and attached to the mortgage. The additional subscribing witness was J. W. Pettyjohn, who was an officer and stockholder in the Covington Company, the mortgagee. The proof of claim under this mortgage was filed in the office of the referee on August 2, 1912. There was another mortgage between the same parties, for a smaller amount, which was allowed. In disallowing the claim in issue, the referee used the following language:

"Foregoing proof of claim allowed as to mortgage and note for $364 principal and interest thereon as a preferred claim on proceeds of the mortgage property, and trustee is hereby ordered to pay same; as to remainder of the claim, disallowed. It appearing that the creditor contends that the defective execution of the other mortgage (for $3,929.74) was by mistake, it is hereby ordered and adjudged that this order allows proper intervention to be hereafter filed for correction of mistake to be considered hereafter as though this disallowance of aforesaid mortgage had never been made.

"This August 30, 1912. R. J. Bacon, Referee."

Pursuant to this order of the referee, an intervention in the form of a petition for reformation of the mortgage alleged to be defective was filed in the office of the referee, but not until the 21st day of May, 1913, more than a year after the order was granted. After hearing upon this intervention the referee denied the petition of the intervener, and declined the claim of priority under the mortgage, whereupon the petition for review under consideration was filed. The objections upon which the referee denied the priority of right claim by the mortgagee were not made by the trustee, who had indeed, as attorney, represented the Covington Company for the enforcement of the mortgage, but were urged by certain creditors. The grounds of objection were that the mortgage was defectively executed; it purporting to have been executed in Georgia, Colquitt county, as shown by its caption, while the acknowledgment of the notary public showed him to be an officer of Duval county, Fla., and further that the subscribing witness to the mortgage was an officer and stockholder of the mortgagee and was therefore incompetent to attest a paper in its favor. As a result of these alleged defects, it was objected that the mortgage should not have been admitted to record, and, further, the additional objection was made that the intervention was filed more than a year after the adjudication in bankruptcy. The amount intended to be secured by this mortgage was $3,929.24.

[1] As to the first objection, the undisputed evidence adduced upon the hearing, is that the paper was executed in Duval county, Fla., and attested by an official witness duly commissioned in that state. This is a compliance with the law of Georgia, § 4203. It is equally clear that the caption of the mortgage, "Georgia, Colquitt County," was adopted by mistake. The understanding was that the papers should be taken to Colquitt county and there signed; the Covington Company resting under the impression that it was necessary, under the law of Georgia, for the wife of the mortgagor to sign with him. When this was found to be inaccurate, the mortgage was signed and duly acknowledged, but the caption was in-

advertently left unchanged. No fraud in the preparation of the mortgage is shown or alleged. This is a court of equity, and will lend its aid to correct an inadvertence, especially where no third party has been injured thereby. The mortgage was recorded as properly executed; its record put all parties on notice of the claim of lien against the particular property therein described. On inquiry, they would have ascertained the true fact, which was that the paper was honestly given to secure a valid debt. Wherever executed, such a mortgage is required by the law of this state to be recorded in the county where the land it relates to lies. This was done, and in the opinion of the court there was a sufficient compliance with the law to make the lien valid and sustainable.

[2] The instrument is also assailed on the ground that the unofficial witness was disqualified. This is highly technical. True, he was a stockholder in the corporation, to wit, the mortgagee; but, if he was competent to witness the signature of the mortgager, it should be held valid, and, the record being regular and before adjudication in bankruptcy, it should be held a secured claim. Many cases accumulated by the assiduity and learning of the opposing counsel were cited on this question, but the court is controlled by a distinct ruling of the highest appellate court of the state. This was in the case of Peagler v. Davis, decided by the Supreme Court of Georgia, January 12, 1915, reported in 84 S. E. 59, where the court decided as follows:

"A stockholder, though incompetent to take an acknowledgment of a mortgage as a notary, because he is a stockholder of the mortgagee corporation, is not incompetent as a nonofficial witness to the signature of the mortgagor."

This ruling, relating to real property, and apparently the latest on the subject, seems conclusive on this court. Besides, in itself it seems entirely proper, and the competency of the unofficial witness is therefore established.

[3, 4] The contention of the objecting creditors that the intervention was filed after the expiration of the 12 months period, as provided in the act, under the circumstances, must also be held without merit in this cause. The record discloses that the proof of the claim this contested mortgage was made to secure was filed August 2, 1912, shortly after the adjudication, and within the 12 months period. Now, the order of the referee denying the proof of claim as a secured debt made express provision for the filing of the intervention to reform the mortgage. A material fact in this connection is that the attorney representing the claim of the Covington Company, the mortgagee, was elected trustee by the creditors of that class who are now objecting, and acted in both capacities. The claimants relied upon him to file the necessary intervention. This he finally did. He had, however, the duty to resist such intervention for the unsecured creditors, if they demanded it. It is clear enough that the trustee hesitated between the conflicting duties of his duplicate trust; that is, his duty to his client, who was the mortgagee, and to the unsecured creditors, whom he represented as trustee. This, doubtless, made him oblivious to the flight of time. It would seem, therefore, inequitable

to charge the mortgagee in this case with the laches of its attorney, who was also the trustee for the objecting creditors. This seems, however, comparatively unimportant, in view of the order of the referee, unlimited as to time in which the mortgagee might file his intervention to reform, or, in other words, to make the mortgage on its face enforceable. The delay was therefore justified by the order of the bankruptcy court, and cannot be chargeable to the mortgagee.

On the whole, therefore, the court is of the opinion that the mortgage is valid. The amount of the debt of the Covington Company in issue is entitled to payment from the proceeds of the property pledged to secure it. A decree may be taken, setting aside the decision of the referee as to this mortgage, and authorizing payment as stated.

In re FLOYD-SCOTT CO.

(District Court, D. Massachusetts. June 8, 1915.)

No. 21221.

1. BANKRUPTCY ⊂⊃191—PREFERENCES—LIEN FOR RENT—NECESSITY OF RECORDING LEASE.

A lease, giving a landlord a lien for the rent on property on the leased premises, under the law of Rhode Island, created an equitable lien, good as against creditors, though the lease was not recorded; and hence, though it was recorded a few days before bankruptcy, when the lessor had reasonable cause to believe that the lessee was insolvent, and that the lien claimed would constitute a preference, the lien did not amount to a voidable preference.

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

2. BANKRUPTCY ⊂⊃151—RIGHTS OF TRUSTEE—APPLICATION OF STATE LAW.

Under Bankr. Act July 1, 1898, c. 541, § 47a (2), 30 Stat. 557, as amended by Act June 25, 1910, c. 412, § 8, 36 Stat. 840 (Comp. St. 1913, § 9631), giving a trustee, as to all property coming into the custody of the bankruptcy court, all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings, the trustee's rights depend upon the law of the state, as the "rights of a creditor holding a lien by legal or equitable proceedings" are essentially a matter of state law.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 193, 239; Dec. Dig. ⊂⊃151.]

In Bankruptcy. In the matter of the Floyd-Scott Company, bankrupt. On review of an order of the referee. Order vacated.

Charles W. Littlefield, of Providence, R. I., for alleged lienholder.
Clarence A. Barnes, of Boston, Mass., for trustee.

MORTON, District Judge. [1] This case was recommitted to the referee, after my former opinion, on motion of the trustee, upon the question whether the lien claimed by the petitioner is a voidable preference. The learned referee reports that it was, because, in his opinion, record of the lease was required in order to give validity to the lien as against creditors, and at the time when such record was made, six days before the bankruptcy, the lessor had reasonable cause to be-

lieve that the lessee was insolvent and that the lien claimed would constitute a preference. The petitioner objects both to the findings of fact and to the rulings of law made by the referee.

I see no sufficient reason to doubt the correctness of the learned referee's findings of fact; and they are affirmed.

The lease was undoubtedly valid at the time when it was made. It was not recorded until more than two years later, and was recorded then with the land records, not with those relating to personal property. If the lien claimed does not depend for its validity upon the recording, it is obvious that section 60 of the Bankruptcy Act (Comp. St. 1913, § 9644), on which the learned referee based his decision, does not apply.

As no possession was taken by the lessor, in my former opinion I stated broadly that the lien in the lease was unenforceable against attaching creditors (meaning those without knowledge of the provisions of the lease), or a trustee in bankruptcy, while the lease was unrecorded. That statement was correct as to the law of Massachusetts (Butterfield v. Baker, 5 Pick. [Mass.] 522; Munsell v. Carew, 2 Cush. [Mass.] 50), and probably so as to the general law. See Hervey v. R. I. Locomotive Works, 93 U. S. 664, 23 L. Ed. 1003; Reynolds v. Ellis, 103 N. Y. 115, 8 N. E. 392, 57 Am. Rep. 701; Stockton Savings & Loan Soc. v. Purvis, 112 Cal. 236, 44 Pac. 561, 53 Am. St. Rep. 210. But it is contended by the petitioner that it is incorrect as to the law of Rhode Island; and, upon further examination, I think that the petitioner is right in its contention, and that my former statement is not correct as applied to the law of that state.

In Groton Mfg. Co. v. Gardiner, 11 R. I. 626, land and a building were demised by a five-year lease containing a lien clause substantially like the one in question. The lease was recorded with the land records, but not with those relating to personal property. The machinery and other property of the lessee on the leased premises was attached by a creditor, at a time when the rent was in arrears, but no possession had been taken by the lessor under the lien; and the attached property was sold by the sheriff. The lessor filed a bill in equity to assert its lien on the proceeds, and was held entitled to a decree on the ground that the lease gave to the lessor an equitable lien on the property in question which was good against an attaching creditor. The case is distinguishable from this only upon the point that the lease there was recorded with the land records, while here it was not recorded at all. It is difficult to see how such record could in any way affect rights in personal property; and it seems to have been regarded by the court as immaterial. At that time, as now, mortgages of personal property were by statute invalid in Rhode Island, except between the parties, unless recorded (General Statutes of Rhode Island 1872, c. 165, § 9); and the requirements as to record of conveyances of real estate were, as to the question here presented, substantially the same as at present (Id. c. 162, § 4). The court said:

"The instrument in the present case was recorded, but not with mortgages of personal property; and if it had been, it would have given it no additional validity. It is not a mortgage, nor does it purport to be a mortgage, even of the after-acquired property. There is no transfer of title or possession.

Although the word 'pledge' is used, it is not a pledge, because unaccompanied by possession. It is simply a contract for a lien whenever the rent is in arrear, and would constitute a lien in equity." Potter, J., Groton Mfg. Co. v. Gardiner, 11 R. I. 629.

This decision seems to establish in Rhode Island equitable rights in personal property in cases like the present. The trustee in bankruptcy takes the property, real and personal, subject to such rights. Sexton, Trustee, v. Kessler, 225 U. S. 90, 32 Sup. Ct. 657, 56 L. Ed. 995; Clark v. Snelling, 205 Fed. 240, 123 C. C. A. 430 (C. C. A. 1st Circuit); Root Mfg. Co. v. Johnson, 219 Fed. 397, 405, 135 C. C. A. 139 (C. C. A. 7th Cir.). He certainly has no stronger position in this respect than the attaching creditor in Groton Co. v. Gardiner. No record of the lease was necessary to secure the petitioner's rights under the lien here asserted. If not, the recording amounted to nothing, as to the questions here presented, and the petitioner's rights took effect from the time when the lease was made.

[2] The property here in question came "into the custody of the bankruptcy court"; and it is suggested by the trustee that under section 47a (2), as amended in 1910, his rights are to be determined according to the general law on the subject, which, it is said, was inferentially incorporated into this section, and that such rights no longer depend strictly upon the law of the state in which the question arises, but upon broader considerations, among which are the desirability of uniformity in bankruptcy administration, and the hostility of our system of bankruptcy to anything in the nature of a secret lien on the property of the bankrupt. These views were stated by Mr. Referee Olmstead in Re O'Callaghan, 30 Am. Bankr. Rep. 97, 103 (but cf. Root Mfg. Co. v. Johnson, supra, 219 Fed. at 407). But the "rights * * * of a creditor holding a lien by legal or equitable proceedings" are essentially a matter of state law and vary in different states. The trustee's rights in this respect, before the amendment of 1910, were certainly defined by the state law (Hervey v. R. I. Locomotive Works, ubi supra; Duffy, Trustee, v. Charak, 34 Am. Bankr. Rep. 5, 237 U. S. 97, 35 Sup. Ct. 264, 59 L. Ed. ——); and they have been expressly held by this court to be so limited under that amendment (In re Waite Robbins Motor Co. [D. C.] 27 Am. Bankr. Rep. 541, 543, 192 Fed. 47; Remington on Bankruptcy [2d Ed.] pp. 961, 966, 967). In some states, liens for rent are given by statute, and are recognized in bankruptcy. Courtney v. Fidelity Trust Co., 219 Fed. 57, 134 C. C. A. 595 (C. C. A. 6th Cir.).

It follows that the learned referee erred in holding that record was essential to the validity of the lien, and that the lien was therefore invalid as a preference. His decree must be vacated, and a decree entered for the petitioner.

STANDARD GAS POWER CO. OF GEORGIA v. STANDARD GAS POWER CO. OF DELAWARE et al.

(District Court, N. D. Georgia. April, 16, 1915.)

No. 45.

COURTS ⟸ 344—JURISDICTION OF FEDERAL COURTS—LOCAL ACTIONS—SITUS OF PATENT RIGHTS—"PROPERTY."

A patent right is not such "property" as may have a situs in the district of the owner's residence, within Judicial Code (Act March 3, 1911, c. 231) § 57, 36 Stat. 1102 (Comp. St. 1913, § 1039), which authorizes service by publication on a nonresident defendant in a suit to enforce "any legal or equitable lien upon or claim to, or to remove any incumbrance or lien or cloud upon, the title to real or personal property within the district where such suit is brought."

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 917; Dec. Dig. ⟸344.]

In Equity. Suit by the Standard Gas Power Company of Georgia against the Standard Gas Power Company of Delaware, the Standard Gas Power Company of New England, and the New England Gas Producer Company. On plea to jurisdiction. Plea sustained.

Dorsey, Shelton & Dorsey, of Atlanta, Ga., for plaintiff.

Smith, Hammond & Smith, of Atlanta, Ga., for defendant Kelley, as trustee, etc.

Robt. C. & Philip H. Alston, of Atlanta, Ga., for defendant Standard Gas Power Co. of Delaware.

NEWMAN, District Judge. This is a bill filed by the plaintiff, who claims to hold, by an assignment from the inventor, certain patent rights in gas producers. It alleges that it made contracts with the defendant companies in which they became assignees of certain rights in the patents in consideration of certain royalties to be paid by them. It is alleged that these royalties have not been paid, and there are other claims as to the forfeiture by the assignees and licensees of their rights under the patents. The prayer of the bill is that all of the agreements and licenses made by the plaintiff or its licensees and assignees to any of the defendants, which are recited in the bill, be declared forfeited, and be canceled and set aside as a cloud upon the title of the plaintiff, and that the plaintiff be declared to be the owner of each and all of the patents and applications for patents in the United States and Canada, referred to therein, free and clear of all license agreements, charges, and incumbrances of every kind and nature.

The bill is filed and service is sought to be perfected under section 8 of the act of March 3, 1875, now section 57 of the new Judicial Code. The plaintiff claims that, being the owner of a patent, and being a citizen and resident of Georgia, it has the right to have service against the defendants under the act referred to. The claim is that the situs of the patent is that of the residence of the owner. The question in the case, and which has been fully argued, is whether a patent right is

such property as brings it within the act of Congress referred to. So much of the act as is material here is as follows:

"When in any suit commenced in any District Court of the United States to enforce any legal or equitable lien upon or claim to, or to remove any incumbrance or lien or cloud upon, the title to real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of or found within the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer, or demur by a day certain to be designated, which order shall be served on such absent defendant or defendants, if practicable, wherever found, and also upon the person or persons in possession or charge of said property, if any there be; or where such personal service upon such absent defendant or defendants is not practicable, such order shall be published in such manner as the court may direct, not less than once a week for six consecutive weeks."

The definite question presented for determination here is whether or not this patent right, the ownership of which is in a company, a citizen and resident of this state and of this district, makes such tangible property within the district as justifies the court in proceeding against parties who are citizens and residents of other states and other districts, to remove a cloud upon the title to the same. The contention is that the citizenship and residence of the owner of the patent right being in this district makes the patent right property in this district, because location of the patent right would be where the owner's residence is.

The only case distinctly in point—that is, the only case where a patent right was claimed to be such property in the district as would bring it within the provisions of section 8 of the act of 1875 (section 57, New Judicial Code)—is Non-Magnetic Watch Co. v. Association, etc. (C. C.) 44 Fed. 6. This is a brief decision by Circuit Judge Lacombe, and is as follows:

"This is an application for an order directing service of process upon the defendant, a Swiss corporation, by publication. The petition states that the suit is brought to remove a cloud upon 'the title to certain letters patent' which it is claimed are the property of the complainant corporation, or rather of its receiver, and which 'original letters patent, the subject-matter involved in this suit, are in the possession of [such receiver].' This statement is not technically accurate. What the suit is concerned with is the title to the patent itself, to the patent right; and the mere custody of the letters evidencing the fact that such patent right was originally granted to a particular inventor is immaterial.

"The petitioner claims that he is entitled to the relief prayed for, under section 8 of the Judiciary Act of 1875, which provides for such service upon nonresident defendants when the suit is commenced 'to enforce any legal or equitable lien upon or claim to, or to remove any incumbrance or lien or cloud upon, the title to real or personal property within the district where such suit is brought.' The various cases which were cited by the complainant's counsel interpreting this section are concerned either with real property, or with such tangible personal property as was susceptible of reduction to actual possession. I cannot satisfy myself that the section covers (or was intended to cover) such incorporeal and intangible property as a patent right, possession of which must of necessity be ideal, not actual, and which cannot be seized or sold under an execution. Stephens v. Cady, 14 How. 528 [14 L. Ed. 528]; Stevens v. Gladding, 17 How. 447 [15 L. Ed. 155]. Statutes which undertake to give to courts jurisdiction over nonresidents, who do not come within the district for purposes either of residence or business, should not be enlarged by too liberal construction, and in the absence of authority I must decline to make the order prayed for. It seems further from the

moving papers that Louis Bornand, who is made a defendant, has been served with process, and has appeared personally. He is a director of the defendant corporation. Complainant asks for an order declaring that the service of process on defendant Bornand shall be deemed good and sufficient service on the defendant corporation. If that motion is based upon the statute already quoted, it should be denied for the reasons above given. If it is contended that the defendant corporation is in fact engaged in business in this district (as the supplementary motion papers seem to indicate), and therefore service upon the director is service upon the corporation, that question cannot be settled on such a motion. Unless it is raised by a motion on the part of the defendant corporation to set aside the service, it will be properly disposed of when the court comes to enter final judgment."

It will be perceived that Judge Lacombe says that he cannot satisfy himself that this section of the act of 1875 covers, or was intended to cover, such incorporeal and intangible property as a patent right. He further holds that the possession of this must necessarily be ideal and not actual, etc.

A number of other cases are cited, but the most important case, I think, is that of Chase v. Wetzlar, 225 U. S. 79, 32 Sup. Ct. 659, 56 L. Ed. 990. The opinion in this case is by the Chief Justice. One of the headnotes in this case expresses what is discussed and decided in the opinion on this particular question. The headnote is as follows:

"The jurisdiction conferred by section 8 of the act of 1875 rests upon a real and not an imaginary or constructive basis."

There must, under the act referred to, be "real or personal property within the district," and I agree thoroughly with the views expressed by Judge Lacombe that a patent right is not such "real or personal property" as would come within this language or within this act. A patent right is something granted by the Patent Office in Washington to an inventor, which "right" he may sell, transfer, or assign, and over which he has, until he divests himself of such "right," exclusive control; but it is not such real or personal property, in my opinion, as was contemplated by this act, such property as the court can seize and act upon as was intended by this law. And the existence of the patent right is co-extensive with the limits of the United States. I do not know that it has a situs anywhere, even if it were of such character as would justify the court in treating it as property under the act in question.

I am compelled to hold, therefore, that there was no basis here for entertaining this suit under section 8 of the act of Congress of March 3, 1875 (Judicial Code, § 57). Consequently service by publication was insufficient for the purpose of bringing the defendants into court.

The plea to the jurisdiction of the court must therefore be sustained.

WALLACE v. CARGO OF 292,000 FEET OF PINE BOARDS.

(District Court, E. D. New York. June 18, 1915.)

1. ACCORD AND SATISFACTION ⟸11—DEMURRAGE—ACCEPTANCE OF CHECK FOR FREIGHT.

The acceptance of a check in full for "freight" due under a charter *held* not an accord and satisfaction of an additional claim for demurrage.

[Ed. Note.—For other cases, see Accord and Satisfaction, Cent. Dig. §§ 75–82; Dec. Dig. ⟸11.]

2. SHIPPING ⟸181—DEMURRAGE—COMPUTATION OF LAY DAYS.

Under a charter party requiring discharge of a cargo of lumber at the rate of 35,000 feet per day, without any exception, Sundays are to be excluded from the lay days allowed, but included in the time for which demurrage may be claimed after the lay days have expired.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 589–592; Dec. Dig. ⟸181.]

In Admiralty. Suit by Nelson A. Wallace, master and part owner of the schooner Charles L. Jeffrey, against a Cargo of 292,000 Feet of Pine Boards. Decree for libelant.

Alexander & Ash and Peter Alexander, all of New York City, for libelant.

Conway, Williams & Kelly and D. T. Kelly, all of New York City, for claimant of cargo.

CHATFIELD, District Judge. This action is for demurrage. It is not disputed that the schooner arrived on the evening of November 9th and that the captain reported in New York harbor to the consignees during the day of Tuesday, November 10, 1914. During that same day he proceeded with the schooner to her berth in Whale creek, by 1 o'clock p. m. on Wednesday, November 11th, was ready to discharge, and at that hour received the permit, which was then filed in the office of the lumber company, and unloading began. This berth was at a city public wharf, where the unloading was under the direction of the city authorities. In ordinary course the cargo had to be removed as fast as unloaded, and could not be piled upon the wharf. The charter party had been made in Boston on the 13th of October, 1914, and provided for the carrying of a cargo of dry pine boards from Liverpool, Nova Scotia, to New York by the schooner Charles L. Jeffrey. The boat was chartered by her captain to Harrigan & Streeter, of Boston, who agreed to pay for the *use* of said vessel "$3.50 per M freight," payable in cash one-half on arrival and the balance on discharge.

"It is agreed that the lay days for loading and discharging shall be as follows: Commencing from the time the vessel is ready to receive or discharge cargo. Cargo to be delivered to the vessel at the rate of 35 M per day and be received from the vessel at the rate of 35 M per day in New York." "Detention" at the rate of $30 per day to be paid by the party of the second part, or agent.

It appears that the cargo was taken over the rail of the schooner onto small trucks, that the unloading did not proceed at the rate of 35 M per day, and that the crew of six men were not fully occupied during

several days at the beginning of the unloading. The agent of Harrigan & Streeter called at the dock and endeavored to hurry the unloading with the company receiving and using the lumber. The unloading proceeded from 1 o'clock on the 11th and upon the 12th, 13th, and 14th. On Sunday no work was done. Work proceeded again on the 16th, 17th, and 18th. On the 19th work stopped early in the day, the captain making a record of three hours' time spent unloading, when, the surveyor stopping, the work ceased because of hard rain. Work went on again on the 20th and the 21st, and again stopped on Sunday. On Monday, November 23d, the lumber was discharged; the work being completed by 5 o'clock p. m. It also appears that on the 21st and 23d some 120,000 feet of lumber was taken from the boat. It appears that the charter was made in the particular form used to remove any question as to the customs in New York harbor. But this has nothing to do with the determination of the case; it merely makes definite the situation under which the charter was drawn.

The libelant brings his case under a strict construction and interpretation of the charter party with respect to the provisions as to lay days. The respondent presents evidence to show that upon Tuesday, November 24th, the next morning after the unloading was completed, the captain of the vessel communicated with the consignee's agent, and that some discussion was had during the day with respect to the captain's claim for demurrage. It would appear that he left town that afternoon, and that the same evening, in a telephone conversation with the steamship brokers, a request was made upon the agent of the consignee for payment of the freight due for the voyage. Upon request for an itemized bill, a statement was rendered by messenger as follows:

New York, Nov. 24, 1914.

Mess. Harrigan & Streeter, or Hamlin Lumber Co., to Gilmartin & Trundy, Dr.

Str. Charles L. Jeffrey.

To water freight on cargo of lumber, 292,391 ft. at $3.50 per M.	$1,023.37	
Less amount of draft for cash and insurance	60.45	
		$962.92
Less 5 per cent. customary insurance and brokerage charge on amt. advanced		3.02
Balance		$959.90

A check for $900 was sent on account, and upon the 30th of November a check for $59.90 for the balance was sent and the bill receipted. The check bore upon the back an indorsement that it was "in full for all freight, schooner Charles Jeffrey." This was received and put through the bank, indorsed for payment in that form. The charter party provides for the hire of the vessel during the voyage, and calls that compensation "freight." It provides that for *detention* $30 per day shall be paid.

[1] The libelant therefore contends that the acceptance of payment in full for "freight" left open the amount sued for as demurrage, and the phrase, that "a commission of 5 per cent. on the gross amount of this charter, demurrage, and any renewals of the same is due," would

indicate that the two payments were not a part of the charge for freight. The next sentence, calling for payment of this commission *in advance* when the commission would be computed upon the amount of demurrage, if any should be incurred, was impossible of complete fulfillment. Under ordinary circumstances the court would presume that both the charges for hire and for demurrage would be included in the ordinary interpretation of such a charter in the term "freight." But in the present case, where the consignee's agent was dealing with the owner and with the brokers separately, where the charter is ambiguous, and where the testimony shows so clearly that the word "freight" was used by the broker as distinct from the claim for demurrage, which was discussed and presented by the master, it is impossible to hold that the acceptance of the check for freight is an estoppel or an accord and satisfaction of the entire claim.

[2] So that we will consider the time consumed in unloading the vessel. The parties having made a definite charter, and having left out of consideration any rules prevailing in the harbor of New York, and each party standing strictly upon the charter, it must be assumed that, if the vessel was ready for discharge at 1 o'clock p. m. upon the day after her arrival and reporting, the time would begin at that hour on November 11th, and the testimony indicates that delivery did begin at that time. The language of the charter party is that lay days are to commence from the time the vessel is ready to discharge cargo, and that cargo is to be received at the rate of 35 M per day in New York. Under the laws governing the interpretation of contracts, as well as the statutory regulations of conduct, the absence of any exception or provision for work caused by necessity would lead us to assume that the statute of the state, treating Sunday as a day not to be devoted to work, would be considered implied, even in a contract as strict as the one in question. Therefore the first Sunday, or the Sunday within the lay days, must be excluded. The time lost upon a rainy day would, however, come within a period which was being estimated from the rate of discharge at "35 M per day." The fraction left by dividing 292,391 feet by "35 M" is substantially near enough to 8½ to give the consignee at the charter rate of discharge until the evening of Friday, November 20th.

Detention for which demurrage is to be given is to be measured by time, rather than working days; hence the libelant is entitled to collect from Friday evening until Monday evening, or 3 days.

The libelant may have a decree for $90 and costs.

ODELL v. BEDFORD CO.

Petition of EDISON ELECTRIC ILLUMINATING CO. OF BROOKLYN.

(District Court, E. D. New York. July 2, 1915.)

RECEIVERS ⇐90—CONTINUANCE OF BUSINESS—LIABILITY FOR ELECTRICITY—PRIOR CONTRACT.

Though, when receivers were appointed for B., it had a contract with an electric company for current at a rate less than charged at retail for temporary service, which, however, authorized suspension of service on notice, unless the arrears were paid up, yet, the receivers having made no election for continuance of the contract subject to its burdens, and the company having stipulated to defer its right to act on the prior breach, and to continue to supply current to the receivers, leaving the question of rate open, and an order requiring it to furnish them current having been made, they, during the time they used it, till a composition was made by B. with its creditors, should pay the ordinary and reasonable rate for temporary use.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 164–166; Dec. Dig. ⇐90.]

In Equity. Suit by William P. Odell against the Bedford Company. On petition of the Edison Electric Illuminating Company of Brooklyn for current furnished to receivers of defendant. Payment ordered.

Hatch & Sheehan, of New York City (Carlyle M. Keyes, of New York City, of counsel), for petitioner.

Stern & Gotthold, of New York City (Ernest J. Ellenwood, of New York City, of counsel), for receivers and for Bedford Co.

CHATFIELD, District Judge. It appears from the papers that the Edison Company had a contract with the Bedford Company at a rate substantially smaller than that charged at retail for temporary service. After the filing of the petition in bankruptcy, as well as after the appointment of receivers in the equity action, question was raised by the Edison Company as to the payment of the amounts due at the time of filing the petition for electric current, and also as to the rate of payment for the future.

Under the terms of the contract, the Edison Company could have given notice of breach and suspended service unless the arrears were paid up. They by stipulation agreed to defer their right to act upon this breach and to continue supplying current to the receivers, if the receivers should deposit in a special account the amount, over the contract price, which would be payable to the Edison Company at the ordinary retail rate, and it was further stipulated that the acceptance of the amount admitted to be due under the contract might be had without prejudice to this question of election. It was evident at the time that this stipulation was entered into that the Bedford Company was planning a settlement or composition with its creditors and that it would wish to continue or renew the contract with the electric light company. There was, therefore, no necessity for the receivers or for the estate in bankruptcy to elect whether it would undertake to carry on the contract as an asset.

It may be assumed that under the decisions of Eames v. H. B.Claflin Co. (D. C.) 220 Fed. 190, and Atchison, T. & S. F. Ry. Co. v. Hurley, 153 Fed. 503, 82 C. C. A. 453, an election for continuation of a contract would have been subject to its burdens as well as its benefits, and the receivers would have stood in the shoes of the Bedford Company, and therefore have been liable to pay up the arrears if they sought to reap the benefits. But that question was postponed, and, inasmuch as the composition has gone through, it lies now between the Bedford Company and the Edison Company to decide whether the Bedford Company, in resuming or carrying on its contract, can hold the Edison Company to the percentage paid the other creditors of the arrears which were a provable debt at the time the petition in bankruptcy was filed. Whether the Edison Company would be held to receive a preference, if it should insist upon the reinstating of the contract, with the payment of arrears, is not involved in the present motion. The receivers, during the time they were in possession, were enabled to put off the time of election on their part with respect to the future contract. They have turned over to the Bedford Company the question of rights and payments under the contract in substantially the position in which it was when the receivers took possession. They are liable, as for rent, for the reasonable amount of use. While under ordinary circumstances the price reserved in the contract or lease is evidence of reasonable use, it is not conclusive. It does not seem equitable to compel the Edison Company by restraining order to furnish current, as before, to the receivers, and then to treat the Edison Company as if they had not been prevented from exercising their rights, and as if the termination of the lease had been left free to them.

It is true that the rate charged for current in the contract must be assumed to have been a reasonable and profitable rate, and that the difference in price would be adjusted solely with reference to the term of service. If the receivers could show that the Edison Company is charging more for its current to them than to other customers, where the amount of current and contract is the same, or if the difference in price in the charge made to the receivers could be shown to be because of any fictitious change in the service, then a reference would be ordered and the reasonable value fixed. But upon the papers as submitted the sole question is whether the ordinary and reasonable value for use should be paid by the receivers during what was substantially an interval or lapse in the carrying out of the contract.

The motion for payment of the retail charge while the receivers were obtaining the current will be granted.

THE VERA.

THE MELROSE.

(District Court, D. Massachusetts. September 14, 1912. On Settlement of Decree, March 5, 1914.)

Nos. 260, 317, 318, 360.

1. COLLISION ⊂=69—STEAM VESSELS MEETING—NARROW CHANNEL RULE.

The steamship Vera passing out from Boston Harbor in the evening came into collision in the channel with the meeting steamship Melrose, and almost immediately afterward with the anchored schooner Baxter. The steamships had agreed by signal to pass port to port. *Held*, on conflicting evidence, that the first collision took place on the Vera's side of the channel and within 500 feet of the schooner, and that the Vera was not in fault for either collision, the second having resulted from the first before the master could get her under control and change the course into which she was deflected thereby; that the Melrose was in fault for both collisions for being on the wrong side of the channel and out of her proper course and for failing to take seasonable and sufficient measures to carry out the passing agreement; that the Baxter was also in fault for both collisions for anchoring too near the channel courses where she interfered with the maneuvers of the other vessels, and outside of the limits prescribed by the harbor master.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 87–90; Dec. Dig. ⊂=69.]

2. COLLISION ⊂=74—ANCHORED VESSEL—IMPROPER PLACE OF ANCHORAGE.

A vessel anchored in a harbor outside the limits prescribed by lawful authority is chargeable with a statutory fault, and in case of collision between other vessels has the burden of proving that her being where she was could not have contributed thereto.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 104; Dec. Dig. ⊂=74.]

3. COLLISION ⊂=90—PRESIDENT ROADS—"NARROW CHANNEL."

President Roads and its approaches are "narrow channels" within the meaning of Inland Navigation Rule 25 (Act June 7, 1897, c. 4, 30 Stat. 101 [Comp. St. 1913, § 7898]).

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 181–186, 196; Dec. Dig. ⊂=90.

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

On Settlement of Decree.

4. COLLISION ⊂=120—SUIT FOR DAMAGES—AMENDMENT OF PLEADINGS TO CONFORM TO FINDINGS.

In a suit for collision, respondent brought in, under Admiralty Rule 59, a third vessel, and her claimant filed a cross-libel against respondent, but not against libelant. There were two collisions, one resulting from the other, in which all three vessels suffered injury. On the hearing, libelant's vessel and the impleaded vessel were both held in fault for both collisions. *Held* that, since the bringing in by respondent of the impleaded vessel enabled libelant to recover half damages from her, she was entitled to recover half the amount of her own damage from libelant and to amend her pleadings accordingly.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 255; Dec. Dig. ⊂=120.]

In Admiralty. Suits for collision by W. Irving Pearce, owner of the schooner Malcolm Baxter, Jr., against the steamship Vera, the

steamship Melrose impleaded; by Dampskibs Actieselskabet International, owner of the steamship Vera, against W. Irving Pearce and others; same against the steamship Melrose; and by New England Coal & Coke Company, owner of the Melrose, against the Vera. Decree in favor of the Vera against both other vessels, and in favor of the Baxter against the Melrose, and of the Melrose against the Baxter each for half damages.

Blodgett, Jones, Burnham & Bingham, of Boston, Mass., for libelant Pearce.

Barry, Wainwright, Thacher & Symmers, of New York City, for libelant New England Coal & Coke Co.

Edward S. Dodge, of Boston, Mass., and Benjamin Thompson, of Portland, Me., for libelants Dampskibs Actieselskabet International et al.

DODGE, Circuit Judge. [1, 2] On January 18, 1910, the four-masted schooner Malcolm Baxter, Jr., entering Boston Harbor, with a cargo of coal on board, from Norfolk, anchored below Castle Island and to the north of Spectacle Island, between 5 and 6 o'clock in the afternoon. The wind at the time was moderate, from S. by W. to S. W. The tide had been ebbing since about 5 o'clock. After swinging to her anchor, the schooner headed in a southwesterly direction, the stern being toward the channel. She lay near the southerly side of the navigable channel up and down the harbor. Whether or not she in any respect obstructed that channel is a disputed question.

Not long afterward, and not far from 6 o'clock p. m., a collision occurred somewhat further up the channel between the Norwegian steamship Vera, outward bound from Boston, without cargo, and the American steamship Melrose, inward bound, with a cargo of coal; the port bow of the Melrose striking the port quarter of the Vera. Both vessels sustained some damage. The Vera, within two or three minutes after this collision, collided with the schooner, striking that vessel's starboard bow and inflicting damage, besides sustaining damage herself.

On January 20, 1910, the libel in the first of the above cases (No. 260) was filed by or on behalf of the schooner's owners against the Vera, claiming damages to the amount of about $3,000 alleged to be due to the Vera's sole fault. On April 7, 1910, this libel was amended so as to claim $4,250 instead of $3,000. On June 28, 1910, the Vera's master, having previously appeared as claimant, filed a petition under Rule 59, setting forth that the Melrose was wholly responsible for, or was contributory in fault with the schooner for, the collision between the Vera and the schooner, and asking for process against the Melrose under the rule, requiring her and all persons interested in her to answer the libel and petition. The Vera's answer was filed July 1, 1910. An answer to the libel on the Melrose's behalf was filed February 13, 1911, and to the petition February 15, 1911, at the hearing.

On June 30, 1910, the Vera's owner filed a cross-libel against the schooner's owners, alleging that the collision was due to the fault of

the schooner and of the Melrose, and claiming damages to the Vera to the amount of $7,000. An answer on the schooner's behalf was filed February 27, 1911, after the hearing had begun. This is the second of the above cases, No. 317.

Also, on June 30, 1910, the Vera's owner filed a libel against the Melrose, making the same allegations and claim as in No. 317. This libel was answered on the Melrose's behalf November 22, 1910. This is the third of the above cases, No. 318.

On November 21, 1910, the owner of the Melrose filed a libel against the Vera alleging the collision with the Melrose to have been caused by the Vera's sole fault and claiming damages to the amount of $5,000. An answer on the Vera's behalf was filed February 11, 1911, at the hearing. This is the last of the above cases, No. 360.

1. I first consider the question of fault arising between the Vera and Melrose for the first of the collisions above mentioned.

No claim is made by either of these vessels that the other was not carrying the lights required by law. According to the testimony from on board each, both sidelights of the other were seen, at one time or another, before the vessels collided. As the sun sets on January 18th considerably before 5 o'clock, and as the weather was somewhat overcast or cloudy, with occasional light snow, it was dark at the time, but there was nothing to obscure the lights, for the purposes of navigation. A moon, new January 11th according to the almanac, was occasionally visible.

The Vera was being navigated under the direction of Folger, a Boston pilot, who had held a full "branch" and been in constant service under it for 10 years on vessels entering or leaving Boston Harbor. He was on her bridge, 90–100 feet aft from the stem. With him there were Rynning, the Vera's master, and Nass, seaman, at the wheel. Stationed on lookout on the forecastle head was Gunderson, a seaman. Not far aft from him, on the forward part of the deck, were Johansen, carpenter, and Nielson, mate; both standing by for orders, but having no immediate duty. All these persons testified in person at the trial, and with Fremstadt, steward, who came on deck from below just before the collision and who also testified, were the eyewitnesses to the collision from on board the Vera. Frolang, the second engineer, who also testified, was below and did not see the collision.

The Melrose was being navigated, after passing Deer Island light, under the direction of her master, Frostead, who held an American master's license for ocean-going vessels; had had 14 years' experience as such master; had been licensed about three years for the waters around Boston, and had, during that time, commanded steamers employed in carrying coal from Baltimore or the Virginian loading ports to Boston. He was on the upper bridge, alone. On the lower bridge were McGray, chief officer, and Wallace, the second officer. Both bridges were some 160 feet aft from the stem. Aft of the lower bridge was the wheelhouse, wherein was a seaman at the wheel. Collard, another seaman, was on lookout in the crow's nest, on the foremast, about 100 feet aft from the stem and 35 feet above the deck. Frostead testified at the trial. The depositions of McGray, Wallace,

and Collard, taken before the trial began, were introduced. These persons, with Middleton, her chief engineer, who happened to be on deck and who testified at the trial, were all the eyewitnesses to the collision from on board the Melrose. Lord, first assistant engineer, who also testified, was in the engine room below.

The Vera was drawing 8 feet, 7 inches forward, and 12 feet, 5 inches aft. Her length was 222 and her beam 32 feet. The Melrose, a considerably larger vessel and of considerably deeper draft, was drawing 24 feet, 11 inches forward, and 25 feet, 8 inches aft. Her length was 400; her beam 52 feet.

According to the Vera's pleadings, the Melrose was first seen from on board her when she was about abreast of bell buoy 9 A. This is shown by the government charts to be a black bell buoy, having a black spar buoy near it, below Castle Island, on the southerly side (on starboard, to a vessel going down) of the narrow channel between President Roads and the inner harbor, and close to the entrance to that channel from the wider waters of President Roads. Nearly opposite to it, on the northerly side of the narrow channel entrance, is buoy No. 8, a red spar buoy. The distance between these buoys, which measures on the charts something over 1,600 feet, may be taken as the width of the channel at that point. About on the line between these buoys and in the channel lay the Eugene, a government dredge, whose location on January 18th has been fixed by the government engineers. Its distance from buoy 8, as indicated by them, measures on the charts a little over 400 feet, and from buoy 9 a little less than 1,200 feet.

The Vera's pleadings further allege that the Melrose's green light was the one first seen, about 1¼ miles away and about four points on the Vera's port bow. When the vessels were about three-quarters of a mile apart, the Melrose, still showing a green light on the Vera's port bow, blew one blast and was answered with one. Thereupon the Vera's wheel was ported, to keep her more on the starboard side of the channel and give the Melrose more room. She kept as far toward that side as she could and clear the sterns of certain schooners lying at anchor. Of these the Baxter was one, lying further down channel than the others, having her stern projecting further into or toward the channel than theirs, and so much further as to bring her directly ahead of the Vera. The Vera's engines were stopped on her account. When the two steamers were a short distance apart, the Melrose blew two blasts and for the first time showed her red light with her green. The Vera thereupon, as the only way to avoid the Melrose and the Baxter, put her helm hard to port and her engines full speed ahead. The Melrose thereupon blew three blasts, continued to approach, and ran into the Vera's port quarter some 20 feet from the taffrail. The Vera answered neither the two blasts nor the three blasts sounded by the Melrose.

The opposing account, given in the Melrose's pleadings, may be thus stated: Before arriving abreast of Spectacle Island lights on the south side and of Nun buoy 6 on the north side of President Roads, while having the City Point range lights open to the N. and the dredge Eugene on her starboard bow, and while running at half

speed, the Vera's red light was first seen above the dredge, and slightly broader than the dredge on the starboard bow. One blast was heard from the Vera and answered while the Vera was still above the dredge, by which time the Melrose had arrived abreast of Spectacle Island. Her helm was thereupon ported and she was headed for Castle Island. It was further ported and the dredge brought to bear about a point on the starboard bow. The Vera, instead of keeping on her own starboard side of the channel, entered the waters on the opposite side under a starboard helm, thus suddenly opening her green light and showing both lights when nearly ahead of the Melrose. Though the Melrose's engines were at once put full speed astern and her helm put hard aport, and though the Vera swung back to starboard under a port helm so as to shut out the green light she had shown, her port quarter swung against the Melrose's port bow.

The Melrose alleges the place of collision to have been about 1,000 feet S. E. by E. from the dredge. If there, it was on the N. E. side of the channel and of the upper range of lights on Spectacle Island. The Vera, denying that the place of collision was on the N. E. side of midchannel, alleges that it was not more than about her length from the schooner Baxter, with which she afterward collided, and which, as no one disputes, was, if in the channel at all, on its southerly side.

The two upper range lights on Spectacle Island are on a line running by compass nearly N. W. ¾ N. and S. E. ¾ S. This range is intended for and used as a guide to the proper course through the narrow channel out of which the Vera was coming, and for the entrance to which the Melrose was heading. An outward bound steamer coming down that channel, if following the range line exactly while in the channel, would not continue long upon it after passing between buoys 8 and 9, because of its direction crossing obliquely the direction of the regular courses followed by vessels from or to the entrance to the narrow channel through President Roads. To continue upon it for three-quarters of a mile (nautical) after passing the buoys would be to run ashore on Spectacle Island. About 2,100 feet below the buoys this range line intersects another line upon which two lights on City Point, South Boston, are in range. This line runs by compass nearly E. and W., is intended for and is used as a guide to the proper channel course through President Roads. At the point of intersection of the two ranges, the steamer above supposed, if following exactly the City Point range, would change her course to port between 3 and 4 points and follow the City Point range through President Roads until it intersected still another range of lights on Spectacle Island, indicating the proper course to and through Broad Sound.

The actual place of collision, if it can be determined from the evidence, will obviously go far to determine, as between the two conflicting accounts of the manner in which the two steamers approached each other, which is the true account.

Capt. Frostead, of the Melrose, as part of his redirect testimony, marked on a copy of Coast Survey Chart 246, initialed "W. B. and B.," the course he claims to have followed through President Roads,

from off Deer Island Light, to the place of collision. This place, as he explained in cross-examination, he meant to put about 900 feet from the dredge Eugene, about 500 feet N. of the upper Spectacle Island range line, and 800–1000 feet above the Baxter, supposing the latter to have been lying about 300 feet to the southward of the point where that range and the City Point range intersect. McGray, chief officer, gives in his deposition the same distance and bearing from the dredge as alleged in the pleadings, but he had made a sworn statement to the local inspectors on the day after the collision (January 19th), according to which the Melrose was nearing the dredge and about 600 feet from it at 5:58 p. m., her half speed toward it was not checked until 5:59 p. m., and collision followed at 6 p. m. Wallace, second officer, put the collision 1,200 feet from the dredge, Collard, lookout, at 900 feet, but neither undertook to give the dredge's bearing, and no other witness from the Melrose undertook to give either its distance or bearing. No careful observation or estimate of either, at the moment, was to be expected under the circumstances, nor, in undertaking to fix the point of collision by reference to the dredge, can I believe that the master and officers of the Melrose have relied so much upon observation or estimate, as upon inference from what they claim the Melrose's course, with reference to the ranges and the Vera's course, to have been during the approach of the two vessels. No witness from the Vera or from any other vessel in the vicinity has undertaken to fix the place of collision with reference to the dredge.

To fix the point of collision, as attempted in the Vera's pleadings, by reference to the Baxter as she lay at anchor, requires the Baxter's location to be first determined. Folger, the Boston pilot commanding the Vera, in his cross-examination, located the Baxter by a mark upon another copy of Chart 246, initialed "E. E. B.," intending, as he testified, to put her not far from the intersection of the two ranges referred to, about 100 feet to the S. or S. W. of that from Spectacle Island and about 300 feet to the S. of that from City Point. The pleadings and the testimony lead me to believe that this cannot be very far from the true location. The Melrose's pleadings allege that the Baxter lay close to the Spectacle Island range, but not how she lay with reference to the City Point range, nor do I find any testimony from on board the Melrose upon this point except McGray's, who says that "in reference to the City Point lights" she was "well over on the opposite of the channel from the side the Melrose was proceeding on" and not far from Spectacle Island range. The Baxter's earlier pleadings (libel in No. 260) allege her anchorage to have been "on" the Spectacle Island range and "somewhat south" of the City Point range—though her later pleadings (answer in No. 317) say to the "westward of" the first, and "well to the south" of the second. The Baxter's master, mate, and engineer gave their depositions before the trial, and were all the witnesses from on board her. Her master (libelant in No. 260) stated that the City Point range was "well open," and that she was 2–500 feet S. W. of the Spectacle Island range. Peterson, her mate, that she was 3–400 feet S. W. of that range and one-quarter of a mile S. of the City Point range. Mar-

cellus, her engineer, that she was 3–400 feet W. of the Spectacle Island range, but he could not tell how she lay as to the City Point range. There were three schooners anchored further to the westward than the Baxter. The Prescott Palmer seems to have lain nearest. Sudds, her steward, called on the Vera's behalf, said that she lay perhaps 200 feet inside the Spectacle Island range, that the Baxter was perhaps 400 feet southeast from her and somewhere near the ranges. Beal, mate of the Fannie Palmer, called on behalf of the Vera, said his vessel was lying 150 or 200 feet inside the Spectacle Island range, that the Baxter was nearer the channel and pretty near down on the range referred to. Cunningham, master of the tug Juno, astern of the Baxter at the time of the collision, and Bohld, mate of a third schooner anchored above the Fannie Palmer but on the same side of the channel, who happened to be on board the Juno, called as witnesses on behalf of the Melrose, put the Baxter no further away from either range than did Folger, if, indeed, their testimony does not tend to show that she was more nearly on one or both of the ranges. Ross, master of another tug which went to the Baxter after the Vera had been in collision with her, called on behalf of the Baxter, put her 6–700 feet inside the Spectacle Island range and inside also of the City Point range; but he does not undertake to say how much. I cannot believe his estimate any more likely to be nearer the truth than that of Folger. The five witnesses last above mentioned were the only witnesses from on board vessels not in either collision.

If my conclusion is right that the Baxter lay very nearly at the point indicated by Folger, she was, according to the charts, not less than 2,000 feet away from the dredge, considerably more than 1,000 feet from the point of collision indicated by Captain Frostead, and in a direction about S. by E. from the latter point. The next question is: How far was the point of collision between the two steamers from where the Baxter lay? Upon this question the various witnesses differ considerably, even those from the same vessel, and upon no one of their estimates by itself can full reliance be placed. From the Baxter herself, Marcellus, keeping watch on deck while the rest of her crew were below at supper, says the Vera was two ships' lengths away when he called the others out. He had been watching both steamers and called his crew when he first thought the Vera likely to hit the Baxter. Her master and mate, thus brought on deck, saw the Vera before she struck, 1,000 feet away according to the master, 5–600 feet away according to the mate. From the two steamers the testimony is as follows: On board the Melrose little attention seems to have been paid to the Baxter after passing her, and it is natural to suppose the attention of those in charge of her to have been directed in the opposite direction. Capt. Frostead undertook no estimate of the distance from any observation at the time of collision, but did say that the Baxter was 6–800 feet away, abeam, when he passed her, also that the Melrose would have gone 4–500 feet during the subsequent interval before the collision. McGray gave no estimate of the distance at the collision, but thought her 1,800 feet away when abeam. Wallace thought the Melrose "may have been" over 2,000 feet from the Baxter, but he did not see the collision and no weight

can be given to such a conjecture. Collard took no notice of the Baxter after passing her, and neither he nor Middleton undertook to estimate the distance. From the Vera, Folger put the collision with the Melrose 300 feet from the Baxter; Rynning, master, 3–400 feet; Nielson, mate, gave the same estimate; Gunderson, lookout, said the distance could not have been over two ships' lengths; Johansen, carpenter, three ships' lengths; Nass, at her wheel, one or two ships' lengths. All these witnesses had the Baxter in view ahead of them and were watching her as well as the Melrose. It is true as to all of them except Folger that they were more or less unfamiliar with English, and that the three last mentioned had to testify through an interpreter. All of them also, Folger included, may be supposed to incline toward estimates in the Vera's favor, upon this point as upon others; but their estimates do not greatly differ from two of the three from the Baxter herself, or from the estimates of witnesses from vessels not in either collision. From the Prescott Palmer, Sudds said he heard the collision, was then looking at the steamers, and that they were just astern of his vessel, 200 or 250 feet away. From the Fannie Palmer, Beal said he saw the collision and that the steamers were 300 feet from his vessel, not over 400 feet from the Baxter, and about halfway from where they would be astern of his vessel and where they would be astern of the Prescott Palmer. Capt. Ross' tug was above the dredge in the narrow channel when the steamers came together and did not see this collision happen. From the Juno, alongside the Baxter, Cunningham saw the collision and puts the steamers 500 feet from the Baxter at the time, or a little better. Bohld, also on the Juno, saw or heard the collision, but does not undertake to say how far it was from the Baxter.

Satisfied as I must be, for the reasons above stated, that the Melrose's witnesses have located the collision much nearer the dredge and much further N. than it really was, I am unable to believe, in view of all this evidence, that the steamers when in collision can have been much over 500 feet, if so much, above where the Baxter lay. This agrees with Captain Cunningham's estimate. A point about that distance from where she lay, measured in any direction which I can regard as representing the direction of the place of collision from the Baxter with any probability, could not be described as on the northerly side of the channel. If the course marked by Capt. Frostead represents the course which a vessel going up on the northerly side of the channel would take, such a point would lie very considerably further S. than any point in that course.

[3] President Roads and its approaches are no doubt to be regarded, generally speaking, as a "narrow channel," within the meaning of Rule 25. The Yarmouth (D. C.) 100 Fed. 667, 668. But below the entrance to the much narrower channel out of which the Vera had come there are no well defined limits at night, nor is it possible to say with much definiteness exactly where the southerly side of the channel is. No doubt for a deep draft vessel like the Melrose there is less width of navigable water than for a lighter vessel such as the Vera. The channel, for the purposes of such a question as this, would seem to have such width on the one side and on

the other of the regular course indicated by the ranges and followed up and down by vessels free to maneuver without regard to others, as would be reasonably necessary for ordinary purposes of safe navigation. Much of the evidence relied on to show that one or another of the vessels here in question was in the channel, or on one side or the other of it, has given me little or no assistance, for want of sufficient assurance that I understood what the witness had in mind in speaking of the "channel." If, however, the Vera had, as she claims, come down from the dredge, keeping the line of the upper range always on her port hand, and had reached the point of collision without any starboarding of her helm, or any change of direction except under a port helm, the direction of the range line obliquely across the channel, and the fact that the Baxter lay so near to the point where the channel course becomes more easterly in direction, seem to me to require the conclusion that at a point about 500 feet above where the Baxter lay she was neither on the northerly side of what can properly be described at that point as the channel nor in the middle of it, but considerably on the southerly side of midchannel. If therefore the courses followed by her to the point of collision were as she claims, she cannot be held in fault for violating Rule 25. Those courses could not have failed to carry her at a safe distance from the course on the opposite side indicated by Capt. Frostead on the chart.

Such were the courses the Vera did follow, unless the account coming from her is to be rejected and that coming from the Melrose accepted instead. The two cannot be reconciled. I must regard the unanimous testimony of the witnesses from the Vera, that she never crossed the range line after passing the dredge, that she departed from its direction only by going to starboard under a port helm, and at no time went to port under a starboard helm, as having the stronger claim to belief. These witnesses had the range lights in sight ahead and were navigating with reference to them. The Melrose witnesses had left them behind.

The following considerations further confirm the account coming from the Vera: To reach the point of collision indicated by Capt. Frostead, the Vera must have gone to port under a starboard helm soon after passing the dredge. The further below the dredge, the greater would have been the change to port required. It is difficult to believe that a pilot of Folger's experience would make such a change, having on his port bow the green light of a steamer with which he had just exchanged whistle signals amounting to an agreement between the two vessels to pass each other port to port. That there had been such an agreement is undisputed. To my mind this fact forbids any conclusion that he had misunderstood the Melrose's bearing from his vessel or the direction in which she was bound. It is easier to suppose that the Melrose had miscalculated her true position in the channel, and brought about the collision by not going to starboard seasonably and sufficiently after the whistles were blown.

That one-blast signals had been thus exchanged being undisputed, it becomes of comparatively small consequence which vessel whistled first. But, since I have to choose between two irreconcilable accounts,

it is perhaps not without significance that Capt. Frostead himself supports the Vera's allegation that the Melrose whistled first. The contrary allegation that it was the Vera is supported only by McGray and Wallace from on board the Melrose, the other witnesses from on board her not undertaking to testify on the point. This discrepancy between Frostead and McGray appears in their reports to the local inspectors made the day after the collision.

The testimony from the Melrose that the Vera showed her green light just before the collision and immediately afterwards shut it out again, I am unable to accept, under the circumstances, as indicating changes of course on the Vera's part which the witnesses from her deny. The supposition that the Vera changed to port and back again to starboard within during the time which the Melrose's witnesses claim to have had her green light in view requires, under the circumstances, stronger evidence to support it against the testimony that no such change to port was made. It is not supported on the Melrose's part by the testimony of any stationed lookout on her bow. She had no stationed lookout further forward than Collard, on her foremast 100 feet aft of her stem.

If the place of collision was substantially as above found, and the account of the approach of the two steamers which comes from the Vera is the one established by the evidence, the collision was brought about by the Melrose's fault in not keeping on the proper side of the channel, and in failing to take seasonable and sufficient measures to carry out the agreement in which both vessels joined by the exchange of signals. There are in her own evidence indications that her change to port after the signals had been exchanged was at most slight. Her speed, claimed to have been reduced from half speed to slow when each vessel sounded one blast, was not altered until her engines were put at full speed astern because collision was imminent. I must hold that the dangerous proximity, which required emergency measures on the part of each vessel, had been brought about by the Melrose's neglect or miscalculation.

If I am right in the above conclusions, it is unnecessary to decide whether or not the Melrose gave a cross-signal of two blasts just before the collision, as all the witnesses from the Vera's deck testify. On the Melrose's part, those in charge of her navigation deny that such a signal was ever sounded, and there are other witnesses who say they heard no such signal. That, if two blasts were sounded, they were at once followed by three from the Melrose, is agreed. Such a signal would have been not improbable from the Melrose if the facts were as above found, nor can I believe the Vera's witnesses to be willfully falsifying in regard to it. On the other hand, confusion as to what they heard would not be impossible under the circumstances. But, if sounded at all, the two blasts were blown at a time when the fault which caused the collision had been committed.

The following claims of fault on the Vera's part are not disposed of by what has been said: (1) That, after the exchange of signals, she did not keep far enough to starboard under a port helm; (2) and failed to keep her course and speed; (3) that when she found collision imminent she failed to give a danger signal, stop, and back, but instead put

her helm hard aport and her engines full speed ahead, thereby throwing her stern nearer the approaching Melrose.

As to (1), in view of the fact that the Vera is shown to have had a group of not less than four anchored schooners on her starboard hand, whose precise position with reference to the channel and each other could not well have been determined while in the vicinity of the dredge, and because it follows from what has been found that the Vera had a right to expect a change to starboard on the Melrose's part so much greater than was made as to have prevented risk of collision when the vessels had reached that part of the channel where collision occurred, I do not think she can justly be held in fault for not keeping still further to starboard. If I am right in finding that she had yielded to the Melrose as much of the channel as compliance with the signals exchanged required, greater proximity to the anchored schooners involved risk which she had the right to avoid.

As to (2), no change of course made after the signals exchanged, which took either vessel further away from the other and from midchannel, can be treated as a fault on her part. As to changes in speed, the Vera's was reduced from full to half speed when the signals were exchanged. Obviously the latter was the more prudent speed for a channel wherein not only the Melrose but anchored vessels, lying so near on her opposite side, were to be avoided. For a further change of speed to slow before the collision, under engines slowed and stopped, the reason given by the Vera's pilot is that her proximity to the Baxter, lying nearly ahead, had become such as to make it appear unsafe to reduce the distance faster than could be avoided before the Melrose had passed and the Vera was free to starboard her helm enough to clear the Baxter's stern. If the place of collision was so near the Baxter as I have thought, I must consider the reason assigned sufficient. If the requirements of the crossing rules, calling upon the privileged vessel to keep her course and speed, have any application to a situation like that existing between these two steamers after the exchange of signals, I think they must yield to special circumstances such as here appear. When she slowed, the Vera had still the right to expect from the Melrose a further change of course taking her clear on the Vera's port side. If it is claimed that, instead of slowing, the Vera's helm should then have been put hard aport and the attempt made to clear the Baxter by passing around her bow, I am unable to think that the situation, as it then presented itself, required of the Vera a departure from her intended course so extraordinary and subject to so much risk that she would have had to pass between the Baxter and the nearest of the other anchored vessels. If the Baxter's stern was about 300 feet from the upper range line, to clear her bow would require the Vera to get at least twice as far from that line, considering the Baxter's length (226 feet), not including her bowsprit and jibboom.

(3) The hard aport helm and full speed ahead ordered by the Vera's pilot was, if an error at all, an error in an emergency created by the Melrose's fault. It was an emergency measure, taken as a last resort as a possible chance of avoiding or lessening the damage to both vessels then imminent. If in any sense an error, I must regard it as an error in extremis.

Whether the collision happened some 500 feet northerly of the range line and some 1,000 feet away from the Baxter as the Melrose claims, or, as the Vera claims, on the other side of the range line, and very much nearer the Baxter, seems to me the question upon which, as to these two vessels, my decision must depend. To discuss all the evidence having any bearing upon this question in detail, consisting so largely, as it does, of estimates as to bearing and distance all subject to more or less doubt of their reliability, would unduly extend this opinion. Having considered the evidence in connection with those leading features of the situation above referred to, I am obliged to regard the Melrose as so far in error in locating the place of collision where she does as to prevent me from believing that the two steamers in fact approached each other and the place of collision as she claims. I must accept the Vera's account as substantially in accordance with the facts, and hold the Melrose solely in fault for the first collision, unless the Baxter was also in fault for it.

2. I next consider the question of fault arising between the Vera and the Baxter, whether for the Vera's collision with the Melrose or for the subsequent collision between the Vera and the Baxter. On the Vera's behalf it is claimed that the Baxter was lying at anchor where she had no right to be anchored, and where she obstructed the Vera's navigation, first by being directly in that vessel's way while endeavoring to pass the Melrose under a port helm, second by being where the Vera could not get clear of her after the collision. If the Baxter was where she had no right to be, and if her being there produced the first of the above results claimed, she is jointly liable with the Melrose for all damage to both steamers sustained in the first collision. If her being where she had no right to be produced also the second of the above results claimed, and there was no fault on the Vera's part subsequently to the first collision, she is jointly liable with the Melrose for all damage to the Vera in both collisions; the second collision in that case following as a consequence from the first. There is no claim made against her on behalf of the Melrose.

There was uncontradicted testimony at the trial from Edward A. Pease, captain of the harbor police and harbor master of Boston at the time, called by the Vera, that on November 14, 1908, under the authority given him by Mass. Rev. Laws, c. 66, §§ 21, 26–28, to establish anchorage grounds in the harbor and require vessels to anchor within them, he issued rules and regulations, unmodified at the time of collision, which had been published in the daily papers and, in printed form, posted in towboat and pilot offices, or distributed to vessels requiring them, to the number of 200 copies. A copy of these rules, marked "Vera Ex. 14," was put in evidence. They direct (Rule 10) that all vessels anchoring between Spectacle Island and Castle Island shall anchor S. W. of a line drawn from the barn on the hill on Spectacle Island and S. W. end of Castle Island. The witness drew this line on another copy of Chart 264, marked "E. S. D." If the Baxter was anchored where I have above found her to have been anchored, she was not only not within the prescribed anchorage ground, but was at least 1,100 feet outside it, at its nearest point. So far from being S. W.

of the line described, she was that much N. E. of it. That she was lying where the harbor master's rules forbade her to lie, she cannot and does not deny.

The witness testified that he had moved vessels which he had found anchored outside the line and between the two islands mentioned, and that vessels very seldom did anchor there. There was evidence on the Baxter's behalf that those in charge of her did not know of the harbor master's rule, and that, as a matter of fact, vessels frequently did anchor between the two islands and outside the line. The three schooners anchored near the Baxter, which have been referred to above, appeared, so far as their location can be ascertained from the evidence, to have been all outside the harbor master's line, though not so far outside it as was the Baxter.

The Baxter's master testified in his deposition that he anchored where he always considered the proper anchorage to be, that he never had any notice to the contrary from the harbor master, that he never heard of the regulation against anchoring there, that he had anchored in that locality half a dozen times or more, and had seen many vessels anchored in the same locality at all times. He admitted that the locality he referred to was not the particular place he occupied on the evening of the collision, but the general locality to the northwestward of Spectacle Island, and said that he had anchored further to the southward and eastward. The Baxter's mate, who had also been master of her and of other schooners and had held a master's license for ten years, said they had always anchored there, that other vessels had done the same, that it was a usual and customary anchorage, that he had never been notified by the Harbor Master not to anchor there, that he had been at anchor in the vicinity to the S. and W. of the same place a week at a time loaded and four or five weeks light. It did not appear, however, that either of these witnesses had anchored or seen other vessels anchored there since November, 1908, when the rule forbidding it was issued.

I do not think the evidence sufficient to show that the harbor master had impliedly sanctioned the violation of his rules involved in anchoring outside the line indicated by him, as in The John Fraser, 21 How. 184, 16 L. Ed. 106. See The Amiral Cecille (D. C.) 134 Fed. 673; Compagnie, etc., v. Burley (D. C.) 183 Fed. 166; Burley v. Compagnie, etc., 194 Fed. 335, 115 C. C. A. 199, the latter a decision by the Court of Appeals in the Ninth Circuit approving the rulings upon a similar question made in each of the two former cases.

Nor do I think the Baxter has shown any such necessity for anchoring outside the harbor master's limits as excuses her for such a violation of his rules. Mere convenience cannot be enough. If it be true that she could not, with her draft of 25 feet, go safely much further to the southward than where she was, there is another authorized anchorage ground in President Roads, to the north of a line between buoy 6 and Deer Island Light, which she had just passed, and if she was to anchor in the Roads at all, I do not see why she might not have so decided in time to anchor there.

The Baxter is therefore at least prima facie in fault for being anchored where she was. O'Neil v. Sears, 2 Sprague, 52, Fed. Cas. No.

10,530; United States v. St. Louis, etc., Co., 184 U. S. 247, 254, 22 Sup. Ct. 350, 46 L. Ed. 520. In The Amiral Cecille and the two following cases above referred to, it was held that a vessel anchored in a harbor outside the limits prescribed by a city ordinance was, in case of collision between her and a moving vessel, guilty of a statutory fault and within the rule laid down in The Pennsylvania, 19 Wall. 125, 22 L. Ed. 148.

The Baxter's location, as hereinbefore found, was, in my opinion, too near the channel courses regularly followed by vessels passing through the Roads, and too near the point where such vessels expect to make the alteration of course which has been described, to be regarded as out of the channel. Though nearest to its southern side, I cannot doubt that she was within that region lying upon either side of the channel courses which is reasonably and ordinarily necessary for the safe passage past each other of vessels bound in opposite directions. Nor can I doubt that she was in some degree obstructing the necessary manoeuvres of the two steamers here concerned by being where she was. She was so near the point of their collision as to compel the Vera to manoeuvre with reference to her while seeking to pass the Melrose, and so near that, unless after the collision the Vera could succeed in instantly checking headway and coming to a standstill, collision with the Baxter was certain. These conditions, establishing also the violation of a federal statute (Act March 3, 1899, c. 425, 30 Stats. 1121, 1152, § 15 [Comp. St. 1913, § 9920]), require the Baxter to show that her being where she was could not have contributed as a cause to their collision. In this she has not, in my opinion, succeeded. The evidence does not satisfy me that the Vera, though not in fault, under the circumstances, for her collision with the Melrose, might not nevertheless and notwithstanding the Melrose's fault have succeeded in avoiding it, had she had unobstructed water where the Baxter lay.

After the first collision the Vera was of course bound, notwithstanding it, to do all she could to avoid the Baxter. The evidence fails to satisfy me that under the circumstances she could reasonably have been expected to do anything more than was done on her part. The collision with the Melrose pushed her stern to starboard and her bow to port, against her effort to swing the other way under her hard aport helm. It disabled her steering gear. Reversing her engines or dropping her anchor, or both, are the only measures which it is suggested that she ought to have taken. Both these things were done, but not until about the time the Vera fouled the Baxter, whether a little before or a little after is not important. It appears that the Vera's master rang for full speed astern before the collision, but could get no response from the engine room. It appears that the collision aroused fear for their safety among the Vera's crew, that some of them went to the boats, and that complete order among them was not restored until the mate, having looked over the quarter to ascertain what damage she had suffered, had reassured them. Meanwhile the Vera, thus somewhat out of control, was traversing the distance above found to exist between the place of collision and the Baxter. The arguments based on the entries in the Vera's engine-room logs have not seemed to me, in view of all the evidence bearing on the question, sufficient to

vary my conclusions as to this distance. The time the Vera would occupy in traversing it, helped as she was by the tide, must necessarily have been very short. Neither her failure to get her engines reversed and her anchor down within that time, nor the conditions on board her to which the delay was due, can be charged to her as faults, under the circumstances. They must be regarded as consequences of her collision with the Melrose, for which, as above, I hold the Melrose and the Baxter in fault. If this result is right, the second collision was also caused by fault on the part of both those vessels and not fault on the Vera's part.

The following decrees will therefore be entered:

In No. 260, the libel is to be dismissed as against the Vera with costs. There is to be an interlocutory decree in the Baxter's favor against the Melrose, and for an assessment of the Baxter's damages, half of which she is to recover from the Melrose.

In No. 317 and also in No. 318, there is to be an interlocutory decree for the libelants and an assessment of the Vera's damages.

In No. 360 the libel is to be dismissed with costs.

The decree in No. 260 dismissing the libel as against the Vera and the decree of dismissal in No. 360 may, however, be withheld for the present, to be entered when final decrees are entered in Nos. 317 and 318, in order that in case of appeal all four cases may go up together.

On Settlement of Decree.

[4] The interlocutory decrees directed in the opinion dated September 14, 1912, were based upon the findings and conclusions set forth in that opinion and upon the state of the pleadings in the respective cases.

According to the findings and conclusions of the opinion, the schooner Malcolm Baxter, Jr., and the steamer Melrose were both to blame as well for the first collision between the steamers Vera and Melrose as for the second collision between the Vera and the schooner.

Upon the libel filed on the schooner's behalf, originally against the Vera and afterward made effective against the Melrose as well—by means of the petition filed therein on the Vera's behalf (No. 260)—a decree against the Melrose for half the schooner's damages was ordered. This was in pursuance of the petition filed on behalf of the Vera, not of the libel, according to which the schooner's owners had charged that the Vera was solely in fault. Neither in that case nor in either of the other cases arising out of the collision had the Melrose pleaded fault on the part of the schooner. In her answer, filed in No. 260 because of the Vera's petition, it was stated that the Melrose as well as the schooner suffered damage; but neither the manner, the particulars, nor the extent of her injuries were alleged. Unless in the prayer for general relief, with which the answer concluded, no relief against the schooner with respect to the Melrose's own damages was asked, and no occasion therefore appeared at the time of the interlocutory decree for any direction regarding them.

If both vessels were to blame for both collisions, as I have held, I see no reason for refusing to the Melrose the right to recoup the

amount of damage she sustained against those she inflicted or caused and is now required to pay. Now that the amount of the damage to her has been ascertained, I do not see that the state of her pleadings in No. 260 necessarily forbids allowance for it in the final decree as between her and the schooner. Ebert v. The Reuben Doud (D. C.) 3 Fed. 529. Amendment of her answer may be necessary, as in that case, and I do not understand that such amendment is objected to.

If the findings and conclusions of the opinion are right, the schooner and the Melrose are to share the total damage to all three vessels; the Vera having the right to recover hers from either of the other two. As between those two, half of what either pays the Vera would seem to be recoverable from the other, together with half the damage recovered for because sustained in either collision.

In re STERBUCK.

(District Court, D. Minnesota, Fourth Division. September 26, 1914.)

1. ALIENS ⇐65—NATURALIZATION—DISCHARGE FROM NAVY—CONSTRUCTION OF STATUTE.

Naval Appropriation Act June 30, 1914, c. 130, 38 Stat. 395, provides that any alien otherwise qualified for admission to citizenship, who has served for one enlistment of not less than four years in the navy or marine corps, and has received therefrom an honorable discharge, or an ordinary discharge with recommendation for re-enlistment, shall be admitted to become a citizen upon his petition without any previous declaration of intention and without proof of residence on shore, that his discharge shall be accepted as proof of good moral character, and that any court of competent jurisdiction may immediately naturalize such alien. Under the law as it then stood a person serving a term of four years in the navy or marine corps and receiving an honorable discharge, or an ordinary discharge with recommendation for re-enlistment, on re-enlistment within four months was entitled to a certificate of continuous service and increased pay, but by a department ruling such benefits were only allowable to citizens. *Held*, that such provision was especially designed to enable aliens coming within its terms and desiring to re-enlist to become naturalized at once and thus secure the increased pay; that, construed in connection with other statutes in force, it did not entitle such an alien, who, without any intention of re-enlisting, waited a period of years before filing his petition, to become naturalized without complying with the requirements of the general statute by posting his petition for 90 days, proving his residence since his discharge and his good moral character during that time.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 129; Dec. Dig. ⇐65.]

2. ALIENS ⇐68—NATURALIZATION—DISCHARGE FROM NAVY—STATUTE GOVERNING.

So much of such provision, however, as reduces the length of service necessary to entitle the petitioner to naturalization without previous declaration of intention to four years, instead of five years, as fixed by Act July 26, 1894, c. 165, 28 Stat. 124, which relates only to the quantum of proof, may be taken advantage of by an applicant whose petition is heard after its enactment, although it was filed prior thereto.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 138–145; Dec. Dig. ⇐68.]

In the matter of the petition of John Sterbuck for naturalization. Petition granted.

BOOTH, District Judge. On the hearing of this petition the chief examiner objected to the admission of the petitioner for citizenship. It appeared from the evidence that the petitioner, Sterbuck, filed his petition for naturalization on May 25, 1914. It is fairly apparent from the petition itself that it was the intention of the petitioner to make his application under the act of July 26, 1894, although the wording of the petition is not in strict accordance with the requirements of the naturalization regulations bearing upon such a petition. The evidence showed that the usual posting was had, but that no declaration of intention had ever been filed by the petitioner. It further appeared from documentary proof that the petitioner had served in the United States navy from July 25, 1905, to July 24, 1909, and received an honorable discharge. The evidence further showed the residence of the petitioner within the United States since August 1, 1909, and in the state of Minnesota for more than one year next preceding the filing of the petition. Evidence was also received in proof of good character of the petitioner covering a period from August 1, 1909, down to the time of the hearing.

The position taken by the chief examiner is that the petitioner is not entitled to be admitted as a citizen, either under the provisions of the act of July 26, 1894, or under the provisions of the act of June 29, 1906, or under the provision of the act of June 30, 1914. It is evident that the petitioner has not in his proof fulfilled the requirements of the act of June 29, 1906 (34 Stat. 596, c. 3592). No declaration of intention was filed, as required by that act, and there was no allegation or proof of five years' residence in the United States next prior to the filing of the petition. It is plain, therefore, that the applicant is not entitled to be admitted as a citizen solely under the provisions of the act of June 29, 1906. The act of July 26, 1894, by its terms exempts certain classes of persons who desire to become citizens from making a previous declaration of intention. It does not, however, exempt a petitioner from having a petition posted for the usual period of 90 days. See U. S. v. Peterson, 182 Fed. 289, 104 C. C. A. 571. The act of July 26, 1894, moreover, requires five consecutive years' service in the United States navy, or one enlistment in the United States marine corps. This requirement the present petitioner did not and could not fulfill, and therefore did not bring himself completely within said act of July 26, 1894.

[1] The act of June 30, 1914, exempts certain classes of persons who desire to become citizens from making a prior declaration of intention, and from proof of residence on shore, and, furthermore, makes an honorable discharge, or an ordinary discharge with recommendation for re-enlistment, proof of good moral character. This act also reduces the requisite term of service in the navy or marine corps

to four years. It further provides that the court may immediately naturalize the petitioner, and this naturally exempts him from the requirement of the 90 days' posting. It is contended on the part of the government that the present petitioner does not come within the provisions of the said 1914 act: First, because said act was not in existence at the time when the petitioner filed his petition; and, secondly, because said act was passed with a view of covering a certain class of petitioners only, and that the present petitioner is not included in that class. The 1914 act, standing by itself, is general in its terms, is tolerably plain, and free from ambiguity. When, however, it is construed in connection with the two other acts above referred to, there does arise ambiguity and uncertainty. The circumstances under which the 1914 act was passed and the history of its inception and passage show that it was designed especially for a particular class of applicants. It appears that, under the United States laws and navy regulations in force at the time of the passage of the 1914 act, a person who had served four years in the navy and received an honorable discharge, or an ordinary discharge with recommendation for re-enlistment, might re-enlist within a period of four months and receive a continuous service certificate with increased pay. There had been no difference in the treatment in respect to re-enlistment and increased pay between citizens and aliens. Under a ruling of the comptroller, however, it was held that such increased pay could only be allowed to American citizens who re-enlisted within the four-month period. It was in view of this ruling and the foregoing circumstances that the act of 1914 was passed, and, without question, one of its purposes was to allow an alien who had served four years in the navy and had been honorably discharged, or had received an ordinary discharge with recommendation for re-enlistment, and who might desire to re-enlist within the four-month period and receive increased pay, to file his petition in the proper court, and at once, without any declaration of intention having previously been filed, and without the necessity of posting, have his petition heard, so that he would be in a position to proceed with his re-enlistment and receive increased pay. It was also provided that proof of honorable discharge, or of ordinary discharge with recommendation for re-enlistment, should be proof of good moral character, and that no proof of residence on shore was necessary.

The question here arises whether the present petitioner can take advantage of any of the provisions of the 1914 act. This act, in my opinion, must be read in connection with the general act of June 29, 1906, and the act of July 26, 1894. Prior to the passage of the 1914 act the term of enlistment in the marine corps had been changed from five to four years, and the 1914 act makes the same change as to the navy, modifying in that respect the five years' service required under the act of July 26, 1894. I do not think, however, that it was the intention of Congress in passing this 1914 act to provide that an alien, who had served four years in the navy, received an honorable discharge, who, without having any intention of re-enlistment, waited a period of years, could then apply at once to the court and be immediately admitted to citizenship without proof as to where his resi-

dence had been during said last-named period, and without any posting. It seems to me that under such circumstances, where a considerable period of time has elapsed between the honorable discharge and the filing of the petition, that the usual posting must be made, and that, while honorable discharge may be proof of good moral character during the period of service, yet that supplemental proof of good moral character during the subsequent period should also be required, as well as proof of residence within the United States and within the state during the subsequent period.

[2] In the present instance the petitioner has provided such proof. He has shown proper residence subsequent to his honorable discharge, and has shown one year's residence within the state next prior to the filing of his petition. His petition has been posted for the usual length of time. He has also shown good moral character during the period subsequent to his honorable discharge and down to the time of hearing. It is true that the proof shows only four years' service in the Navy instead of five years as required by the law in force at the time he filed his petition. Inasmuch, however, as between the time when he filed his petition and the time of the hearing the law was changed, making proof of four years' service sufficient, I see no reason why the petitioner may not take advantage of this change in the law, at the time of the hearing, inasmuch as in his case it simply affects the quantum of proof necessary to be furnished, and that quantum of proof, in my opinion, is to be measured at the time of the hearing, rather than at the time when the petition was filed.

Under all these circumstances, I am of the opinion that the objections of the chief examiner should be overruled, and the petitioner admitted to citizenship.

STROUT v. UNITED SHOE MACHINERY CO. et al.

(District Court, D. Massachusetts. November 1, 1913.)

PLEADING ⊂=225—AMENDMENT—DISCRETION OF COURT.

Whether or not to permit amendment after demurrer sustained is, in general, a question for the court's discretion upon all the circumstances.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 575–583; Dec. Dig. ⊂=225.]

At Law. Action by Charles A. Strout, trustee, against the United Shoe Machinery Company and others. On motion to amend a special replication and demurrer thereto. Amendment allowed, and demurrer sustained.

Judgment affirmed in 225 Fed. —, — C. C. A. —. See, also, 208 Fed. 646.

Whipple, Sears & Ogden, of Boston, Mass. (Sherman L. Whipple and Alexander Lincoln, both of Boston, Mass., of counsel), for plaintiff.

Coolidge & Hight, of Boston, Mass., for defendants.

DODGE, Circuit Judge. A demurrer to this special replication was sustained and judgment for the defendants ordered on September 15, 1913. See the opinion herein of that date. 208 Fed. 646. A judgment so ordered, however, according to the practice, is not ordinarily entered before the close of the term. The plaintiff has since moved, on September 30, 1913, to amend the replication by adding to paragraph 4 thereof:

"The following specification of the particulars in which the defendants have fraudulently concealed the cause of action set forth in the amended declaration from the knowledge of the trustee appointed on February 17, 1905, and the circumstances of its discovery."

As has been stated in the above opinion, this special replication has been already once amended, on May 3, 1913. This is the second application to amend it, and is made after the court had held it necessary to specify the fraud alleged and the date and circumstances of the discovery of the cause of action said to have been concealed. The ruling that this was necessary was made after argument on the plaintiff's part to the contrary.

At the time the first amendment to this replication was allowed, it was distinctly understood by the court and counsel that the plaintiff was prepared to stand or fall by the replication as then amended and would not ask to amend further.

In his brief submitted on this motion the plaintiff says he followed a rule laid down by certain Massachusetts decisions in drafting his first amendment, and submits that this exonerates him—

"from a charge of negligence so culpable as to deprive him of relief if it ultimately turned out that he would be entitled to relief if he had set forth the particulars of the fraud and its discovery."

But for this clause, if it means that the omission to specify was due to negligence, I should be obliged to suppose the omission designed for the purpose of avoiding specification.

At the hearing on the demurrer, the authorities upon which specification was held necessary were fully cited and discussed and the question submitted by both parties on the replication as it stood, after both had been fully heard. The full opportunity afforded for making such an amendment as is now offered before the court had decided prevents the plaintiff from saying that he has not deliberately taken his chance of a decision adverse to what he contended at the hearing.

Whether or not to permit amendment after demurrer sustained is, in general, a question for the court's discretion upon all the circumstances. The circumstances referred to tend somewhat strongly to require disallowance of this amendment. But the plaintiff's suit is not a penal action, if it can be said to partake of that character in some respects. Chattanooga, etc., v. Atlanta, 203 U. S. 390, 27 Sup. Ct. 65, 51 L. Ed. 241. That strict enforcement of rules of procedure which would be proper in such an action is perhaps not here required. That the defendants' rights will necessarily be prejudiced by allowing the amendment further than can be compensated by the imposition of terms under rule 11 is not entirely clear. It seems to me, on the whole, inexpedient to terminate the case in this court by a purely discretionary

ruling, and the amendment is therefore allowed, subject to such terms as may be hereafter imposed upon the plaintiff, if the defendant makes request therefor.

It was understood at the hearing on this motion that if the amendment should be allowed the above demurrer was to apply to the replication as thereby amended; also that neither party desired further hearing upon the demurrer so applied.

I find nothing in the specifications added to the replication by this amendment to alter the conclusions announced in the opinion of September 15, 1913.

The specifications relating to the vote of the stockholders of the Goddu Company on June 7, 1904, to the filing of the bill in equity to dissolve the corporation in pursuance of the vote—to the company's answer—to the entry of the decree on February 17, 1905, and to the provisions of that decree, are not specifications of anything which would tend to concealment of the cause of action, and they confirm the conclusion that nothing done by the defendants to the injury of the company's business or property through their control of the company could have been done after that control was terminated by the decree.

Whether or not the trustee then appointed was nominated by the defendants, or the premiums on his official bond were paid by them or their counsel, he necessarily became an officer of the court and independent of them. No suggestion is made in the specifications that he failed to act independently of them, or that there was any collusion between him and them.

The specifications allege statements by the defendants to the trustee that "there were no valid claims existing in favor of the corporation," or that its patents and patent rights "were of little or no value." If such statements could be taken as stating anything more than conclusions of law or opinions of values, they could not, in any case, be taken as statements tending to conceal either the alleged doings of the defendants while they controlled the corporation, or the alleged injuries to the company thereby. Whether they were true or false, or whatever the defendants' intent in making them, they could not be regarded as preventing or obstructing, or as excusing, the trustee from making such inquiry as would at once have discovered all there was to know relating to these matters. Still less could such statements be regarded as tending to prevent or hinder any stockholders having complaints to make of any such acts or injuries from bringing them to the trustee's attention within six years from February 17, 1905, as they did, according to the specifications, after that period had expired. The company's records and books, as now appears from the specifications, were part of the assets put into the trustee's hands by the decree of February 17, 1905.

The specifications wholly fail to make it appear that reasonable diligence in inquiry was used to discover the facts asserted as constituting the cause of action, and that they nevertheless remained undiscovered until the time of discovery now specified.

No "failure to disclose" on the defendants' part which I can regard as amounting to concealment of the cause of action is made to appear

by the specifications. As stated in the former opinion, I am unable to give any weight to the allegation that the defendants "failed to disclose said facts by reason of the aforesaid plan and conspiracy."

I must therefore again sustain the demurrer, and, as before, order judgment for the defendants.

MEMORANDUM DECISIONS

AMERICAN ASPHALTUM & RUBBER CO. et al. v. STANDARD ASPHALT & RUBBER CO. (Circuit Court of Appeals, Seventh Circuit. November 4, 1914.) No. 2002. Appeal from the District Court of the United States for the Northern District of Illinois. Chas. C. Bulkley, of Chicago, Ill., for appellants. Chas. K. Offield, Henry S. Towle, Albert H. Graves, James R. Offield, and Frank L. Belknap, all of Chicago, Ill., for appellee.

PER CURIAM. Order dismissing appeal on stipulation.

AMERICAN ROTARY VALVE CO. v. MOORHEAD. (Circuit Court of Appeals, Seventh Circuit. May 18, 1915.) No. 2214. Appeal from the District Court of the United States for the District of Indiana. W. Clyde Jones and Keene H. Addington, both of Chicago, Ill., Ferdinand Winter, of Indianapolis, Ind., and Robert C. Wheeler, of Chicago, Ill., for appellant. Chas. Sansberry, James W. Noel and Finley P. Mount, both of Indianapolis, Ind., for appellee.

PER CURIAM. Heard and affirmed.

ATLAS UNDERWEAR CO. v. COOPER UNDERWEAR CO. (Circuit Court of Appeals, Seventh Circuit. June 4, 1915.) No. 2107. Appeal from the District Court of the United States for the Northern District of Illinois. Louis Quarles, of Milwaukee, Wis., for appellant. C. H. Duell, F. P. Warfield, and H. S. Duell, all of New York City, for appellee.

PER CURIAM. Dismissed pursuant to stipulation of counsel.

AYRES v. GRAHAM et al. (Circuit Court of Appeals, Seventh Circuit. May 27, 1915.) No. 2208. In Error to the District Court of the United States for the Northern District of Illinois. E. F. Thompson and Francis H. Clark, both of Chicago, Ill., and Harry S. Stokes, of Nashville, Tenn., for plaintiff in error. W. J. Calhoun and D. H. Mann, both of Chicago, Ill., for defendants in error.

PER CURIAM. Heard and judgment affirmed.

BOGLE et al. v. McKEY. (Circuit Court of Appeals, Seventh Circuit. April 27, 1915.) No. 1951. Appeal from the District Court of the United States for the Northern District of Illinois. M. F. Gallagher, of Chicago, Ill., for appellants. Max J. Farber and Herman Frank, both of Chicago, Ill., for appellee.

PER CURIAM. Order reversing on confession in open court.

CHICAGO FUSE WIRE & MFG. CO. v. HOWARD ELECTRIC CO. (Circuit Court of Appeals, Seventh Circuit. April 28, 1915.) No. 1908. Appeal from the District Court of the United States for the Northern District of Illinois. Luther L. Miller, of Chicago, Ill., for appellant. Howard M. Cox and Dwight B. Cheever, both of Chicago, Ill., for appellee.

PER CURIAM. Order dismissing appeal.

CHICAGO, M. & ST. P. R. CO. v. MRACEK. (Circuit Court of Appeals, Seventh Circuit. May 25, 1915.) No. 2153. In Error to the District Court of the United States for the Northern District of Illinois. O. W. Dynes and C. S. Jefferson, both of Chicago, Ill., for plaintiff in error. Wm. Duff Haynie, Herbert C. Lust, and O. R. Barrett, all of Chicago, Ill., for defendant in error.

PER CURIAM. Judgment affirmed.

CHICAGO & A. R. R. v. STRONG. (Circuit Court of Appeals, Seventh Circuit. November 4, 1914.) No. 2109. In error to the District Court of the United States for the Eastern District of Illinois. C. E. Pope, of East St. Louis, Ill., for plaintiff in error. D. E. Keefe and D. J. Sullivan, both of East St. Louis, Ill., for defendant in error.

PER CURIAM. Judgment affirmed.

CITY OF VEEDERSBURG, IND., v. REISING. (Circuit Court of Appeals, Seventh Circuit. January 12, 1915.) No. 2191. In Error to the District Court of the United States for the District of Indiana. Jas. Bingham, of Indianapolis, Ind., and V. E. Livengood and A. T. Livengood, both of Covington, Ind., for plaintiff in error. Samuel Alschuler, of Chicago, Ill., and Chas. A. Crawford, of Terre Haute, Ind., for defendant in error.

PER CURIAM. Judgment affirmed.

CITY OF WEATHERFORD, OKL., v. NUVEEN. (Circuit Court of Appeals, Seventh Circuit. November 24, 1914.) No. 2147. In Error to the District Court of the United States for the Eastern Division of the Northern District of Illinois. Schuyler F. Lynn and Weldon Webster, both of Chicago, Ill., for plaintiff in error. Harry P. Weber and Geo. W. Miller, both of Chicago, Ill., for defendant in error.

PER CURIAM. Judgment affirmed.

In re FREEMAN WEST SIDE & SUBURBAN EXPRESS CO. SALBERG et al. v. CENTRAL TRUST CO. OF ILLINOIS. (Circuit Court of Appeals, Seventh Circuit. October 13, 1914.) No. 2119. Petition to the District Court of the United States for the Eastern Division of the Northern District of Illinois. Benj. E. Cohen, of Chicago, Ill., for petitioners. Lavern W. Thompson, of Chicago, Ill., for respondent.

PER CURIAM. Petition to review and revise dismissed.

F. W. THURSTON CO. v. CHADELOID CHEMICAL CO. (Circuit Court of Appeals, Seventh Circuit. April 27, 1915.) No. 2242. Appeal from the District Court of the United States for the Northern District of Illinois. Taylor E. Brown, of Chicago, Ill., for appellant. Victor Elting, of Chicago, Ill., for appellee.

PER CURIAM. Order dismissing per stipulation of counsel.

HENKEL et al. v. UNITED STATES. (Circuit Court of Appeals, Ninth Circuit. May 12, 1915.) No. 2095. Appeal from the Circuit Court of the United States for the District of Montana. Walsh & Nolan, of Helena, Mont., for appellants. B. K. Wheeler, U. S. Atty., of Butte, Mont.

PER CURIAM. Pursuant to stipulation and agreement of counsel for respective parties, filed May 12, 1915, case entered dismissed by clerk pursuant to provisions of rule 20 of Rules of Practice of Circuit Court of Appeals. See, also, 196 Fed. 345, 116 C. C. A. 165.

In re INTERSTATE CONST. CO. HAMMOND SAVINGS BANK & TRUST CO. v. FIRST NAT. BANK OF HAMMOND, IND. (Circuit Court of Appeals, Seventh Circuit. May 26, 1915.) Nos. 2198, 2199. Appeals from the District Court of the United States for the District of Indiana. Jas. Rosenthal, of Chicago, Ill., for appellant. W. J. Whinery and J. E. Wilson, both of Hammond, Ind., for appellee.

PER CURIAM. Heard and affirmed.

KEOKUK & HAMILTON BRIDGE CO. v. MISSISSIPPI RIVER POWER CO. (Circuit Court of Appeals, Seventh Circuit. April 27, 1915.) No. 2034. Appeal from the District Court of the United States, for the Southern District of Illinois. F. T. Hughes and E. L. McCoid, both of Keokuk, Iowa, and C. A. Boston, of New York City, for appellant. Apollos W. O'Harra, of Keokuk, Iowa, W. E. Blake, of Burlington, Iowa, and J. O. Boyd, of Keokuk, Iowa, for appellee.

PER CURIAM. Appeal dismissed.

LEWIS v. UNITED STATES. (Circuit Court of Appeals, Seventh Circuit. April 27, 1915.) No. 1880. In Error to the District Court of the United States for the Northern District of Illinois. Wm. A. Cunnea and B. E. Cohen, both of Chicago, Ill., for plaintiff in error. Jas. H. Wilkerson, of Chicago, Ill., for defendant in error.

PER CURIAM. Order reversing on confession of error.

MONTANA WATER CO. v. CITY OF BILLINGS. (Circuit Court of Appeals, Ninth Circuit. May 3, 1915.) No. 2602. Appeal from the District Court of the United States for the District of Montana. O. F. Goddard and Wm. Johnston, both of Billings, Mont., and Gunn, Rasch & Hall, of Helena, Mont., for appellant. Edward Horsky, C. B. Nolan, and Wm. Scallon, all of Helena, Mont., and James L. Davis, of Billings, Mont., for appellee.

PER CURIAM. Pursuant to stipulation of counsel for respective parties thereto, appeal (from 214 Fed. 121) dismissed, without cost to either party.

NEWMAN v. NEWMAN CLOCK CO. et al. (Circuit Court of Appeals, Seventh Circuit. April 29, 1915.) No. 1782. Appeal from the Circuit Court of the United States for the Eastern Division of the Northern District of Illinois. Chester E. Cleveland, of Chicago, Ill., for appellant. R. M. Shaw, and J. Sidney Condit, both of Chicago, Ill., for appellees.

PER CURIAM. Appeal dismissed.

PENNSYLVANIA CO. v. DONAT. (Circuit Court of Appeals, Seventh Circuit. May 19, 1915.) No. 2190. In Error to the District Court of the United States for the District of Indiana. Elmer Leonard, J. H. Rose, and F. E. Zollars, all of Ft. Wayne, Ind., for plaintiff in error. R. B. Newcomb, A. G.

Newcomb, and E. C. Chapman, all of Cleveland, Ohio, G. M. Skiles, T. J. Green, and Roscoe C. Skiles, all of Shelby, Ohio, and James B. Harper and Otto E. Fuelber, both of Ft. Wayne, Ind., for defendant in error.

PER CURIAM. Heard and judgment affirmed.

In re PREBLE MACH. WORKS. STANDARD OIL CO. v. SURPRISE. (Circuit Court of Appeals, Seventh Circuit. June 1, 1915.) No. 2222. Appeal from the District Court of the United States for the District of Indiana. Alfred D. Eddy and Robert W. Stewart, both of Chicago, Ill., and C. B. Tinkham, of Hammond, Ind., for appellant. Fred Barnett, of Hammond, Ind., and Channing L. Sentz, of Chicago, Ill., for appellee.

PER CURIAM. Heard and affirmed.

PSIMOULES v. UNITED STATES. (Circuit Court of Appeals, Ninth Circuit. July 12, 1915.) No. 2622. Appeal from the District Court of the United States for the Southern Division of the Southern District of California. Annette Abbott Adams, Asst. U. S. Atty., of San Francisco, Cal., and Albert Schoonover, U. S. Atty., of Los Angeles, Cal.

PER CURIAM. On motion of Mrs. Assistant United States Attorney Adams, made on behalf of Mr. United States Attorney Schoonover, and pursuant to stipulation signed by appellant and counsel for appellee, and filed therefor, ordered, motion to dismiss appeal granted, and appeal dismissed. See, also, 222 Fed. 118.

SHEETS et al. v. PUGH et al. (Circuit Court of Appeals, Ninth Circuit. May 3, 1915.) No. 2600. Appeal from the Circuit Court of the United States for the Eastern Division of the Eastern District of Washington. John J. Skuse and Fred B. Morrill, both of Spokane, Wash., for appellants. Reese H. Voorhees, of Spokane, Wash., for appellees.

PER CURIAM. On motion of counsel for appellants, and pursuant to stipulation of counsel for respective parties thereto, appeal dismissed, without costs to either party.

In re TENGWALL CO. FALLOWS v. CONTINENTAL & COMMERCIAL TRUST & SAVINGS BANK. (Circuit Court of Appeals, Seventh Circuit. June 10, 1915.) No. 2206. Appeal from the District Court of the United States for the Northern District of Illinois. Jas. H. Wilkerson and Edwin H. Cassels, both of Chicago, Ill., for appellant. Herman Frank and Percy B. Davis, both of Chicago, Ill., for appellee.

PER CURIAM. Heard and affirmed.

TURNOCK MEDICAL CO. et al. v. CAMPBELL. (Circuit Court of Appeals, Seventh Circuit. September 22, 1914.) No. 2130. In Error to the District Court of the United States for the Eastern Division of the Northern District of Illinois. W. Knox Haynes and Michael Feinberg, both of Chicago, Ill., for plaintiffs in error. J. H. Wilkerson, of Chicago, Ill., for defendant in error.

PER CURIAM. Order dismissing appeal pursuant to stipulation.

UNITED STATES v. CHICAGO JUNCTION R. CO. (Circuit Court of Appeals, Seventh Circuit. February 15, 1915.) No. 2112. In Error to the District Court of the United States for the Northern District of Illinois. J. H. Wilkerson, of Chicago, Ill., for plaintiff in error. John Barton Payne and John D. Black, both of Chicago, Ill., for defendant in error.

PER CURIAM. Order dismissing writ of error.

UNITED STATES v. KUMEKICHI TSUGAWA. (Circuit Court of Appeals, Ninth Circuit. May 12, 1915.) No. 2590. Appeal from the District Court of the United States for the Territory of Hawaii. Jeff McCarn, U. S. Atty., and J. W. Thompson, Asst. U. S. Atty., both of Honolulu, T. H. Bitting & Ozawa, of Honolulu, T. H., for appellee.

PER CURIAM. On motion made on behalf of counsel for appellant, appeal dismissed.

WHITE v. UNITED STATES. (Circuit Court of Appeals, Ninth Circuit. August 9, 1915.) No. 2629. In Error to the District Court of the United States for the Northern Division of the Western District of Washington. Vanderveer & Cummings, of Seattle, Wash., for plaintiff in error. Clay Allen, U. S. Atty., of Seattle, Wash.

PER CURIAM. Pursuant to stipulation of counsel for the respective parties filed July 30, 1915, and a certificate of the clerk of the court below, stating the case and certifying that a writ of error was duly sued out and allowed therein, having been filed, ordered and adjudged that the writ of error in this cause be and hereby is dismissed.

YUNG v. PRENTIS. (Circuit Court of Appeals, Seventh Circuit, Jan. 12, 1915.) No. 2125. Appeal from the District Court of the Eastern Division of the United States for the Northern District of Illinois. Wm. A. Morrow and Chas. F. Hille, both of Chicago, Ill., for appellant. J. H. Wilkerson, of Chicago, Ill., for appellee.

PER CURIAM Judgment affirmed.

END OF CASES IN VOL. 224

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